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Is There a Right to Hate Speech?

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POINT/COUNTERPOINT

Protected Speech or Unlawful Incitement: An Israeli Perspective

by Gabriel Eckstein

Freedom of speech and expression are arguably two of the most guarded liberties globally. They often are touted as fundamental to any democratic society that is based on pluralism and respect for human dignity. Yet, states worldwide have devised varying rationales for imposing limitations on the enjoyment of such rights. U.S. jurisprudence, for example, formulated the concept of "fighting words," while Germany places restrictions on statements considered to promote a belief in racial superiority.

Recently, the extent to which the freedoms of speech and expression should be protected has come to the fore of Israeli debate in light of the recent assassination of Israeli Prime Minister Yitzhak Rabin by a right wing extremist. Many Israelis, including the Prime Minster's widow, accuse the right wing Likud political party of inciting extremists to go beyond the bounds of civil disobedience (i.e., to engage in violence). One parliament member recently demanded that the Israeli media refuse to report on extremists' views and demonstrations. In addition, the Knesset (parliament) has been considering several bills that could modify the scope of the right to free speech and a free press in Israel.

In this issue's Point/Counterpoint, the authors consider whether or not international human rights law should permit governments to impose limitations on certain speech, in the context of the ongoing debate in Israel following Rabin's assassination. Natan Lerner is Professor of Law at Tel-Aviv University, where he teaches international law, and a lecturer at the Interdisciplinary Center for the Study of Business, Law and Technology. His most recent book is GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW. Zeev Segal also is Professor of Law at Tel-Aviv University and a legal commentator for the Israeli newspaper *Ha'aretz*. He specializes in administrative, constitutional, and media law. He recently published *Israel Ushers in a Constitutional Revolution: The Israeli Experience, The Canadian Impact* in CONSTITUTIONAL FORUM.

Is There A Right to Hate Speech?

by Natan Lerner

I have been asked to discuss whether international human rights law does or should permit limits on "inflammatory political speech" in the context of the debate that followed the assassination of Prime Minister Rabin. Leaving aside the question of the precise legal meaning of the words "inflammatory" and "political speech," I would like to point out that the debate in Israel regarding measures against the abuse of freedom of speech and association in order to incite against others, because of racial, religious or political motives, is not new. This debate does not differ from the worldwide controversy on how to strike a balance between those freedoms, in a democratic and pluralistic society, and the principles of coexistence, tolerance and respect for the human rights of all.

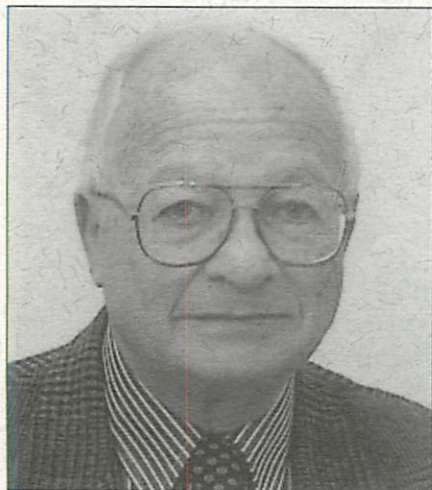

Photo courtesy of Natan Lerner

Natan Lerner

Sandra Coliver's *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* defines hate speech as: "an expression which is abusive, insulting, intimidating, harassing and/or which incites to violence, hatred or discrimination." Hate speech laws are those which prohibit any of the three types of hate speech: group libel, harassment, and incitement. These categories seem to cover the concept of "inflammatory political speech" and it is in this sense that I use the phrase in this article.

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The decision taken by the Government of Israel, on November 19, 1995, to declare illegal extremist, violent, and racist organizations, does not imply a departure from former norms, nor the addition of new limitations on freedom of speech or association. Israel has ratified the 1965 Convention on the Elimination of All Forms of Racial Discrimination (Convention), without reservation, and the 1966 Covenant on Civil and Political Rights (Covenant), with some reservations not related to the issue of incitement. Israel is therefore bound by universal human rights law regarding hate speech and incitement, as provided by Article 4 of the Convention and Article 20 of the Covenant. It should be noted that, unlike the United States, Israel did not introduce any reservation to the above-mentioned Article 4 of the Convention.

At its December 1994 session, the UN General Assembly adopted two significant resolutions. The first deals with "contemporary forms of racism, racial discrimination, xenophobia and related intolerance." The second expresses alarm at "the acts of violence, of intolerance and of discrimination on the grounds of religion and belief," and condemns "all instances of hatred, intolerance and acts of violence, intimidation and coercion motivated by religious extremism and intolerance."

A year earlier, the Committee on the Elimination of Racial Discrimina-

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tion (CERD), after receiving "evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference," reaffirmed that the provisions of Article 4 are mandatory and States Parties to the Convention must " not only . . . enact appropriate legislation but also . . . ensure that it is effectively enforced." The Committee reiterated that the prohibition on the dissemination of ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, as embodied in Article 19 of the Universal Declaration of Human Rights. It also drew attention to Article 20 of the Covenant, which restricts advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. In 1983, the Human Rights Committee, the implementing

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body of the Covenant, had already declared the prohibitions incorporated in Article 20 as "fully compatible with the right to freedom of expression contained in Article 19."

This interpretation of the provisions of the principal human rights treaties, which have similar counterparts in regional instruments, is the correct one. It is in this spirit that the Secretary-General of the United Nations, after analyzing legislation of 42 countries, drafted a Model Law Against Racial Discrimination which states that the freedoms of opinion, expression, and peaceful assembly should be subject to some restrictions, among them the following: (1) it shall be an offense to threaten, insult, ridicule or otherwise abuse a person or group of persons with words or behavior which may be interpreted as an attempt to cause racial discrimination or racial hatred; (2) it shall be an offense to defame an individual or group of individuals on racial grounds. Organizations which violate these restrictions should be declared illegal and prohibited.

Following this interpretation, many countries adopted measures to fight racial, religious, and political incitement. The list of states having such a legislation is a long one. Recently, the 1993 Italian law, the 1993 Human Rights Act in New Zealand, the new Russian Constitution of 1993, the South African Constitution of 1993, and the new Croatian Penal Code in preparation, each incorporated such measures. In addition, last November, Spain modified its Penal Code to declare illegal organizations promoting hatred or violence based on religion or race. The Code encompasses offenses against religious beliefs and threats against ethnic or other groups. Anti-Semitism is specifically mentioned among the motives for the promotion of hatred or violence and the advocacy of genocide is equally punished.

In the United States, where freedom of speech is so sacred, the Supreme Court declared in the well-known 1993 decision *Wisconsin v. Mitchell* that state legislation permitting tougher sentencing for offenses motivated by racial or religious hatred are constitutional. A recent amendment to Israel's new penal law similarly justifies the strengthening of penalties for offenses grounded in racist motivation.

Against this background, it is impossible to continue to argue that freedom of speech is *the* paramount value in a democratic and liberal society. This freedom is very important, but it is not absolute. And it cannot be invoked to undermine basic freedoms, violate the law, praise crime, or hurt others physically or emotionally.

Nobody in Israel is advocating restrictions on the expression of views,

It is clear that incitement to commit a crime or use violence should be restricted. The remaining discussion encompasses the more difficult issue of the dissemination of ideas repudiated by society.

opinions, or philosophies that may have a place in the free market of ideas. There is, however, a difference between opinion and incitement or instigation. It is clear that incitement to commit a crime or use violence should be restricted. The remaining

Should society wait until these views become a real and present danger to public peace?

discussion encompasses the more difficult issue of the dissemination of ideas repudiated by society on the whole because of their negative character, such as racism.

Should society wait until these views become a real and present danger to public peace? Is content enough to put into operation restrictions on free speech and association? In 1987, the Israeli High Court of Justice was asked to decide whether or not the Israeli Broadcasting Authority was entitled to refuse to broadcast utterances containing clear racist incitements by Kahane supporters. The question of "clear and present danger," as well as administrative considerations, played a role in the decision limiting the powers of the Authority. Justice Bach stated that when clear racism is present, it is sufficient to justify restrictions, even when there is no "near certainty" of harm to the social order. With the tragic and traumatic background of the Jewish people, Bach said, there was no need in Israel to emphasize "the utterly destructive influence of incitement to racial hatred."

There seems to be little doubt that the climate of incitement created by the extreme right in Israel — combining racism, religious radicalism, and political themes — was an essential factor leading to the assassination of the Prime Minister. The profile of the murderer and his friends and supporters, as in the case of Baruch Goldstein, is a profile of a typical bigot whose threats should not be tolerated even before they translate themselves into criminal acts.

Democracy must protect itself before it becomes too late. This is the basis of the argument of those who accept the need to restrict the freedoms of speech and association in those extreme cases when democracy, the rights or the good names of others, and public order are threatened by irresponsible individuals who could not care less about the rule of law and basic freedoms. ⊕