REGULATING HATE PROPAGANDA IN JAPAN:

CANADIAN HATE REGULATION AND JAPANESE MINORITIES

by

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ABSTRACT

With the end of the Second World War, the importance of human rights protection and promotion became an important objective throughout much of the world. The incitement of hatred of members of minority groups, for instance, on the basis of race, religion or colour, is prohibited in many countries, including Canada. In addition to existing provisions in federal and provincial Human Rights Acts, Canada has criminalized hate propaganda by adding "Hate Propaganda" offences to its Criminal Code. However, such legal regulation has been controversial because of the possible conflict with freedom of expression.

The purpose of this thesis is to analyze the rationales of anti-hate propaganda laws in Canada in light of the constitutional right to freedom of expression, and to ask whether similar laws should be introduced in Japan.

Japan is a country often described as "homogeneous." Maintaining the reputation of being homogeneous in the racial and cultural context, Japan has avoided recognizing the existence of minorities. However, behind this illusion, minorities in Japan are hidden and forgotten. Members of minority groups quietly but certainly exist in Japan, fighting against racism and discrimination. Japanese minorities are also the targets of hateful expression. However, at present, Japanese law does not control discriminatory expression.

The Canadian approach to hate propaganda expresses intolerance towards hate activities and promotes equality amongst people. With the rationales of the Canadian concept of anti-hate propaganda laws as a foundation for analysis, this thesis examines the possibility of regulating hate propaganda in Japan, based on the recognition of minority rights.

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> "Conscious that all people are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time..."
>
> **The Preamble of the Rome Statute of the International Criminal Court**[1]

Fifty-five years have passed since the world witnessed the biggest tragedy. During World War II, a great number of people were denied their human rights and forced to sacrifice their lives. In Germany, six million Jews were killed under the Hitler regime. The Japanese military invaded China, Korea and many East Asian countries, resulting in the rape and murder of countless men, women and children. Atrocities such as these were the product of bigotry, hatred, and the disrespect for human rights and dignity. After World War II, the United Nations was established in 1945 with the objective of promoting world peace and human liberties. Since then, human rights protection has been positively discussed in various ways including the enactment of various human rights treaties.

However, human beings are still caught in the middle of hatred. For example, in 1991, there was a massive massacre in the name of "ethnic cleansing" in the former Yugoslavia. In addition, in 1994, Rwanda experienced a massive practice of genocide which resulted in the establishment of an *ad hoc* International Criminal

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[1] Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9.

Tribunal to punish those who led the massacre. It does not appear unusual for vulnerable people to experience hatred. These kinds of hate-motivated incidents can be found in any society around the world.

The following are selected incidents involving racial and religious hatred that have recently occurred in the United States and Canada.

(a) A high school teacher teaches his students that the Holocaust was a hoax and that Jews are responsible for all the problems in the world. If students' essays and exams reflect his view, they get high marks. If not, they get low marks.[2] (b) A burning cross is placed inside the fenced yard of a black family that has just moved into a white neighborhood.[3] (c) Members of the Ku Klux Klan (KKK) harass and threaten a gay male couple after one of the men testifies in support of a proposed local hate crimes ordinance.[4] (d) A young college student finds the words "Nigger go home!" scrawled on his dormitory room the first day of school.[5] (e) A former member of Aryan Nations and founder of his own white supremacist hate group sends threatening letters and racist posters to the director of an adoption agency in order to discourage her in her attempts to place minority children with

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[2] R. v. Keegstra, [1990] 3 S.C.R. 697.
[3] R.A.V. v. City of St. Paul, 505 U.S., 112 S.Ct. 2538, 120 L.Ed. 2d 305 (1992).
[4] National Gay and Lesbian Task Force Policy Institute, *Anti-Gay/Lesbian Violence, Victimization, and Defamation in 1991,* (Washington DC, 1991) at 18.

white families.[6] (f) A black worker is subjected repeatedly to racist speech on the job. A noose is hung in his work area. His co-workers direct racial slurs and death threats at him.[7] (g) Jewish radio talk show host, Alan Berg is murdered at his home by members of the Order, a white supremacist hate group after speaking against the Ku Klux Klan on his radio show.[8]

Within North American society, the environment has become more conducive to debate on hate speech and hate-motivated incidents due to consciousness about equality issues and increasing numbers of immigrants. Canada and the United States share similar national traits such as the composition of their minorities, cultural diversity and the types of hate propaganda that have occurred. However, the two countries seem to have decided to pursue different ways of dealing with hate related incidents. In a 1992 decision, the Supreme Court of the United States unanimously struck down an ordinance of St. Paul, Minnesota, which regulated public expression of hatred. The ordinance prohibited the display of any symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[9] The U.S. Supreme Court found that the ordinance involved content-

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[5] K.E. Mahoney, "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) University of Illinois Law Review 789.
[6] United States v. Gilbert, 884 F.2d 454 (9th Cir. 1989).
[7] L. Lederer & R. Delgado, eds., *The Price We Pay: The Case against Racist Speech, Hate Propaganda and Pornography,* (New York, NY: Hill and Wang, 1995).
[8] United States v. Lane, 883 F.2d 1484 (10th Cir. 1989).

based discrimination, which is traditionally prohibited, and ruled that it created the possibility that the city criminalized expression with which the government disagreed.[10]

Canada during the same period had a case in which the unconstitutionality of anti-hate propaganda laws was raised.[11] In this case, a teacher from Alberta challenged a section of the Criminal Code prohibiting wilfull promotion of hatred. The Supreme Court of Canada upheld the section prohibiting hate propaganda and found it to be constitutional.[12]

Canada has passed legislation to combat racism and hate literature since the end of World War II using not only criminal sanctions but also civil law remedies. Examples of such legislation include s. 181 of the Canadian Criminal Code prohibiting spreading "false news."[13] Section 13 of the Canadian Human Rights Act prohibits any activities that are "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."[14] Section 43 of the Canadian Post Corporation Act permits the Minister to make an interim prohibitory order disallowing the use of the mail for the

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[9] R.A.V. v. City of St. Paul, supra note 3.
[10] Ibid.
[11] See R. v. Keegstra, supra note 2.
[12] Ibid. Details of this case and other related cases are discussed in Chapter II.
[13] Canadian Criminal Code, s. 181. For the description of this section, see infra note 56.
[14] Canadian Human Rights Act, s. 13(1). For the section, see infra note 87.

purpose of committing criminal offences.[15] Most interestingly, the country has explicitly regulated hate-related activities in its Criminal Code. Sections 318 and 319 of the Canadian Criminal Code criminalize advocating genocide,[16] inciting hatred in public,[17] and wilfully promoting hatred[18] against any "identifiable groups."[19] By regulating hate literature, Canada works towards the alleviation of discrimination and racism.

In my country, Japan, there is no such legislation despite the fact that hate propaganda against minority groups exists. Japan is a country that is often portrayed by the outside world as "homogeneous." The majority of Japanese in fact believe themselves to be living in a homogeneous country. This view creates a problem in that the existence of minority groups is most often overlooked by the larger majority. This avoidance is being practised not only by the public but also by political leaders. For example, in a 1980 report to the Human Rights Committee of the United Nations, the Government of Japan, referring to Article 27 of the International Covenant on Civil and Political Rights, stated that there were no minority groups in Japan.[20] In 1986, then Japanese Prime Minister Yasuhiro

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[15] Canadian Post Corporation Act, s. 43.
[16] Canadian Criminal Code, s. 318.
[17] Canadian Criminal Code, s. 319(1).
[18] Canadian Criminal Code, s. 319(2).
[19] Section 318 of the Code defines "identifiable groups" as "any section of the public distinguished by colour, race, religion, or ethnic origin."
[20] ICCPR, Human Rights Committee, 12th Sess., UN Doc. CCPR/C/10/Add.1(1980). The government of Japan referring to Article 27 of ICCPO stated: "The right of any person to enjoy his own culture, to

Nakasone shamelessly stated to the world that Japan was a "homogeneous" country with no minorities.[21] He went on to say that nobody either suffered from or experienced racial discrimination within the country.[22] Statements such as these entrenched the notion of Japan as a racially and culturally homogeneous nation. However, I contend that the Japanese culture of homogeneity is not an objective portrait of the society but a political discourse, which was originally created by unscrupulous leaders.

Japan is not a homogeneous country. There are racial, national and class minorities who have lived in Japan for decades and centuries. Three main groups of minorities exist in the country, which make up the majority of Japan's minority people. They are the Ainu, the Buraku and ethnic Koreans. The Ainu are the Japanese indigenous people (officially recognized as the indigenous people of Japan by the United Nations), residing mainly in Hokkaido, the Northern area of Japan. Buraku people came into existence during the *Tokugawa* (Edo) period (1603-1868) and they were referred to the "outcaste" people.[23] The ethnic Koreans are individuals or descendents of individuals who voluntarily or involuntarily left their homeland before and

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profess and practice his religion or to use his own language is ensured under Japanese law. However, minorities of the kind mentioned in the Covenant do not exist in Japan."

[21] "'No Minority Races in Japan,' says Nakasone," Japan Times (October 24, 1986).

[22] Ibid.

during World War II. (Most ethnic Koreans currently residing in Japan are second, third and fourth generations.) In addition to these minorities, there are other minorities from Okinawa Island, China and East Asia. Japan is neither a homogeneous nor a racism-free country as certain political leaders contend. There are various minorities living in Japan who suffer from discrimination and racism.

Several human rights organizations campaign for minorities' rights in Japan. Each organization deals with different members of minority groups and adopts different methods for the promotion of minorities' rights. The Buraku Liberation League (BLL), *Buraku Kaiho Domei*, for example, advocates for the rights of Buraku people while the Utari Association, *Utari Kyokai*, promotes human rights for the Ainu. Both groups report and document human rights violations. According to the BLL, hate activities against the Buraku and other minorities have recently increased. Public spaces are full of negative graffiti against minority groups.[24] Also, there are threatening phone calls to offices of the BLL.[25] During my years in Japan, I personally witnessed derogatory scribbles against certain groups of people in public places. There is an atmosphere and hopelessness for those targeted by derogatory statements and practices.

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[23] For detail of the *Tokugawa* Shogunate (Edo) Era (1603-1868), see Chapter III.

[24] Personally, I have found so many scribbles saying "Die, *Eta*," in the public spaces such as school walls and park roads in Japan.

[25] Buraku Liberation League, *Buraku Liberation News*:No. 95(March 1997).

The purpose of this thesis is to introduce the Canadian concept of anti-hate propaganda laws and to ask whether similar laws should be introduced in Japan. Maintaining the reputation of being homogeneous in the racial and cultural context, Japan has avoided recognizing the existence of any minority groups in Japan. The Canadian approach to hate propaganda expresses intolerance towards hate activities and promotes equality amongst people. I hope that the introduction of similar laws into Japan will be a significant step toward the abolishment of discrimination and hate propaganda and the establishment of minorities' rights.

In my thesis, I adopt the following format. In Chapter Two, I introduce various hate propaganda laws legislated in Canada and analyze the rationales utilized to enact such laws. In so doing, I refer to the study results of the Special Committee on Hate Propaganda of 1965 and other documents collected by the federal and provincial Canadian governments. The Special Committee on Hate Propaganda analyzed the issue of hate propaganda from various angles ranging from hate materials distributed by white supremacist groups to the psychological effects on victims and communities. The Committee eventually convinced the Canadian legislature to amend the Criminal Code in order to regulate hate propaganda activities. I also refer to cases that have appeared before the Supreme Court of Canada concerning the constitutionality of anti-hate propaganda laws in light of

freedom of expression. The Supreme Court's rationales in upholding the regulation of hate propaganda are well articulated and interesting. The cases I introduce are *R. v. Keegstra*, *R. v. Zundel*, *Canada v. Taylor* and *Ross v. School District No. 15*. Each case argued against the sections of different legislation regulating hate activities in light of freedom of expression.

In Chapter Three, I challenge the myth of Japanese homogeneity by introducing Japanese ethnic, racial and class minorities. This introduction includes discussions of the minorities' current and past circumstances, their background and experience of discrimination and racism in Japanese society. Since some minorities' backgrounds and histories are being still debated in Japan, I only state the officially known information on minorities because the purpose of mentioning it is not to challenge the historical facts currently recognized but to introduce the existence of minorities. I hope to establish that the uniqueness of Japanese culture, its homogeneity, is a misconception created for the purpose of justifying the exclusion of "outsiders" from the mainstream Japanese. Then I introduce the experience of discriminatory practices and hate activities of minority groups. Although I would like to use figures on hate activities collected by government institutions, such figures do not exist currently in Japan since Japan lacks any law enforcement to collect data on hate activities. Therefore, I cite information from human rights organizations that have dealt with

the issue of discrimination and racism in Japan. This data and information is distributed by means of newsletters and web sites. Since most private advocates rely for data collection on minority people who individually or personally report their experience, the number and types of hate activities in this thesis are limited. Thus, I must admit that Japanese hate activities and related data, which I cite in this thesis, are neither officially collected nor recognized by the government of Japan.

In Chapter Four, I raise the possibility of enacting anti-hate propaganda laws as appropriate remedies for hate activities. I argue the hypothesis that it is possible to enact hate propaganda laws under the theory of freedom of expression in the Constitution of Japan. In so doing, I explain the system of the Constitution, a limitation clause and the scope of freedom of expression. Although fully guaranteed, every right in the Constitution of Japan including freedom of expression is subject to regulation for the so-called *public welfare standard*, which plays a similar role to section 1 of the Canadian Charter of Rights and Freedoms. I present the regulations of certain expression historically accepted by the Supreme Court of Japan - pornography and defamation - and discuss the Court's reasoning. Referring to the Courts' rationales for regulations on pornography and defamation, I adopt these rationales to the enactment of hate propaganda laws.

I then point out the substantial obstacles in enacting anti-hate propaganda laws in Japan. As mentioned above, the concept of being homogeneous is strongly rooted in the people's minds, and it does affect the way people are. I will introduce the Japanese traditional way of thinking including "groupism" influenced by Confucianism and Feudalism. With all discussions, I argue my thesis in this Chapter that Japan needs to enact hate propaganda laws to promote minorities' rights.

Considering a comparative study between Canada and Japan, there is one issue that requires specific attention - culture. In addition to the differences of core cultures of the east and west, there are more technical differences between the two countries. Canada is a very diverse country while in Japan the majority group is very large with small groups of minorities. Knowing it has an ethnic mosaic, Canada has established its culture and customs by accepting new immigrants and foreigners into their land. Japan, on the other hand, closes its doors to newcomers as a government policy in protecting its old customs built upon bloodlines and family values. Thus, the two countries have different philosophical beliefs, and the people have different beliefs resulting from different traditions and cultures. I believe that these sociological differences could affect the way of interpreting social relations as well as legal culture.

However, my view is that human rights and dignity should be valued over customs and cultures. Discrimination attacking the very core of an individual or group should not be tolerated in society. Hate propaganda is a violation of human rights.

The achievement of a good quality of life is a goal of human beings, and the quality is gained from dignity and respect for others as well as for one's self. Nobody should receive disrespect because one belongs to a certain race or religion. Hate propaganda makes the victims and their communities feel weak, useless and miserable. Hate propaganda tells the vulnerable groups that they are worthless.

Article 1 of the Universal Declaration of Human Rights states as follows:

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[26]

Keeping this belief in mind, I argue for the enactment of anti-hate propaganda laws in Japan.

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[26] Universal Declaration of Human Rights, 10 December 1948, A/RES/217 A(III).

Chapter Two: Prejudice and Hate: Hate propaganda Laws of Canada and Their Rationales

I. Introduction

Since the end of World War II, many countries like France, Germany, and England have regulated the circulation of hateful literature or messages on the basis of certain visible characteristics such as race, ethnicity and religion in public.[27] Canada is one of the countries. The Canadian legislation, directly or indirectly, aims to protect specified target groups as well as the public from being exposed to hateful expression. In this Chapter, I explore various Canadian anti-hate propaganda laws and their rationales. Referring to studies on hate propaganda ranging from the analysis of hate materials to psychological effects on victims and society, I argue that hate propaganda should be regulated for the protection of human rights and society.

II. Prejudice - Cause of Hate

Hate propaganda is about hatred and bigotry against different groups. It is motivated by prejudice and speaks ill of others out of prejudice and bigotry. Prejudice is a first step

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[27] In France, the defamation of a person or a group of persons on the basis of their belonging or not belonging to an ethnic group, a nation, a race or specific religion is punished under the statute (Law No. 72-546, July 1, 1972.). Germany has passed many laws to punish hateful expression against certain groups, including the West German Penal Code, which prohibits genocide and attacks on human dignity by inciting hatred. (The West German Penal Code, s. 86.). The United Kingdom's Race Relations Act 1976 prohibits a person from publishing and distributing written matter which is "threatening, abusive or insulting." (Race Relations Act 1976, c. 74, s.70 (U.K.).

towards hate propaganda, and I believe that hate propaganda can be avoided if prejudice could be minimized. Many psychologists have studied prejudice and stereotypes, and created their own definition of prejudice. For example, Professor Fred Pincus defines prejudice as an "attitude toward a category of people."[28] Professor Gordon Allport's definition of prejudice is "an avertive or hostile attitude toward a person who belongs to a group, simply because he belongs to that group."[29] Professor James Jones defines prejudice as a "positive or negative attitude, judgement, or feeling about a person that is generalized from attitudes or beliefs held about the group to which the person belongs."[30] Although the definitions use different words, the meanings behind the words are the same.

Prejudice and stereotypes towards certain individuals or groups are not unfamiliar to most individuals. Most individuals possess some degree of prejudicial attitude toward people belonging to different groups from their own. For example, Jack Levin and Jack McDevitt discussed certain "pictures in our heads" in their book, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*. All members of group X are "dirty" and "lazy." All members of groups Y are "money-hungry," "powerful," and "shrewd."

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[28] F.L. Pincus & H.J. Ehrlich, ed., *Race and Ethnic Conflict: Contending Views on Prejudice, Discrimination, and Ethnoviolence*, 2nd ed., (Boulder, CO: Westview Press, 1999) at 61.
[29] G. Allport, *The Nature of Prejudice*, (Cambridge, MA: Addison-Wesley, 1954) at 8.
[30] J.M. Jones, *Prejudice and Racism*, 2nd ed., (New York: McGraw-Hill Companies Inc., 1997) at 10.

All members of group Z are "illogical," "emotional," and "submissive." The authors continued that these stereotypes are "so powerful, so widely accepted, and so enduring that, based solely on the above unattributed characteristics, many people can easily identify" each group.[31] The important issue in their discussion was not whether or not these "pictures" are correct, but that many people are able to recognize the groups as African-Americans, Jews and women, respectively.

However, it is important to acknowledge that prejudice is not something human beings are born with. Human beings learn prejudice. Professor Pincus referred to the learning process of prejudice as follows:

> "Children as young as three or four years of age often begin to learn the prevailing stereotypes of a group long before they can even identify the group or, for that matter, comprehend the full meaning of what they have learned. In the early years, parents are the major teachers of prejudice. Consider the white parent who tells the child that he cannot play with the children of color across the street because they are dirty... It does not take much repetition of similar messages before the child is motivated to not play with them and develops an aversive response to them."[32]

The Chairperson of the Special Committee on Hate Propaganda of 1965, Maxwell Cohen, agreed that prejudice is a learned behaviour. He stated that human beings are not born "with any meaningful inborn racial or ethnic differences in intelligence or

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[31] J. Levin & J. McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, (New York, NY: Plenum Press, 1993) at 22.
[32] F.L. Pincus & H.J. Ehrlich, supra note 28 at 60-61.

personality attributes[33]:

> "[T]he way man thinks about himself, about his group and especially about other groups is conditioned by his upbringing, by his family and religious experience, by his education, by his general environment."[34]

If prejudice is something that is learned from the surrounding environment, then the environment should be made as prejudice free as possible in order to avoid people learn prejudice.

The existence of hate propaganda creates a very negative environment in which people can learn prejudicial attitudes or views towards certain groups. It creates or worsens the tension amongst groups by strengthening prejudice, and it is dangerous enough to persuade people to believe in what it stands for.

III. History of Anti-Hate Propaganda Laws

The first movement towards the suppression of hate propaganda activities in Canada came about during the 1930's when Nazi propaganda was distributed in several regions of the country.[35] In response to such propaganda, the province of Manitoba enacted a statute to regulate hate propaganda.[36] However, such activity continued. In 1953, several religious and ethnic minority groups took their complaints concerning hate propaganda to the Joint Committee of the House of Commons and the

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[33] Special Committee on Hate Propaganda, *Hate Propaganda in Canada*, (Ottawa: Queen's Printer and Controller of Stationery, 1966)(Chair: M. Cohen) at 28.
[34] Ibid. at 28.
[35] Law Reform Commission of Canada, Hate Propaganda [Working Paper 50], (Ottawa: Supply and Services, 1986) at 5.
[36] The Libel Act, S.M. 1934, c.23, s.13A.

Senate.[37] During the 1960s, there was mounting hate propaganda against racial, religious, colour or ethnic minorities across all provinces.[38] "Hate propaganda" was disseminated through pamphlets, leaflets and through oral communications. Some of them were stuffed in apartment house mailboxes, and others were placed on the campuses of universities. In response to such hate propaganda activities, then Federal Minister of Justice, Guy Favreau, announced for the first time the appointment of a Special Committee to study hate propaganda activities in Canada and Mr. Maxwell Cohen was appointed as chairperson.

The Special Committee on Hate Propaganda of 1965 (hereafter, the Cohen Committee or the Committee) discovered important issues about hate propaganda. Amongst them was that there were some common themes running through most of the propaganda. The most popular themes found by the Committee were that Communists are Jews; that Hitler was right in his policy of racial extermination; that a Jewish conspiracy exists to gain control of the Canadian as well as the world economy; that the Black race is an inferior one which can weaken our society; and that the Black people should go back to Africa. Such anti-Jewish and anti-Black hate propaganda was widespread, especially in Ontario and Quebec. The following hate messages are examples of the hate messages distributed in public during the 1960s:

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[37] Law Reform Commission of Canada, supra note 35 at 6.
[38] Special Committee on Hate Propaganda, supra note 33 at 8.

> "We believe in the superiority of the Aryan race as proved by his great culture and civilization. The negro races have never developed a civilization, discovered any new invention, written a great symphony, or even originated an alphabet. They are a MUCH lower level to the Whites. We believe in sending all negros back to Africa whence they came." [emphasis original].[39]
>
> "Hitler was right.. Hitler raised Germany from the depths of Democracy. He sought the friendship of Britain in creating a new Europe based on national unity, social justice, racial betterment and defense against Communism; but the Jews forced Britain to declare war on their behalf."[40]
>
> "Christian unite, boycott Jewish filth, Nazism is dead, but Communism lives. FIGHT COMMUNISM OR DIE A SLAVE." [emphasis original].[41]
>
> "Just as the NAACP, Martin Luther King and other extreme left-wing elements use Negro churches as protective fronts to hold their subversive meetings, the U.S. Communist Party uses Jewish Religious Centers for their secret dens of Anti-American plotting."[42]
>
> "THE ENEMY IS AMONG US.. Unconsciously you pay the way for Jewish world domination by purchasing kosher foods, filth literature, or taking loans from the Jewish owned finance companies. LOOK at television and you just see murder, rape, perversion and hatred against the white man. All brought to you by your friendly ZIONIST VIEW." [emphasis original].[43]

The Committee uncovered the fact that most hate messages like the above were created and distributed by members of right-wing, extremist organizations and not by individuals. Although the number of active organizations and the volume of hate propaganda activities were not large number, the Committee concluded that the real number of such activities was much larger than had been

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[39] Ibid. at 261.
[40] Ibid. at 17.
[41] Ibid. at 18.
[42] Ibid. at 16.

stated publicly. The Committee was well aware of the seriousness of the issue and concluded as follows:

> "It is easy to conclude that because the number of persons and organizations is not very large, they should not be taken too seriously. The Committee is of the opinion that this line of analysis is not longer tenable after what is known to have been the result of hate propaganda in other countries, particularly in the 1930's when such material and ideas played a significant role in the creation of a climate of malice, destructive to the central values of Judaic-Christian society, the values of our civilization. The Committee believes, therefore, that the actual and potential danger caused by present hate activities in Canada cannot be measured by statistics alone."[44]

One important Committee finding was about prejudice. The Committee indicated that prejudice could be a dangerous factor in creating unhealthy race relations and may germinate into hatred for certain groups of people. It was concluded that continuing to ignore the developing prejudice and continuing hate activities would be a mistake.[45] In explaining the reason for its conclusion, the Committee used the example of the use of hate propaganda under the Third Reich as an illustration of how vulnerable human beings are:

> "The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals."[46]

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[43] Ibid. at 266.
[44] Ibid. at 24.
[45] Ibid. at 14.
[46] Ibid. at 8.

Hitler's oppressive regime during World War II was one of the world's most unforgettable historical events. Cruel practices by the Third Reich and its supporters proved that human beings can be vulnerable and irrational in the case of economic or political chaos and depression. Hate propaganda can play a crucial role in creating tension amongst various racial, religious, and ethnic groups. The rationality of mankind is now just a myth. "Given the right technique and circumstances, human beings can be persuaded to believe almost anything."[47] The Committee suggested that the government should immediately react against hate propaganda since such hate "could mushroom into a real and monstrous threat to our way of life" in times of social stress.[48]

Professor Gordon Allport, an American psychologist, analyzed the nature of prejudices and stereotyping from the perspectives of the agents of prejudice in his classic book, *The Nature of Prejudice*. He documented how the Third Reich succeeded in its cruel practice against Jewish people. In referring to Hitler's Germany, Professor Allport used a one-to-five scale to rank the prejudiced actions against other groups: 1. antilocution (least aggressive), 2. avoidance, 3. discrimination, 4. physical attack, and 5. extermination (most aggressive). He contended that it was true that activity on one level is transitional to a more intense level:

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[47] Ibid. at 30.
[48] Ibid. at 24.

> "It was Hitler's antilocution that led Germans to avoid their Jewish neighbors and erstwhile friends. This preparation made it easier to enact the Nurnberg laws of discrimination which, in turn, made the subsequent burning of synagogues and street attacks upon Jews seem natural. The final step in the macabre progression was the ovens at Auschwitz."[49]

Allport asserted that social consequences of much less aggressive prejudice were harmful enough to growing to hatred. We should not underestimate the real harm and effect of hate propaganda affecting human beings and their psychology. Allport concluded that this fateful progression is frequent. Since human beings "grow ever more interdependent, they can tolerate less well the mounting friction."[50]

Hatred and bigotry between groups always exist as prejudice does. However, it is possible to prevent a tragedy from erupting from prejudice by preventing its growth. The Canadian Government's Minister of Foreign Affairs Lloyd Axworthy stated in a meeting of the United Nations Commission on Human Rights in 1996 as follows:

> "Why should we renew and strengthen our commitment to human rights? The answer is clear. If we turn away from the desolation and dismay of human suffering; if we fail to stop hatred from flowing through the channels of our new electronic networks; if we do not care about the present and future vulnerable children.. then we will face harsh consequences down the road. On the larger landscape of human society, what began as hateful rhetoric may turn into urban terrorism, regional warfare and genocide."[51]

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[49] G. Allport, supra note 29 at 14-15.
[50] Ibid. at 16.
[51] ESC, 52nd Sess., 24th Mtg., UN Doc. E/CN.4/1996/SR.24(1996).

Human beings can be very vulnerable under difficult circumstances. The rationality of mankind can be paralyzed in chaos and hardship. Considering human irrationality, hate activities should not be overlooked simply because the volume of activities or people involved at a certain moment is not substantial. Rather, we must always keep in mind that everyone has, no matter to what degree, the possibility of engaging in acts of hatred since prejudices and stereotypes are common to most individuals. In his later article, Maxwell Cohen contended that Hitler's success on the persecution of Jews was based on racist propaganda:

> "It was clear that despite the crushing defeat of Hitler and of Germany, Naziism remained alive during the post-war period, as evidenced by the persistence of certain kinds of racist propaganda."[52]

Human beings are incapable of all of a sudden practicing wide-scale acts of cruelty one day without some background motivational forces being at play. Moreover, human beings are incapable of exercising cruelty on those whom they respect. Prejudice may grow to hatred. Disrespect based on prejudice is learned, and hostility or bigotry can be developed step by step in everyday life. If prejudice is minimized, hatred could be avoided.

One criticism against the Cohen Committee's findings on prejudicial practice was that the Committee "did not address the

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[52] M. Cohen, "The Hate Propaganda Amendment: Reflections on a Controversy," (1971) 9 Alberta Law Review 103 at 105.

issue of the degree of harm resulting from hate propaganda, which is fundamentally different from the harm resulting from acts of discrimination."[53] Hate propaganda discriminates against certain people on the basis of their visible characteristics like discrimination does. Hate propaganda is a form of discrimination which has a voice. If discrimination is an action without words, hate propaganda is an action with powerful words. Discrimination is recognized to have created harm, and hate propaganda, which screams out loud that certain people do not deserve the respect as human beings, would create greater harm than discrimination.

The Cohen Committee concluded that minority groups in Canada are entitled to protection from physical attacks as well as threats and vilification directed at them on the basis of their memberships in particular groups. Recognizing the lack of adequate legal protection and/or remedies for victims of hate propaganda, the Committee suggested new legislation to forbid the following: (1) advocacy of genocide, (2) incitement to hatred of groups that is likely to occasion breach of the peace, and (3) group defamation. In 1966, the Federal government of Canada added "Hate Propaganda" provisions in its Criminal Code. As a result, three offences exist under sections of the Criminal Code: advocacy of genocide (s. 318), the public incitement of hatred likely to lead to a breach of the peace (s. 319(1)), the wilful

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[53] M. Valois, "Hate Propaganda, Section 2(b) and Section 1 of the Charter: A Canadian Constitutional Dilemma," (1992) 26 R.J.T. 381.

promotion of hatred (s. 319(2)). Sections 318 and 319 state as follows respectively:

> "318(1) - Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years;
>
> 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 is guilty.
>
> (2) - Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty..."[54]

"Identifiable group" in these sections is defined in s. 318 as "any section of the public distinguished by colour, race, religion, or ethnic origin."[55] Sections 318 and 319 maintain strict procedures which require the consent of the Attorney General to prosecute an offender.

Section 181 of the Criminal Code, which was enacted prior to ss. 318 and 319, is an alternative provision for the prosecution of hate-promoters. It reads as follows:

> "181. Everyone who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years."[56]

In addition, the Canadian Human Rights Act and each provincial Human Rights Act also prohibit discriminatory practices on such

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[54] Canadian Criminal Code, ss. 318, 319(1), and 319(2), supra notes 16, 17, 18.
[55] Canadian Criminal Code, s. 318(4). Critics suggest that this section should be reviewed since it does not contain such minorities as sexual orientation and sex.
[56] Canadian Criminal Code, s. 181, supra note 13.

bases as colour, ethnic origin, and race. Section 13 of the Canadian Human Rights Act, for example, is utilized in an attempt to alleviate any racist campaign communicated through telecommunication. With these laws, Canada has began to combat racism and hate propaganda.

However, the validity of these laws has been debated in light of a guaranteed constitutional right - freedom of expression. Freedom of expression is a symbol of Western democracy and one of the fundamental human rights guaranteed to people in democratic countries including Canada. The opponents of anti-hate propaganda laws claim that regulating certain expression, no matter how offensive and disfavourable the expression may be, should strictly be prohibited on the basis that it infringes on freedom of expression. In the next section, I explore the difficult relationship between freedom of expression and hate propaganda. In so doing, I introduce the approach of the Canadian courts to anti-hate propaganda laws, discussing four important cases which have appeared in the battle with freedom of expression.

IV. Case Analysis: Conflicts between Freedom of Expression and Hate Propaganda Laws

A. Introduction to the Canadian Charter of Rights and Freedoms

Although legislated decades ago, the regulation of hate propaganda has been under debate. Since anti-hate propaganda laws could technically suppress certain kinds of "expression," the regulation is considered to be in violation of a constitutional

right - the freedom of expression. The Canadian Charter of Rights and Freedoms of 1982 guarantees freedom of expression while authorizing the legislature to limit the right by reasonably justifiable laws within a standard of a free and democratic society. Before turning to case analysis, I will briefly introduce the Canadian Charter and a process of a Charter review.

With the acknowledgement of the inadequacy and ineffectiveness of the Canadian Bill of Rights, the Charter of Rights and Freedoms was enacted in 1982. The Charter satisfies many elements which the Bill of Rights does not. The Charter is not merely a statutory instrument but part of the Constitution of Canada. It expressly overrides inconsistent statutes. It applies to not only the federal level but also provincially. Most importantly, it explicitly gives a new approach and mandate to the protection of fundamental rights and civil liberties.

The Canadian Charter of Rights and Freedoms guarantees various rights and freedoms. Sections 2 through 23 specifically set out rights and freedoms guaranteed to people, ranging from Democratic Rights, Legal Rights and Equality Rights to Minority Language Educational Rights. Section 3, for example, guarantees the right to vote. The right to be secure against unreasonable search or seizure is guaranteed by s. 8. Section 15 guarantees equality before and under the law and equal protection and equal benefit of the law.

Fundamental freedom is guaranteed by section 2: freedom of conscience and religion (s. 2(a)), freedom of thought, belief, opinion and expression including freedom of the press (s. 2(b)), freedom of peaceful assembly (s. 2(c)), and freedom of association (s. 2(d)). While these rights are to be fully guaranteed, the Charter contains a limitation clause, which authorizes a legislative body to enact a law limiting a Charter right if the law is considered as "reasonable" as can be "demonstrably justified" in a free and democratic society. Section 1 of the Charter provides as follows:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[57]

This limitation of rights is applicable to freedom of expression. When a law is challenged under the Charter, the reviewing court will follow a two-stage review process which s. 1 mandates. The first stage is to determine whether the challenged law abridges a Charter right, and if so, the second stage is to determine whether the law is a reasonable one that "can be demonstrably justified in a free and democratic society." If the law survives the first stage, the court may move to the second stage.

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[57] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11. (hereafter, the Charter.)

B. Principles Underlying Freedom of Expression

In the first stage of a Charter review, the Court assesses the scope of a Charter right. Freedom of expression is guaranteed in s. 2 of the Charter:

> "2. Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[58]

Freedom of expression is one of the foundations of individual liberty in Western democratic theory.[59] It is invaluable not only for the maintenance of a democratic society but also as "the basis for the historical development of the political, social and educational institutions of western society."[60] Such influential western philosophers as Locke, Hobbs, Mill, Madison and Jefferson argued that freedom of expression provided important benefits in a democratic society and passionately advocated for the right. In *R. v. Kopyto*, Justice Cory stated the meaning of democracy in light of freedom of expression:

> "...[I]t is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions... The concept of free and uninhibited speech permeates all truly democratic societies."[61]

Freedom of expression is constitutionally protected under three rationales: a) Search for the truth; b) Democratic participation

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[58] Ibid.
[59] See C.F. Beckton, "Freedom of Expression in Canada - How Free?," 13 Manitoba Law Journal 583.
[60] R.W.D.S.U. Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

in society; and c) Personal fulfilment and human flourishing. In Canada, these three rationales were first established in *Irwin Toy v. Quebec.*[62] In *Irwin Toy*, Justices Dickson, Lamer and Wilson delivered the majority opinion:

> "We have already discussed the nature of the principles and values underlying the vigilant protection of free expression such as ours. They were also discussed by the court in *Ford*, and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated..."[63]

a) Search for the Truth

John Stuart Mill articulated the concept of free trade of ideas - marketplace of ideas - in his work, *On Liberty*, and embraced the importance of exchanging opinions and arguments without any interference from outside. He argued that the suppression of opinions is wrong because it is only by "the collision of adverse opinions" that the truth can be discovered or confirmed.[64] Mill believed in a human capacity of reaching to Truth and argued that wrong opinions would ultimately yield to fact and argument, but this could only occur if their propagators were exposed to alternative views.[65] Mill's marketplace of ideas followed John Milton's Areopagitica - A Speech for the Liberty of

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[61] R. v. Kopyto (1987), 47 D.L.R.(4th)213 at 226.
[62] Irwin Toy v. Quebec [1989] 1 S.C.R. 927.
[63] Ibid. See also R. v. Keegstra, supra note 2, and R. v Zundel, [1992] 2 S.C.R. 731.
[64] See J. S. Mill, *On Liberty*, C.V. Shields ed., (New York, NY: Bobbs-Merrill, 1956).

Unlicensed Printing. Milton believed that the clash of arguments would eventually lead to Truth:

> "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple: who ever knew Truth put to the worse, in a free and open encounter."[66]

Mill's "marketplace of ideas" is explicitly represented in the U.S. First Amendment (as recognized by Justice Oliver Wendell Holmes in his dissenting opinion in *Abrams v. United States*[67]). Later, it was clearly expressed in the United States Supreme Court by Justice Douglas in his dissenting opinion in *Dennis v. the United States*:

> "When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilization apart."[68]

Mill's marketplace of ideas recognizes freedom of expression as a fundamental human liberty and establishes the high standard of acceptance not only in the United States but also in many countries including Japan, which believe in Democracy.

b) Democratic Participation in Society

Freedom of expression is a symbol of Western liberal democracy. It is recognized that in maintaining the political

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[65] Ibid.
[66] J. Milton, *Areopagitica*, (New York, NY: AMS Press, 1971).
[67] Abrams v. the United States, 250 U.S. 616, 630 (1919).

system, we must strictly defend the right. As seen throughout modern history, democracy was in crisis when freedom of expression was oppressed and jeopardized. Professor Alexander Meiklejohn, American law professor, argued that the protection of freedom of expression is justified only when the expression deals with government.[69] He indicated that many forms of expression not related to the democratic process would not be considered worthy of protection.[70] In *Switzman v. Elbling*,[71] Justice Rand confirmed Meiklejohn's argument by communicating that government was "ultimately a government by the free public opinion of an open society," and that it demanded "the condition of a virtually unobstructed access to and diffusion of ideas."[72] While Mill's "marketplace of ideas" would include not only political speech but also the ideas of philosophy, history, the social sciences, the natural sciences and medicine, to Meiklejohn there was no place in his theory for an extension of the protection to the ideas of literature, scholarship and arts. His only objective for freedom of expression was to contribute to a democratic system of government.

c) Human Fulfilment and Flourishing

The third rationale of the constitutional protection for freedom of expression was established by Professor Thomas I.

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[68] Dennis v. the United States, 341 U.S. 494 (1951).
[69] See, A. Meiklejohn, "The First Amendment Is an Absolute," (1961) 1961 Supreme Court Review 245.
[70] Ibid.
[71] Switzman v. Elbling, [1957] S.C.R. 285.

Emerson. Human fulfilment and flourishing is the rationale which opposes Meiklejohn in the wide degree of protection it offers freedom of expression. Emerson argued that the greatness of human capacity comes from the use of freedom of expression:

> "[T]he proper end of man is the realization of his character and potentialities as a human being. Man is distinguished from other animals principally by the qualities of his mind. He has powers to reason and to feel in ways that are unique in degree if not in kind. He has the capacity to think in abstract terms, to use language, to communicate his thoughts and emotions, to build a culture. He has powers of imagination, insight and feeling. It is through development of these powers that man finds his meaning and his place and in the world."[73]

Emerson believed that freedom of expression was not only for its political functions, but also as an end in itself, and that free expression was essential to the dignity of all individuals.[74] His argument was that expression is protected "not just to create a more perfect polity, and not just to discover the truth, but to enlarge the prospects for individual self-fulfilment or to allow personal growth and self-realisation."[75] Emerson contended that Expression in the political, artistic, social and cultural context must be protected unless it becomes action which the government has a legitimate interest in banning.[76]

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[72] Ibid.
[73] T. Emerson, *Toward a General Theory of the First Amendment,* (New York: Random House, 1963) at 4.
[74] Ibid. See also Emerson, *The System of Freedom of Expression,* (New York: Random House, 1970).
[75] Ibid. See also P.W. Hogg, *Constitutional Law of Canada,* 4th ed., (Toronto: Carswell, 1996).
[76] Ibid.

I believe that Emerson's argument is the ultimate purpose of freedom of expression. Although Mill's marketplace of ideas and Meiklejohn's political participation greatly contribute to the protection of freedom of expression, these arguments can only serve the purpose within the framework of Emerson's human flourishing and fulfilment. The exchange of ideas and the political participation in society are requirements in attaining the most of human capacities. According to Emerson, human minds must be free - free from fear and anxiety to express their views in order to achieve the potentialities and capacities of human beings, which I also believe is the purpose of our lives.

C. Canadian Cases Concerning Hate Propaganda

a) Scope of Freedom of Expression in Cases

Canada as a democratic country fosters the importance of individual liberty and freedoms. In a 1989 Supreme Court decision in *Irwin Toy v. Quebec*,[77] all these three rationales for the constitutional protection of freedom of expression were articulated for the first time since the establishment of the Charter of Rights and Freedoms of 1982.

However, freedom of expression in the Charter is not protected at all times and under all circumstances. The right is subject to regulation as in s. 1 of the Charter. The Supreme Court of Canada defines the scope of expression by s. 2(b) as follows: "activity is expressive if it attempts to convey

[77] Irwin Toy v. Quebec, supra note 62.

meaning."[78] Traditionally, the Canadian courts take the principle of "content neutrality" in defining expression. "The content of a statement cannot deprive it of the protection accorded by s. 2 (b), no matter how offensive it may be."[79] The truth or popularity of [their] content is not relevant.[80] If expression conveys meaning, it would be protected under s. 2(b), "however unpopular, distrustful or contrary to the mainstream."[81] This definition of "expression" seems to be broad and ambiguous since there is not much expression which does not convey meaning. However, there is expression which is clearly not protected under s. 2(b)- physical violence.[82]

b) Background and Overviews: R. v. Keegstra, R. v. Zundel, Canada v. Taylor and Ross v. School District No. 15.

In this section, I will be introducing the facts and background of various cases to demonstrate the Canadian approach to hate propaganda. A landmark battle between hate propaganda laws and the right to freedom of expression appeared before the Supreme Court of Canada in 1992, claiming the unconstitutionality of s. 319 of the Canadian Criminal Code. *Regina v. Keegstra* aroused a heated debate on a difficult relationship between anti-hate propaganda laws and freedom of expression in Canada.

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[78] Re ss. 193 and 195.1 of Criminal Code (Prostitution Reference) [1990] 1 S.C.R. 1123; Rocket v. Royal College of Dental Surgeons [1990] 2 S.C.R. 232.
[79] R. v. Keegstra, supra note 2 at 828.
[80] Ross v. School District No. 15, [1996] 1 S.C.R. 827.
[81] Ibid. at 729.

James Keegstra, the defendant, was charged under s. 319(2) of the Criminal Code, which prohibits the wilful promotion of hatred.[83] Keegstra was a high school teacher in Alberta from the early 1970's until he was dismissed in 1982. During these years, he taught his students that Jews were "subversive," "sadistic," "money-hungry," and "child killers," and they were responsible for "every problem happening in the world." He also taught them that the Holocaust was created by the Jews to "gain sympathy." He instructed his students to follow his views even in examinations. If they followed his views, they would get high marks. If they did not, they would get poor marks. Keegstra was convicted of public, wilful promotion of group hatred under s. 319(2) (then s. 281.2(2)). He appealed to the Alberta Court of Appeal, which found that s. 319(2) of the Criminal Code unjustifiably infringed Keegstra's freedom of expression as guranteeed by s. 2(b) of the Charter and he received a new trial, which upheld the original guilty conviction. Keegstra took his challenge of the validity of s. 319(2) of the Code under the Charter to the Supreme Court of Canada.

During the same period, the following cases were being discussed before the Supreme Court: *R. v. Zundel*[84] and *Canada v.*

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[82] Irwin Toy v. Quebec, supra note 62. "A murderer or a rapist cannot invoke freedom of expression in justification of the form of expression he has chosen."
[83] See R. v. Keegstra, supra note 2.
[84] R. v. Zundel, supra note 63.

Taylor.[85] Ernest Zundel was convicted of wilfully spreading false news, contrary to s. 181 of the Criminal Code. Zundel published a pamphlet called *Did Six Million Really Die?*, suggesting that it has not been established that six million Jews were killed before and during the World War II and that the Holocaust was a myth perpetuated by a "worldwide Jewish conspiracy." Zundel challenged the validity of s. 181 of the Criminal Code under the Charter to the Supreme Court of Canada. The Supreme Court was in unanimous agreement that s. 2(b)'s protection extended to deliberate falsehoods, because the truth or falsity of a statement can be determined only by reference to its content.[86] Zundel was acquitted on the basis that s. 181 of the Code was an unconstitutional infringement of the right to freedom of expression.

The appellants in *Canada v. Taylor*, including the leader John Ross Taylor and the Western Guard Party (a white supremacist organization) distributed cards inviting calls to a telephone number answered by a recorded message. The message contained statements denigrating the Jewish race and religion. A human rights complaint was laid, and the Human Rights Commission established a tribunal against Taylor, which concluded that the messages constituted a discriminatory practice prohibited under s. 13(1) of the Canadian Human Rights Act, and ordered him to

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[85] Canada v. Taylor, [1990] 3 S.C.R. 892.
[86] Ibid. at 733.

cease the practice. Section 13(1) of the Canadian Human Rights Act provides as follows:

> "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 be reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."[87]

Under s. 13(1), an intention by the perpetrator to communicate hate is not required, unlike the sections 318 and 319 of the Criminal Code. Only an activity which is "likely to expose a person or persons to hatred" on the basis of race or religion is required under the section.

In spite of the order, Taylor continued his communication and was found in contempt. The Western Guard Party was sentenced to a $5,000 fine and Taylor was sentenced to one year of imprisonment, which was suspended upon the condition that the appellants obey the Tribunal's cease and desist order. (The party paid the fine and Taylor served his sentence.) With continuing degrading communication by the Western Guard Party, in 1983, the Human Commission filed a new complaint against Taylor and his party. Taylor argued that s. 13(1) of the Canadian Human Rights Act violated s. 2(b) of the Charter of Rights and Freedoms, and therefore, the Tribunal's cease and desist order should be invalidated. The party appealed to the Supreme Court of Canada,

challenging the constitutionality of s. 13(1) of the Canadian Human Rights Act under the Charter.

In *Ross v. School District No. 15*,[88] Malcolm Ross, a mathematics teacher, was accused of violation of s. 5(1) of the New Brunswick Human Rights Act which reads as follows:

> "5. No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,
> (b)discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex."[89]

Ross had published many books expressing anti-Semitic views while teaching in the public school system in New Brunswick. Investigating the case, the New Brunswick Human Rights Commission found that Ross continuously alleged that his Christian faith and way of life were under attack by an international conspiracy by Jewish people who Ross alleged controlled the mass media and international finance. Referring to Jews as the "synagogue of Satan," Ross believed that "we have allowed those who hate the Lord to rule over us." Although it was acknowledged that Ross had not expressed his view on anti-Semitism in the classroom, the Board of Inquiry concluded that an anti-Jewish view had been fostered and poisoned the classroom environment. The Board ordered the School Board to comply with four conditions: (a)

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[87] Canadian Human Rights Act, s. 13(1), supra note 14.
[88] Ross v. School District No. 15, supra note 80.
[89] New Brunswick Human Rights Act, R.S.N.B., 1973, c. H-11, s. 5(1).

place Ross on a leave of absence without pay for a period of 18 months; (b) appoint him to a non-teaching position, if one became available during that period; (c) terminate his employment at the end of that period if, in the interim, he had not been offered and accepted a non-teaching position; and (d) terminate his employment with the School Board immediately if he published any further anti-Semitic writing, or sold or distributed his earlier anti-Semitic works. Ross challenged the constitutionality of the Board's decisions to the Supreme Court.

D. Issues and Analysis

a) Freedom of Hate Expression

Judicial review of legislation under the Charter requires a two-stage review process: the first stage is whether or not the challenged law abridges a Charter right such as freedom of expression under s. 2(b), and the second stage is whether or not the law "can be demonstrably justified in a free and democratic society" under s. 1. The Supreme Court in these four cases reached the same conclusions in the first stage of a Charter review that the communications in question were within the protection under s. 2(b).

Take, for example, *R. v. Keegstra,* which discusses the principles of freedom of expression in Canada. In *Keegstra,* the decision is divided 4 to 3. The majority opinion is that although s. 319(2) violates the defendant's right (Keesgtra's freedom of expression), the law "can be demonstrably justified in a free and

democratic society."[90] Section 319(2) is a "reasonable limit" on the Charter right in a free and democratic society.

In a first stage of *Keegstra*, the Court examined the scope of freedom of expression under s. 2(b) of the Charter and assessed whether the challenged law (here it is s. 319(2) of the Criminal Code.) infringes a Charter right (Keegstra's freedom of expression.). Chief Justice Dickson, delivering the majority opinion, and Justice McLachlin, writing the dissenting opinion, agreed on the definition of "expression" in the Charter context as discussed in *Irwin Toy Ltd. v. Quebec*[91]: Expression is an activity conveying meaning or attempting to convey meaning, through a non-violent form of expression. The Court adopted a strict categorical test that permits content-based restrictions on expression only if the expression is communicated in a physically violent form, and found that Keegstra's activity was not performed in a physical violent form. Communications, which wilfully promote hatred against an identifiable group, are to be protected by s. 2(b) of the Charter; therefore, s. 319(2) of the Criminal Code infringes Keegstra's freedom of expression. Although the Court once acknowledged that "not all expression is equally worthy of protection,"[92] hate activities which s. 319(2) attempted to prevent in *Keegstra* were recognized as worthy of protection under the Charter.

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[90] The Charter, supra note 57.
[91] Irwin Toy v. Quebec, supra note 62.

I disagree with the Supreme Court on this point. I believe that the Court, in discussing the scope of freedom of expression in hate propaganda, did not consider the expression in question, but rather merely followed the theory of "conveying meaning" of expression. An inquiry of whether or not an expression in question is protected should be analyzed case by case. In analyzing the reasons (rationales) why freedom of expression is protected under the Constitution, one must realize that hate-related expression neither has value for any of the three rationales for constitutional protection of freedom of expression nor satisfies the premise of non-violent forms. Hate propaganda should not be protected as a constitutional right for the following reasons.

Hate Contributes to Marketplace of Ideas?

John S. Mill said that freedom of expression is constitutionally protected for the promotion of the marketplace of ideas, so that human beings can attain the truth.

The marketplace of ideas, however, does not apply to the purpose of hate propaganda. The objective and goals in communicating hate propaganda is not to exchange the ideas in attaining the truth, but to attack and degrade vulnerable people and deny equality. James Keegstra, for example, did not allow his students to challenge his argument that the Holocaust was a Jewish conspiracy. The students who disobeyed Keegstra's argument

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[92] Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R.

received lower marks than those who followed his views. Keegstra rather oppressed any possible diverse ideas and opinions from his students. Keegstra did not use the theory of the "marketplace of ideas" in his communication but rather he used a means of oppression and domination to express his views.

In addition, as it has been said in a Supreme Court decision, there is very little chance that expression that promotes hatred against an identifiable group is true.[93] Hate mongers argue that a certain race, religion, or nationality is superior to others. Hate propaganda distorts the truth that every single person is equally privileged, regardless of his or her race, age, sex, sexual orientation, nationality, ethnic origin, colour, disability, or any other visible character. Hate propaganda only undoes the truth that all human beings are equally privileged by denying human respect and dignity.

One issue that makes little sense in Mill's truth argument is that he assumed that human beings are always capable of distinguishing truth from untruth. He believed that good, just opinions always flourish and bad, unjust ones ultimately disappear. It is based on the absolute affirmation of human rationality, which has been in question since World War II, and ignores even the slight possibility of human capacity of irrationality. However, one must realize that the abuse of the theory of marketplace of ideas sometimes could encourage the good

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1326, and R. v. Zundel, supra note 63 at 760.

ideas to vanish. The world witnessed that wrong opinions have thrived, and as a result, millions of people died during World War II. The Third Reich practice against Jews was the Hitler regime's successful consequence of having left prejudice and hatred within people. In hate propaganda, the use of the marketplace of ideas and open discussions can largely affect the practice of prejudice and stereotyping, which is underestimated but in reality is deeply rooted in people's minds. It has been argued that in times of chaos and panic, the result of "open discussions" on hatred makes people vulnerable and irrational. In my view, in any society, it is possible that ultimately just opinions could readily disappear and unjust ones ultimately could flourish. Mill's marketplace of ideas must consider the context and the circumstance in which the "ideas" are introduced.

Similarly, one scholar has stated that it was partly through a clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive.[94] This argument is weak because it is based on the assumption that all people are equally courageous and privileged and have equal power to argue against wrong opinions. This assumption is wrong particularly for many minorities who have traditionally been oppressed and underrepresented in society.

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[93] Ross v. School District No. 15, supra note 80.

Hate Propaganda is Democratic?

Alexander Meiklejohn stated that freedom of expression should be protected so that every member of society is able to participate in democratic society. Government is "ultimately a government by the free public opinion of an open society."[95]

It is important to notice that Meiklejohn's theory was made for every single member of society, not for people in power. Thus, it should apply to literally every member of society. According to the Supreme Court, however, hate perpetrators are free to participate fully in a "democratic society," throwing racial slurs and messages at vulnerable people while the target individuals suffer from the perpetrators' "participation" or intrusion into their own rights. If racially harassing people is a constitutionally protected activity under Democracy, where is the democracy for the victims? Has "Democracy" lost its meaning? Democracy is a system which encourages everyone's full participation in society. Democracy is the right to equality of opportunity for every member of society regardless of race, colour, religion, sex, age, nationality, ethnicity, sexual orientation or any other visible characteristic. However, it seems that in hate propaganda, those who have louder voices oppress the powerless and voiceless. The more the powerful speak,

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[94] See S. Braun, "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes? Regina v. Zundel," (1987-88) 11 Dalhousie Law Journal 471.
[95] C. Beckton, supra note 59.

the less the powerless become. Professor Catharine MacKinnon argues that:

> "Both sides of law accordingly show virtually total insensitivity to the damage done to social equality by expressive means and a substantial lack of recognition that some people get a lot more speech than others... [t]he power of those who have speech has become more and more exclusive, coercive, and violent as it has become more and more legally protected... the less speech you have, the more the speech of those who have it keeps you unequal; the more the speech of the dominant is protected, the more dominant they become and the less the subordinated are heard from."[96]

"Some people's freedom hurts other people's equality."[97] By giving certain groups an absolute power, other groups would suffer from their loss of opportunities for equal access to political and social participation. In a society that permits hate propaganda derogating and attacking certain groups in the name of democratic free expression, hate perpetrators enjoy the privilege at the expense of the victims. If the Supreme Court's argument on freedom of expression prevails, then democracy indeed has lost its meaning.

There is one argument from a court, denying the right of freedom of expression to hate propaganda. The Ontario Court of Appeal in *R. v. Zundel*, in examining a distinction between rights and freedoms, concluded that s. 181 of the Criminal Code is not an infringement of s. 2(b) because it falls within the permissibly regulated area. The court suggested as follows:

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[96] C. MacKinnon, *Only Words*, (Cambridge, MA: Harvard University Press, 1993) at 72.

> "It is difficult to see how such conduct would fall within any of the previously expressed rationales for guaranteeing freedom of expression. Spreading falsehoods knowingly is the antithesis of seeking truth through the free exchange of ideas. It would appear to have no social or moral value which would merit constitutional protection."[98]

Hate propaganda fails to survive any of the rationales of freedom of expression. It has no value in a social or political process and deserves no constitutional protection. The Cohen Committee of 1965 affirmed as follows:

> "The Committee firmly believes that Canadians who are members of any identifiable group in Canada are entitled to carry on their lives as Canadians without being victimized by the deliberate, vicious promotion of hatred against them. In a democratic society, freedom of speech does not mean the right to vilify."[99]

Freedom of expression is a tool for democracy. It is used to affirm and maintain the political system. At the same time, it should not be forgotten that democracy is not an abusive, arbitrary system that the strong can survive over the weak. Democracy is a system which creates a fair, equal society for all.

Human Fulfilment in Hate Propaganda?

Thomas Emerson argued that freedom of expression should be protected for human flourishing and fulfilment. No matter how subtle it is and how ridiculous it sounds, every expression is significant to someone out there.

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[97] C. MacKinnon, "Pornography, Civil Rights, and Speech," (1985) 20 Harvard Civil Rights-Civil Liberties Law Review 1 at 8.
[98] R. v. Zundel (1987), 58 O.R. (2d) 129 (C.A.).
[99] Special Committee on Hate Propaganda, supra note 33 at 24.

However, hate propaganda distorts the importance of self-realization and flourishing. Hate promoters can very adversely affect the victims which in turn infringes on their right to self-fulfilment. A powerful harm of hate propaganda is that it is able to attack one's existence and deny one's humanity. It makes vulnerable people powerless and voiceless. It has been reported that some victims of hate propaganda change their jobs, quit schools and move to other neighbourhoods to avoid further harassment. In this psychological struggle, the victims are hardly able to pursue personal growth and fulfilment. Rather, hate propaganda creates a lack of personal growth in the victims through promoting contempt of certain groups of people. Hate propaganda makes it difficult for the victims to recognize their identity, enhance their personal growth and pursue self-realization and flourishing. Rather, it can have the negative consequences of making the victims weak and powerless by creating self-doubt and self-hate within the victims. Hate propaganda fails to survive a constitutional protection in the theory of personal growth and fulfilment.

b) Limitations on the Right

Finding that hateful expression is worthy of constitutional protection at the first stage, the Court turned to the second stage of a Charter review. In this stage, the Supreme Court delivered different decisions on different sections in question, articulating three issues: Proportionality (Oakes) Test

(Limitations on the Right), Harm caused by Hate Propaganda, Canada's Commitment to Multiculturalism and its obligation to eliminate racism and discrimination under international treaties.

Limitations on Charter rights are difficult to justify but permissible by s. 1 of the Charter.[100] Under the limitation clause, a law can limit a Charter right if the law is considered as "reasonable" as can be "demonstrably justified" in a free and democratic society. Addressing the question of whether a right can be limited, Justice Dickson firmly established the excellent rationale of s. 1 in *R. v. Oakes*. He stated in the case that the word "free and democratic society" in s. 1 itself set the standards of justification under s. 1. Since the guaranteed rights are derived from the values of a free and democratic society, only the values of a free and democratic society would satisfy the limitation of the guaranteed rights.[101] "The underlying values of a free and democratic society both guarantee the rights in the Charter and, in appropriate circumstances, justify limitations upon those rights."[102] Chief Justice Dickson defined "those values" as follows:

> "[T]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of

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[100] See P.W. Hogg, supra note 75.
[101] Ibid. at 671.
[102] R. v. Keegstra, supra note 2 at 736.

> individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."[103]

Although courts in a Charter review insist upon a "stringent standard of justification,"[104] they also will permit the enactment of limits where there is a strong demonstration that the exercise of the rights "would be inimical to the realization of collective goals of fundamental importance."[105] The *Oakes* test purports to achieve a proper "balance between individual rights and community needs."[106] The *Oakes* test established the criteria which determine whether a law is a reasonable limit that can be demonstrably justified in a free and democratic society: 1. Sufficiently important objective in limiting a Charter right; 2(a). Rational connection between a challenged law and the objective; 2(b). Means chosen are reasonable and demonstrably justified; and 2(c). Proportionality between the effect and the objective.

In *Keegstra*, *Zundel*, *Taylor* and *Ross*, the Court asked whether the laws in question could be justified under the s. 1 inquiry. *Keegstra*, *Taylor* and *Ross* each pass the *Oakes* test, successfully justifying the regulation of hate propaganda. Take, for example, the majority opinions in *Taylor* and *Ross*, which are matters of sanctions under the civil laws. The Court in *Taylor*

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[103] R. v. Oakes, [1986] 1 S.C.R. 103 at 136.
[104] Ibid. at 136.
[105] Ibid. at 136.

found that the Parliament's objective of promoting equal opportunity "unhindered by discriminatory practices, and thus of preventing the harm caused by hate propaganda" based on race or religion is pressing enough to override the freedom of expression.[107] The objective of Parliament of restricting "activities antithetical to the promotion of equality and tolerance in society" is rationally connected to the means used by Parliament which restricts the propaganda through non-criminal sanctions. The wording "hatred and contempt" in s. 13 is not vague or overbroad and causes minimum impairment. Section 13(1) well serves to combat hate propaganda and its harmful consequences.[108] In *Taylor*, the Court utilized the factors such as harm caused by hate propaganda, international commitment to combat discrimination and racism, and the principles of equality and multiculturalism to find a reasonable limit on freedom of expression.

In *Ross*, the Board's order concerning Ross' employment conditions was assessed. Before reviewing the *Oakes* test, the Court first evaluated modern educational theory. Referring to the American case, *Brown v. Board of Education of Topeka*, the Court found the objective of education as follows:

> "Today, education is perhaps the most important function of state and local governments... It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural

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[106] Ross v. School District No. 15, supra note 80 at 827.
[107] Ibid. at 894.
[108] Ibid. at 895.

> values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[109]

Referring to *Brown*, the Court found that the Canadian educational system was also the system to foster "equality, respect and tolerance" in society.[110]

The Court in applying the *Oakes* test found the objective of the Board's order by referring to the elements of the *Oakes* test in *Canada v. Taylor* such as harms caused by hate messages, international community's commitment to the eradication of discrimination, and other Charter rights such as equality and multiculturalism as guaranteed in ss. 15 and 27. The objective of the Board's order was to "remedy the discrimination in the School Board created through the respondent's writings and publications" and to undo the poisoned educational environment in the School Board which the Court found pressing and substantial. In the second branch of the proportionality test, the Court found the Board's order as "conciliatory in nature" with non-criminal sanctions, the Court decided that the objective of the order is well "suited to encourage reform of invidious discrimination."[111] It is reasonable to conclude that there is a causal relationship between the respondent's conduct and the harm. The majority found that the Board's order is legitimate except for the order 2(d), which was to terminate Ross's employment with the School Board if

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[109] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) at 493.
[110] Ross v. School District No. 15, supra note 80.
[111] Ibid. at 880.

he publishes or writes anti-Semitic views. The Board's decision was based on the view that it is necessary to include 2(d) into their decision because the "situation could not be corrected through an apology and renunciation of his views by the respondent. Nor could it be corrected through continual monitoring of the respondent's classroom."[112] However, the Court found that clause 2(d) impaired Ross's right more than is necessary and could not be justified under s. 1 of the Charter.

In my view, clause 2(d) should have been upheld on the basis of the objective of offering education. As the Court acknowledged, teachers largely contribute to the educational environment. Students, especially younger students, who are in the process of gaining knowledge and intelligence as well as creating personalities, spend a significant amount of time with their teachers and can be influenced by the teachers. Young children are likely to believe in whatever their parents and teachers believe. Letting a teacher with a racist viewpoint be an employee of school districts is dangerous enough to send a powerful message to children that this kind of racist conduct is permissible in society. The purpose and objective of education is to promote respect and tolerance amongst peoples, would disappear. Although I agree that Ross's right should be impaired as little as possible, we must strongly protect children and their environment from intolerance.

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[112] Ibid. at 883.

In *Keegstra*, which related to criminal sanctions against hate propaganda, the Court found that the Parliament, in enacting s. 319(2), sought "to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons."[113] The objective of s. 319(2) is to "illustrate to the public the severe reprobation" against hateful messages and to show that this kind of activity is not welcome and is unacceptable in Canada.[114] Parliament's intention to criminalize wilfuly promoting hate propaganda is well connected with its objective of protecting target groups from the harm of hate propaganda. The Court decided while non-criminal legal tools of combating hate propaganda exist, the effectiveness of criminal prohibition is indispensable to combat hate propaganda and racism. The Court believed that criminal prohibition and sanction of wilful promotion of hatred could succeed in "sending out a strong message of condemnation."[115] Section 319(2) was successfully justified in the *Oakes* test under s. 1 of the Charter.

Section 181 of the Criminal Code in *Zundel*, however, failed to meet the *Oakes* test. Justice McLachlin, writing the majority opinion, found that the section could not be justified in a free and democratic society. In identifying the objective of Parliament in enacting s. 181, the Court found that the section

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[113] R. v. Keegstra, supra note 2.
[114] Ibid. at 700.
[115] Ibid. at 700.

purports to achieve "the protection of the public interests from harm,"[116] or that which would "threaten the integrity of the social fabric." The Court also found that these objectives can be applied to any sections in the Criminal Code and was thus are too broad. The Charter, instead, requires a specific purpose which is pressing and substantial in regulating a Charter right. Moreover, Justice McLachlin pointed out that the original objective of s. 181 is to preserve "political harmony in the state by preventing people from making false allegations against the monarch and others in power,"[117] and has a political background. Contrasting the specific objective of s. 319(2) of the Criminal Code in *Keegstra* that the primary purpose is to combat hate mongers and propaganda, the majority found that s. 181 is to maintain political stability and harmony within the state and is "anachronistic." The Court in *Zundel* also cited the vagueness and broadness of the language in finding the objective of s. 181. The words prescribed in the statute ("statement, tale or news" and "injury or mischief to a public interest") have a broad meaning and can be extended to all controversial statements. Justice McLachlin added that it could be assumed that although the question of falsity of a statement is often a matter of debate, a statement, which includes arguments other than a "pure fact", could be caught within the ambiguous meaning of s. 181. Section 181 might have a "chilling effect" on minorities, preventing them

[116] R. v. Zundel, supra note 63 at 762.

from participating in controversial debates for fear that they might be prosecuted. As a result, the Court found that s. 181 could not be justified under s. 1 of the Charter as a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society."

I disagree with the Court decision in *Zundel*. Primary, the majority opinion did not discuss the significant issues argued as in *Keegstra* and *Taylor* such as the content of Zundel's communication or its effects on the victims, nor the substantial analysis such as harm caused by hate propaganda, international treaties or equality rights in Canada. Justice McLachlin's concern about s. 181's original objective or words is, to some extent, legitimate. However, she could have dealt with more substantial issues by looking at the case as a crime related to hate propaganda not just an analysis of the constitutionality of spreading lies because the content of Zundel's has more vicious elements than a mere lie. As a result of *Zundel*, the public received a clear and strong message that hate propaganda is of social importance within Canadian society and thus is worthy of protection at the expense of the victims' dignity.

One question arising from *Zundel* is why Zundel was not charged under s. 319(2), which prohibits inciting hatred but under s. 181. It is awkward that Zundel was aquitted while Keegstra was found guilty for the same kind of communications

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[117] Ibid. at 763.

just because the sections under which both were charged were different. Both defendants involved vicious hate propaganda, purporting to attack certain groups of people. Hate propaganda by Zundel was as vicious and malicious as that of Keegstra. Considering the similar nature of the communications by Keegstra and Zundel, Zundel could have been charged and convicted under s. 319(2).[118]

In applying the second branch of the proportionality test, the majority and dissenting judgements in *Keegstra* and *Zundel* disagreed on the means of attaining Parliament's objective - the criminal sanctions of hate propaganda. The dissenting judgements did not believe that the criminal sanctions of hate propaganda would effectively alleviate hate propaganda and racism. In assessing Parliament's means of sanctions in *Zundel*, Justice McLachlin stated that Zundel's communication deserved no criminal sanctions because it was not a serious misconduct.[119] Lies, like those in *Zundel*, have been left and should be left to the sanctions under the civil laws in common law history.[120] I think the expression communicated in *Zundel* was not mere lies but malicious verbal attacks against certain groups of people. The harm against victims was pressing and clear.

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[118] The charge against Zundel was placed after the Alberta Court of Appeal struck down s. 319 as unconstitutional. It can be assumed that s. 319 was not used in Zundel because of the Court of Appeal decision.
[119] R. v. Zundel, supra note 63 at 774.
[120] Ibid. at 774.

There is an opinion that education programs expressing the benefits of tolerant relations between racial and religious groups are more effective than criminal sanctions.[121] I agree with the idea of establishing effective education programs for racial and religious tolerance, and such programs will surely reduce the tension amongst groups of society. I also believe that legal sanctions, especially criminal sanctions, should be the last means that a society should pursue in attaining tolerance within group relations. However, as the Cohen Committee and Professor Allport argued, criminal sanctions are also extremely beneficial in alleviating the hate propaganda that currently exists. Professor Allport argued that the establishment of a law creates a public conscience or "a standard for expected behaviour that will help to check overt prejudice."[122] The use of legal sanctions can send a message to society that hateful expression against any identifiable groups is morally and legally prohibited. Such sanctions themselves play an important role in preventing hate propaganda. Considering that hatred or at least negative prejudice amongst groups already exists, education programmes should not be the only means that society should rely on in creating tolerance amongst groups.

As another effective way of prohibiting hate propaganda, it is argued that human rights statutes are less severe and more

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[121] R. v. Keegstra, supra note 2 at 783-85.
[122] G. Allport, supra note 29 at 32.

effective than criminal prohibition.[123] However, creating tolerant attitudes towards different groups may require different types of condemnation. Human rights statutes may offer less strong incentives to hate mongers to change their attitudes towards certain groups, I believe that criminal sanctions can effectively express the objective of prohibiting hate propaganda that the society finds intolerable. A combination of different measures can have more effect than simply one measure. Combining criminal sanctions and human rights provisions with educational programmes is the most effective way to pursue tolerance in society and prevent further hate propaganda.

c) Harm Caused by Hate Propaganda

I experienced racial slurs for the first time while enjoying my summer vacation in a little town in British Columbia, Canada in 1992. A stranger (Caucasian) in a passing car yelled at me, "Jap, get out of the town!" I froze and was in shock for a while. I was with some of my friends and I felt embarrassed. All I could understand was that the person who yelled at me felt enough animosity towards my nationality to enable himself to scream such words. I was called 'Jap' and insulted in front of my friends by a person who I had never seen. I felt ashamed of my nationality. As a target, such experience was not just a problem of dignity, but was a problem of my existence. I began to have increased feelings of insecurity when in the company of Caucasians.

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[123] R. v. Keegstra, supra note 2 at 784.

Can harm be a legitimate reason to limit a fundamental freedom? John S. Mill, a great civil liberty advocate and creator of the concept of the marketplace of ideas, was convinced that "harm" should be considered in balancing rights and freedoms:

> "[T]he sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good either physical or moral is not a sufficient warrant."[124]

Proponents and opponents of anti-hate propaganda laws largely differentiate their opinions regarding the degree and amount of harm caused by hate propaganda. The proponents usually place more emphasis on mental and psychological harm caused, while the opponents tend to endorse the traditional discourse of freedom of expression for the protection of speech. The Alberta Court of Appeal in *R. v. Keegstra* found s. 319(2) of the Criminal Code unconstitutional because the injury and harms caused by hate propaganda are not serious enough to require the sanction of criminal laws. The Court of Appeal concluded that greater harm than the harm caused by hate propaganda should be required in criminally punishing hate propaganda.[125] The Supreme Court in *Keegstra*, *Zundel* and *Taylor* also concluded that harm caused by hate propaganda did not contain elements substantial enough to take hate communication outside s. 2(b) protection, although the

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[124] J.S. Mill, supra note 64 at 23.
[125] R. v. Keegstra [alberta c. of a]

Court has acknowledged that hate activities are "deeply offensive, hurtful and damaging to target group members."[126]

Some argue that the injuries from hate propaganda are "merely dignitary, and not a real harm."[127] Others have concluded that legal toleration of speech-related harm is the currency with which we as a society pay for the protection of freedoms.[128] Like Judge Kerans of the Alberta Court of Appeal, the opponents of the anti-hate propaganda laws tend to overlook the real harm caused by hate propaganda. It appears that they do not realize that in a society which protects freedom of hate expression, those who are the targets of malicious racial and religious harassment are the people who have to pay this high price. Harm caused by hate propaganda is serious enough to take hate propaganda outside of s. 2(b) protection.

There are two primary harms caused by hate propaganda: direct harm and indirect harm. Direct harm is the harm the victims and their communities have experienced directly while indirect harm refers to societal harm - harm affecting the larger society itself including its audience (bystanders).

Direct Harm

The Cohen Committee was convinced by a study that documented how hate propaganda could create psychological effects on its

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[126] R. v. Keegstra, supra note 2 at 761.
[127] R. Turner, "Regulating Hate Speech and the First Amendment: The Attractions of, and Objections to, an Explicit Harms-Based Analysis," (1996) 29 Indiana Law Review 257 at 264.

audience and psychological damage to victims. The damage which hate propaganda can cause is not necessarily related to its volume. Rather, it should be acknowledged that the hateful messages and materials circulating in Canada are damaging and deeply hurtful to the targeted groups. It is not too much to say that it is amongst the victims that hate propaganda may have its most tragic social and psychological consequences.[129] Hate messages and expressions do not attack just "a person" but rather attack the very core of the person's social existence. It has been argued that "being called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving a slap in the face."[130] Hate propaganda can cause in the victims an "instinctive, defensive psychological reaction, as well as fear, rage, shock, and flight."[131] This kind of harm which is caused directly to victims is the direct harm. This "psychological reaction" may result in mental disorder and physical suffering. Professor Patricia Williams's argument on mental harm caused by hate propaganda. She calls the mental harm as a result of hate propaganda 'spirit murder' since it causes the following symptoms on the victims:

> "Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty

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[128] F. Schauer, "Uncoupling Free Speech," (1992) 92 Columbia Law Review 1321 at 1322.
[129] Special Committee on Hate Propaganda, supra note 33.
[130] C.R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," (1990) 1990 Duke Law Journal 431 at 452.
[131] Ibid. at 452.

> in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[132]

Professor Williams contends that hate propaganda should no longer be categorized just as a problem of dignity, but it is rather a violence which degrades an individual's dignity and injures his/her mental health. Professor Richard Delgado identified the harm caused by hate propaganda as follows:

> "[M]ental or emotional distress is the most obvious direct harm caused by racial insult... and mere words, whether racial or otherwise, can cause mental, emotional, or even physical harm to their target, especially if delivered in front of others or by a person in a position of authority."[133]

He continued that hate propaganda attacking one's social existence could inflict psychological harm upon the victims. A Canadian professor Kathleen Mahoney sees hate propaganda as "racial harassment" and regards the propaganda as legal violence:

> "Like sexual harassment, hate propaganda constitutes a serious attack on psychological and emotional health... While the Court acknowledges that some wordless human activity can have meaning and must be protected under section 2(b), it does not seem to recognize that the corollary is also true. That is, activity that takes the form of expression can also be devoid of meaning in the constitutional sense."[134]

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[132] Patricia Williams's 'spirit murder' is introduced in M.J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," (1989) 87 Michigan Law Review 2320 at 2336. For reference, P. Williams, "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism," (1987) 42 Miami Law Review 127 at 139.

[133] See R. Delgado, "Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling," (1982) 17 Harvard Civil-Rights Civil-Liberties Law Review 133.

[134] K.E. Mahoney, "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography," (1992) 55 Law & Contemporary Problems 77 at 83.

Attacks on "physical" integrity are protected under the law since they harm a victim's ability to communication and self-fulfillment. So do attacks on their mental dignity.[135] Expression or speech acts and can "offend, injure reputation, fan prejudice or passion, and ignite the world."[136]

The long-term consequences of hate propaganda should also be discussed - the lowered self-worth and dignity of victims. The Cohen Committee found that there is a tendency that members of minority groups, who are exposed to prejudice and stereotypes, see themselves in a negative way including a devaluation of self and an acceptance of the majority group's judgement of inferiority. Professor Allport also argued that those who are exposed to prejudices are likely to develop feelings like frustration that might lead them to potentially harmful consequences such as denial of membership, withdrawal and passivity to community, self-hate and aggression against their own group. The examples of these groups are black people and Native people in the North American society. As a result, the members of minority groups are likely to reduce/refuse the opportunity to higher occupations and income. The Committee also concluded that prejudice could easily inflict cruel economic, social and psychological damage on the victims. For example,

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[135] Y.D. Montigny, "The Difficult Relationship between Freedom of Expression and Its Reasonable Limits," (1992) 55 Law and Contemporary Problems 35.
[136] H. Wellington, "On Freedom of Expression," (1979) 88 Yale Law Journal 1105 at 1106-7.

children, who are exposed to prejudice, racial slurs and insults, find themselves "rejected and attacked." They become passive adults and less likely to develop a positive self-image and poise than non-targeted individuals.[137]

The Supreme Court of Canada in *Keegstra* agreed that hate propaganda causes serious harm to victims as well as their communities.[138] Referring to historical contexts and the destructive roles that hate propaganda played under Nazi Germany during World War II, Justice Dickson concluded that hate propaganda should be eradicated before the matter could mushroom. Hate propaganda with an intention to discriminate makes "the speech appear violent and dangerous, rather than innocuous."[139] Hate propaganda is not merely an offensive way of communicating messages, but it causes harm and pain to the target groups.[140] As recognized in the report of the Cohen Committee, the Court found that the pain, psychological effects, and harm caused on target groups by hate propaganda are tremendous and should be taken seriously.

Indirect Harm

The second category of harm caused by hate propaganda is the indirect harm to society. The Law Reform Commission of Canada stated that promoting hatred is "clearly dysfunctional to

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[137] G. Allport, supra note 29.
[138] R. v. Keegstra, supra note 2.
[139] Ibid.
[140] Ibid.

society."[141] The Supreme Court in *Taylor* acknowledged the harm to society caused by hate propaganda as follows:

> "Hate propaganda presents a serious threat to society. It undermines the dignity and self-worth of target group members and, more generally, contributes to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality."[142]

In a society that accommodates hate propaganda, harmony between different groups breaks down and the tension amongst groups become tense. "It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society."[143] As a result, the idea of equality becomes less persuasive and meaningless. The idea of tolerance and respect, which has been promoted for an equal society, would vanish.

Also, in considering societal harm, one can think of potential consequences which the victimized people can indirectly affect onto society. A society is an entity made up of membership of people. If individuals experience negative attitudes and hateful messages, and as a result, feel useless and weak, these people become less likely to contribute to society. The society loses valuable resources (positive individuals willing to contribute to the positive activation of society.), and the

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[141] Law Reform Commission of Canada, supra note 35 at 31.
[142] Canada v. Taylor, supra note 85 at 894.

society becomes something negative that is comprised of countless individuals who have been mentally and psychologically damaged or hurt.

d) The Role of International Laws & Charter Rights

International Treaties and Human Rights

The third rationale, articulated by the Supreme Court, for the regulation of hate propaganda is the Canadian international commitment to alleviate racism and hate propaganda. In so doing, the Court cited treaties for the promotion of international human rights, finding that the Parliament's objective of prohibiting hate propaganda could be strongly justified under the international standards of protecting human rights.

The current issue and stance of international human rights originated from the catastrophe of World War II. A global movement towards political democracy and the promotion of human rights and dignity was recognized by many countries. In 1945 the United Nations was formed in the aftermath of the war and the international standards for the protection of human rights were established. The first major achievement of the United Nations was the creation of the Universal Declaration of Human Rights in 1948. Since 1966 the United Nations has followed up the Declaration with six core human rights treaties. These treaties include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and

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[143] R. v. Keegstra, supra note 2 at 747.

Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD). Each document speaks for human rights, dignity and respect and obliges State Members to respect the words of these documents. For example, the International Covenant on Civil and Political Rights guarantees freedom of expression and human dignity. Article 19 and 20 read as follows:

> 19.2. "Everyone shall have the right to freedom of expression..."
> 19.3. "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.
> 20.1. "Any propaganda for war shall be prohibited by law."
> 20.2. "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[144]

While ICCPR advocates for freedom of expression, it also makes it reasonable that State members enact any possible laws to prohibit the activities purporting to destroy "public morals." In 1981, a Canadian hate promoter John Ross Taylor, who was charged under s. 13 of the Canadian Human Rights Act, brought a complaint against Canada to the United Nations Human Rights Committee. His complaint was on the basis that s. 13(1) of the Canadian Human Rights Act which prohibits the communication of hate messages by

telephone was in violation of Article 19 of ICCPR, which guarantees freedom of expression. The Human Rights Committee reviewed the case and concluded as follows:

> "...[O]pinions which Mr.[Taylor] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit."[145]

Considering the nature of his communication, the Committee dismissed Ross' complaint. The International Convention on the Elimination of All Forms of Racial Discrimination, of which Canada is a signatory member, specifically proposes to alleviate racism. Article 4 of the Convention reads 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 Convention, *inter alia*:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial hatred, 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;

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[144] International Covenant of Civil and Political Rights, 16 December 1966, A/RES/2200 A(XXI). Japan is also a signatory member state of ICCPR.

[145] Taylor and Western Guard Party v. Canada, Communication No.104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No.40 (A/38/40) 231 (1981), 5 C.H.R.R.D/2097.

> (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.[emphasis added.][146]

The provision requires that member States must prohibit the dissemination based on racial superiority or hatred and incitement to racial hatred in their criminal laws. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms speaks of freedom of expression, while containing the idea of promotion of morals:

> "(1) Everyone has the right to freedom of expression... (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restriction or penalties as are prescribed by law and are *necessary in a democratic society*, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or *morals, for the protection of the reputation of rights of others,...*" [emphasis added.][147]

The Convention on the Prevention and Punishment of the Crime of Genocide, of which Canada is also a signatory country, is another treaty reference to consider. Article II and IV are especially important:

> II. "In the present Convention, genocide means any of the following acts committed with intent to destroy, in

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[146] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, A/RES/2106 A(XX).
[147] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No.5.

> whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole in part.[148]
>
> IV. "The Contracting Parties undertake to enact, in accordance with their representative Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III.[149]

The section also provides that member States prohibit such actions in their criminal codes. Most importantly, the section prohibits causing "serious bodily or *mental* harm" with intent to destroy a national, ethical, racial or religious group. By this international treaty, psychological harm is recognized as intolerable harm caused by hate propaganda, and State Parties are obliged to punish hate activities by legislating appropriate law. These international human rights treaties, although they have no legal binding power on State parties, should not only be legally binding but also morally respected and promoted. It should be acknowledged that we created the United Nations from the lessons of World War II. If following international treaties is not a legal obligation, it should be at least a moral one as a signatory country. Otherwise, we might repeat the same mistakes.

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[148] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, A/RES/260 A(III).

Equality & Multiculturalism under the Charter.

In addition to these international treaties, the Court in *Keegstra* articulated that other Charter rights are as worthy of respect as freedom of expression and freedom of expression is not the only consideration in balancing rights and freedoms within Canada. In 1985, Justice Wilson in *Singh v. Minister of Employment and Immigration* noted:

> "[I]t is important to bear in mind that the rights and freedoms set out in the Charter are fundamental to the political structure of Canada and are guaratneed by the Charter as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society," it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter."[150]

Sections 15 and 27 in the Charter support the creation and maintenance of a free society, which is guaranteed by s. 1 of the Charter. These sections declare the equal protection and equal opportunities among peoples under the law, and multiculturalism respectively as follows:

> 15(1). "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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[149] Ibid.
[150] Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 218.

> 27. "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[151]

Section 15 speaks of equality without discrimination on the basis of race, national, or ethnic origin, colour, religion, sex, age or mental or physical disability of every individual. Members of society should receive equal protection and benefit of the law. According to Justice Dickson in *R. v. Big M Drug Mart Ltd.*, the free and democratic society intended in the Charter is the one which "aims at equality with respect to the enjoyment of fundamental freedoms."[152]

In addition, s. 27 promotes the essence of multiculturalism guaranteeing equality amongst Canadians with various heritages. These two sections add sense to each other since equality regardless of origins or beliefs can be genuinely combined with the idea of multiculturalism because of the composition of Canadian society. Having a sense of "ethnic mosaic," which respects the cultural heritage of the members of society, Canada has developed an identity differing from other countries.

However, hate propaganda undermines members of target groups and causes disharmonious tension between racial, religious and ethnic groups. It prevents Canada's commitment to the values of equality and multiculturalism reflected by ss. 15 and 27 in the Charter. Thus, hate propaganda threatens the ideology of liberal

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[151] The Charter, supra note 57.
[152] R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 336.

democracy, which Canada has fostered. Chief Justice Dickson in *Taylor* affirmed this view as follows:

> "[T]he international commitment to eradicate hate propaganda and Canada's commitment to the values of equality and multiculturalism enshrined in ss. 15 and 27 of the Charter magnify the weightiness of Parliament's objective in enacting s. 13(1)."[153]

Hate propaganda sends strong messages that members of particular groups are not given equal rights in society. Hate propaganda indicates that individuals of particular groups do not deserve concern, respect and consideration.[154] Hate propaganda threatens and undermines Canada's model of a free and democratic society, which respects equality and harmonious relationships amongst its peoples. The Court in *Keegstra* proved how these sections of the Charter not only protected the dignity of all individuals, but also maintained the Canadian concept of equality as prescribed under ss. 15 and 27.

V. Conclusion

The Canadian approach to hate activities is to encourage tolerance and respect between groups of people in society. The regulations resulted from the excellent analysis and studies of group tension in a multicultural society. Study of prejudice and stereotypes by the Cohen Committee served well to justify the regulation on hate propaganda and successfully overcame the difficult relationship between freedom of expression and the

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[153] Canada v. Taylor, supra note 85 at 894.

regulation of hate activities. The Supreme Court of Canada has utilized invaluable factors such as harm caused by hate propaganda, international obligations under treaties as well as referring to other Charter rights in fostering an egalitarian perspective which it has used for the constitutionality of hate propaganda laws. These issues are universally applicable to any society with various races and ethnicity.

However, I disagree with the Supreme Court's analysis on the scope of s. 2(b). I strongly believe that freedom of expression should be fully protected for the three rationales cited above. However, I am convinced that hate propaganda satisfies none of the rationales. In addition, the Canadian Charter of Rights and Freedoms made it clear that freedom of expression is subject to regulations and cannot be protected under all circumstances. Considering the lack of value of hate propaganda, hate propaganda should not even fall within the ambit of s. 2 of the Charter.

In the next Chapter, I move to the topic of Japan and the issues of racism and hate propaganda in its cultural context. I will be introducing different races and ethnic groups living in Japan in contending that Japan is not a homogeneous country but a diverse country. Then I adopt the Canadian approach to hate propaganda including the results of the government study on hate propaganda and the court analysis to Japanese minorities in

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[154] M. Moran, "Talking about Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech," (1994) 1994 Wisconsin Law Review 1425.

Japan. In so doing, I will only refer to parts of the Canadian analysis of hate propaganda that are beneficial in this context and will suggest appropriate measures for fighting hate propaganda in Japan.

Chapter Three: The Japanese Myth of "Homogeneity" and Discrimination against Ethnic, Racial and Class Minorities

I. Introduction

"Homogeneous." This is one of the most common and oft used words for describing Japan. The "homogeneity" of Japanese culture has been promoted by the public as well as by many political figures. A 1996 statement by former Prime Minister Nakasone that Japan was a "homogeneous" country with no minorities is an example of the commonly held attitude towards minorities in Japan.[155] Japan is not a homogeneous country. Japan has many minorities including race, ethnicity and class minorities.

In this Chapter, I introduce three types of Japanese minorities living in Japan: the Ainu, the ethnic Koreans, and the Buraku people. Minority groups in Japan have various backgrounds; some voluntarily came to Japan hoping to create new and better lives; others are born in Japan and have grown up in the country. I will illustrate day-to-day discrimination and racism against those members in the country, ranging from ethnic discrimination as public policies to discriminatory statements by private citizens. For example, in terms of public policy, those residing in Japan who possess a nationality other than Japanese were obliged to register a fingerprint impression with a local government institution.[156] If they refused, they would be punished

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[155] Japan Times, supra note 21.
[156] The submission of fingerprint impression was abolished in 1993. However, I will present this policy in detail later in Chapter III

under the law.[157] Malicious discriminatory scribbles attacking minorities constantly appear on public roads and walls. Minority members have suffered from discrimination and ridicule by "pure" ethnic Japanese as illustrated below.

Despite a number of such discriminatory practices against Japanese minorities, there exists no law enforcement to deal with the issue in Japan. No government agencies collect data or statistics on such activities. Nor are there government studies like the Cohen Report of Canada. The only agencies currently dealing with the issue are private organizations which advocate for minority rights. Thus, I had to rely on the data related to discriminatory incidents and hate propaganda collected by these organizations.

II. Japanese Minorities

A. The Ainu (Word translates in Ainu language as "human beings")

The Ainu people, once called a "dying race," (*Horobiyuku Minzoku*) are the indigenous people of Japan.[158] Most Ainu people traditionally reside in Hokkaido, the northern part of Japan. According to statistics generated by the Hokkaido Regional Government, there are approximately 24,000 Ainu people living in Hokkaido.[159] Statistics for the Ainu living outside of Hokkaido

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since this practice is a good example of the oppression of aliens living in Japan and foreigners at large. See also, infra note 186.

[157] I define "foreigners" as the same way the government of Japan defines: those possessing a nationality other than Japanese.

[158] R. Siddle, *Race, Resistance and the Ainu of Japan*, (London: Routledge, 1996) at 77.

[159] G. Nomura, *Ainu Minzoku-o Ikiru*, (Tokyo: Sofukan, 1996).

have not been generated. Ainu living in larger cities, which have no Ainu communities, hide their Ainu identity to avoid discrimination.[160] Others who choose to disclose their Ainu identity often confront day-to-day discrimination in schools or in the workplace.[161]

The interrelationship between the Japanese (*Wajin*) and the Ainu has a long history, although the origins of the Ainu remain debatable. Historically, the Ainu people were called *Emishi,* which meant barbarian or savages and in Chinese ideograph *Emishi* was referred to as "eastern barbarian."[162] These names relate to the current stereotype of the Ainu people: unclean, barbarian and primitive.[163] The Ainu are the most distinctive looking of Japan's minority groups and thus they are discriminated against on the basis of their physical appearance more so than the other groups. One perceived characteristic of the Ainu is that as a people they possess more hair than do ethnic Japanese. Thus, "hairy Ainu" is often used to illustrate one of the stereotypes against the Ainu.[164] In a society that largely perceives itself as homogeneous, the purity of race and blood as well as physical appearance are considered very significant factors for assimilating into the mainstream. An Ainu expressed the difficulty that the Ainu have surviving within Japanese society:

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[160] Ibid.
[161] Ibid.
[162] R. Siddle, supra note 158 at 27.
[163] G.A. De Vos & W.O. Wetherall, *Japan's Minorities: Burakumin, Koreans and Ainu,* (London: Minority Rights Group, 1974) at 17.

> "If only half-shamo, or even only quarter-shamo, even when Ainu blood is only a small portion of your actual blood, if you have an Ainu face you will surely be treated in general as Ainu."[165]

From ancient times, discrimination and persecution of the Ainu was practised in many ways. A Japanese politician referring to Darwin's Law of Nature made the following statement during the 5th Imperial Diet in 1893:

> "The survival of the fittest is a natural feature of the world. The Ainu race (*Ainu jinshu*) is an inferior race, while our Japanese race (*naichi jinshu*) is a superior race. The superior race say that the inferior Ainu race will naturally die out ... and that there is no need to protect them."[166]

It is said that the most serious Ainu persecution started when the *Meiji* government enacted the Hokkaido Former Natives Protection Act of 1899 (*Kyudojin Hogoho*),[167] which mainly dealt with the following Ainu policies: agriculturalization, education and welfare assistance (notably medical care).[168] The purpose of the Act was to facilitate the assimilation of Japanese and the Ainu people. In other words, the Diet aimed for the "transformation of the Ainu into model Imperial subjects" by destroying their former language, customs and values.[169] For example, Article 1 granted Ainu families wishing to engage in agriculture up to five hectares of undeveloped land as an

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[164] G. Nomura, supra note 159.
[165] "Shamo" is another word for the Ainu. R. Siddle, supra note 158 at 156.
[166] Ibid. at 88.
[167] Hokkaido Former Natives Protection Act (Law No. 27, March 1, 1899)
[168] R. Siddle, supra note 158 at 70.
[169] Ibid. at 70.

allotment without charge.[170] However, this engagement did not guarantee Ainu families a full ownership but was full of restrictions.[171] The assimilation was practised in agriculture by the means of physically "transforming the Ainu into productive citizens and Japanizing their lifestyle,"[172] Article 9 provided the Ainu with education at national expense through the medium of special Native Schools.[173] Education was segregated between Ainu and Japanese children, and the quality and duration of Ainu education was inferior. The government aimed at cultivating loyalty amongst the Ainu children for the Emperor and nation though this education program.

This assimilation policy was not just an historical incident that happened in the 1800's but can be still seen in recent years. The Head of the Prime Minister's office declared during the 77th Diet in 1976:

> "Talking of assimilation, both the government and regional groups are making efforts that [the Ainu] will be self-awakened as Japanese... It would appear that they are conscious of themselves as a minority group of different race, but we sincerely hope that they will be conscious of themselves as Japanese the same as everybody else."[174]

There still exist conflicts between the Ainu and the Japanese regarding Ainu identity. While the Ainu leaders wish to establish

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[170] Hokkaido Former Natives Protection Act, supra note 167.
[171] Ibid.
[172] See Siddle, supra note 158 at 71.
[173] Hokkaido Former Natives Protection Act, supra note 167.
[174] Head of Prime Minister's Office and Head of Okinawa Development Agency Ueki Mitsunori, 77th Diet, House of Representatives Accounts Committee, 20 May 1976, in ASS3 at 710-11.

the fact that they are a separate people, the Japanese leaders attempt to assimilate the race into the mainstream Japanese society.

B. Ethnic Koreans in Japan (*Zainichi*)

A large migration of Koreans to Japan started in 1910 when Japanese colonialism spread into Korea.[175] Since the Japan-Korea Annexation of 1910, Japan colonized Korea for 36 years. During these years, many migrated to Japan in search of employment after their economy was devastated by Japanese colonialism, while others were involuntarily forced to migrate as labourers, especially during the years toward the end of World War II. Currently, there are approximately 700,000 North and South Korean nationals residing in Japan.[176] A large number of them are the third (*Sansei*) and fourth (*Yonsei*) generation who have been born and brought up in the country.[177] The ethnic Koreans comprise more than 85% of the total foreign resident population.[178]

As a result of the Annexation, the Koreans were given Japanese nationality. As subjects of the Japanese Emperor, many

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[175] Y. Fukuoka, "Koreans in Japan: Past and Present," (1988) 31 Saitama University Review 1.

[176] Y. Fukuoka, "Beyond Assimilation and Dissimilation: Diverse Resolutions to Identity Crises among Younger Generation Koreans in Japan," (1989) 31 Saitama University Review, No. 2. Japan has a different "nationality" system from Canada. The Japanese Nationality Law is not based on place of birth but on bloodline. Using that meaning, even if one is born in Japan, he or she does not automatically acquire Japanese citizenship. Including 150,000 "naturalized" Koreans possessing Japanese citizenship and Koreans who came to Japan to work or to study, Professor Fukuoka mentioned that the number of ethnic Koreans in Japan exceeds 1,000,000 or about 1% of the population of Japan.

[177] Y. Fukuoka, supra note 175 at 1.

Koreans participated in the Second World War. During the years of colonization, the Japanese Empire utilized many policies and strategies in Japanizing the Koreans through education, religion and politics. One of these policies, for example, forced the Koreans to change their names into Japanese ones and to change their religion to Shintoism, which is a traditional Japanese religion. However, these policies of Japanization did not guarantee that the Koreans were equally treated as the ethnic Japanese. The legal status of Koreans and Japanese are categorized in the Family Registration (*Koseki*).[179] In the *Koseki* system, Japanese were classified as *Naichi-jin* (inland people), while all Koreans possessing Japanese nationality, whether living in Korea or in Japan, were classified as *Gaichi-jin* (outsiders).

After the Japanese unconditional surrender to the Allied Forces, the status of Koreans was suspended. The Koreans were then classified as "liberated nationals," and as a result, were excluded from the most privileged nationals which the United Nations protected.[180] The liberated nationals meant that the Koreans were not included in the category of citizens of "nations

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[178] G.A. DeVos & W.O. Wetherall, supra note 163 at 10.
[179] For details of the *Koseki* system, see infra note 197 and the section of Buraku people.
[180] C. Lee, "The Legal Status of Koreans in Japan," in *Koreans in Japan*, (California: University of California Press, 1981) at 137. After World War II, the United Nations established a status of "privileged nationals" for those who lost their original nationality as a result of war. The Koreans, although they changed their status in their homeland because of the war, were not given this status.

whose status has changed as a result of the war."[181] In 1947, the Japanese government agreed with the Supreme Commander for Allied Powers (SCAP) to enact the Alien Registration Law, by which the Koreans were legally classified as aliens. The Law came into effect when the government of Japan signed the San Francisco Peace Agreement of 1952, and the Koreans who had gained Japanese nationality after the Annexation officially became "aliens." From then on, the possession of Japanese ethnicity became the sole criteria that determined Japanese citizenship. In determining the legal status of Koreans, the historical fact that most Koreans living in Japan are descendants of the people who were forced to leave their country during the Second World War by Japanese was completely ignored.[182] As a result, even though the Koreans are subject to taxation in the country like other aliens, they are not entitled to receive government benefits such as public education funds and national health insurance.[183]

The contemporary problems the Koreans have faced in Japan seem to have related to the legal status they have been given. Thus, the discrimination against them is, and can be, practised through "legitimate" means. Stripped of their Japanese nationality after the War, the Koreans in Japan are currently not entitled to many services that are available to the Japanese. For

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[181] Supreme Commander for the Allied Powers, "Definition of United Nations Nationals, Neutral Nations, and Enemy Nationals," *Directives*, SCAPIN-217, AG 312.4 (October 31, 1945) (Tokyo: SCAP headquarters).
[182] C. Lee, supra note 180 at 137.
[183] Ibid. at 149.

example, the Korean residents without Japanese nationality are, in principle, excluded from employment in government service, public operations and in the public schools with few exceptions under the law.[184] In addition, one of the biggest concerns amongst the Koreans was the Alien Registration Law of 1952.[185] Under the law, every alien over sixteen years of age, including Koreans who were permanent residents of Japan, and who resided in Japan for a period in excess of one year were required to apply for an initial foreigners registration at the appropriate municipal war office. At the time of registration, the applicant was required to provide a fingerprint impression on the original registration card. If a person refused to register a fingerprint impression, it could result in that person's arrest.[186] Parents who had to take their children to the local institution for fingerprinting often felt insulted. In addition to the fingerprint obligation, all persons registered under the Alien Registration Law were required to carry the registration card at all times.[187] The card is nicknamed by some Koreans "kae p'yo" (dog tag).[188] Being unable

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[184] See M. Weiner, *The Origins of the Korean Community in Japan 1910-1923*, (New Jersey: Humanities Press International INC., 1989) at 1. "In public schools" doesn't mean that ethnic Koreans cannot attend public schools in Japan, but here I mean that no Korean schools are publicly funded.

[185] The submission of finger-print impression was abolished in 1993.

[186] Though this finger-prints obligation of aliens has been abolished since 1993, the Koreans as well as other aliens had suffered from this notorious law since its enactment of 1947. In fact, there are cases that some Koreans who were born in Japan with non-Japanese nationality were deported to Korea because of the law.

[187] The possession of the Alien Registration Card is still in effect. However, it is currently under review.

[188] C. Lee, supra note 180 at 142.

to produce a registration card upon request can result in the person's arrest.[189] In 1980, a Korean national, Mr. J. Han of Tokyo refused to register his fingerprint. This was the first time since the enactment of the Law that an individual had refused to comply. He was charged under the Law and fought against the Law for almost 10 years. Mr. Han said:

> "Not as privileges given from kindness but as fundamental human rights, fingerprinting and the alien registration card must be abolished."[190]

Such treatment as the registration cards and fingerprinting tended to affirm and even encourage discriminatory practices in the private sphere. Considering that Japanese are more likely to believe authority figures than people in the United States or Canada, this type of "discriminatory" practice by the authorities dangerously encourages discrimination against the Koreans by Japanese private citizens.

The Koreans born in Japan have an option of obtaining Japanese citizenship at the age of twenty: naturalization. However, some Koreans who have been previously discriminated against refuse to be naturalized as Japanese because of the struggles inside themselves. Day-to-day discrimination against the Koreans has been practised in many areas of business, employment and marriage. The Koreans who are refused dignity and

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[189] Ibid. at 142.
[190] K. Min, *Zainichi Kankokujin no Genjo to Mirai*, (Tokyo: Hakuteisha, 1994) at 135.

autonomy by the Japanese in the practice of discrimination are unlikely to have a strong desire to become "Japanese."[191]

C. Buraku (village or hamlet) People or *Burakumin*

The history of the Buraku people in Japan dates back to the 1600s. Buraku people became the outcaste group during the *Tokugawa* Era (1603-1868). In the early years of the *Tokugawa* Era, the *Tokugawa* Shogunate established a four-caste system under a feudal federal system. The four caste included the *Shi*(warriors), the *Nou*(farmers and peasants), the *Ko*(craftsmen), and the *Sho*(merchants). Buraku people were those who did not belong to one of the four castes and thus they became the outcaste people. Buraku people were called *Eta* (defilement abundant) and *Hinin* (non-humans) during the *Tokugawa* Period. The people were assigned such duties as slaughtering animals and executing criminals, duties which were recognized as "polluting acts" under Buddhist and Shintoist beliefs.[192] The "polluting" occupations of *Eta* and *Hinin* included skinners, butchers, leather workers, cremators, and tomb watchers.[193] Since Buraku people are ethnically, linguistically and racially indistinguishable from non-Buraku Japanese, *Eta* and *Hinin* were forced to wear special clothes or shoes and live in ghettos or on marginal farm lands, so that they

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[191] Ibid. Also see generally C. Lee, supra note 180.
[192] For updated information on the Buraku Liberation League, see http://blri.org.
[193] H.W. Smith, *The Myth of Japanese Homogeneity: Social-Ecological Diversity in Education and Socialization*, (New York: Nova Science Publishers Inc., 1995) at 197.

could be recognized as the outcaste group.[194] Although the lowest social rank was abolished by the Emancipation Edict during the *Meiji* Restoration of 1868, the de facto status of Buraku people did not change. *Eta* and *Hinin* during the *Tokugawa* era started being called "*Buraku*" or "*Tokushoku Buraku*" in the early *Meiji* Era. Buraku people in the *Meiji* Era were still subject to discrimination because of their origin and traditional socio-economic status in society. Therefore, the Buraku can be understood as neither a racial nor an ethnic minority, but rather as a class minority. According to a 1993 government survey, there were thousands of Buraku communities with 1.2 million residents in Japan.[195] The Buraku communities are concentrated mostly in western Japan and historically it is reported that there have been no Buraku people in Hokkaido and Okinawa.[196]

The identity of all Japanese people can be traced in the Family Register (*Koseki*), which was established in 1872 at the start of the *Meiji* Era for the purpose of maintaining population records.[197] The *Koseki* is an open public record that records all information on all individuals of families including addresses, births and deaths. The old version of the *Koseki* even included an

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[194] Ibid. at 197.
[195] This figure is only based on people at 4442 Buraku communities (Dowa districts referring to the Buraku areas in terms of government policy administration) nationwide. The Buraku Liberation suspects that actual figures are estimated to be as many as 6000 Buraku communities with over 3 million population.
[196] E.A. Su-lan Reber, "Buraku Mondai in Japan: Historical and Modern Perspectives and Directions for the Future," (1999) 12 Harvard Human Rights Journal at 299.

individual's social status. Though the *Koseki* system was amended during the *Meiji* Restoration of 1868, the old *Koseki* was not destroyed and remained accessible to certain people such as lawyers and investigators.[198] A law in 1976 changed the system of the *Koseki*. The *Koseki* no longer was available openly to the public. Those wanting access to the *Koseki* now must demonstrate a legitimate purpose.[199]

Historically, discrimination against people in the Buraku communities has occurred on many occasions. For example, discrimination in marriage persists against the Buraku. It has been known that in some occasions Japanese hire private investigators to research the background of their children or grandchildren's potential future partner. If they find that the future partner is from a Buraku community, the parents are likely to oppose the marriage. In May of 1996, the Osaka district court awarded a Buraku woman 4.1 million yen as compensation from a man who allegedly cancelled their common-law relationship after the discovery of her Buraku identity.[200] The man was influenced by his

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[197] Ibid. at 312.
[198] Ibid. at 313.
[199] Nevertheless, private investigators were often able to investigate someone's background without the Family Registration simply by investigating the subject's hometown (since most Buraku people live in their own communities.). However, some prefectures like Osaka have recently enacted an ordinance which prohibits background investigation of the Buraku communities.
[200] E.A. Su-lan Reber, supra note 196 at 325.

mother who had prejudice against Buraku people, in spite of the fact that a child was born to the couple.[201]

Discrimination in employment is one of the most serious forms of discrimination against the Buraku people since it involves systematic discrimination by institutions and companies. Some companies in Japan also hire detective agencies to investigate possible employees' backgrounds. If they find out an individual has a Buraku background, that person more often than not would find him/herself no longer a candidate for employment. A so-called Buraku list was first discovered in November 1975. A Buraku list contains names, locations, number of households and main occupations of the occupants of approximately 5,300 Buraku people living in Japan. The purchasers of the lists were mostly Japan's largest companies including Toyota, Nissan, Kubota, and Yasuda Trust Bank.[202]

In response to these incidents, in 1985, the Osaka Prefecture enacted the Prefectural Ordinance to Regulate Personal Background Investigation Conductive to Buraku Discrimination. The ordinance prohibits investigative agencies from inquiring and/or reporting whether any person lives in a Buraku area. It was found in 1998 that two major investigative agencies had made discriminatory inquires about the background of job applicants in Osaka.[203] The two agencies were inspected on suspicion of

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[201] Ibid. at 325.
[202] Ibid. at 311.
[203] Buraku Liberation League, *Buraku Liberation News*: No. 104(May 1998).

violating the ordinance. The agencies eventually admitted that they had conducted investigations into applicants' backgrounds including the potentiality of Buraku origins and also checked into nationality, ideology and religion. As a result of the inspection, it was discovered that more than 1,000 companies registered with the investigators, including social welfare and medical institutions, and extra departmental organizations of the Osaka Prefecture and City Governments.

This kind of experience is the everyday reality for members of minority groups in Japan. Although the minorities whom I introduced above compose a large part of the total minority population living in Japan, there are other minorities in Japan such as people with disabilities, Chinese Japanese and illegal foreign workers. With the existence of many types of minority groups, it is argued that Japan's cultural uniqueness of homogeneity is just a myth. With the diversity of members, racism and discrimination also exist in Japan. Japan is a country with various races, ethnicity, and classes.

I have detailed various kinds of discriminatory practices against minority groups in this section. In the next section, I will present various kinds of hateful expression (hate propaganda) against Japanese minorities.

III. Discrimination and Hate Propaganda against Minorities

Discrimination against such minority groups as the Ainu, the Buraku and ethnic Koreans is tacitly accepted in the country.

Discrimination in marriage or employment opportunities has been publicly encouraged and other forms of discrimination have been politically confirmed through legislation. In this environment, animosity and hatred against certain minority groups are expressed in public. I have personally seen such propaganda as "Die, *Eta*," or "Koreans, get out," written in public spaces many times. The Buraku Liberation League (BLL) has claimed that scribbling and anonymous discriminatory letters as well as telephone calls have been sent to their offices and that the number of these incidents as well as other discriminatory propaganda publicly distributed has been rising dramatically.[204] Such propaganda contains certain themes with the most widely seen being: "Wipe out Burakumin," or "Liquidate all Burakumin." The BLL received discriminatory graffiti on the entrance of the Buraku Liberation Centre twice in 1998. The two messages read: "Die, Etta (extreme filth)."[205] The BLL denounced such graffiti as extremely malicious. In 1996, discriminatory graffiti appeared on the wall of the main and north entrances of Awaji Junior High School, in the city of Osaka. It read, "Die, *Eta*."[206] The graffiti was also directed at Koreans as well as people with disabilities. In July of 1996 when the O-157 epidemic, food poisoning caused by E-coli Bacteria, spread over the Osaka area, there appeared

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[204] Buraku Liberation League, supra note 25.
[205] Buraku Liberation League, Buraku Liberation News: No. 102 (May 1998).
[206] Buraku Liberation League, supra note 25.

discriminatory graffiti against the Buraku people. The graffiti read:

> "O-157 was generated from the blood of Buraku people, maggots, residing in the Awaji district. Therefore, kill all the Buraku people by dropping an atomic bomb on the Awaji district."[207]

In May 1997, a leader of the Organization for the Protection of the *Yamato* Race (ethnic Japanese) mentioned the following in his web site.

> "There are a lot of physically deformed minors, sitting in wheelchairs, and asking for welfare and donations in the streets... If we do not have any organization to counter such a situation, members of the Yamato Race, who posses dominant genes guaranteed by the excellent blood succeeded from our ancestors, will be extinguished."

In 1997 a man in Mie prefecture who was seen writing graffiti saying, "*Eta*, Yotsu (animal), Non human. Their daily jobs are tanning and slaughtering animals," was arrested in July 1997.[208] Hateful messages such as these are displayed in public and are extremely malicious and harmful to the target victims as well as to the overall community.

As mentioned before, it has been known that there are slight but visible differences between the Ainu people and ethnic Japanese in physical appearance. In 1983, a degrading statement against the group made by a High School teacher in Hokkaido five

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[207] Ibid.
[208] Although the man was arrested, his charge was not based on discriminatory activities. Instead, he was accused of damaging property and building structures.

years earlier came to public attention. The teacher in a human rights class stated:

> "You kids seen Ainu before? If you marry them, you're in a trouble. You'd better be careful, 'cause they're hairy like bear is."[209]

Even a teacher of a human rights class is capable of expressing this prejudicial perspective against a minority. In addition, there was a letter directed to the Ainu from an ethnic Japanese, reading as follows:

> "I saw, although only briefly, in a magazine that Ainus desire to obtain the four northern islands. It also stated that the Ainu were the original inhabitants of Hokkaido. I was thoroughly disgusted by this... My Ainus, it is sad that even dogs do not forget kindness. You owe much kindness to the Japanese. Snatching away someone's property with excuses of your own conveniences is the beginning of robbery...If you want to keep on living in Japan, you ought to thank the Japanese for *letting you live* in Hokkaido." [emphasis added.][210]

The Japanese hate propaganda against minorities viciously attacks their identity. Hate propaganda makes the victims feel shameful about who they are. It is a vicious form of discrimination and it has been suggested that having been exposed to discriminatory practices can cause self-identity problems including anger, self-doubt and self-hate within the victims.[211] A young Korean man said the following:

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[209] G. Nomura, "Human Rights for Minorities in Japan: Seeking the Establishment of the Law for the Ainu Race," in *White Paper on Human Rights in Japan: From the Viewpoint of the Discriminated,* (Tokyo, Japan: Buraku Liberation Research Institute, 1984) at 87.
[210] Ibid. at 87.
[211] See C. Lee & G. De Vos, *Koreans in Japan: Ethnic Conflict and Accommodation,* (Berkeley: University of California Press, 1981).

> "What I fear most is the formation of discrimination inside myself, as the result of my long exposure to discrimination from the outside."[212]

This shared physicality can in itself bring about one of the cruellest by-products of discrimination. For many minorities, they are able to pass themselves off as "pure" Japanese but this comes at a cost. For many, they feel they must deceive mainstream society into believing they are just like them when in fact they are not. The cost of this game of deception is lowered self-esteem and often self-loathing. For example, a Korean Japanese youth said the following:

> "Throughout the years of my life in Japan, I have been hating myself for being a Korean. I have always tried to be like a Japanese. I do not know how many times I have trembled with fears of having my real identity discovered by my peers."[213]

Discrimination, racism as well as hate propaganda exist in Japan.

Such minorities as Ainu, Buraku and ethnic Koreans in Japan are part of our nation, and members of each group deserve the same concerns and protection under the law as majority Japanese. Targeted in discriminatory practices and hate propaganda, the minority groups have criticized the absence of laws to control discriminatory incidents, including prohibiting displays of discriminatory expression.[214] However, at present there is neither legislation to regulate such propaganda nor have appropriate remedies been provided by the government in response to

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[212] Ibid. at 307.
[213] Ibid. at 307.
[214] Buraku Liberation League, supra note 25.

complaints. The next chapter will present the possibility of regulating hate propaganda in Japan. I analyze the postwar Constitution of Japan and the possible conflict between the prohibition of hate propaganda and freedom of expression. Freedom of expression in Japan, though strongly protected, is not guaranteed all of the time and under all circumstances. The Constitution of Japan provides the Diet with the authority to regulate expression that harms social order and human rights. I present certain cases that have been used as the foundations for the regulation of certain kinds of expression. Further, I argue for the enactment of anti-hate propaganda laws in Japan.

Chapter Four: Freedom of Expression in Theory and Practice in Modern Japan

I. Freedom of Expression and Prohibited Expression

A. Theory of the Constitution of Japan of 1947 and the Public Welfare Standard.

On August 15, 1945, Japan unconditionally surrendered to the Allied Forces. Japan was then placed under the supervision of the Supreme Commander for the Allied Power (SCAP), which aimed at democratizing Japan. One significant mission of the SCAP was to amend the old Japanese constitution (the *Meiji* Constitution), which was symbolic of Japanese Imperialism and the sovereignty of the Emperor. With instructions from the General Headquarters of the Allied Power (GHQ), the government of Japan prepared a draft of a new constitution. The draft, however, was rejected by the SCAP for it was suggested that it did not intend to democratize the old constitutional system. A new draft was prepared by the GHQ. The new Constitution (Nihonkoku Kenpo) was promulgated on November 3, 1947, by the Emperor and came into effect on May 3, 1948.

The new Constitution is largely based upon Anglo-American legal systems.[215] It includes the concepts of popular sovereignty and supremacy of the Constitution. More importantly, the Constitution explicitly guarantees fundamental human rights to

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[215] H. Hata & G. Nakagawa, *Constitutional Law of Japan*, (The Hague: Kluwer Law International, 1997) at 19.

all Japanese people. Article 14 of the Constitution states as follows:

> "All people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."[216]

Though various rights and freedoms were guaranteed under the *Meiji* Constitution, these rights were only guaranteed "within the limits of the laws." For example, Article 29 of the *Meiji* Constitution, guaranteeing freedom of expression, declared that "Japanese subjects shall, within the limits of law, enjoy the freedom of speech, writing, publication, assembly and association." The ambiguous statement of "within the limits of law" therefore provided the Diet with authority to restrict any rights and freedoms guaranteed to the people in the Constitution.

The current Constitution contains more democratic elements than the old constitution with fewer restrictions on people's rights and liberties. Chapter III (Articles 10 to 40) of the Constitution of Japan sets forth personal rights of liberty and social rights of people. Human rights and liberties are declared as "eternal and inviolable" guaranteed to the people of present and future generations.[217] These rights are largely categorized as "spiritual freedoms," "economic freedoms" and "social rights." Spiritual freedoms involve inner activities as well as activities expressing one's mind and thought. Economic freedoms present

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[216] Constitution of Japan, (November 3, 1946).
[217] Ibid.

freedoms to choose and change one's residence (Article 22), freedoms to choose one's occupation (Article 22) and freedoms to own property (Article 29). Social rights include the right to maintain the minimum standards of living (Article 25), the right to an equal education (Article 26) and the right of workers to organize, bargain, and act collectively (Article 28). Spiritual freedoms have been protected more strictly than economic freedoms and social rights. In other words, regulating spiritual freedoms requires a stricter procedure under the Constitution than regulating economic freedoms or social rights.

As for spiritual freedoms, Article 19, for example, guarantees the right to freedom of thought and conscience. Freedom of religion is guaranteed in Article 20. Academic freedom is given in Article 23. Freedom of expression is guaranteed as spiritual freedom in Article 21 to all the people regardless of their class, race or religion. Article 21 states as follows:

> "21-1. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.
> 21-2. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated."[218]

Though the word "freedom of expression" also existed under the *Meiji* Constitution, the idea of protecting any forms of expression came into effect when the new Constitution was promulgated. Freedom of expression under the Constitution of Japan includes not only speech and the press, which were

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[218] Ibid.

guaranteed under the *Meiji* Constitution, but also painting, sculpture, music, movies, plays and symbolic forms of speech such as picketing and demonstrations.

As discussed in Chapter II, it is clear that the right to freedom of expression is indispensable for human prosperity and for the maintenance of Western liberal democracy. Similarly, this concept of freedom of expression is recognized in the Constitution of Japan. As a country strongly influenced by authoritarianism and militarism during World War II, Japan realized the necessity of building a legal system designed to maintain democracy and to protect absolute human rights and freedoms. Since the promulgation of the Constitution of Japan in 1947, freedom of expression is constitutionally protected under the principles of the marketplace of ideas, democratic participation in society and personal fulfilment and flourishing.[219]

In Japan, the right to freedom of expression is not protected in an absolute form. Although the Constitution guarantees rights and freedoms as "permanent and inviolable" rights, at the same time it places certain restrictions on these rights and freedoms. Restrictions are to be determined by the public welfare standard. Article 12 and 13 respectively provides for the public welfare as follows:

> Article 12: "The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the

[219] K. Yamashita, *Gaisetsu Kenpo*, (Tokyo: Yuhikaku Sousho, 1984) at 64.

> constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare."[220]
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> Article 13. "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."[221]

In these articles, it is expected that the rights and freedoms should be enjoyed by people so long as the public welfare is protected. Article 12 defines the public welfare as a people's responsibility to utilize their rights for the public welfare.

There is controversy about this standard because of fear that state officials may place arbitrary restrictions on individual rights and liberties. Some analysis deals with the comparison of limitation on freedoms by the public welfare standard to the "freedom within the law" in the *Meiji* Constitution, which was used to unreasonably place restrictions on individuals' rights.

There are several theories on the judicial interpretation of the public welfare standard. Some argue that the public welfare did not apply to spiritual freedoms but could restrict only economic freedoms.[222] Since the regulation of Articles 12 and 13 does not have "legally" binding power but only "morally" binding power, spiritual freedoms cannot be restricted. The public

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[220] Constitution of Japan, supra note 216.
[221] Ibid.
[222] N. Ashibe, *Kenpohanrei wo Yomu*, (Tokyo: Iwanami Shoten, 1987) at 91.

welfare in Articles 22 and 29, which involve economic freedoms has legal meaning; therefore, only economic freedoms can be restricted by the public welfare. One of the most popular rationales for the public welfare standard is called *Naizai Seiyaku Setsu*. The *Naizai Seiyaku Setsu* embraces the idea that the public welfare is immanent in every human right.[223] According to this theory, the public welfare standard is required not to politically restrict individuals' rights and liberties but to harmonize conflicting rights. The purpose of the public welfare standard in this theory is to equalize conflicting human rights and to apply the goal of the Constitution to every single person. Therefore, the public welfare applies to every single right from spiritual freedoms to economic freedoms guaranteed in the Constitution.

The Supreme Court has traditionally upheld the public welfare standard in cases affecting freedom of expression. In a 1951 decision, the Court declared that no freedom of expression may oppose the public welfare.[224] Moreover, the Court held that the people have a responsibility at all times to exercise freedom of expression for the public welfare.[225] In Japan v. Sugino, the

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[223] Ibid. at 91. In Japanese, "*Naizai*" means inner existence, "*seiyaku*" is restrictions.
[224] Sakanara v. Tokyo Express Railways, 5 Minshu 214, 217 (Sup.Ct., G.B., April 4, 1951). The Supreme Court held:"It is clear from the provision of Articles 12 and 13 of the Constitution that no freedom of expression may oppose the public welfare."
[225] Japan v. Ito, 14 Keishu 1243 (Sup.Ct., G.B., July 20, 1960).

Supreme Court explicitly ruled on the interpretation of the public welfare standard as follows:

> "[T]he maintenance of order and respect for the fundamental human rights of the individual's person - it is perfectly these things which constitute the content of the public welfare."[226]

Although the Supreme Court argued that the objective of the public welfare standard was to "respect the fundamental human rights of the individual's person," I believe this sentence did not address individual rights. Rather the rationale of the public welfare standard lies in a strong sense of cultural unity and emphasis on consensus in social relations. As the Supreme Court of Japan stated, no individual's rights are more important than the protection of the public welfare, which promotes the maintenance of harmony and order. The purported objective, I believe, of the public welfare is to put restrictions on certain kinds of expression and other human rights in order to "harmonize" conflicting fundamental rights of individuals and to eventually maintain social order.

In the sense of harmonizing conflicting rights, the standard has a similar function to s. 1 of the Canadian Charter of Rights and Freedoms, which accepts such limitations on rights by laws "as can be demonstrably justified in a free and democratic society." I consider the Canadian limitation clause a strong commitment to collectivity, multiculturalism and cooperation

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[226] Japan v. Sugino, 4 Keishu 2012, 2014 (Sup.Ct., G.B., October 11, 1950).

amongst peoples, which the Charter embraces especially in ss. 15 and 27. In *R. v. Oakes*, Justice Dickson established that the rationale of s. 1 lies in the words "free and democratic society." The values of a free and democratic society such as respect for the dignity of human beings, commitment to social justice and equality and respect for cultural and group identity both guarantee the rights in the Charter and limits those rights at the same time.[227] The Court concluded that the Canadian Charter embraced the ideal of equality and respect amongst every single person in the country. However, I would say that the public welfare standard has more flexibility in limiting rights than s. 1 because of the language of Article 12 that people "shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare." The language places more stress on individual's own responsibility to smoothly cooperate for the public welfare than one's rights and freedoms. I would interpret that the guaranteed rights in the Constitution of Japan are understood by the people to have more elements of duty for the public welfare than individual rights.

With the public welfare standard, the Supreme Court traditionally has placed certain restrictions on certain rights. In the next section, I detail the cases concerning freedom of expression and the public welfare standard.

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[227] R. v. Oakes, supra note 103 at 136.

B. Unprotected Expression: Pornography (*Waisetsu-Bunsho*) and Defamation (*Meiyo Kison*) Cases

As the Constitution of Japan declares, the right to freedom of expression, although it must be protected as largely as possible, is not an absolute right. Freedom of expression, like other constitutional rights, is subject to restrictions for the goal of the public welfare. For example, distribution of obscene literature is prohibited under the Criminal Code.[228] Also, defamation and insult against any individual can be punished under the Criminal Code.[229] Since the promulgation of the Constitution of Japan, the Supreme Court has successfully justified the regulation of certain expression and has narrowed the right to freedom of expression using the public welfare standard.

In this section, I explore the rationale for pornography regulation and prohibition of defamation and insult in Japan. On March 13, 1957, the Supreme Court ruled on the regulation of pornography in the *Lady Chatterly's Lover's* case, confirming that certain kinds of pornography should be banned for the public welfare.

a) The Pornography Regulation Approach: Pornography is Anti-Social

In the *Lady Chatterly's Lover's* case of 1957, the accused were a publisher and a novelist. They were arrested in 1950 on the charge of selling an obscene publication under Article 175 of

the Criminal Code after a translation of the novel had become a best-seller. Article 175 of the Criminal Code provides as follows:

> "Article 175. A person who distributes or sells an obscene writing, picture or other object or who publicly displays the same, shall be punished with imprisonment at forced labor for not more than two years or a fine of not more than 5,000 yen or minor fine. The same applies to a person who possesses the same for the purpose of sale."[230]

The court of first instance found that the book in question did not classify as obscene writing regulated in the Criminal Code but that certain passages closely resembled pornography. The court found the publisher guilty and fined him 250,000yen, but found the translator not guilty. The accused appealed on the basis that the guarantee of freedom of expression in Article 21 of the Constitution, which prohibits censorship, was almost unrestricted; therefore, Article 175 of the Criminal Code infringed on the defendants' right to freedom of expression. The Prosecutor also appealed on the ground that the translator also should have been found guilty. The Tokyo High Court found both the publisher and the translator guilty and fined them respectively 250,000yen and 100,000yen. Both defendants appealed to the Supreme Court.

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[228] Penal Code of Japan, Article 175.
[229] Penal Code of Japan, Article 230.
[230] Penal Code of Japan, supra note 228. In this Article, there is no description of what constitutes obscene materials, which became the sole issue discussed in *Chatterly Lover's* case by the Supreme Court of Japan.

The Supreme Court in *Chatterly* dealt with two issues: whether the Article infringes the right to freedom of expression guaranteed by the Constitution and; whether the work in question should be categorized as pornography as regulated in Article 175 of the Criminal Code. The Court's conclusion on the constitutionality of Article 175 of the Criminal Code was as follows. Since all rights and freedoms are subject to restriction for the public welfare under Articles 12 and 13 of the Constitution of Japan, the right to freedom of expression is not absolutely guaranteed. The sale of obscene writing "contains the danger of inducing a disregard for sexual morality and sexual order."[231] The Court should be a "guardian of society" for protecting the maintenance of a minimum of sexual morality and a sexual code is part of public welfare.[232] The regulation on freedom of expression under the public welfare standard has been confirmed as constitutional. Therefore, Article 175 of the Criminal Code is constitutionally justified. The Court then concentrated only on the question of whether or not the translation in question fell under the heading of obscene writing regulated in Article 175.

The Court's argument on the constitutionality of Article 175 of the Criminal Code was not convincing. The Court in *Chatterly* did not thoroughly analyze and explore whether or not restricting the sale of obscene writings regulated in Article 175 was

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[231] Koyamam v. Japan, 11 Keishu 997, (Sup.Ct., G.B., March 13, 1957).

constitutional. In other words, the Supreme Court did not analyze the constitutionality of Article 175 of the Code, but rather focused on the analysis whether the writings in question is within the meaning of "obscene" writings. It simply declared the constitutionality of the public welfare standard which included the protection of sexual morality. There was neither the analysis of Article 175 nor an explanation of the relationship between protecting "sexual morality and order" and banning the sale of obscene writings.

Nevertheless, if the Court's argument that the Court should be a guardian of society is valid, I would claim that the argument should be applicable the regulation of hateful expression against minority groups. In considering the morals of society, I would argue that social morality is in great danger because of hate propaganda - social morality, which protects human rights and dignity in a sense that every human being is equally privileged. Maintaining social morality should also be the role of the Court and the legislature. In reality, many members of minority groups hide their identity to avoid discrimination and, as a result, they suffer from self-deception and self-hate. Harm caused by hateful expression and the breach of social morality is tremendous.

Historically, the Supreme Court has declared that the purpose of public welfare was to serve to harmonize conflicting

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[232] Ibid.

fundamental rights so that "individuals' rights will be equally respected."[233] This argument can be applied to the regulation of hate propaganda in a sense that anti-hate propaganda laws serve the public welfare by maintaining public (social) morality. The Supreme Court in *Chatterly* declared as follows:

> "...[E]ven though the ethical sense of a substantial majority of the people were paralyzed and truly obscene matters were not recognized as obscene, the courts would have to guard society against moral degeneration in accordance with the norms of the prevailing social ideas, which are the ideas of *sound men of good sense*. After all, neither the courts nor the law must always and necessarily affirm social realities, *they must confront evil and corruption with a critical attitude* and must play a clinical role."[234] [emphasis added.]

The Supreme Court in *Chatterly* presented their discretion in interpreting the scope of freedom of expression. The Court articulated the public welfare standard to regulate certain expression to protect society from "evil and corruption." In hate propaganda, there is also evil and corruption. Hate activities attempt to poison society's conscience by creating inequality amongst groups. Hate propaganda attempts to psychologically and mentally oppress certain groups in society. Hateful messages certainly do not sound like "the ideas of sound men of good sense." Hate propaganda is an obvious evil and we should regulate it in order to protect minority groups from evil and corruption.

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[233] Ibid.
[234] Ibid.

b) Pornography Undermines Equality

The promotion of human rights and equality is another legitimate argument for regulating pornography and also a practical approach to the regulation of hate propaganda. Although it is still a legitimate point of view for banning pornography in the east, the argument of the maintenance of sexual morality in regulating pornography has been seen as conservative in North American society. Instead, some feminist scholars, both in Canada and the United States, argue that the sin of pornography is that it promotes the idea of the sexual inferiority of women and furthers gender inequality.[235] The argument is that pornography degrades and dehumanizes women by turning them into a male fantasy. Women become sexual objects and are subordinated to men. Pornography exploits women's sexual and economic inequality and sells women to men for sex.[236] This type of view has been recently reflected in legislation in the United States:

> "Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harms women's opportunities for equality of rights in employment, education...; promotes rape, battery, child abuse, kidnapping and prostitution...; and contributes significantly to restricting women in particular from full exercize of citizenship and participation in public life."[237]

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[235] C. MacKinnon, *Toward a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989).
[236] Ibid. at 195.
[237] Code of Indianapolis and Marion County, Indiana, 16-1(a)(2). This section was recently struck down as unconstitutional.

In *R. v. Butler*, the Supreme Court of Canada assessed the constitutionality of a provision of Criminal Code which prohibits the distribution of pornography.[238] In applying the Oakes test, the Court rejected the argument that Parliament's original objective of banning pornography was to promote sexual morality. However, the Court upheld the provision on the basis that the regulation promoted sexual equality.[239] Interestingly, in *Butler*, the Supreme Court, in analyzing the nature of harm caused by pornography, stated that there are similarities between the harm that pornography directs against women and the harm caused by hate propaganda in the way that both attempt to deprive the victims of equal access to rights. Pornography denies women an access to sexual equality while hate propaganda strips minority groups of an access to social equality.

Similarly, the Special Committee on Pornography and Prostitution discussed the relationship between harms caused by pornography and hate propaganda as follows:

> "If one accepts the argument that pornography is an expression of misogyny, then use of the hate propaganda section of the Code in this connection is particularly attractive. If the evil seen in pornography is the communication of an untrue message which expresses or propagates hatred against women, it seems logical that this Code provision, and not one dealing with sexual morality, should be aimed against it."[240]

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[238] R. v. Butler, [1992] 1 S.C.R. 452.
[239] Ibid.
[240] Report of the Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada*, (Ottawa: Supply and Services, 1985), vol. 1 at 319.

Pornography in Japan is recognized as a "crime of violation of the social welfare order."[241] It is argued that pornography was banned because it was believed to violate and harm many people's human rights.[242] If banning pornography is justified because of its nature of harming people's human rights, the same concept should be applied to anti-hate propaganda laws for the reasons mentioned above. Hate propaganda should be recognized as a crime since it certainly violates and harms minorities' human rights.

Article 14 of the Japanese Constitution guarantees equality rights under the law to all people regardless of their "race, creed, sex, social status or family origin."[243] Equality rights as regulated in s. 15 of the Canadian Charter were discussed in *Keegstra* and *Taylor* to reasonably limit freedom of expression. Article 14 is understood as a right of "spiritual freedoms," to which the freedom of expression belongs, and is fully protected. If I may use the argument of the Canadian Supreme Court, I would have to say that freedom of expression is not, and should not be, the only consideration in balancing the rights and freedoms guaranteed to people. Hate propaganda denies access to social equality to the target groups. If Japan embraces equality amongst all individuals under the Constitution, the victims of hate propaganda (minority groups) should be equally protected under the Constitution.

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[241] Y. Okudaira, *Hyogen no Jiyu II*, (Tokyo: Yuhikaku, 1984).
[242] Ibid.
[243] Constitution of Japan, supra note 216, Article 14.

c) The Defamation and Insult Approach: Hate Propaganda Damages Person's and Groups' Right to Good Names

A person's public reputation is protected under the law in many societies including Japan and Canada. Human beings establish their lives on the basis of interactions and interrelationship with others. In this interrelationship of life, it is not too much to say that confidence and honour which a person receives from others as well as from one's self plays a significant role towards having a meaningful life. Therefore, the rationale of defamation laws as maintaining a person's good name before the public and protecting personal privacy seems practical and valid.

Modern Japanese defamation law dates back to the 1800s. Traditionally, Japanese place extreme emphasis on an individual's public reputation in social relations. In other words, in Japanese society, public acknowledgement and acceptance plays an important role in determining one's life. In order to achieve acceptance, the Japanese largely attempt to behave within a framework which a "normal" Japanese person seems to follow. Individuality and uniqueness are not welcomed personality characteristics or behaviour, but collectivity and passiveness are likely to be praised. In a society like Japan, to protect an individual's name seems extremely important in having a normal and good quality of life as a member of society.

In Japan, the rights of the person to a good name and privacy are protected under both civil and criminal codes. No distinction is made in Japanese defamation law between libel and

slander. Under Articles 710 and 723 of the Civil Code, defamation is subject to compensation:

> "Article 710. A person who is liable in compensation for damages in accordance even in respect of a non-pecuniary damage, irrespective whether such injury was to the person, liberty or reputation of another or to his property rights.
>
> Article 723. If a person has injured the reputation of another, the Court may, on the application of the latter, make an order requiring the former to take suitable measures for the restoration of the latter's reputation either in lieu of or together with compensation for damages."[244]

In a 1970 decision, the Supreme Court defined "reputation" in Article 723, as "social" reputation which a person receives from society on the basis of one's character, virtue, fame, and credibility.[245] Article 230 of the Criminal Code prohibits defamation as follows:

> "Article 230. A person who defames another by publicly alleging facts shall, regardless of whether such facts are true or false, be punished with imprisonment at or without forced labour for not more than three years or a fine of not more than 1,000 yen.
>
> Article 230-1. A person who defames a dead person shall not be punished unless such defamation is based on a falsehood.
>
> Article 230-2. When the act provided for in paragraph 1 of the preceding Article is found to relate to matters of Public Interest and to have been done solely for the benefit of the public and, upon inquiry into the truth or falsity of the alleged facts, the truth is proved, punishment shall not be imposed."[246]

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[244] Civil Code of Japan, Law 89 of 1896.
[245] Minshu 24, 13, 2151. (December 18, 1970).
[246] Penal Code of Japan, Law No. 45 of 1907.

Although today's defamation law in Japan only protects individuals or corporations, it could possibly be extended to the protection of groups to which individuals belong. A person's visible characteristics are absolutely related to the person's public reputation because human beings always exist as members of certain groups, while they also exist as individuals. In any society, people are often categorized into certain groups such as Asian, Black, women, White, Muslim, and so forth.[247] In Japan, the people are categorized as ethnic Japanese (*Wajin*), Ainu, Buraku, Koreans, Chinese, etc. Stereotypes based on visible characteristics such as race, colour and gender exist because people generally conceive of others as members of groups more than as individuals. Levin and McDevitt refer to stereotypes:

> "To some extent, the tendency to generalize about other people is probably universal. Almost everybody, based on personal experience that may or may not be limited, makes at least some generalizations about what other groups of people are like... every member of a stereotyped group is seen as a rubber stamp of everyone else in that group. Individuals differences are totally obscured."[248]

As the scholars argue, prejudices toward and generalizations about certain groups are universal and common activities that any person exercizes. Prejudice and stereotypes create the false perception that all members of certain groups have this negative personality or behaviour. However, a person's character and personality through stereotypes and generalization are

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[247] See J. Levin & J. McDevitt, supra note 31.
[248] Ibid. at 22.

unfortunately one of the most common and popular ways that the public and society as a whole conceive of others. Because all individuals are prejudiced toward certain people, negative prejudices and stereotypes that hate propaganda promotes about certain people can easily circulate and deeply hurt an individual and his/her groups' public reputation. Hate propaganda could encourage negative prejudices toward certain groups by attempting to confirm these prejudices and stereotypes which, to some extent, all individuals have. When a hate propagator screams about a Jewish conspiracy in public, the public reputation of Jewish people could be hurt. When a hateful message that Black people are lazy is unleashed, their (group) public reputation could be jeopardized. Hate activities damage a person's core existence and visible characteristics, which are the most exposed part of characteristics. Hate propaganda damages a person's public reputation on the basis of his/her "character, virtue, fame, and credibility," which are protected under the law. If a person tells me that I am useless and worthless simply because I am Asian, that person would damage my confidence and credibility of being Asian and also hurts my right to a good name as being Asian. For these reasons, I believe that hate propaganda against any groups should be prohibited because it unjustly attacks a person's and groups' public reputation.

C. Conclusion

Regulating certain expression under the Constitution of Japan is in theory and practice possible. While the Constitution of Japan protects human liberty and autonomy through the exercise of freedom of expression, it also permits the regulation of certain expression for the public welfare. The Supreme Court of Japan has historically interpreted freedom of expression in a non-absolute form and agreed with the regulation of certain expression against certain people. Pornography is banned for the protection of the public welfare and public morality. Defamation is prohibited in order to protect an individual's good name. For all these reasons, I have no doubt that the government of Japan is capable of regulating hate propaganda in relation to freedom of expression under the Constitution.

However, the substantial problems and conflicts in enacting or implementing anti-hate propaganda laws in Japan lie in different issues. In the next section, I present possible obstacles to anti-hate propaganda laws in Japan.

II. Freedom of Expression of Minorities and Obstacles to Freedoms

The guarantees of rights and freedoms set forth in the Constitution of Japan are well respected by most Japanese. The Japanese legal system has traditionally been influenced by European civil law. In addition, since the end of World War II, the system has shared similarities with the Anglo-American system. The written premises and promises, rights and freedoms,

and the system under the Constitution of Japan can be, therefore, seen as Westernized. However, Lawrence W. Beer, a well-known Japanologist, claims that "social culture affects law, and widely accepted legal norms and institutions affect the status of freedom of expression in society."[249] A substantial reflection of a society and people is how it interprets freedoms. Thus, the idea of "democracy" and "freedom" in Japan has significantly different meanings from those of Western countries like the United States and Canada.[250] Despite the fact that the Japanese legal system has been under the influence of Western counties, the customs and traditions may have more influence on freedom and its interpretations.

A. Restriction by People

To a large degree, modern Japanese culture and customs date back to the *Tokugawa* era (1603-1868). When the *Tokugawa* era started, the *Tokugawa* Shogunate adopted neo-Confucianism in addition to the traditional feudalism system. In both feudalism and Confucian beliefs, the Japanese traditionally place emphasis on harmony and consensus among people and disapprove of individualistic characters and attitudes, which are familiar to Western cultures. Feudalism encourages loyalty to the state and family, hierarchy, seniority and membership within a group, and

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[249] L.W. Beer, "Freedom of Expression: The Continuing Revolution," in *Japanese Constitutional Law* (Tokyo: University of Tokyo Press, 1993) at 223.
[250] L.W. Beer, *Freedom of Expression in Japan*, (Tokyo: Kodansha International LTD, 1984) at 108.

Confucius promotes harmony and consensus amongst people. The way these cultural beliefs promote particular goals has affected Japanese people in everyday life - in the way they act, the way they speak to one another, and the way they treat each other. Neo-Confucian and feudalistic beliefs play an important role not only with respect to the relationship between the state and the people but also to the relationship amongst people.

In order to survive in Japanese society, the most important challenge for a Japanese individual is to find a group to which to belong and to maintain their position in that group. A Japanologist, J. Bachnik introduced Japanese group-based relationships as follows:

> "Relationships are crucial in Japanese society, but this statement involves much more than a truism about social life. In a real sense, not the individual but *the relationship between individuals* is the basic "unit" of Japanese social organization... In the same sense, *the relationship between self and social order* constitutes the organization of social life." [emphasis original.][251]

Thus, this type of Japanese relationship therefore is psychologically forced. During my years in Japan, I looked for a group to which I could belong not because of the desire to do so but because of the fear that I may be left alone or isolated. One scholar has also pointed out the existence of a unique Japanese

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[251] J.M. Bachnik, "Hierarchy and Solidarity in Japan," in J.M. Bachnik & C.J. Quinn, Jr., ed., *Situated Meaning: Inside and Outside in Japanese Self, Society, and Language*, (New Jersey: Princeton University Press, 1994) at 225.

"in-group" culture.[252] He added that the in-group culture implies that the interests of the community or the group are given priority over those of the individual.[253] Being in a group-based, hierarchical society, it is vital for Japanese individuals to determine their relationship to others based on group membership and their relative position within the group.[254] There are myriad levels of group identification, from the nuclear family to school class, company, and perhaps even the nation as a whole, each with its own internal hierarchy.[255]

This "in-group" system lies in the ideology of *ie*, which literally means house, home or family.[256] A Japanese scholar, Yoshio Sugimoto, defined *ie* system as a "quasi-kinship unit with a patriarchal head and members tied to him through real or symbolic blood relationship."[257] The head of *ie* controls all family events ranging from the household matters to the choice of marriage partners for his family members.[258] In the hierarchical community, Japanese learn a sense of duty over rights, sometimes accepting the unequal tie to a social superior as natural.[259] Families, schools and communities confirm that the individual

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[252] A. Marfording, "Cultural Relativism and the Construction of Culture: An Examination of Japan," (1997) 19 Human Rights Quarterly 431.
[253] Ibid.
[254] K. Yamaga-Karns, "Pressing Japan: Illegal Foreign Workers under International Human Rights Law and the Role of Cultural Relativism," (1995) 30 Texas International Law Journal 559 at 571.
[255] Ibid. at 571.
[256] Y. Sugimoto, *An Introduction to Japanese Society*, (New York: Cambridge University Press, 1997) at 137.
[257] Ibid. at 137.
[258] Ibid. at 138.

should serve group or state unity. Self-sacrifice for unity is regarded as a beauty. Cultural values such as harmony, consensus, social hierarchy and loyalty to the group continue to be the primary objectives of most Japanese.

However, this hierarchy can be problematic to those who are younger or lower in a status when attempting to express their beliefs and thoughts. A Japanese scholar, Chie Nakane, explained Japanese social relations in a hierarchy as follows:

> "At any meeting or gathering... the frequency with which a man offers an opinion, together with the order in which those present speak at the beginning of the meeting, are... indications of rank. A man who sits near the entrance may speak scarcely at all throughout the meeting. In a very delicate situation those of an inferior status would not dare to laugh earlier or louder than their superiors, and most certainly would never offer opinions contradictory to those of their superiors. To this extent, ranking order not only regulates social behavior but also curbs the open expression of thought."[260]

Nakane further claimed that even if there are others who share a contrary opinion to superiors, they are unlikely to come forward for the "fear that this might jeopardize their position as desirable group members."[261] The ranking of people therefore prevents the free expression of individual thought. This psychological force, thus, can be applied to the premises of Professor Beer that social culture affects law. Although the written document explicitly guarantees freedom of expression to

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[259] See K.V. Wolferen, *The Enigma of Japanese Power*, (New York: Knopf Inc. 1989) at 202.
[260] C. Nakane, *Japanese Society*, (Berkeley: University of California Press, 1970) at 33-35.

every member of society, the traditions and customs play a significant role in making sure that the people behave within the traditions and customs which implicitly restrict the rights from being performed. Beer continued to explain the relationship between the status of freedom of expression and the in-group culture as follows:

> "The tradition of compulsory conciliation may reinforce the contemporary use of powerful *socio-psychological pressures to force an individual to conform to the group*. Emphasis upon conformity with the group, to the point of psychological coercion, is perhaps the greatest single obstacle to the evolution of a balanced right consciousness in Japanese society. It is perhaps difficult for many Westerners to understand that in a free society like Japan psychological force without attendant physical coercion or governmental sanction can be a very significant obstacle to the development of democratic constitutionalism."[262] [empahsis added.]

Because of a strong sense of loyalty, hierarchy and seniority within in-group relations, there is an unpleasant side-effect for the relationship in out-group patterns. Though a Japanese individual politely holds a traditional attitude of quietness over the people in senior or higher positions within a group, the group as a whole tends to be acutely "conscious and assertive of its rights as a collection in dealing with outsiders."[263] This tendency can be partly applied to the Japanese type of discrimination against minorities - outsiders. Minority groups are left outside of the mainstream, and discrimination against

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[261] Ibid. at 144.
[262] L.W. Beer, "The Public Welfare Standard and Freedom of Expression in Japan," in *The Constitution of Japan* (Seattle: University of Washington Press, 1968) at 214.

these minorities is somehow justified under group-oriented patterns.

The Japanese tradition of grouping patterns explains another justification for the Japanese hostility to and discrimination against minorities. In in-group relations, people in lower positions or of younger ages must be quieter than those in higher positions or of older ages because of hierarchy. In the race structure in Japan, the application of this social hierarchy to minorities in race and ethnicity could be considered valid. A higher ranked group, which is the majority Japanese, has quieted lower ranked groups, which are the minorities. There is a conception that minority groups (in a race hierarchical structure) should consent to the will of majority group. Thus, hate propaganda laws could be very difficult to be enacted since they affect the traditional policy of Japanese hierarchy. As a result, hate propaganda laws could increase the tension between majority and minority Japanese. Restriction from the public is one of the obstacles where socially consented to discrimination is not easily overcome.

B. Restriction by Government Institutions

As previously pointed out, Japan has a serious problem in the legislation concerning the treatment of aliens including Koreans and Chinese descendants brought to Japan during the Second World War. In observing the legal system towards aliens,

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[263] L.W. Beer, supra note 250 at 114.

it can be said that Japanese legislation seems to have initiated discriminatory practice under the law. With the government initiation, the public conception regarding minority people has hardly been improved. Even if hate propaganda laws were successfully enacted, there would be problems in properly implementing such laws. For example, in implementing hate propaganda laws in criminal law there is a technical but substantial problem in a Japanese criminal justice system - prosecutorial discretion.

This prosecutorial discretion is being practised by two criminal justice institutions. The Japanese police, under Article 246 of the Criminal Code,[264] have wide discretion in handling cases reported to the office. In other words, the police have discretion to either send a case to the prosecutor's office for further investigation and indictment or to close a case which they conclude is "small." For example, in 1978, there were 1,136,448 cases reported to the police; of which the police eventually identified only 599,302 cases.[265] Out of 599,302, only 168,646 were actually reported to the prosecutor's office. The police failed to report almost 40% of all cases.[266]

Even though the cases are reported to the prosecutor's office, the prosecutorial discretion of the prosecutor's office can also be exercized. In 1987, the prosecutor's office had a

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[264] Penal Code of Japan, Article 246.
[265] See, J.O. Haley, *Authority without Power: Law and the Japanese Paradox*, (New York: Oxford University Press, 1991) at 126.

total of 3,441,024 caseload. Of the total caseload, only 50% were actually prosecuted because of lack of sufficient evidence or for other reasons. Finally, prosecution was suspended in only 10% of the total caseload. Considering the fact that Japanese policy enforcement and the Japanese legal institutions are mostly occupied by ethnic Japanese, it is doubtful that anti-hate propaganda laws would be properly implemented by the state's legal institutions.

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[266] Ibid. at 128.

Chapter IV: Conclusions - Toward the Regulation of Hate Propaganda

In October 1999, a stranger, who passed me on the street, came right into my face and called me "Jap." I was again called "Jap." I froze for a second. Although I have experienced this type of verbal slur before, I will never get used to it. I reacted to this word in exactly the same way as I did when I experienced it for the first time. My heart started beating very fast. The person was not violent in a physical form, but he certainly had the power to mentally hurt me. He denied my dignity and existence by calling me "Jap." I was degraded again because of my nationality. I felt weak and miserable.

We must realize that the theory of "sticks and stones" is not a legitimate argument and that words can deeply hurt people. Discriminatory words against one's visible characteristics are not just words but rather vicious attacks on his/her existence and dignity.

The rationales which the Supreme Court of Canada articulated to regulate hate activities are universal and, to some extent, applicable to Japanese minorities. Harm that is caused by hate propaganda in Canada - harm to target groups and to society at large - is also found in Japan. The members of Japanese minority groups who have been exposed to discrimination and racism express

their pain and suffering, creating self-doubt and self-hate.[267] The society's conscience on social equality is being paralyzed, accepting discrimination against minority groups in employment opportunities and marriage. Hate activities cause such harm, encouraging more discrimination and racism.

The great importance of international human rights treaties, to which Canada is a signatory state, was discussed by the Supreme Court of Canada. In addition to its ratification of the Universal Declaration of Human Rights, in 1979, Japan signed two international treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Under these treaties, State parties are obliged to take all appropriate means to "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."[268] Moreover, Japan signed the International Convention on the Elimination of All Forms of Racial Discrimination under which State Parties must condemn racial discrimination by "all appropriate means and without delay a policy of eliminating racial discrimination."[269] The government of Japan is thus morally, if not legally, obliged to combat hate

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[267] For experiences of discrimination and racism, see Levin & McDevitt, supra note 31, Allport, supra note 29, Lee & De Vos, supra note 211, and also Min, supra note 190.
[268] International Covenant of Civil and Political Rights, supra note 144.
[269] International Convention on the Elimination of All Forms of Racial Discrimination, supra note 146, Article 2.

propaganda circulated in the society. Japanese minorities are the victims of such propaganda on the basis of certain characteristics that the very same treaties specify.

Equality rights were also positively discussed by the Supreme Court of Canada in regulating hate propaganda. Although the Canadian Charter fully guarantees the right to freedom of expression, it also protects other Charter rights such as Equality and Multiculturalism. The Supreme Court in *Keegstra* made it clear that in balancing rights and freedoms guaranteed in the Charter, it is necessary to consider all the rights equally, not just freedom of expression. Article 14 of the Constitution of Japan also guarantees equality under the law regardless of different characteristics.

However, I found the Canadian approach to the scope of freedom of expression weak. Unlike the Court, I argue that hate propaganda should not be protected by the Constitution for it fits within none of the rationales for freedom of expression. Hate activities rather undermine the goals of freedom of expression. Vicious hate propaganda silences members of target groups by verbally attacking their existence. The victims become passive in society, forced to move from their neighbourhood, quit their jobs or change their schools in order to avoid continuing harassment. Some North American scholars argue that hate propaganda is itself a form of restriction on expression. Joel Bakan, a Canadian law professor, argued that hate propaganda

undermines the discourse of freedoms of expression by creating an environment in which members of target groups feel fear in expressing their identities and ideas.[270] His argument continued that the purpose of regulating discriminatory practice is to promote the "values that lie at the core of freedom of expression itself" rather than restricting the freedom.[271] In this sense, regulating hate expression can rather make progress in promoting equal rights and opportunities amongst non-dominant groups rather than oppressing the people's right to freedom of expression.

The Constitution of Japan guarantees the right to freedom of expression to every person including members of minority groups. In applying Bakan's argument, it seems clear that the current freedom of expression in Japan is being exercized only by those who speak loudly including the majority or high status individuals or groups with a hierarchical system. Hate propaganda should be regulated in Japan in order to bring equality to minority groups.

Moreover, silencing others through hate propaganda is against the principle of human fulfilment and flourishing. Emerson argued that the proper end of human beings is the self-realization of his character and potentialities.[272] The mind of human beings must be free for the achievement of self-realization. As discussed in Chapter II, members of minority

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[270] J. Bakan, *Just Words: Constitutional Rights and Social Wrongs*, (Toronto: University of Toronto, 1997) at 73.
[271] Ibid. at 74.

groups are likely to doubt their identity as a result of constant exposure to prejudice and discrimination. Self-doubt and anger that are caused in these victims discourage the attainment of self-realization. Hate propaganda encourages these doubts and fears to grow and prevents minorities from achieving such purposes of self-realization and fulfilment. Regulating such vicious hate propaganda contributes to the promotion of freedom of expression by giving the vulnerable target groups the opportunities to exchange ideas, participate in society and find personal growth.

For the exercise of freedom of expression in Japan, the Supreme Court of Japan has historically regulated certain types of expression that are likely to damage the public welfare and society's conscience - pornography and defamation. The public welfare standard applies to every right in the Constitution and is to serve for the harmony between conflicting fundamental rights so that individual rights will be equally respected." It is reasonably possible in theory for Japan could enact hate propaganda laws for the protection of minority rights using the analysis above.

However, in properly implementing hate propaganda laws, aforementioned restrictions and obstacles are to be overcome. Regulating hate propaganda could possibly be problematic in Japan not because of legality of the regulation but because of mental

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[272] T. Emerson, supra note 74.

attitudes. The Japanese legal system regarding its treatment of minority members has been improving little by little. The fingerprint obligation was abolished. The obligatory possession of the alien registration card is currently under inquiry. However, it is necessary to take more aggressive steps to guarantee minorities their full rights. Any disadvantageous legal status of minority groups regulated as in the Alien Registration Law should be abolished especially for Koreans and Chinese residents who came to Japan as a result of the Japanese militarism before and during World War II. By doing so, the public would be encouraged to recognize these aliens as full members of Japanese society. I say this because I believe the Japanese hate propaganda is not only a public practice but also a product of traditional legislation which excluded minorities and manipulated public minds and cultivated hate within the people.

Legislation is significant in maintaining social activities and relations. Every time the government of Japan has "legitimately" denied minorities' rights, the public mind was successfully set in the denial of such rights. In the 1990s, while the people have become aware of "internationalization" and "globalization," the people are still paralyzed in unequal relations between groups. I suggest that legislation should play a positive role in helping to have social relations equal. In Japan, there is a large population from the majority (Japanese) and very small minorities. A number of minority people hide their

identity such as Ainu, Buraku and Koreans to avoid racism and discrimination. Majority Japanese, on the other hand, would like to keep their "superior" status to others. With little voice from minority groups, I presume that it could be very difficult to change current social relations and realities at the public level. Regulating hate activities can send out a strong message to the public that this kind of discriminatory activity is not permissible in Japanese society. As banning pornography may maintain "sexual morality," regulating hate propaganda would revise social morality and conscience that every single person is entitled to have a good, confident life regardless of race, colour, religion, class or any other characteristics.

I also suggest that another means for the promotion of minorities' rights is that the government should offer proper education about minorities and minority issues to adults and children. Although I suggest in this thesis that hate propaganda laws need to be enacted in Japan, such laws should be seen as supplementary. Educating people to be tolerant and to have respect amongst racial or ethnic groups is an ultimate remedy for unequal relationships amongst people. Although each measure can have an effect, the combination of education programmes and law enforcement would have a significant effect on alleviating hate propaganda and racism.

The Constitution declares equality under the law to all the people regardless of race, creed, sex, social status or family

origin.[273] It is not against the freedom of expression guaranteed by the Constitution to regulate hate propaganda, but it is the violation of the Constitution to deny certain groups equal legal protection.

[273] Constitution of Japan, supra note 216, Article 14.

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