

REGULATING HATE AND RACIAL SPEECH IN ISRAEL

*Raphael Cohen-Almagor**

I. INTRODUCTION

Israel is a Jewish democracy. It is founded on *Halacha* (Jewish law) and on liberal principles. While some segments of Jewish orthodoxy believe there is no room for freedom because all is dictated by the Almighty, liberal ideology is based on the tenets of freedom. While some segments of Jewish orthodoxy believe that all Jews are in the same boat, and must sink or swim together, liberalism believes in tolerance and in a “live and let live” attitude. The tension between the two basic foundations of Israel is noticeable and significant.

Moreover, Israel is surrounded by authoritarian Arab states. Consequently, security considerations are prominent. To date, Israel has survived eight wars (the 1948 Independence War, the 1956 Suez War, the 1967 Six Day War, the 1969-1970 War of Attrition, the 1973 Yom Kippur War, the 1982 Lebanon War, the 2006 Hezbollah War, and the 2008-2009 Hamas War) and two Palestinian uprisings: the first started in 1987 and finished in 1993, when Israel signed the Oslo Accords; the second started in 2000 and is still ongoing in various shapes and forms. Terrorism has been a continued and most alarming concern. Syria and Lebanon are two of the notorious hotbeds for terrorism and violence against Israel. There is a common saying in Israel: “Evil erupts from the North,” referring to the wars and hostilities Israel has had to face since its establishment in 1948. Israel’s relationships with its two other neighbors, Egypt and Jordan, are complex. Although it enjoys peace with both (with Egypt since 1979; with Jordan since 1994), it is a far cry from the peaceful relationships that exist between countries in Europe. Caution is the name of the game, on both sides.

Israel is a country of immigrants. After the Holocaust, many Jews and non-Jews alike realized the need to establish a state for the Jewish people. Jews from all different corners of the world arrived in Israel

and established it as their home. Representatives of many countries can be found in Israel. The gathering of people from different cultures, traditions, ideologies, and worldviews is bound to create problems. Indeed, Israel is saturated with schisms, the major ones being: between religious and secular Jews; between immigrants and *Sabras* (people who were born in Israel); and between *Ashkenazim* (generally speaking, people who came from Europe and America) and *Sepharadim* (generally speaking, people who arrived from Asia and Africa).

Another major schism is between Jews and Palestinian Arabs inside the Green Line (the 1967 borders). Some twenty percent of the Israeli population is Palestinian Arab. This is a considerable minority that feels deprived, under-privileged, and alienated from the State and its symbols. By and large, the Palestinian Arabs do not endorse the *raison d'être* of Israel as a Zionist Jewish democracy.

The victory of the 1967 Six Day War was a milestone in the history of young Israel. The besieged nation launched a surprise preemptive attack that resulted in the expansion of its territory at the expense of its neighboring countries. We are still living with the consequences that are perceived by some as a tremendous blessing and by others as a tragedy. The occupation of Judea and Samaria (the West Bank) yields two other major schisms: between Palestinians under the Palestinian Authority and Israeli Jews, and between the ideological right and the ideological left. While the ideological right sees the occupation as necessary and believes in building and reinforcing settlements in Judea and Samaria, the ideological left perceives the occupation as evil and calls for Israel's withdrawal from the occupied territories and the establishment of an independent Palestinian state alongside Israel.

The combination of geographic circumstances, severe security threats, and difficult rifts yields a stressed and troubled society. Israeli democracy is quite vulnerable.

Twenty percent of the population are immigrants from the former Soviet Union, where no democracy existed... large segments within Israeli society wish to transform democracy into theocracy, while others preach one state for all Jews and Palestinians on the western side of the Jordan River, which would effectively represent the end of Israel as we know it... [r]epeated public polls have shown that some thirty percent of Israeli citizenry wish to transform democracy into 'a government based on strong hand,' limit free expression and freedom of the press so as to have 'better control.'¹

* Professor and Chair in Politics, Department of Politics and International Studies, University of Hull, United Kingdom. The writing of this Essay was inspired by communications

Given these tenuous conditions, it is interesting to analyze how Israel has coped with destabilizing expressions that have aimed to increase the rifts in society, and to promote hatred against the “other,” whoever the other might be. The concern of this Essay is with Israel’s policy on hate speech and racial expressions. Usually, such expressions have stemmed from the ideological right against two groups of people: those who have aimed to give away parts of Israel’s territory and the Palestinian-Arabs. In this context it should be noted that Israel does not have any written guarantee of freedom of expression. It is argued that Israel needs to protect its citizens, both Jewish and non-Jewish, as well as to protect itself as a Jewish democracy. In doing so, it needs not infringe on free expression or create discriminatory situations.²

II. THE DILEMMA

Should the liberal State prosecute people for preaching hate? Let me present both sides of argument.

A. Arguments Against Prosecution for Hate Speech

On the opposing side it can be argued that it is laziness to prosecute people for hate. Instead of investing in education, the State resorts to shortcuts and employs the law. Furthermore, censorship of hate might do more harm than good. The more appropriate response is to confront hateful ideas and expose their vile underpinnings. The results, it should be acknowledged, are not assured. Some people may find the message of hate-mongers attractive, but this is a risk a liberal society should take. Israel will not be threatened by such speech. In a multi-religious, multi-ethnic, multicultural society like Israel, there is bound to be some degree of antagonism between groups, most of it born of ignorance. The appropriate response is education and the vigorous enforcement of non-discrimination policies. The answer to hate speech is more speech, not criminal proceedings. In the end, they may argue, the issue boils down to a question of trust: Do we trust ordinary citizens to reject hate and uphold democratic values? As we should trust good,

with Eran Shendar, Steve Newman, Ian Green, and Terry Heinrichs. I am indebted to them for their insights. I also acknowledge with gratitude the excellent research assistance of Ilana Yakubovich and Orna Rosh. All websites were accessed on March 29, 2009.

¹ See Raphael Cohen-Almagor, Center for Democratic Studies, http://cde.haifa.ac.il/index.php?option=com_content&task=view&id=28&Itemid=5 (last visited May 3, 2009).

² Zaharah R. Markoe, *Expressing Oneself Without A Constitution: The Israeli Story*, 8 CARDOZO J. INT’L COMP. L. 319 (2000).

solid common sense, Israeli censorship, like all censorship, is paternalistic and reveals a deep-seated suspicion of democracy.

Free speech proponents may add that hate speech allegedly lowers self-esteem and silences its victims. But this is an empirical assertion and needs to be assessed in light of the evidence. In the mind of its proponents, it is a mistake to treat the serious harms attributed to hate speech as an irrebuttable presumption. Such proponents of free speech do not deny that derogatory remarks of the sort commonly labeled hate speech can sometimes, at least for some persons, have a negative impact. But it is disputed that such remarks always and necessarily inflict immediate mental and emotional distress that is morally on par with physical harm. Sometimes hateful or insulting words merely cause annoyance or meager offense. Certainly, the distinction between serious mental and emotional distress and annoyance or meager offense is not a trivial one. Plenty of things that people say may offend us, causing us at least some degree of mental or emotional distress. Nonetheless, we are not justified in demanding that the State protect us from all personal insults. Should we punish a person who is said to inflict mental or emotional distress on a minority (or majority) group? What do we do when one vulnerable minority verbally assaults another vulnerable minority? Indeed, the perception of what words or symbols serve to wound or denigrate others is highly subjective. Is it hate speech when a Palestinian decries Zionism as racism? Is it hate when a Jew describes all Arabs as dirty and stupid? The crime of hate speech is a highly problematic offense. Moreover, because censorship comes at a cost to democracy, it is better to respond to the threat of hate speech with more speech rather than criminal laws. We should combat false and malicious ideas with the truth and a vigorous defense of our values.

Free speech proponents may further include a caveat, saying that we should err on the side of freedom of speech, except (possibly) when there is substantial evidence that the hate speech would lead to harm, such as physical violence or emotional distress that are morally on par with physical harm. Absent compelling evidence of such grave and imminent harm or offense to individuals or the State, hate speech should not be criminalized.

B. Arguments for Prosecution Against Hate Speech

On the other side, those who are in favor of criminalization of hate speech argue that the State has a role to play in combating hate; that the State has a responsibility to counter hate propaganda. The proponents of hate speech criminalization are concerned with the potential

contagion of hate, the psychological harm likely to be suffered by any minority group targeted by hate-mongers, and the threat to Israel's social harmony and stability should hate propaganda succeed in spreading an infection of hate in the majority. Furthermore, such proponents of hate speech criminalization may argue that Israel's anti-hate speech laws are important for their symbolic value, for the message they convey, especially to the Arab minority that this group is not neglected and deserted to a harsh fate.³

C. Possible Solution

It is this author's belief that the State ought to weigh the costs of allowing hate speech as well as the risks involved, and balance these against the costs and risks to democracy and free speech censorship. I insist on having the government establish a nexus of harm linking the proscribed utterance to some grave and imminent threat of tangible injury. This would require that the government perform a contextual analysis drawing on empirical data: Who was harmed? How were they harmed? This is much of the same sort of burden we demand of the plaintiff in a libel case. And if the argument dwells on society's right of self-defense, then we should seek evidence of a real threat to individuals and/or social stability.

III. THE LEGAL FRAMEWORK

Section 133 of the Israel Penal Law provides that "if a person committed, attempted, prepared, or conspired with another to commit an act of sedition, then he or she is liable to five years imprisonment."⁴ The Penal Law defines "sedition" as:

- (1) the arousal of hatred, contempt or to [sic] disloyalty toward the State or its lawfully constituted administrative or judicial authorities;
- (2) the incitement or provocation of Israel residents to attempt changing by unlawful methods anything established by an enactment;
- (3) the creation of discontent or resentment among Israel residents;
- (4) the promotion of conflict and enmity between different parts of

³ Critics may make the counter-argument that this is a dangerous way of making a symbolic statement: it creates a weapon against the freedom of expression that might all too easily be abused. It also encourages certain laziness in the public, who may feel that the existence of a criminal law excuses private citizens from the civic obligation to stand up for constitutional values by speaking out against hate-mongers.

⁴ Penal Law, 5737-1977, 8 LSI 133 (1977) (Isr.).

the population.⁵

The Israel Penal Law also addresses the issue of hate. Section 144F(a) provides:

If a person commits an offense out of a racist motive . . . or out of enmity toward a public because of their [sic] religion, religious group, community of origin, sexual inclination or because they are foreign workers, then he shall be liable to double the penalty set for that offense or to ten years imprisonment, whichever is the lesser penalty.⁶

In August 1986, in fighting against the *Kach* movement established by Meir Kahane,⁷ the Knesset (Israeli Parliament) amended the Penal Law to specify “incitement to racism” as a criminal offense:

(a) If a person publishes anything in order to incite to racism, then he is liable to five years imprisonment.

(b) For the purposes of this section, it does not matter whether the publication did cause racism, and whether or not it is true.⁸

Further:

If a person holds a publication prohibited under section 144B for distribution, in order to cause racism, then he is liable to one year imprisonment, and the publication shall be confiscated.⁹

The term “racism” is defined as:

persecution, humiliation, degradation, a display of enmity, hostility or violence, or causing violence against a public or parts of the population, all because of their [sic] color, racial affiliation or national ethnic origin.¹⁰

Section 4 of the Prevention of Terrorism Ordinance, 1948, holds that “a person . . . publish[ing] . . . words of praise or sympathy for or an appeal for aid or support of a terrorist organisation,” and a person assisting the organization in its activities, is subject to criminal proceedings and a maximum penalty of three years’ imprisonment and/or a fine of up to £1,000.¹¹ Section 144D2 of the Penal Code added

⁵ Penal Law, 5737-1977, 8 LSI 136 (1977) (Isr.).

⁶ Penal Law, 5737-1977, 8 LSI 144F(a) (1977) (Isr.).

⁷ For discussion on Meir Kahane’s ideology, see generally his most comprehensive book MEIR KAHANE, UNCOMFORTABLE QUESTIONS FOR COMFORTABLE JEWS (1987).

⁸ Penal Law, 5737-1977 (Amendment No. 20), 8 LSI 144B(a)-(b) (1986) (Isr.).

⁹ Penal Law, 5737-1977, 8 LSI 144D (1986) (Isr.).

¹⁰ Penal Law, 5737-1977, 8 LSI 144A (1977) (Isr.). For a critical discussion of this law, see RAPHAEL COHEN-ALMAGOR, THE BOUNDARIES OF LIBERTY AND TOLERANCE ch. 13 (1994).

¹¹ Prevention of Terrorism Ordinance, 5708-1948, KT 24, No. 33 (Isr.), available at http://www.mfa.gov.il/MFA/MFAArchive/1900_1949/Prevention%20of%20Terrorism%20Ordinance%20No%2033%20of%205708-19.

a new provision—incitement to violence and terror—that encompasses any publication that calls for violent action or terrorism, or words of praise, support, or encouragement of violence. The Code provides:

- (a) If a person publishes a call to commit an act of violence or terror, or praise, words of approval, encouragement, support or identification with an act of violence or terror (in this section: inciting publication) and if—because of the inciting publication’s contents and the circumstances under which it was made public there is a real possibility that it will result in acts of violence or terror, then he is liable to five years imprisonment.
- (b) In this section, “act of violence or terror”—[is] an offense that causes a person bodily injury or places a person in danger of death or of severe injury.
- (c) The publication of a true and fair report about the publication prohibited under subsections (a) and (b) does not constitute an offense under this section.¹²

The result is that in order to convict a person for inciting violence or terrorism, the prosecution must prove that the content was inciting, that the intention of the publisher was to incite violence or terror, and that the likelihood of violence as a result of the publication was a concrete probability. Compared to the offense of praising acts of violence under section 4(A) of the Prevention of Terrorism Ordinance, the offense of incitement to violence or terror does not prohibit speech that contributes to creating a climate of violence, unless there is a real possibility that it would lead to a violent act or terror.¹³

IV. THE ATTORNEY GENERAL’S STANCE: RECENT TRENDS

In 2005, during the onset of Prime Minister Sharon’s Disengagement Plan, which was designed to evacuate all the Gaza Strip

¹² Penal Law, 5737-1977, 8 LSI 144D2 (1977) (Isr.). See also www.halachot.co.il.

¹³ For further discussion, see Miriam Gur-Arye, *Can Freedom of Expression Survive Social Trauma: The Israeli Experience*, 13 DUKE J. COMP. & INT’L L. 155 (2003); Miriam Gur-Arye, *HaGvulot Pliot Al Bituyim HaTormim L’Hivutzrot Aklim Alim* [Criminal Limitations on Expressions that Contribute to Violent Atmosphere], in 2 SEFER SHAMGAR MA’AMARIM [ESSAYS IN HONOUR OF PRESIDENT MEIR SHAMGAR] 136-55 (Aharon Barak ed. 2003); Mordechai Kremnitzer, *MaHi HaStay Asurah?* [What Is Forbidden Incitement?], in KOACH HAMILIM V’HACHULSHAT HADA’AT [POWER OF THE WORDS AND THE FRAILTY OF REASON] 100-112 (Michael Konfino ed. 2002). See also CrimC (TA) 2110/03 State of Israel v. Haim Pniri and Others [2005] IsrDC 5765(1) 826, available at http://209.85.129.132/search?q=cache:sS6X6w0igFwJ:www.nevo.co.il/Psika_word/mechozi/m05071624-192.doc+%D7%AA.%D7%A4.+2110/03&hl=iw&ct=clnk&cd=3&gl=il, where people were convicted for inciting racism. They painted graffiti in public places, saying “Expel the Arabs.” *Id.*

settlements and withdraw the Israel Defense Forces (“IDF”), when considerable public protest was crystallizing, deliberations were held in the offices of the Legal Advisor to the Government and the Attorney General as to which path the law enforcement system would take. Should the route of stern and explicit enforcement be taken, where not even the smallest offense will go unpunished given the potential hazard concealed in it? In the alternative, should law enforcement adhere to tolerance, seeing every speech as worthy of protection, and every protest legitimate, given the weight of the historical event and the sincere pain of the settlers?

The basic assumption in those deliberations was that the prosecution had enough evidence to open an investigation in one case or another (i.e., there was reasonable suspicion for speech transgressions, like sedition under Sections 133 and 136 of the Penal Law, or incitement to disobedience under Sections 109-10 of the Penal Law).¹⁴ The question was whether to open an investigation upon receiving such complaints initiated by a citizen or by the police.¹⁵ In other words, whether the broader public interest was better served by choosing the criminal path over tolerance.

Shendar explained that his office had to pit the need for a moral ruling regarding the resulting benefit for the social framework by prosecuting speech transgressions vis-a-vis the resulting harm to democracy from that potential prosecution.¹⁶ This calculation of pros and cons, losses and gains tried to assess the necessity of belligerent preemptive acts that excluded free expression. This task, of course, was not easy, and one can hear in Shendar’s language the reluctance to proscribe free speech and the desire to avoid opening investigations and trials on such concerns. Free speech, or more accurately the freedom to protest, was perceived as a basic right, and much concern was given to the issue of trust: preserving the people’s trust, including those associated with the hard-core settlers,

¹⁴ Section 110 of the Penal Law, Incitement to Disobedience, states:

If a person incited or induced a person who serves in an armed force to disobey a lawful order, then he is liable to one year imprisonment; if thereby he intended to injure national security, then he is liable to five years imprisonment; if the offense was committed when armed hostilities are in progress by or against Israel, then he is liable to seven years imprisonment.

Penal Law, 5737-1977, 8 LSI 110 (1977) (Isr.).

¹⁵ Eran Shendar, Law Enforcement, Freedom of Expression, and its Place in the Realm of Ideological Crimes During the Disengagement Period, Conference on Freedom of Speech In Light of Prime Minister Sharon’s Disengagement Plan (Gaza First Plan), Univ. of Haifa (Dec. 20, 2005), available at http://cds.haifa.ac.il/documents/pastconferences/freedom_of_speech_shendar.pdf.

¹⁶ HCJ 935/89 Uri Ganor v. The Attorney General [1989] IsrSC 44(2) 485, 508-509 (Isr.).

in the law enforcement system.¹⁷

The Attorney General decided to take two different paths regarding free expression and free action. On free expression, the limits of tolerance and restraint were stretched, due to a conscious decision to not investigate nor prosecute speech, even speech on the verge of legality. The Legal Advisor to the Government, Menachem Mazuz, explained that the existence of broad limits of protest was of utmost importance: it is better to allow opposition feelings of anger and frustration rather than face violent underground movements.¹⁸ On the other hand, with regard to free action, there was little tolerance regarding road blocks, oil dispensers, ninja throwers, or burning cars at main junctions. At the core of this decision was the belief that the public interest necessitated this dual policy: providing leeway for legitimate protest, allowing the venting of anger and rage and, at the same time, taking an aggressive approach against breaches of law aimed at the creation of anarchy and the violent thwarting of Knesset decisions.¹⁹

V. CONCLUSION

In a perfect world we would respond to hate with education, not criminal laws. But our world is not perfect and history shows that hate speech might lead to horrible crimes. Therefore, legal intervention may be warranted to fight down racism and bigotry. At the same time we should insist on satisfying some stringent requirements before we pursue the legal avenue. The law may be appropriate but only in significant rare circumstances.

Prior to employing the law we need to pay notice to considerations of ethics and legitimacy. Here, the media has considerable weight in delineating the bounds of the acceptable. The media should expose hate-mongers and abandon the veil of objectivity. The notion of objectivity does not require the media to treat hate-mongers as though their views have moral or factual legitimacy. Media outlets should

¹⁷ Eran Shendar, Law Enforcement, Freedom of Expression, and its Place in the Realm of Ideological Crimes During the Disengagement Period, Conference on Freedom of Speech In Light of Prime Minister Sharon's Disengagement Plan (Gaza First Plan), Univ. of Haifa (Dec. 20, 2005), available at http://cds.haifa.ac.il/documents/pastconferences/freedom_of_speech_shendar.pdf.

¹⁸ Menachem Mazuz, *HaMivchan HaDemokrati [The Democratic Test]*, MAARIV ONLINE, Aug. 17, 2005, <http://www.nrg.co.il/online/1/ART/972/253.html>.

¹⁹ Raphael Cohen-Almagor, *Political Extremism and Incitement in Israel 1993-1995, 2003-2005: A Study of Dangerous Expressions, Democracy and Security*, 3 DEMOCRACY & SECURITY 21, 27-28 (2007) (citing Shendar, *supra* note 17).

denounce deliberate attempts to incite hatred.²⁰

A final word about the Internet: much of the bigotry and hateful messages are now found online. The Internet is no different from other media and should not be exempted. The content matters, not the mode of communication. If Israeli society decides that some expressions do not merit protection, it would be absurd to prohibit them in the society at large while permitting the same expressions on the free highway of the Internet.²¹ In this context I should mention that the International Covenant on Civil and Political Rights calls for national laws against “advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.”²² Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination requires its signatories to outlaw “dissemination of ideas based on racial superiority or hatred.”²³ Finally, the First Additional Protocol to the Council of Europe’s Convention on Cybercrime, stressing that “all human beings are born free and equal in dignity and rights,” requires the adoption of measures prohibiting the transmission of racist or xenophobic messages through computer systems.²⁴

²⁰ See generally RAPHAEL COHEN-ALMAGOR, SPEECH, MEDIA, AND ETHICS: THE LIMITS OF FREE EXPRESSION ch. 4 (2001); Raphael Cohen-Almagor, *Political Extremism and Incitement in Israel 1993-1995, 2003-2005: A Study of Dangerous Expressions, Democracy and Security*, 3 DEMOCRACY & SECURITY 21 (2007). My view on fighting down incitement is much more rigid than on fighting down hate. This is due to the factor of time: incitement is a form of speech-act where there is little time to react and prevent the harm.

²¹ For further deliberation, see generally RAPHAEL COHEN-ALMAGOR, THE SCOPE OF TOLERANCE 252-60 (2006); RAPHAEL COHEN-ALMAGOR, IN INTERNET’S WAY, in ETHICS AND EVIL IN THE PUBLIC SPHERE: MEDIA, UNIVERSAL VALUES & GLOBAL DEVELOPMENT (Mark Fackler & Robert S. Fortner eds., forthcoming 2009).

²² International Convention on Civil and Political Rights art. 20(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

²³ International Convention on the Elimination of all Forms of Racial Discrimination art. 4, Nov. 20, 1963, 60 U.N.T.S. 195, *available at* http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

²⁴ Additional Protocol to the Convention on Cybercrime, Concerning Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems art. 3, Jan. 28, 2003, S.T.E. 189, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>.