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The International Convention on the Elimination of all Forms of Racial Discrimination: An Analysis of Article 4's Implementation on Hate Speech in the United States, Japan, and Germany

Chioma Chukwu-Smith

THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: AN ANALYSIS OF ARTICLE 4'S IMPLEMENTATION ON HATE SPEECH IN THE UNITED STATES, JAPAN, AND GERMANY

ABSTRACT

In 2017, white supremacists gathered in Charlottesville, Virginia to protest the removal of Confederate General Robert E. Lee's statue from a public park. The "protesters" chose to voice their concerns by carrying tiki torches and spewing racist chants. The encounter began with hateful speech and ended in bloodshed and death. This is one example of how the United States, along with several other democracies, has been confronted with the question of how far they should go in limiting extreme forms of hateful, discriminatory expression.

In various countries around the world, hate speech, at its worst, has resulted in political extremism and targeted violence. But the way these countries have responded to hate speech has varied vastly with different democracies having conflicting views on how hate speech should be regulated. Different definitions, standards, and regulations exist in various countries to constitute how a given country would classify "hate speech." This results in different responses to these differing interpretations of hate speech. Freedom of speech, however, is almost always regarded as a fundamental individual right in most democratic constitutional systems. It is a right that international human rights law obliges states to guarantee, respect, and enforce.

This Note focuses on three countries and their response to hate speech: The United States, Japan, and Germany. It will discuss how hate speech is defined in these countries, and what regulations—or lack thereof—have resulted. Additionally, this Note will focus on one of the international human rights treaties, the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). Article 4 of ICERD requires states both to implement hate speech laws for purposes of furthering the right to equality, and to respect and enforce freedom of expression. This Note will discuss how ICERD can be implemented in areas where hate speech legislation has failed.

INTRODUCTION

In New York City, one of the most prized and beautiful places in Manhattan is Columbia University. At one of the entrances, many tourists and students are aware of an "iconic piece" that usually resides there: the man who stands at the gate with signs that say, "Google it! Jews control . . ."[1] "Some of his signs have said 'Google it! Jews control the internet,' 'Google it! Jews control Congress,' 'Google it! Jews control Wall Street,' 'Google it! Jews control Hollywood,' 'Google it! Jews control Obama,' and 'Google it! Jews financed black slavery.'"[2] While Columbia students—one-third of whom are Jewish—have managed to make a joke of the man, the reality is that this man's signs and rhetoric, whether direct or indirect, may have an influence on people's consciousness and promote anti-Semitism.[3] This story is a small example of how protected free speech can be emotionally, socially, and psychologically damaging to certain demographics.

Throughout the world, and particularly in the United States, there has been a false dichotomy created between free speech and hate speech.[4] "Should society value dignity, *or* should society value liberty? Should we allow any type of hate speech, even if it may cause psychological harm or an increase in violence and racist thought, *or* should we counteract hate speech with more speech?"[5] These types of questions are being asked by United States scholars, but this presents the reader with a false choice. Liberty, First Amendment rights, and freedom of speech can be valued while upholding societal structures and laws implemented

1. Deborah Levine, *Sticks and Stones May Break My Bones, But Words May Also Hurt Me: A Comparison of United States and German Hate Speech Laws*, 41 FORDHAM INT'L L.J. 1293, 1294 (2018).

2. *Id.*

3. *Id.* at 1294–95.

4. The term "hate speech" will be used throughout this article, yet the term remains largely undefined by any one authority. Therefore, for the purposes of this paper, when the term hate speech is used, the reader can assume this definition from the *United Nations Strategy and Plan of Action on Hate Speech* is being used:

> There is no international legal definition of hate speech, and the characterization of what is 'hateful' is controversial and disputed…. the term hate speech is understood as any kind of communication in speech, writing or [behavior], that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, [color], descent, gender or other identity factor. This is often rooted in, and generates intolerance and hatred and, in certain contexts, can be demeaning and divisive.

United Nations Strategy and Plan of Action on Hate Speech, UNITED NATIONS (May 2019), https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf [https://perma.cc/3JQH-VNXM].

5. Levine, *supra* note 1, at 1295 (emphasis added).

to protect vulnerable communities from the psychological harm and violence associated with hate speech.

In 2017, white supremacists gathered in Charlottesville, Virginia to protest the removal of Confederate General Robert E. Lee's statue from a public park.[6] The "protesters" chose to voice their concerns by carrying tiki torches and spewing racist chants.[7] The encounter began with hateful speech and ended in bloodshed and death.[8] The issue of hate speech has confronted several democracies with the question of how far they should go in limiting extreme forms of hateful, discriminatory expression.[9] The words "hate" and "speech" joined together lead reasonable people to imagine what could fall under that category. While the most common assumptions would surely be included (including but not limited to racist, homophobic, or sexist speech), different definitions, standards, and regulations exist in various countries for what a given country would classify as "hate speech." This results in different responses to these differing interpretations of hate speech. In various countries around the world, hate speech, at its worst, has resulted in political extremism and targeted violence. But the way these countries have responded to hate speech has varied vastly with different democracies having conflicting views on how hate speech should be regulated. Freedom of speech, however, is almost always regarded as a fundamental individual right in most democratic constitutional systems. It is a right that international human rights law obliges states to guarantee, respect, and enforce.[10]

This Note will focus on three countries and their response to hate speech: The United States, Japan, and Germany. It will discuss how hate speech is defined in these countries, and what regulations—or lack thereof—have resulted. Part I of this Note will focus on one of the international human rights treaties, the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). Article 4 of ICERD—unlike the U.S. Supreme Court's approach and interpretation of the U.S. Constitution's First Amendment—has a specific provision for hate speech that "condemn[s] all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons . . . or which attempt to justify or

6. Debbie Lord, *What Happened at Charlottesville: Looking Back on the Rally that Ended in Death*, ATLANTA NEWS NOW (Aug. 13, 2019), https://www.ajc.com/news/national/what-happened-charlottesville-looking-back-the-anniversary-the-deadly-rally/fPpnLrbAtbxSwNI9BEy93K/ [https://perma.cc/AUJ9-29CC].

7. *Id.*

8. *See id.*

9. Craig Martin, *Symposium: Hate Speech Laws in Japan Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada*, 45 HASTINGS CONST. L.Q. 455, 455 (2018).

10. *Id.* at 456.

promote racial hatred and discrimination in any form . . ."[11] Unlike the First Amendment, this part of the treaty quite explicitly requires states both to implement hate speech laws for purposes of furthering the right to equality, and to respect and enforce freedom of expression.[12]

This Note will also explore the similarities and differences between how hate speech is regulated and ICERD is implemented in the United States, Japan, and Germany. Part II of this Note focuses on the First Amendment of the U.S. Constitution, analyzing what lies at the foundation of the primacy of free speech in the United States. For example, one point of regular debate in the United States is whether there is a free speech breaking point, or "a line at which the hateful or harmful or controversial nature of speech should cause it to lose constitutional protection under the First Amendment."[13] Surveys have traditionally shown that American people generally have strong support for free speech, but that number decreases when the poll focuses on particular forms of controversial speech.[14] Despite the fact that there is in fact a disdain among Americans for controversial, hateful speech, the Constitution has yet to be amended or interpreted to reflect this sentiment. This is because regulating hate speech is viewed as a threat to the important American value of free speech.[15] If the harm of hate speech is taken seriously, it must be accepted that it poses a threat to democratic values, even undermining constitutional rights.[16] But to suppress hate speech similarly risks causing significant harm to constitutional rights and democratic principles.[17] This poses a challenge for constitutional democracies throughout the world, and the United States offers a particularly poignant example.

Part III of this Note will analyze questions similar to those posed in Part II with Japan as the focus. It will begin by looking at the history of free speech in Japan and how some of the attitudes towards free speech today have formed over time. Next, a turning point for Japan will be discussed—when it became apparent that Japan was in need of more hate speech regulation. Finally, the last piece on Japan will focus on instances within case law in which ICERD has been implemented.

11. International Convention on the Elimination of All Forms of Racial Discrimination, art. 4, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

12. Martin, *supra* note 9, at 457.

13. Stephen J. Wermiel, *The Ongoing Challenge to Define Free Speech*, AM. BAR ASS'N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-on going-challenge-to-define-free-speech/the-ongoing-challenge-to-define-free-speech/ [https://per ma.cc/6SK5-CNHM].

14. *Id.*

15. *See* Martin, *supra* note 9, at 456.

16. *Id.*

17. *Id.*

Part IV of this Note discusses Germany in a similar context. First, Germany's general relationship with free speech and its constitutional free speech laws are discussed. Next, Germany's well-known history with the Holocaust and World War II are discussed as the primary reasons behind Germany's posture towards free speech and hate speech. Germany's laws reflect the high value that German society places on preventing its horrific history from repeating itself. Finally, a case is discussed that tries to implement ICERD, and while Germany's laws on hate speech have been highly effective, the case highlights a few problems with ICERD's implementation in the midst of Germany's very specific laws.

I. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The development of ICERD evidences international awareness of problems surrounding hate speech and racial discrimination. The United Nations, along with several countries around the world, have recognized that racial discrimination has become a global problem, and it is often linked to speech discriminating against racial minorities.

A. The History and Origins of ICERD

ICERD was adopted on December 21, 1965.[18] The United Nations ("UN") General Assembly adopted it in plenary with 106 votes to none, and it was the first international human rights treaty targeting racial discrimination.[19] From its inception, the UN had a stated goal of promoting and encouraging respect for human rights for all without distinction to race.[20]

The adoption of ICERD stands as a moment in international legal history that established the protection of general human rights and fundamental freedoms for racial, national, and ethnic minorities.[21] ICERD stemmed from decades of frustration with mostly Western powers and the affront to humanity represented by apartheid, a system that purported to divide and rank human beings on the basis of their race.[22] This practice relegated some populations to the status of "racial inferiors," while simultaneously elevating the status of Europeans.[23] Apartheid and related practices were built upon centuries of racial theorizing, which heightened the perceived, and accurate, need for a treaty like

18. ICERD, *supra* note 11.

19. DAVID KEANE & ANNAPURNA WAUGHRAY, FIFTY YEARS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A LIVING INSTRUMENT, 1 (2017).

20. *Id.* at 2.

21. *Id.* at xiv.

22. *Id.*

23. *Id.*

ICERD.[24] Thus, while nineteenth-century international law imbibed the racist virus, the twentieth century attempted to find an escape through fundamental, principled statements affirming equality, the dignity of human beings, and the worth of various cultures in humanity.[25]

The Convention carried the hopes and aspirations of many in the international community for an international order of mutual respect among nations and people.[26] But the document generated mixed emotions.[27] At the culmination of the drafting process, it was regarded as everything from merely an infant step in the progress of humanity to a triumph of diplomacy.[28]

B. ICERD's Prohibitions on Hate Speech

ICERD contains twenty-five articles, and Article 4 specifically addresses hate speech. Article 4 states in relevant part:

> 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 [color] 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 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 [color] 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.[29]

The Convention does not directly use the words "hate speech," but the italicized words above emphasize the places the drafters intended to regulate racially motivated hate speech. Some commentators have confirmed this assertion, including the UN Committee on the Elimination of Racial Discrimination

24. KEANE & WAUGHRAY, *supra* note 19, at xiv.
25. *Id.*
26. *Id.* at xv.
27. *Id.*
28. *Id.*
29. ICERD, *supra* note 11 (emphasis added).

themselves in their 2013 General Recommendation.[30] This was General Recommendation No. 35 and titled "Combatting racist hate speech."[31] The discussion took place on August 28, 2012, and focused on understanding the causes and consequences of racist hate speech and how the resources of ICERD could be mobilized to combat it.[32] Paragraph 5 directly addresses Article 4 of ICERD and hate speech, stating that "[t]he drafters of the Convention were acutely aware of the contribution of speech to creating a climate of racial hatred and discrimination, and reflected at length on the dangers it posed."[33] It goes on to say that "[w]hile the term hate speech is not explicitly used in the Convention, this lack of explicit reference has not impeded the Committee from identifying and naming hate speech phenomena and exploring the relationship between speech practices and the standards of the Convention."[34]

Thus, ICERD imposes an obligation on state parties to prohibit hate speech more explicitly than some countries actually do, as the treaty expresses an implied value within the Convention to mitigate and protect against the damage caused by racially motivated hate speech. ICERD does not contemplate the prohibition of hate speech as compromising free speech in the same way countries like the United States do, which has theoretically had benefits when it comes to implementation. But while effective implementation is the obvious goal of any treaty, there have been obstacles implementing ICERD due to the absence of, or problems with, domestic laws.

II. THE UNITED STATES

The First Amendment of the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[35]

The United States has unfortunately been a leading country in the perpetuation of racial discrimination through hate speech. The Supreme Court's interpretation of the Constitution regarding hate speech has left racial minorities in America feeling unprotected.[36]

30. U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating Racist Hate Speech, 26 Sept. 2013, CERD/C/GC/35, https://www.refworld.org/docid/53f457db4.html [https://perma.cc/3S96-UV8M].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. U.S. CONST. amend. I.

36. *See* R.A.V. v. St. Paul, 505 U.S. 377 (1992).

The United States ratified ICERD in 1994, and thus was bound by all the provisions of the treaty at that time.[37] Regarding the U.S. Constitution and speech laws, on one hand, some Americans believe hate speech, like all other forms of speech, should be a guarantee "protected by the First Amendment, compris[ing] what we refer to as freedom of expression."[38] The U.S. Supreme Court describes this freedom as "the matrix, the indispensable condition of nearly every other form of freedom."[39] Some Americans believe "without [this freedom], other fundamental rights, like the right to vote, would wither and die."[40] On the other hand, a point of regular debate has been whether there is a free speech breaking point.[41] The question commonly posed in these debates is whether there is a line at which the hateful, harmful, controversial nature of speech should cause it to lose constitutional protection under the First Amendment.[42]

While there is not currently a category of speech known as "hate speech" that can be uniformly prohibited or punished,[43] certain types of hate speech that have the purpose and effect of fostering hatred against groups defined by race, ethnicity, religion, gender or sexual orientation are causing significant harm.[44] Members of such groups suffer direct emotional and psychological harm due to the speech itself, but also in the form of increased levels of discrimination as a consequence of the hatred fomented in society by such speech.[45] This type of harm going unchecked does significant harm to the broader constitutional system, by undermining democratic systems of equality and inclusiveness, and ironically by undermining the freedom of expression itself as the members of target groups are cowed into silence.[46] Despite these problems with hate speech and the damage it causes to certain Americans, there are some individuals and groups that still advocate for the protection of free speech—even free speech that is damaging in this sense.[47]

37. *Where the United States Stands on 10 International Human Rights Treaties*, CIVIL AND HUMAN RIGHTS NEWS (Dec. 10, 2013), https://civilrights.org/edfund/resource/where-the-united-states-stands-on-10-international-human-rights-treaties/ [https://perma.cc/PT7U-YYT5].

38. *Freedom of Expression*, ACLU, https://www.aclu.org/other/freedom-expression [https://perma.cc/X973-CAGV].

39. Palko v. State of Connecticut, 302 U.S. 319, 327 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

40. *Freedom of Expression*, *supra* note 38.

41. Wermiel, *supra* note 13.

42. *Id.*

43. *Id.*

44. Martin, *supra* note 9, at 455.

45. *Id.*

46. *Id.* at 455–456.

47. *See Freedom of Expression*, *supra* note 38 (noting the ACLU's controversial defense of free speech rights of groups that spew hate such as the Ku Klux Klan and the Nazis. "…if only popular ideas were protected, we wouldn't need a First Amendment . . . If we do not come to the

A. Intentions of the Framers

The freedoms proposed in the First Amendment are, quite literally, the first time the Constitution of the United States was amended. The fact that amendments to the Constitution were beginning to take place suggests that the issues being addressed were of importance to the Framers. Observing what has now become the primacy of the First Amendment prompts the question of what the Framers' intentions were when it was first implemented.

The First Amendment was a reaction against the suppression of speech and the press that existed in English society.[48] Until 1694, there was an elaborate system of licensing in England, making no publication permissible without a government-granted license.[49] Thus, it is widely accepted that the First Amendment was meant, at least in part, to abolish prior restraints on publication.[50]

Speech in England was also restricted by the law of seditious libel that made criticizing the government a crime.[51] The English Court announced that the king was above public criticism and that, as a result, statements critical of the government were forbidden.[52] In 1704, Chief Justice Holt explained the perceived need for the prohibition of seditious libel: "If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it."[53] Professor Erwin Chemerinsky proposed that "[t]ruth was not a defense to the crime because the goal was to prevent and punish all criticism of the government."[54] Professor Zechariah Chaffee added, "[t]he [F]irst [A]mendment was . . . intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law breaking, forever impossible in the United States of America."[55]

Thus, there is little doubt that the First Amendment was meant to prohibit the licensing of publication that existed in England and to forbid punishment for seditious libel.[56] Beyond this, there is little indication of what the framers

defense of free speech rights of the most unpopular among us, even if their views are antithetical to the very freedom the First Amendment stands for, then no one's liberty will be secure").

48. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1235 (5th ed. 2017).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. CHEMERINSKY, *supra* note 48, at 1235; THOMAS HOWELL, A COLLECTION OF STATE TRIALS 1095, 1128 (1812).

54. CHEMERINSKY, *supra* note 48, at 1236.

55. ZECHARIAH CHAFEE, FREEDOM OF SPEECH IN WAR TIMES, S. Doc. No 95, at 12 (1st Sess. 1919).

56. CHEMERINSKY, *supra* note 48, at 1236.

intended.[57] Nothing in the historical record sheds light on most of the free speech issues that society and the courts in the early twenty-first century currently face.[58]

B. Before the Primacy of the First Amendment

Despite the difficultly of ascertaining all intentions of the framers, the power and primacy of the First Amendment in United States courts and culture cannot be denied. "The First Amendment is first, not simply because it falls at the beginning of a list of amendments, but because it articulates the first freedom and the nature of that freedom."[59] Most Americans believe that the First Amendment's protections "guarantee[] the freedom essential to humans as rational beings."[60] In *Palko v. State of Connecticut*, Justice Cardozo wrote that the freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal."[61]

In early, post-World War I Supreme Court decisions, there was a surprisingly pervasive judicial hostility to free speech.[62] *Schenck v. United States*, for example, followed this theory, while also being one of the first places the primacy of the First Amendment was acknowledged by the Supreme Court.[63] While the United States was at war, defendants Charles T. Schenck and Elizabeth Baer printed and circulated leaflets to men who had been called and accepted for military service, urging them not to submit to the draft and military service.[64] Defendants argued that the First Amendment forbids Congress from making any law abridging the freedom of speech, or of press.[65] The Court rejected this argument. In holding that the speech was not protected, the Court stated, "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."[66] While this case established a piece of the First Amendment that Congress was allowed to regulate, the Court also acknowledged the First Amendment's

57. *Id.*

58. *Id.*

59. Dr. Owen Anderson, *Why the First Amendment is 'First in Importance'*, THE WASH. TIMES (Dec. 12, 2016), https://www.washingtontimes.com/news/2016/dec/12/why-the-first-amendment-is-first-in-importance/ [https://perma.cc/5MR6-TBQC].

60. *Id.*

61. 302 U.S. 319, 326–327 (1937).

62. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1207–1208 (1983).

63. 39 S. Ct. 247 (1919).

64. *Id.* at 248.

65. *Id.*

66. *Id.* at 249 (emphasis added).

primacy by saying, "[w]e admit that in many places and in ordinary times the defendants in saying all that was said . . . would have been within their constitutional rights."[67] This theme of acknowledging the importance of First Amendment rights, while regulating it through doctrines like the Clear and Present Danger test, continued in several other cases decided by Justice Oliver Wendell Holmes.[68]

A variety of historical, intellectual, and personal factors, however, led Holmes to express more libertarian values.[69] In *Abrams v. United States*, Holmes revealed "the extent to which he had become more sensitive to [F]irst [A]mendment concerns in the eight months following his opinions for a unanimous Court in *Schenck*, *Frohwerk*, and *Debs*."[70] Similar to the *Schenck* Defendants, the *Abrams* Defendants were charged with conspiracy by printing, writing, and distributing many copies of a leaflet or circular conspiring against the United States government at a time of war.[71] While the majority sounded very much like Holmes in *Schenck*, Holmes appeared to have a different view in his *Abrams* dissent, stating:

> [T]he principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.[72]

While the facts of *Abrams* were similar to *Schenck*, Holmes expressed views that indicated his views on First Amendment protections were shifting. Holmes' changing views were representative of how free speech evolved into a fundamental, primary right for all Americans.

C. The Primacy of the First Amendment as a Fundamental Human Right

There is voluminous literature debating why freedom of speech should be considered a fundamental right.[73] While there is not a single, universally accepted theory of the First Amendment, there are different views as to why freedom of speech should be regarded as a fundamental right.[74] There are four

67. *Id.*

68. *See* Frohwerk v. United States, 249 U.S. 204, 206 (1919); Debs v. United States, 249 U.S. 211, 215 (1919).

69. Rabban, *supra* note 62, at 1211.

70. *Id.*

71. Abrams v. United States, 250 U.S. 616, 617 (1919).

72. *Id.* at 628.

73. CHEMERINSKY, *supra* note 48, at 1238.

74. *Id.*

major theories under which this argument is made: that freedom of speech is protected to further self-governance, to aid the discovery of truth via the marketplace of ideas, to promote autonomy, and to foster tolerance.[75]

The first reason for the First Amendment's primacy is self-governance, which promotes that freedom of speech is crucial in a democracy.[76] Candidates must be openly discussed for voters to make informed selections in elections, people can influence their government's choice of policies through speech, and public officials are held accountable through criticisms that pave the way, if necessary, for their replacement.[77] Professor Vincent Blasi argued that freedom of speech serves as an essential "checking value" on government, checks the abuse of power by public officials, and that, through speech, voters retain "a veto power to be employed when the decisions of officials pass certain bounds."[78]

Another classic argument for protecting freedom of speech's primacy is that it is essential for the discovery of truth.[79] In his *Abrams* dissent, Justice Holmes further expressed his shifting values regarding the importance of the freedom of speech. He invoked the powerful metaphor of the marketplace of ideas writing that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[80] In other words, the argument is that truth is most likely to emerge from the clash of ideas.[81] John Stuart Mill supported this view when he wrote that:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[82]

He added that an opinion may be true and may be wrongly suppressed by those in power, *or* a view may be false and people are informed by its refutation.[83] Finally, Justice Brandeis embraced this same view when he stated that the "fitting remedy for evil counsels is good ones" and that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, *the remedy to be applied is more speech, not enforced*

75. *Id.*

76. *Id.*

77. *Id.*

78. Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 523, 542 (1977).

79. CHEMERINSKY, *supra* note 48, at 1239.

80. Abrams v. United States, 250 U.S. 616, 630 (1919).

81. CHEMERINSKY, *supra* note 48, at 1239.

82. JOHN STUART MILL, ON LIBERTY 19 (1859).

83. CHEMERINSKY, *supra* note 48, at 1239 (emphasis added).

silence."[84] Brandeis's theory can be found in the values of other countries, yet the concept of applying more speech in the face of demonstrably harmful speech has been controversial in the context of hate speech.

A third major rationale for protecting the primacy of free speech as a fundamental right—which is possibly the most well-known—is that it is an essential aspect of personhood and autonomy.[85] For example, Professor C. Edwin Baker said that:

> [T]o engage voluntarily in a speech act is to engage in self-definition of expression. A Vietnam war protestor may explain that when she chants 'Stop This War Now' at a demonstration, she does so without any expectation that her speech will affect continuance of the war . . . [R]ather, she participates and chants in order to *define* herself publicly in opposition to the war. This war protestor provides a dramatic illustration of the importance of this self-expressive use of speech, independent of any effective communication to others, for self-fulfillment or self-realization.[86]

This rationale—more than the others—captures the United States' value of protecting speech because its crucial aspects of autonomy and expression are intrinsically important.[87] In his *Procunier v. Martinez* concurrence, Justice Thurgood Marshall gave perspective to the importance of free speech to the human race, stating that "[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression."[88]

One final common rationale for the primacy of freedom of speech that has received substantial attention in recent years is that it is integral to tolerance, which should be a basic value in our society.[89] Professor Chemerinsky cites the views of Professor Lee Bollinger, a primary advocate of this view. Bollinger argued that, "while free speech theory has traditionally focused on the value of the activity protected (speech), [an alternative approach] seeks a justification by looking at the disvalue of the [frequently intolerant] response to that activity . . ."[90] He goes on to say, "[the free speech principle] involves a special act of carving out one area of social interaction for extra-ordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control

84. Whitney v. California, 274 U.S. 357, 375, 377 (1927) (emphasis added).

85. CHEMERINSKY, *supra* note 48, at 1241.

86. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978).

87. CHEMERINSKY, *supra* note 48, at 1241.

88. 416 U.S. 396, 427 (1974) (Marshall, J., concurring), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

89. CHEMERINSKY, *supra* note 48, at 1241–42.

90. *Id.* at 1242; LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 9 (1986).

feelings evoked by a host of social encounters."[91] Thus, the free speech principle is concerned with helping shape "the intellectual character of the society."[92] The claim is that tolerance is an essential value, that protecting unpopular or distasteful speech itself is an act of tolerance, and such tolerance serves as a model that encourages more tolerance throughout society.[93] This is relevant to the tensions that exist between the protection of free speech and the harm caused by hate speech protected by the First Amendment.

All four of these rationales provide a helpful foundation for understanding why free speech is held dearly in the United States and is protected at almost all costs. While this reasoning exists, there are several scholars and individuals who have simultaneously criticized each of these rationales for the way in which they ignore, undermine, or simply harm groups that do not inherently find their values protected by these rationales. While each rationale highlights some of the great freedoms experienced by free speech in the United States, conversely, each rationale also includes less than ideal consequences faced by individuals residing in the United States that experience the backlash of the First Amendment's staunch protection of almost all forms of speech.[94] Hate speech falls into the category of being protected speech while harming certain demographics, particularly racial minorities.

III. JAPAN

While Japan and the United States bear stark cultural differences, Japan has been likened to the United States regarding freedom of speech laws. Like the United States, Japan's Constitution protects freedom of expression while also limiting it in some circumstances. The value of free speech has grown over time in Japan, resulting in Japan facing similar challenges to the U.S. These challenges include an increase in damaging, hateful speech toward minorities that ends up being protected by the law. The increasing population of minority and "non-Japanese" people in Japan—and their experience of racial discrimination—presents the question of the effectiveness of a treaty like ICERD, which was created specifically for this type of national dilemma.

A. Free Speech in Japan

The Constitution of Japan guarantees freedom of assembly, speech, the press, and "all other forms of expression."[95] Regarding public matters, freedom

91. CHEMERINSKY, *supra* note 48, at 1242; BOLLINGER, *supra* note 90, at 10.

92. CHEMERINSKY, *supra* note 48, at 1242; BOLLINGER, *supra* note 90, at 120.

93. CHEMERINSKY, *supra* note 48, at 1242.

94. There are, however, forms of speech that are unprotected and less protected under the First Amendment. *See id.* at xxvii-xxx.

95. NIHONKOKU KENPŌ [KENPŌ], art. 21, para. 1 (Japan). This constitution does in fact say "*all* other forms of expression" are protected. *Id.*

of expression is "a particularly important constitutional right in a democratic nation" according to the Supreme Court of Japan.[96] Similar to the United States, Japan's Supreme Court has also expressed that, while constitutionally protected, freedom of expression has limits and may be restricted.[97] The Supreme Court of Japan states in dicta that "freedom of expression under Article 21, paragraph (1) of the Constitution is not guaranteed without restriction but it may be restricted for the sake of public welfare to a reasonable and unavoidable necessary extent."[98] It goes on to say:

> Whether or not a restriction on a particular type of freedom is acceptable within such extent should be determined by comparing various factors including the degree of necessity to restrict the freedom, the content and nature of the freedom to be restricted, and the manner and the level of the specific restriction imposed on the freedom.[99]

While Japan's Supreme Court has laid a similar foundation to the U.S. Supreme Court regarding limitations and restrictions on certain types of speech,[100] some Japanese activists have taken the view that "America needs to get on the same page as Japan" and "outlaw hate speech."[101] These comments appear to be motivated by the "seemingly unstoppable rise of white supremacist, Neo-Nazi groups in the United States on [former] President Donald Trump's watch."[102] Those with this viewpoint believe that in this type of atmosphere, "there is no guarantee that freedom of speech will maintain a marketplace of ideas in which enlightenment wins out over hate."[103] Right now, the opposite is happening in the United States, causing Japanese activists and commentators to urge the United States to "follow Japan and Western European countries by passing laws outlawing hate speech."[104] But has Japan—as it claims it has—successfully outlawed hate speech?

As a comparative example, the United Kingdom's hate speech laws "set criminal penalties, including fines and imprisonment, for anyone convicted of using abusive, threatening and insulting words and behavior intended to stir up

96. Sayuri Umeda, *Limits on Freedom of Expression: Japan*, LIBRARY OF CONGRESS (June 2019) https://www.loc.gov/law/help/freedom-expression/japan.php#_ftn4 [https://perma.cc/5LCW-YU2D] (citing Sup. Ct., June 11, 1986, 1981 (O) 609, 40 Minshu 872, https://perma.cc/6YEG-R8T3).

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* CHEMERINSKY, *supra* note 48, at xxvii–xxx (listing the several types of speech that are either less protected or completely unprotected).

101. Shaun O'Dwyer, *Japan Doesn't Need to Criminalize Hate Speech*, THE JAPAN TIMES (Sept. 20, 2017), https://www.japantimes.co.jp/community/2017/09/20/voices/japan-doesnt-need-criminalize-hate-speech/#.Xk3bvhdKigR [https://perma.cc/5JTD-KQTC].

102. *Id.*

103. *Id.*

104. *Id.*

hatred on the grounds of religion, race or sexual orientation, or which otherwise cause alarm, harassment or distress."[105] People have been convicted under these laws, signaling that the United Kingdom has not simply put forth suggestions, but it will also follow through to convict with consequences in the face of the inappropriate exhibition of hate speech.[106] A commonsense understanding of the law would lead one to conclude that the UK establishing these laws illustrates their proactivity in outlawing hate speech through providing specific convictions when these laws are violated.

"Japan's hate speech legislation has no such penalties," and its laws do not support the punishment of hate speech.[107] For example, in 2016 there were "domestic and international protests . . . hate-filled demonstrations and online abuse directed against Japan's ethnic Korean . . . minorit[ies] by ultra-right-wing organizations."[108] In response, Japan's law called for "efforts to eliminate unfair discriminatory speech and behavior . . . against persons originating from outside Japan and their descendants."[109] Yet these efforts, "including coordination between local and national governments to conduct public awareness and education campaigns to eliminate it," are nothing more than "vaguely worded 'measures' to eliminate hate speech."[110] Concrete laws and consequences are necessary to address the problem.

While Japanese scholars, leaders, and activists seemingly desire to be on the opposite side of white supremacist history, unfortunately their laws have not been implemented in a way that reflects this desire. Additionally, while ICERD was created to address this type of discrimination when domestic law does not, ICERD also has not been implemented in a way that reflects this. Damaging hate speech has continued to take place in Japan, but Japan is reluctant to formalize laws as stringent and effective as the UK's hate speech laws exemplified above. As the negative effects of this lack of regulation continue in Japan, however, the need only increases for its laws to be reviewed.

B. The Call for Hate Speech Laws

For decades in Japan, there have been calls for human rights legislation and antidiscrimination protections.[111] In 2012 and recent years subsequent, the calls have been in response to an increased incidence of anti-Korean rallies and

105. *Id.*
106. Shaun O'Dwyer, *supra* note 101.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. Martin, *supra* note 9, at 460.

demonstrations.[112] Given the tense history between Korea and Japan, these demonstrations have caused significant pain and controversy.[113]

There are currently "over half a million people in Japan who are of Korean descent and who do not have Japanese nationality."[114] The Koreans in Japan:

> are mostly descendants of immigrants from Korea who were stripped of their Japanese nationality after World War II. While they are third and fourth generation descendants of those initially brought to Japan when Korea was part of the Japanese Empire, and who were thus born and raised in Japan, they retain North or South Korean nationality . . . [S]ome are effectively stateless as a matter of international law, even though [they are] registered as being North Korean under Japanese law. The internal dynamics of this community are complex, and . . . [s]everal of the rallies against Korean-Japanese [people] were videotaped and received considerable publicity.[115]

One rally included a "young girl screaming that Koreans should be massacred, among other things."[116] "Several of the protests were held outside of Korean-Japanese schools, [subjecting] young children to abusive verbal attacks."[117]

While some laws and attempts at implementing ICERD resulted from this discrimination against Koreans in Japan, some would argue that this type of discrimination does not necessarily constitute racism. One scholar suggested that "[b]ecause the large numbers of Koreans and Chinese who live in Japan are racially indistinguishable from Japanese, the prejudicial attitude Japanese have toward them is more a case of ethnic prejudice and discrimination, that is, ethnocentrism, rather than racial prejudice."[118] Thus, while Korean discrimination in Japan falls under a very important category of hate speech discrimination, it does not necessarily address forms of racial discrimination that exist in Japan against people who do not look Japanese.

112. *Id.* at 460–61.

113. *See South Korea and Japan's Feud Explained*, BBC (Dec. 2, 2019), https://www.bbc.com/news/world-asia-49330531 [https://perma.cc/F9N8-SU6Z].

114. Martin, *supra* note 9, at 461.

115. *Id.* (citing Shigenori Matsui, *The Challenge to Multiculturalism: Hate Speech Ban in Japan*, 49 UBC L. REV. 427, 443 (2016)).

116. *Id.*

117. *Id.*

118. Debito Arudou, *Japan's Under-Researched Visible Minorities: Applying Critical Race Theory to Racialization Dynamics in a Non-White Society*, 14 WASH. U. GLOBAL STUD. L. REV. 695, 702 (2015). Depending on one's definition of race, Japan's problems of discrimination against Koreans present an interesting contrast to the United States in that Korean descendants can often "pass" as Japanese ethnicity. In other words, it has often been noted by Japanese individuals that discrimination towards Korean or Chinese individuals occurs when the foreigners to Japan begin to speak, and less so when they see them visually. This would especially be true with Korean-Japanese descendants discussed above. In essence, this makes the visible and non-visible minority distinction Arudou makes all the more important and informative.

Although the analysis above accurately describes the root causes of discrimination in Japan, it overlooks what happens at "'Japanese Only' establishments, where 'foreigners' have been excluded based on sight-identification alone."[119] There are problems in Japan with what some scholars have called "visible minorities."[120] "Visible minority" is an established term that was approved by the Canadian Government as an official legal status in 2009, referring to people who belong to a visually identifiable group.[121] In the context of minorities in Japan, it is defined as "residents of Japan who are visually identified as not 'looking Japanese' . . . and are thus treated as 'not Japanese.'"[122] These groups include, but are not limited to, subcontinental Indians, descendants of the African diaspora, non-Nikkei South Americans, and some South Asians.[123] This distinction highlights some of the problem of applying ICERD in Japan—who falls under the application and protections of the treaty?

C. Implementation of ICERD in Japan

Without domestic laws that cover private acts of racial discrimination, Japanese courts indirectly apply international treaties to fill the gap.[124] International law, therefore, was what courts used to provide an interpretive compass to draw boundaries of unacceptable conduct.[125]

"Although not the first foreigner to sue for discrimination [in Japan], Ana Bortz nevertheless put racial discrimination on the map in Japanese jurisprudence" in *Bortz v. Suzuki*.[126] "In 1988, the Brazilian reporter was ordered to leave a jewelry store in Hamamatsu, a city of more than half a million people [a]fter the owner discovered that she was Brazilian, and not French as he had assumed."[127] The owner directed her attention towards a sign that said "foreigners are strictly forbidden."[128] Bortz took issue with the owner, store employees, and local police, as well as summoning her colleagues from the foreign media, in the hopes that the store owners would capitulate and recognize that this behavior violated her human rights.[129] When the storeowners refused to apologize, Bortz sued in what a scholar called a "fairly remarkable" decision

119. *Id.* at 703.
120. *Id.* at 701.
121. *Id.*
122. *Id.* at 701–02.
123. Arudou, *supra* note 118, at 702.
124. Timothy Webster, *Reconstituting Japanese Law: International Norms and Domestic Litigation*, 30 MICH. J. INT'L L. 211, 217 (2008).
125. *Id.* at 218.
126. *Id.*
127. *Id.*
128. *Id.*
129. Webster, *supra* note 124, at 218.

given that no law in Japan specifically prevented this type of behavior.[130] In arriving at a conclusion, the court insisted that ICERD could fill the legislative gap left by the Japanese government by stating:

> If an act of racial discrimination violated a provision of ICERD, and the State or organization did not take the measures that it should have, then one could, in accordance with Article 6 of ICERD, at the very least seek compensation for damages . . . due to the omission.[131]

The judgement led to the largest damages award for racial discrimination to this day with Bortz winning 1.5 million yen ($12,500 at the time) in damages.[132]

While this case inspired other foreigners to avail themselves of the Japanese government, and it was mostly a win in terms of ICERD's implementation acting as a "gap filler," there were also problems with how ICERD was implemented. The fact that Article 4 is not used as part of the case's analysis is problematic. The purpose of Article 4 is to directly address hate speech, but the decision in this case does not specifically address the speech "foreigners are strictly forbidden." While this court's conclusion is one of the first, and most favorable, anti-discrimination decisions in Japan involving ICERD, it could have gone further in describing what kind of speech is impermissible in Japan towards non-Japanese individuals. This case offered important, though not binding, precedent for similarly aggrieved foreigners, but it did not effectively target hate speech in a way that set precedent for the damaging words Japanese individuals and businesses use towards non-Japanese people.[133]

A case that exemplifies a more extreme and ineffective use of ICERD's Article 4 in Japan is *McGowan v. Narita*. In this case, African-American designer Steve McGowan had lived in Japan for nearly a decade married to a Japanese woman outside of Osaka.[134] In 2004, he stood outside of an eye glass store with a South African friend admiring some frames, then suggested, "[t]hey have even better ones inside" as McGowan had visited the store once in the past.[135] Narita Takashi, the director of the store stepped out of the store and unleashed a string of abusive language, screaming in Japanese "[g]et out of here. I hate black people. Don't touch the door. Don't touch the window. You're bothering me. Impossible!"[136] Narita proceeded to wave the backs of both hands as if driving away animals, which stunned McGowan.[137] "[W]hen McGowan and his wife returned to the store to discuss the incident, Narita told them that

130. *Id.*
131. *Id.* at 219.
132. *Id.*
133. *Id.*
134. Webster, *supra* note 124, at 226.
135. *Id.*
136. *Id.*
137. *Id.* at 226–27.

he had 'bad memories' of black people" from prior experiences making him "excited when he saw McGowan."[138]

Even more surprising was the fact that Osaka's district court dismissed McGowan's claims due to "insufficient evidence" because McGowan could not prove that he heard and experienced the verbal abuse.[139] The court focused "on the fact that [McGowan] could not be sure whether he heard Narita claim that he hated 'black people' (kokujin) or 'foreigners' (gaikokugin)."[140] From the perspective of many foreigners, common people in Japan, and even scholars, this was an odd distinction for the court to dwell on, as both terms would constitute discrimination and likely racism in Japan. A Japanese man yelling at an African American man that he hates foreigners/blacks would register as racism in this context, regardless of which word was used.[141] Nevertheless, the court found that McGowan was not good enough at Japanese to ascertain the meaning of Narita's utterances.[142]

Fortunately, this decision was overturned on appeal in an unpublished decision rendered in 2006.[143] While McGowan received a fraction of what Bortz received above, the Osaka High Court awarded McGowan 350,000 yen (approximately $3,000 at the time) in compensation.[144] Similar to the district court, however, "the appellate court did *not* find that Narita had committed an act of racial discrimination," but found that "Narita's acts exceeded 'social norms,' which suffices to attach liability under Japanese tort law."[145]

While this case is considered a divergence from Japanese jurisprudence regarding racism, it once again highlights how ICERD and international law are failing to be implemented.[146] In this case, there was a high evidentiary burden on the Plaintiff to prove that what he heard and experienced was discriminatory.[147] The appellate court did not seem to even consider international law doctrines regarding hate speech even though the words and actions used against McGowen were arguably more forceful than what Bortz experienced. For example, using the language of Article 4, this case involved

138. *Id.* at 227.

139. Webster, *supra* note 124, at 227.

140. *Id.*

141. *Id.*

142. *Id.* Interestingly, the act in and of itself of telling a foreigner who speaks fluent Japanese that their "Japanese isn't good enough" is another way Japanese people discriminate against foreigners and other races in Japan. *See* Daisuke Kikuchi, *Tackling Signs in Japan that You're Not Welcome*, THE JAPAN TIMES (June 4, 2017), https://www.japantimes.co.jp/news/2017/06/04/national/tackling-signs-japan-youre-not-welcome/#.XlAToRdKhQI [https://perma.cc/XS8M-3TED].

143. Webster, *supra* note 124, at 227.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See id.*

the promotion of ideas "based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin."[148] There was an attempt by Narita to "justify . . . racial hatred and discrimination" when he said he had just had bad experiences with black people.[149] Additionally, ICERD claims that it shall declare it a punishable offense by law, declare the promotion of these ideas illegal while prohibiting the promotion of these racist ideas, and that it shall not permit any institution to promote or incite racial discrimination.[150] This language also directly applies to the earlier case as finding out a person is Brazilian—and not French—then discriminating against them on that basis is a direct violation of ICERD. Thus, Article 4 of ICERD would easily have been applicable, but again, this application was overlooked.

IV. GERMANY

Germany and the United States are often compared as having two of the most differing approaches to hate speech and free speech, making Germany an ideal country to analyze regarding the effectiveness of ICERD, free speech, and hate speech regulations.[151] What makes Germany interesting as a comparison to the United States is that there are similar values for the freedom of speech in Germany, but within those values, Germany and the United States differ in their constitutional approach to hate speech. Germany, as compared to Japan, is similarly fascinating. While the United States is a "melting pot" of people, cultures, and ideas, Japan and Germany constitute two of the more homogenous countries in the world.[152]

A. Free Speech in Germany

Germany's central guiding authority on free speech comes from Article Five of the Basic Law of the Federal Republic of Germany. Article Five is titled "Freedom of Expression, Arts, and Sciences" and states:

> (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general

148. ICERD, *supra* note 11.

149. *See id.*

150. *See id.*

151. *See* Mila Versteeg, *What Europe Can Teach America About Free Speech*, THE ATLANTIC (Aug. 19, 2017), https://www.theatlantic.com/politics/archive/2017/08/what-europe-can-teach-america-about-free-speech/537186/ [https://perma.cc/FKC3-7XWU].

152. *See* Max Fisher, *A Revealing Map of the World's Most and Least Ethnically Diverse Countries*, WASH. POST (May 16, 2013 at 11:33 a.m. CDT), https://www.washingtonpost.com/news/worldviews/wp/2013/05/16/a-revealing-map-of-the-worlds-most-and-least-ethnically-diverse-countries/ [https://perma.cc/4XVX-HCAY].

> laws, in provisions for the protection of young persons and in the right to personal honour. (3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.[153]

The German constitution's free speech provisions, unlike the United States and Japan, explicitly state that these rights have limits that will be found in general laws and provisions within Germany. It also highlights a concern for young people to be protected while citizens and residents of Germany practice free speech. While Germany's constitution incorporates free speech in a way that bears some similarities to the United States and Japan, several scholars describe Germany's allowance of free speech as couched in subordination to human dignity.[154] Human dignity stands at the heart of German constitutional law and is framed in an absolute manner.[155] It has been framed as the heart of German constitutional law because, similar to the United States' First Amendment suggesting the primacy of free speech by amending and implementing it first, Article One of the German basic law states that "the dignity of man is inviolable" and "[t]o respect and protect it is the duty of all state authority."[156] One scholar notes:

> human dignity is at the top of the Basic Law's value order. It is *the* formative principle in terms of which all other constitutional values are defined and explained. The omnipotence of human dignity in German constitutional law is unparalleled, since human dignity is perceived as the root for all basic rights, and all basic rights are considered specific manifestations of the human dignity principle.[157]

Human dignity has been framed as an "absolute" matter in Germany's constitution because human dignity has essentially been interpreted as referring to the most fundamental of human rights, which should not be violated under any circumstances.[158] Some scholars refer to human dignity as the "preferred freedom" in German constitutional law, analogizing it again to the First Amendment in the United States.[159] Article One of the Basic Law is equivalent

153. GRUNDGESETZ [GG] [BASIC LAW], art. 5, translation at http://www.gesetze-im-internet.de /englisch_gg/index.html [https://perma.cc/FQ6Z-DRKP].

154. *See* Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT'L L.J. 277, 326 (2008).

155. *Id.* at 324.

156. *Id.*

157. *Id.*; DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 359, 361 (2d ed. 1997); Dierk Ullrich, *Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany*, 3 GLOBAL JURIST FRONTIERS 1, 82 (2003).

158. Carmi, *supra* note 154, at 324.

159. *Id.* at 324–325; Ronald J. Krotoszynski Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1577 (2004).

to the First Amendment in that human dignity occupies the position that liberty is said to play in the American constitutional order.[160] In those countries that value human dignity above individual liberty, dignity is in significant tension with liberty and freedom of expression.[161] Article Five of the Basic Law is the free speech clause, but when compared to Article One, the primacy of the latter is evident.[162]

> Elements of dignity and personal honor serve as both external and internal limitations on freedom of expression. The robust human dignity clause affects the interpretation of Article 5, but Article 5 itself specifically mentions the right for personal honor, among other things, as a limitation on free speech. This legal approach reflects a deep-seated cultural fact that personal honor [and dignity are] simply more important to Germans than free speech.[163]

As with the United States, Japan, and most countries in the world, there is a reason Germany's constitution favors human dignity over free speech—its own history.

B. Germany's History and Resulting Hate Speech Laws

Since the United States and Germany fall on opposite ends of the spectrum, they continue to be a helpful, illustrative comparison. The two countries have not only differing free speech and hate speech laws, but also starkly different histories that have led them to develop their own legal systems. For example, the United States started a war to gain independence, while Germany started World War II.[164] These two histories have vastly "influenced the values of the respective countries, which in turn has affected their respective laws, especially for hate speech regulation."[165]

Germany's hate speech laws can mostly be attributed to World War II and the Holocaust.[166] Speech was generally restricted during World War II, and freedom of speech essentially did not exist.[167] While most scholars agree with this attribution, the argument has also been made that the origins of hate speech laws date back to the Middle Ages.[168] Nonetheless, "[t]he legal reconstruction of Germany following the Holocaust included numerous measures specifically intended to eradicate the ideolog[ies] of Nazism and the racial prejudice

160. Carmi, *supra* note 154, at 325; KOMMERS, *supra* note 157, at 359.

161. Carmi, *supra* note 154, at 325; KOMMERS, *supra* note 157, at 359.

162. Carmi, *supra* note 154, at 325–326.

163. *Id.* at 326; Krotoszynski, *supra* note 159, at 1607.

164. Levine, *supra* note 1, at 1305. The reality of black slavery is another horrible part of United States history that some argue should influence the United States in the same way as the Holocaust and World War II have affected Germany.

165. *Id.*

166. *Id.* at 1317.

167. *Id.* at 1317–18.

168. *Id.* at 1318; *See* Carmi, *supra* note 154, at 327.

underlying the Holocaust."[169] Unlike provisions in the United States focused on individual freedom that allocate equal protection through the law, freedom of religion, and the right to vote, the German constitution contains more communal provisions "aimed at disbanding the Nazi party, preventing the rise of any similar organization, and removing Nazi ideology and rhetoric from public discourse."[170] For example, the German government "may ban political parties and associations that threaten the 'free democratic basic order' and . . . may limit the exercise of individual rights by any citizen whose conduct threatens the stability of the state or infringes on the rights of others."[171] Unlike Japan, Germany's laws strongly and clearly reflect that they are willing to follow through on their protections against racism through legal enforcement. Acts classified as "attacks on human dignity," "incitement to race hatred," and propagating the "Auschwitz lie" (a Nazi concentration camp) are classified as serious offenses and carry stiff penalties.[172]

The German Penal Code includes language that specifies acts of hate speech that are illegal.[173] For example, Section 130 of the German Criminal Code covers inciting hatred stating:

> (1) Whoever, in a manner which is suitable for causing a disturbance of the public peace,
>
> > 1. incites hatred against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them or
> >
> > 2. violates the human dignity of others by insulting, maliciously maligning or defaming one of the aforementioned groups, sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population
>
> incurs a penalty of imprisonment for a term of between three months and five years.[174]

169. Natasha L. Minsker, *"I Have a Dream—Never Forget": When Rhetoric Becomes Law, A Comparison of the Jurisprudence of Race in Germany and the United States*, 14 HARV. BLACKLETTER L.J. 113, 137 (1998).

170. *Id.* at 137–138.

171. *Id.* at 138.

172. *Id.* Additionally, the "Auschwitz lie" refers to contemporary attempts to deny the historical truth of the Holocaust. Herbert A. Strauss, et al., *On the "Auschwitz Lie"*, 87 MICH. L. REV. 1026, 1026 (1989).

173. Levine, *supra* note 1, at 1319.

174. STRAFGESETZBUCH [StGB] [PENAL CODE], § 130, https://www.gesetze-iminternet.de/englisch_stgb/englisch_stgb.html#p0877 [https://perma.cc/7D42-GVZ8]. The statute continues:

> (2) Whosoever

In contrast to the criticisms of Japan's laws not having specific consequences attached to them, here, Germany has attached a specific range of sentences to their penal code, formalizing appropriate sentencing with respect to certain actions. Internationally, along with several countries in Europe that enforce similar laws, the specificity and willingness to enforce laws against hate speech has given Germany a positive reputation among those fighting for more regulation of hate speech in countries that are more protective of all forms of speech like the United States.

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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) 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.

(3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6(1) of the Code of the International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.

(5) Subsection (2) above shall also apply to written materials (section 11(3)) of a content such as is indicated in subsections (3) and (4) above.

(6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86(3) shall apply mutatis mutandis.

Id.

C. Implementation of ICERD in Germany

While there is a broad international consensus that governments must defend freedom of expression against suppression as a fundamental human right, these sentiments are limited by an equally broad international consensus that this speech does not include the most degrading and threatening forms of racist speech.[175] Some claim that this value is documented by Article 4 of ICERD.[176] Germany, however, has already implemented these values into their legal system. Thus, regarding ICERD's regulation of hate speech, how much has ICERD been needed when Germany's domestic laws have addressed the purpose behind the formation of Article 4?

One of the problems Germany faces is that their laws against hate crime are so thorough. As a result, when ICERD is sought to be implemented after the German Penal Code fails to convict, ICERD is likely to categorize German domestic law as "sufficient" to have convicted the crime correctly. Therefore, if an individual uses hate speech and the German court decides not to convict them under domestic German law, the individual is also unlikely to be convicted under ICERD due to Germany's robust laws. A good example of this is *TBB-Turkish Union in Berlin/Bradenburg v. Germany*. In this case,

> [t]he German cultural journal *Lettre International* published an interview with Mr. Thilo Sarrazin, the former finance Senator of the Berlin Senate and member of the Board of Directors of the German Central Bank, entitled 'Class instead of Mass: from the Capital City of Social Services to the Metropolis of the Elite.'[177]

During this interview, "Mr. Sarrazin expressed himself in a derogatory and discriminatory way about social 'lower classes,' which are 'not productive' and would have to 'disappear over time' in order to create a city of the 'elite.'"[178] In this context, he stated in part:

> The city has a productive circulation of people, who work and who are needed . . . Beside them, there is a number of people, about 20% of the population, who are economically not needed. They live off social welfare . . . and transfer income; on a federal level this segment is only 8-10%. This part of the population needs to disappear over time. A large number of Arabs and Turks in this city . . . have no productive function, except for the fruit and vegetable trade . . .
>
> There is another problem: the lower the class, the higher the birth rate. The birth rates of the Arabs and Turks are two to three times higher than what corresponds

175. Friedrich Kubler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 356 (1998).

176. *Id.*

177. U.N. Comm. on the Elimination of Racial Discrimination, Communication No. 48/2010: Opinion, 4 Apr. 2013, CERD/2/82/D/48/2010, https://www2.ohchr.org/English/bodies/cerd/docs/CERD-C-82-D-48-2010-English.pdf [https://perma.cc/K2CW-96SF] [hereinafter Opinion].

178. *Id.* at ¶ 2.1.

> to their overall part in the population. Large segments are neither willing nor able to integrate. The solution to this problem can only be to stop letting people in and whoever wants to get married, should do it abroad . . . My idea would be to generally prohibit influx, except for highly qualified individuals and not provide social welfare for immigrants anymore.
>
> . . . I don't have to accept anyone who doesn't do anything. I don't have to accept anyone who lives off the state and rejects this very state, who doesn't make an effort to reasonably educate their children and constantly produces new little headscarf girls. That is true for 70% of the Turkish and for 90% of the Arab population in Berlin. Many of them don't want any integration, they want to live according to their own rules. Furthermore, they encourage a collective mentality that is aggressive and ancestral . . .
>
> . . . The Turks are conquering Germany just like the Kosovars conquered Kosovo: through a higher birth rate. I wouldn't mind if they were East European Jews with about a 15% higher IQ than the one of Germans.[179]

As this commentary was quite offensive, the Turkish Union "'as the interest group of the Turkish citizens and citizens with Turkish heritage of Berlin and Brandenburg' filed a complaint of criminal offense against Mr. Sarrazin to the Office of Public Prosecution."[180] It claimed:

> that Mr. Sarrazin's statements constituted incitement of the people, pursuant to article 130 of the Criminal Code, in particular because 'Turks and Arabs were presented as inferior and denied a right to existence in our society.' Mr. Sarrzin's statements were reviewed with respect to article 130 . . . of the German Criminal Code, [but] the Office of Public Prosecution established that there was no criminal liability for Mr. Sarrazin's statements and terminated the proceedings. The Office . . . based its decision on article 5 of the Basic Law (freedom of expression) and concluded that incitement to hatred against a segment of the population versus an individual was not recognized and that Mr. Sarrazin's statements are considered as a 'contribution to the intellectual debate in a question that [was] very significant for the public.'"[181]

After domestic remedies had been exhausted, the Turkish Union claimed to be violated and victimized by Germany and, among other Articles, claimed that Article 4, paragraph (a) of ICERD should be applied to their case because Germany, a state party to ICERD, "failed to provide protection under its Criminal Code against Mr. Sarrazin's racially discriminatory and insulting statements directed against . . . individuals of Turkish heritage."[182] This complaint was also rejected, however, for multiple reasons. The court first found that Mr. Sarrazin's statements, though polemic, "did not call for particular

179. *Id.*
180. *Id.* at ¶ 2.2.
181. *Id.* at ¶ 2.3.
182. Opinion, *supra* note 177, at ¶¶ 2.6, 3.1.

actions like violence or arbitrary measures."[183] Germany also maintained that "the decisions by the criminal prosecution authorities were in conformity with article 4 (a) of the Convention."[184] "As a consequence of the interview, there were several complaints from organisations and individuals of different nationalities, [but] the authorities concluded that considering the context, purpose, and content of the statements, an offence of incitement to racial or ethnic hatred could not be established."[185] Furthermore, it noted that Mr. Sarrazin expressed his own personal views and did not attempt to represent any official or semi-official views.[186] It went on to say "[t]here was no indication that Mr. Sarrazin intended to incite hatred against certain segments of the population," and "[h]is statement was neither objectively suitable nor subjectively determined to strengthen an emotionally increased hostile attitude against people of Turkish or Arab origin."[187] As a result, the Turkish Union did not find a remedy through ICERD Article 4.[188]

An interesting aspect of this case is that ICERD's implementation did not come out of a gap in legislative remedies in Germany. It came out of the fact that Germany had so many laws and regulations addressing hate speech, that the decision came down questioning why ICERD was necessary since German laws were already so robust. While the case illustrates some positive outcomes in terms of seeing domestic law against hate speech implemented, it also presents a problem that prompts an important question: what if the given country has made the wrong decision in the midst of robust legislation? Here, a tribunal applying ICERD objectives could have concluded that Article 4 of ICERD was violated because racist and discriminatory sentiments were—at the very least—

183. *Id.* at ¶ 4.4.

184. *Id.* at ¶ 4.5.

185. *Id.*

186. *Id.*

187. Opinion, *supra* note 177, at ¶ 4.5. The case goes on to say, "Hatred based on intolerance was not incited, promoted or justified. There were a lot of critical reactions to Mr. Sarrazin's statements and many people living in Germany stated in public that they did not share his point of view. In August 2010, Mr. Sarrazin published his book 'Germany is [sic] self-destructing," which included similar statements. Many important personalities took public positions against the views put forward in the book. Chancellor Angela Merkel called Mr. Sarrazin's statements 'stupid' and the Social democratic Party, to which Mr. Sarrazin belongs, initiated a procedure for exclusion from the Party. This discussion showed that a majority of the German population did not share the opinion of Mr. Sarrazin and it is not true that a main part of the society was encouraged and confirmed in their latent racism because of the interview and the decisions to terminate the criminal investigations. The State party submits that there was no increased risk for the petitioner or its members to become victims of future criminal acts. Rather, as a consequence of the interview, the discussion on how to improve the situation of immigrants and how to promote their integration has gained welcome prominence." *Id.* Thus, both the fact that Germany's leaders and people were able to speak against these sentiments, along with inciting violence towards a certain group of people, were very important factors in this decision.

188. *Id.*

presented in a public sphere, thus publicly promoting negative ideas about Arabs and Turks.

Additionally, Article 4(a) was indeed violated. While the case above claims the ideas were the personal views of the speaker, thus labelled not harmful, Article 4(a) does not rule this type of harm out. Article 4(a) states that *all dissemination of ideas based on racial superiority or hatred* shall be declared punishable.[189] The language used by Mr. Sarrazin above easily falls into this category. While ICERD mentions violence, violence does not need to be directly involved in the speech for ICERD to apply. Thus, in this case, ICERD failed to be properly implemented.

V. A PROPOSAL ON HOW TO BETTER IMPLEMENT ICERD IN HATE SPEECH CASES THROUGHOUT THE WORLD

A. Comparing the United States, Japan, and Germany

From a comparative, analytical perspective, the United States sits on one end of the spectrum in which free speech holds primacy over, what some would argue, human dignity because of the lack of hate speech regulation. While some Americans have called for change in this area, compared to other countries, the movement to regulate speech at all is both slow and unpopular.

Japan falls into a category not nearly as extreme as the United States. While Japan has valued free speech as prime in the past, recently, as they witness the damage it is causing the United States and deal with lawsuits involving racism and discrimination themselves, they have hesitated to associate themselves with the United States' "all speech should be protected" sentiments.

Finally, in relation to the United States, Germany falls on the opposite end of the spectrum by valuing human dignity and honor over freedom of speech. With extensive and intentional laws regulating hate speech, Germany has shown their concern not to repeat their own horrific history, favoring instead to protect vulnerable groups from the damages of hate speech. One would think that the United States' history with slavery and genocide would lead to the same conclusions as Germany, but it has not.

In light of this, the way that ICERD has failed to be implemented is somewhat different in each country but bears similarities in terms of what solutions could look like.

B. How ICERD Can Change for Better Implementation

From an assessment of these three countries, while ICERD Article 4 has provided some relief against hate speech, it largely has not consistently accomplished its purpose when it comes to implementation. The language in the

189. ICERD, *supra* note 11.

treaty illustrates a desire to stop racial discrimination through hate speech, but the language also needs more specificity to be effective.

First, ICERD Article 4 needs specific language to ensure that if the treaty is violated, certain consequences will be applied to the situation. For example, Article 4(a) states, "[State parties] [s]hall 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 . . ."[190] But the treaty does not go far enough to explain *how* an offense will be punishable by law once the treaty is violated. Who is responsible for deciding the sentence? Under what circumstances does the offence become punishable by law? Specifying these things would be incredibly helpful in implementing ICERD more effectively across the board.

The two cases discussed from Japan above support this analysis. In *Bortz v. Suzuki*, ICERD's implementation in the midst of the Japanese legislative gap was a positive choice on the part of the Japanese judiciary, but it also presents a problem in that it leaves to the discretion of the court *when* they think that legislative gap needs to be filled. Thus, it results in cases like *McGowan v. Narita* where the victim of hate speech experienced something arguably more racially targeted and offensive, and the court decided that he didn't experience any discriminatory speech. A common sense reading of ICERD Article 4 would almost definitely place McGowan in a category of experiencing the discrimination described in Article 4. But because ICERD was used as a non-binding gap filler, the court decided differently and brought charges against the defendant through Japanese laws on "social norms." In terms of suggested language that could be added to ICERD to promote proper implementation, it could specify, "When a country decides to use ICERD as a gap filler for lack of legislation regarding hate speech in the state party, hate speech should be analyzed and defined as . . ." If one reads Article 4, the definition of hate speech can be extracted as "speech targeted at promoting or justifying the racial hatred or discrimination of a person or group based on their color or ethnic origin that incites racial discrimination and has the possibility of inciting violence against such a group based on their color or ethnic origin."[191] A provision could also be included for when a party appeals using ICERD when domestic law does not supply the desired remedy, as in the German case. Consequently, it would increase the efficiency and effectiveness of ICERD if common problems with implementation that result in hate speech acquittals are analyzed and then applied to the language of Article 4.

Second, each state that is a party to ICERD should evaluate their laws on hate speech and assess how their laws are hindering effective implementation of Article 4. Parties to ICERD have a responsibility to assess how their domestic

190. *Id.*
191. *Id.*

laws interfere with or impact agreements they have made with other state parties. The issue of ICERD's language is relevant here because there is not much direction in Article 4 for how to assess whether the application of domestic law is accurate when ICERD Article 4 is cited as the basis for appeal.

For example, the case above with Germany provides an example of how domestic law creates some confusion about how ICERD should be applied when an appeal is brought. Germany has some of the best, most effective legislation in the world when it comes to hate speech laws. But the case above exemplifies how Germany's values are reflected in their laws, making other instances of hate speech that may not violate their specific values fail to be convicted when they very well may have violated international law norms codified through ICERD. A solution would be for countries like Germany to compare their laws' values with the values codified in ICERD Article 4 and ask questions about what is different, what is missing, and how their laws can also catch what would be considered an international violation. The same holds true for a country like the United States.

CONCLUSION

ICERD is a necessary treaty that was created in response to problems of discrimination being faced by vulnerable, marginalized communities in multiple countries. It has been useful and needs to be supplemented rather than eliminated. It is apparent that implementation of Article 4 has, at the very least, not corresponded with the original goals intended by the UN. However, if the language of the treaty is changed to specify how and when ICERD will be triggered to bring violators to conviction, this will increase effectiveness and hate speech discrimination cases will correctly be convicted more often. Additionally, state parties must commit to assessing their own free speech and hate speech laws to foster a legal system in which ICERD is most likely to thrive. While Germany is the most progressive of the three countries discussed in this article in regard to hate speech regulation, all three countries must put more effort into assuring that domestic legislation will—as the Vienna Convention on the Law of Treaties instructs on the interpretation of treaties—reflect the "ordinary meaning . . . of the treaty" in this context in light of the "object and purpose" originally intended for ICERD.[192]

CHIOMA CHUKWU-SMITH*

192. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

* J.D. Saint Louis University School of Law, Editor-in-Chief *Saint Louis University Law Journal* Volume 65, B.A. State University of New York at Geneseo. This Note is dedicated to my late father, Dr. Prince Chuma B. Chukwu, who never left any words unspoken and gave everything he had to the people he loved. Daddy, you can finally say "my daughter is a lawyer." Thank you to my advisor William Johnson (Dean of Saint Louis University School of Law; Professor) for your

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