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Limiting the Limitations on Political Speech

by Zeev Segal

The assassination of the late Israeli Prime Minister, Yitzhak Rabin, was not just the killing of a nation's political leader. The assassination brought an end to a firm belief that hate speech and hate propaganda could never lead to such an act of violence by one Jewish person against another. Nonetheless, Yegal Amir currently stands trial in Tel-Aviv for the assassination.

The probable connection between the assassination and hate statements which were made by religious leaders who viewed the prime minister's policy as destructive of all Jewish values, has sharpened the debate over free politi-



Photo courtesy of Zeev Segal

Zeev Segal

cal speech versus the right of democracy to defend itself.

Israel is deeply committed to fundamental human liberties, even in the absence of a comprehensive written constitution and an entrenched bill of

rights. In the landmark decision *Kol Ha'am* in the 1950s, as justification for limiting speech, the Israeli Supreme

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Court introduced into the legal system standards for freedom of speech similar to the American standard "clear and present danger." In the 1989 *Schnitzer* case, Justice Aharon Barak adopted the American "near certainty" test to annul a military censor's decision to prevent publication of an article that dealt with the functioning of the Israeli Mossad, the Israeli intelligence agency. The "near certainty" test, which prevailed in the United States in the 1950s, requires that there be a probable, material harm that flows from the speech. The degree of probability required is high, even if the serious danger expected should not necessarily be immediate.

Following such Israeli Supreme Court decisions, the "free market of ideas," which in the language of U.S. Supreme Court Justice Oliver Wendell

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Holmes is essential to democracy, continues to flourish in Israel. The opportunity for free and open debate exists in spite of valid legislation hostile to freedom of speech. The policy adopted for many years by the State's prosecution refrained from instituting legal criminal proceedings when speech was involved. Such a policy reflected tolerance toward intolerance. It enabled inflammatory speech to become part and parcel of our daily public life. Publications — in newspapers, demonstrations, etc. — even when containing incitement to racism, were met with little law enforcement.

Israel's deep respect for freedom of speech concurs with the European Convention on Human Rights. Article 10 of the Convention allows limitations on freedom of expression only where they are prescribed by law and are "necessary in a democratic society," *inter alia*, for "national security" or "public safety" or "the protection of morals . . . or the rights of others."

In the 1994 case of *Jersild v. Denmark*, the European Court of Human Rights for the first time addressed the difficult questions of whether and how far free expression should be limited when the content of the political expression is of a racist nature. The *Jersild* case arose following the broadcast of a television program by the applicant, a journalist. It consisted of an interview with three youth who made extremely abusive and derogatory remarks about ethnic groups in Denmark including the assertion that blacks and other immigrants were not human beings. Following the broadcast, the applicant was convicted of having aided in the dissemination of racist remarks.

The Court of Human Rights ruled that the Danish law restricting freedom of speech in order to protect groups of people from racist speech was enacted for a legitimate purpose. The Court, however, also considered the question whether the applicant's conviction was "necessary" in a democratic society.

In the Court's view, news reporting is one of the most important means by which the press plays its "watchdog"

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role. To punish a journalist for assisting in the dissemination of statements made by another person in an interview would seriously inhibit the role of the press in discussing matters of public interest. Thus, by a majority of 12 votes to 7, the Court held that the means used were *disproportionate* to the aim of protecting the rights of others, and concluded that there had been a breach of Article 10 of the European Convention on Human Rights.

It is my submission that the majority view in the *Jersild* decision strikes a proper balance between freedom of expression, racism, and incitement. Although incitement to racism should not be ignored by the legal machinery, we do not have to kill the messenger, i.e. the media, to combat the message.

The Israeli criminal law, which is

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based in this respect on ex-Mandatory (British) provisions, defines the offense of seditious publication in very broad terms. It is an offense to promote feelings of ill-will and hostility between different classes of people. According to the law, promotion of hostility directed at the state shall be deemed seditious publication unless it aims to show that the government was

The law states that incitement to racism constitutes a criminal offense if it is published with the specific intention to incite racism. The obligation to prove specific intent makes the law very hard to implement.

wrong in its actions or omissions, or to convince the citizenry to change the political reality by lawful means.

In 1986, the Israeli parliament enacted a new criminal offense: incitement to racism. The law states that incitement to racism constitutes a crim-

inal offense if it is published with the specific intention to incite racism. The obligation to prove specific intent

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makes the law very hard to implement.

The policy of not applying the law is evidenced by the prosecution's decision in 1993 not to indict ex-Chief Rabbi Shlomo Goren, who called on Israeli Defense Force soldiers not to obey orders to evacuate Jewish settlements in Judea and Samaria [i.e., the West Bank] and the Gaza Strip. The policy, which was based, *inter alia*, on deep respect for freedom of speech, was challenged before the Israeli Supreme Court. The Court, however, did not find the policy unreasonable.

The same policy was followed by the Attorney-General in July 1995 in his decision not to institute criminal proceedings against Rabbis who published a statement that soldiers should not obey orders to withdraw from army camps in the Territories.

An exception to this policy came with the indictment of Benjamin Kahana, who was charged in 1993 with the offense of seditious publication by spreading hate propaganda against the Arab minority. Although Kahana was acquitted in a lower court, the District Court of Jerusalem allowed an appeal by the State. In its decision, rendered in December 1995, the court ruled that incitement to racism is one aspect of seditious publication. The court (Judge David Heshin) paid tribute to the importance of an open political debate, yet found grounds for conviction when it concluded that the publication was likely to promote racism as a natural result of the speech.

One month after Prime Minister Rabin's assassination, the Attorney-General brought criminal proceedings for seditious publication against the organization, Zo Artzeinu ("This is Our Land"). This action led to disturbances of public order. The Attorney-General

threatened the press that he would institute legal proceedings against newspapers that conveyed messages of incitement. He later retracted the threat following a petition to the Supreme Court by the Journalists' Association.

The idea of instituting legal proceedings against the media, which often reports on sedition and incitement, albeit never with the intention to promote such actions, is a road that should not be taken. Fighting words can be attributed only to those who promote them with a very specific intention, and not to those who make society aware of such ideas.

In a democratic society, discussion should be open to all views and all messages, except in very rare circumstances. Only a serious and real danger to public safety, which is imminent and almost inevitable, may justify limiting freedom of speech.

Moreover, limitations on speech are

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contrary to democracy. Therefore, limitations on the freedom of speech are justified only when democracy is faced with a genuine and substantial need to defend itself. When such a situation arises and a compelling and pressing public necessity becomes evident, it is the right of the State to act, via its criminal code, in order to preserve democracy. Then, and only then, does the right to exist come before the citizens' right to speak. 🌐

