Freedom of Speech and Incitement Against Democracy

Edited by
David Kretzmer and Francine Kershman Hazan

Kluwer Law International

FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY

The Minerva Center for Human Rights,
The Hebrew University of Jerusalem

and

FRIEDRICH EBERT STIFTUNG

Edited by

David Kretzmer

and

Francine Kershman Hazan

KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / BOSTON

A C.I.P. Catalogue record for this book is available from the Library of Congress

ISBN 90-411-1341-X

Published by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands.

Sold and distributed in North, Central and South America
by Kluwer Law International,
675 Massachusetts Avenue, Cambridge, MA 02139, U.S.A.

In all other countries, sold and distributed
by Kluwer Law International, Distribution Centre,
P.O. Box 322, 3300 AH Dordrecht, The Netherlands.

Printed on acid-free paper

Printed in the Netherlands.

FOREWORD

Professor David Kretzmer*

On 4 November 1995, Prime Minister Yitzhak Rabin was murdered by a lone assassin. The assassination threw the country into turmoil, as well as into a period of soul-searching. The period between the signing of the Oslo Accords in 1993, and Mr. Rabin's assassination two years later had been one in which the schisms in Israeli society were widened and tensions ran high. While a majority of the country supported the accords, as time passed opposition mounted. Many of the opponents regarded the accords as a disaster that shattered their dreams of a Greater Land of Israel. In the months that preceded the assassination the rhetoric of the government's opponents became more and more vociferous. Mr. Rabin was called a traitor and murderer; and at one demonstration a placard was held up portraying Mr. Rabin in the uniform of an SS officer. At the same time attempts were made to delegitimize the government, mainly by the pernicious argument that it did not enjoy a 'Jewish majority'. Rabbis published a proclamation that soldiers should refuse orders to vacate Jewish settlements.

The prosecuting authorities took a liberal attitude to all the anti-government speech. Free speech arguments prevailed in the face of some demands to prosecute for incitement. It would seem that Mr. Rabin's assassination led the authorities, and many others, to wonder whether their restraint had been well advised. The direct cause of Mr. Rabin's death was the bullets of the assassin, not words, but many were convinced that words had played a significant role in creating the atmosphere in which the assassination of the prime minister had become possible. The restraint that had been shown before Mr. Rabin's assassination was cast aside. People who expressed satisfaction with Mr. Rabin's death were arrested and prosecuted. Calls were made for an examination of

---

* Director, The Minerva Center for Human Rights, The Hebrew University of Jerusalem.

Israeli law regarding incitement and proposals were made for new legislation that would specifically outlaw expressing support for an offence involving violence.

It seems to me that it was fortunate that no actual decisions on legislation were made in the heat of the moment. Time for reflection was needed. The articles in this book were originally presented at a conference held one year after the assassination. The object of the conference was to contribute to the reflection needed on a number of issues:

1. What are the boundaries of freedom of expression in a democratic society? To what extent should such a society tolerate anti-democratic speech?
2. When should a democratic society act against speech that advocates violence?
3. How should the crime of incitement be defined? Should mere expression of support for acts of violence be criminalized?
4. What attitude should the legal system take towards defamation of public figures? What are the limits to what one may legitimately say about political leaders?
5. Is the law a good tool to use? How do all the theoretical arguments look when they reach the political process? Can we make general statements that are relevant in all democratic societies, or are all these questions necessarily related to the political conditions and culture of a given society at a given time?

The articles in this book, which were originally presented at the Jerusalem conference, reveal a large diversity in views and perspectives. Some of the articles explore the criminal law of incitement. Eser, after examining the German law, expresses doubt about the use of criminal law to suppress speech that supports violence. He regards the criminalization of words of approval for a crime as highly problematical. Alexander argues for a libertarian approach to free speech. He would not hold a speaker liable for speech which leads to acts of responsible individuals. Lawrence suggests that the traditional emphasis of criminal law on notions of culpability, mainly the actor's state of mind, should be the determining factor. He concedes, however, that this does not provide easy answers in cases of speech likely to cause violence. Harel argues that two tests should lie at the center of criminal liability: materialization of harm and the intention/meaning test.

The doubts about the use of criminal law and the libertarian approach have not convinced Kremnitzer and Ghanayim, who present a proposal for reform of Israeli criminal law. They would abolish the crime of sedition, but would redefine incitement so as to include, inter alia, praise for, identification with or support for

a serious felony that has been committed, as well as publishing a call, explicit or implicit, to commit a felony or an act of violence.

Other articles deal with basic principles of free speech theory. Schauer examines the difficulties in tracing the causal relationship between speech and harm. He distinguishes between probabilistic and deterministic notions of harm and shows that it is impossible to separate descriptive discourse about cause and effect of speech and normative arguments about free speech. Schauer concludes that there is an 'unsatisfying interdependence of fact and value in so much thinking about free speech.'

Frowein reviews the way the European Commission and the Court of Human Rights have dealt with incitement against democracy. He shows that these institutions have developed a conception of democracy that will not accept preparation for totalitarianism. Frowein argues against a libertarian approach to speech that advocates violent overthrow of the democratic structure. He is not afraid of drawing lines between legitimate political discourse and unacceptable incitement. Like Frowein, Baer also rejects a libertarian approach to free speech. She argues for a contextual model that stresses the right to equality and the victims' perspective.

Fletcher addresses the defamation of public figures. He supports use of tort law, rather than criminal law, and argues that the approach of the US Supreme Court in *New York Times* v. *Sullivan*, ignored traditional concepts of tort law.

Finally, Oberndörfer examines the notion of a 'militant democracy' adopted in Germany since the Second World War. He expresses doubt whether use of the law has in fact contributed much to the protection of democracy.

The appropriate legal arrangements on the issues addressed in this book must be judged according to the political and social conditions, as well as the legal and political culture, in a given society. In no society will the answers to the questions raised here be easy, but the different approaches discussed in this volume certainly enrich the debate of the issues that are relevant not only in Israel, but in many modern democracies.

NOTES ON CONTRIBUTORS

Larry A. Alexander is Warren Distinguished Professor of Law at the University of San Diego School of Law. He writings include: *Whom Does the Constitution Command?* (Greenwood Press) and *Constitutionalism: Philosophical Foundations* (Cambridge University Press). He is co-editor of *Legal Theory* and a member of the editorial board of *Law and Philosophy* and *Ethics*. He is president-elect of AMINTAPHIL and a member of the American Society for Political and Legal Philosophy and the American Philosophical Association. His teaching and research interests include constitutional law, substantive criminal law and legal and moral philosophy.

Susanne Baer studied political science and law at the Free University in Berlin and the University of Michigan Law School, and received her Ph.D. in Frankfurt am Main (*Dignity or Equality? On Constitutional Directives for Adequate Law Against Discrimination* (Nomos)). She is currently assistant professor of law at Humboldt University in Berlin. She is co-director of a programme on feminist jurisprudence, co-editor of the feminist law journal *Streit* and a founder of model projects on intervention against domestic violence. Her speeches and publications cover topics in comparative, constitutional and administrative law, as well as legal theory.

Albin Eser, Prof. Dr. Dres. h.c., MCJ, received his legal education at the Universities of Würzburg and Tübingen, the Free University of Berlin and the Universities of New York and Cambridge. Since 1982 he has been full professor at the University of Freiburg im Bresgau and director of the Max Planck Institute for Foreign and International Criminal Law. From 1971 to 1978 he served as part-time judge at the State Courts of Appeals at Hamm/Westphalia and Stuttgart. From 1989 to 1992 he was vice-president of the German Research Foundation and, from 1994 to 1997, chairman of the Social Sciences and Humanities Section of the Max Planck Society. His publications in English include *Suicide and Euthanasia: The Rights of Personhood* (University of Tennessee Press).

George P. Fletcher, J.D., LL.M., is Cardozo Professor of Jurisprudence at Columbia University School of Law. He is a member of the California Bar and appears television as a professional moderator. His extensive writings include *Basic Concepts of Legal Thought* (Oxford University Press) and *With Justice for Some: Victims' Rights in Criminal Trials* (Addison-Wesley). His fields of research and teaching cover criminal law, torts, comparative law and legal philosophy. He was among the first American academics to teach law in Hungary after the fall of Communism.

Jochen Abr. Frowein, Prof. Dr. Dr. h.c., is Professor of Constitutional and Public International Law at the University of Heidelberg and director of the Max Planck Institute for Comparative Public Law and International Law, as well as vice-president of the Max Planck Society. From 1981 to 1993 he was vice-president of the European Commission of Human Rights and president of the German Society for International Law (from 1989). He is a member of the Institut de Droit International.

Alon Harel, D.Phil., LL.M., is a senior lecturer in the law faculty of the Hebrew University of Jerusalem. He has published articles in the Oxford Journal of Legal Studies and the University of Pennsylvania Law Review. He is a member of the Association of Civil Rights in Israel.

Khaled Ghanayim, LL.M., is a doctoral student in the law faculty of the Hebrew University of Jerusalem. He is a research assistant at the Israel Democracy Institute, and a teaching assistant in the law faculty of the Hebrew University of Jerusalem and the Ramat Gan College School of Law. His main academic interest is Israeli criminal law, in particular its relationship to German criminal law. His publications include *The Law of Incitement*, *The Law of Defamation* and *The Error in Persona and Aberratio Ictus - A Transferred Malice?* (with Mordechai Kremnitzer).

Mordechai Kremnitzer, Ph.D., is Ivan C. Rand Professor of Law at the Hebrew University of Jerusalem, and is a former dean of its law faculty. He heads the project for the adaptation of existing Israeli law to the new Basic Laws at the Israel Democracy Institute, and has chaired a number of government commissions on legal and educational issues. He is the author of numerous books and articles in the fields of penal and public law.

Frederick M. Lawrence, J.D., is professor of law and associate dean for academic affairs at the Boston University School of Law. His teaching and research interests include civil rights crimes and civil rights enforcement, civil procedure and criminal law. He is the author of *Punishing Hate: Bias Crimes under American Law* (Harvard University Press).

Anthony Lewis has been a columnist for the New York Times since 1969. He has twice won the Pulitzer Prize, the second for his coverage of the US Supreme Court. He is the author of *Portrait of a Decade*, about changes in American race relations, and *Make No Law: The Sullivan Case and the First Amendment*. He was for fifteen years a lecturer at Harvard Law School, teaching a course on the constitution and the press. He has taught at a number of other universities as a visitor, among them the universities of California, Illinois, Oregon and Arizona. Since 1983 he has held the James Madison Visiting Professorship at Columbia University.

Dieter Oberndörfer, Ph.D., is the holder of the Chair of Political Science at the University of Freiburg and is director of the Institute of Political Science. He also holds the Stephen Muller Chair for Contemporary German Politics at the Johns Hopkins Bologna Center. He has approximately 200 publications to his name in the fields of history of political ideas and political theory, politics and administration in the Third World, political opinion and election research, and nationalism. He is a member of the German UNESCO Commission and is on the board of directors of the German Peace Corps.

Frederick Schauer, J.D., is Frank Stanton professor of the First Amendment and Academic Dean at the John F. Kennedy School of Government, Harvard University. A fellow of the American Academy of Arts and Sciences and vice-president of the American Society for Political and Legal Philosophy, he is the author of *Free Speech: A Philosophical Inquiry* (Cambridge University Press), *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press), *The First Amendment: An Anthology* (West) and *The Philosophy of Law* (Harcourt Brace).

TABLE OF CONTENTS

SESSION I

BOUNDARIES OF FREEDOM OF SPEECH

KEYNOTE ADDRESS: FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY

Anthony Lewis

We meet to discuss a compelling subject in compelling circumstances. I necessarily bring to the subject American premises. Everyone at this conference is undoubtedly familiar with the American view - the very broad view - of freedom of speech. In the United States today, that freedom is a legally enforceable right that the courts have sustained even when the 'speech' involved was unpopular, hateful, or menacing. Burning the American flag as a protest against government policy was held to be a form of protected speech. American Nazis could not be forbidden to march through the streets of Skokie, Illinois, a village that was home to survivors of the Holocaust. University speech codes that prohibited the use of words insulting to people because of their race or religion have been held to be unconstitutional.

But even if you are familiar with the general American attitude, I think I still must discuss it. For one can easily assume, as most Americans probably do, that we have *always* taken this permissive legal view of what may be said. That is not true - not at all. It is only quite recently in our history that unpopular speech has been protected by firm legal doctrine. And in the long struggle towards that end I believe we can see the reasons for that freedom.

The First Amendment, with its sweeping command that Congress 'make no law... abridging the freedom of speech, or of the press,' was added to our Constitution in 1791. Just seven years later, Congress passed the Sedition Act that made it a crime to publish false, malicious statements about the President, John Adams. It was a political move by members of the Federalist Party, then the majority in Congress, to protect a Federalist President from criticism by followers of the Vice-President, Thomas Jefferson. A number of Jeffersonian editors were prosecuted and convicted, in the run-up to the election of 1800, for

D. Kretzmer and F. Kershman Hazan (eds.),
Freedom of Speech and Incitement Against Democracy, 3–10.

commentary that really did no more than poke fun at Adams's supposed pomposity.

Jefferson and Madison attacked the Sedition Act as a violation of the First Amendment and of the whole system created by the Constitution, the republican form of government. The Act, Madison said, was 'levelled against the right of freely examining public characters and measures, and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right.' In America, Madison said, drawing a distinction from Great Britain, 'the people, not the government, possess the absolute sovereignty.' If citizens are the ultimate rulers, it follows that they must be able to criticize those whom they choose to govern them.

The Supreme Court never passed on the constitutionality of the Sedition Act. However, it became an issue in the election of 1800. Jefferson won, and on taking office he pardoned all those who had been convicted under the act. In a sense, then, the United States had had a referendum on whether it wanted to carry over from English law the crime of seditious libel, making it an offence to criticize the state or its officials. The answer was no, but it was not a definitive answer.

After the Sedition Act, it was more than a century before Congress again passed a law that punished political speech. When the United States entered World War I, in 1917, the country's mood was intensely jingoistic; words of German origin were eschewed, so that 'sauerkraut' was called 'liberty cabbage'. In that atmosphere, Congress passed the Espionage Act that made it a crime to obstruct the war effort. In 1918, Eugene V. Debs, a socialist and pacifist who was five times the Socialist Party's candidate for President, was prosecuted for a speech in which, in passing, he expressed sympathy for three men who were in jail for helping others who had refused to register for the draft. He said they were paying a penalty for 'seeking to pave the way to better conditions for all mankind.' For those words, Debs was convicted of violating the Espionage Act and sentenced to ten years in prison. He ran for President the next time from a Federal penitentiary. Debs took his case to the Supreme Court, arguing that his right to free speech under the First Amendment had been violated. But the Court unanimously rejected his argument in an opinion by Justice Oliver Wendell Holmes, Jr.

To describe the *Debs* case is to appreciate how profound a change there has been since then in the Supreme Court's understanding, and Americans' understanding, of the value of free speech. It is unthinkable now that anyone would be sent to prison for speaking critically of official policy, whether or not in wartime. The change began just a few months after the *Debs* decision, when the Supreme Court decided another Espionage Act case, *Abrams* v. *United*

States. It involved anarchists who threw leaflets from the tops of buildings in New York protesting President Wilson's dispatch of troops to Russia after the Bolshevik Revolution. They were convicted and sentenced to *twenty* years in prison, for words that did no more than criticize government policy. The Supreme Court again upheld the convictions, but this time there was a dissent by Justice Holmes, joined by Justice Brandeis. I must quote a few sentences of it:

> 'Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and you want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition... But when men have come to realize that time has upset many fighting faiths, they may cone to believe even more than the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market... That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment... While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.'

What extraordinary rhetoric for a judicial opinion. It was the first, ever, by a Supreme Court justice that treated freedom of speech as a fundamental value. And it came from one, Holmes, whose dominant position as a judge was to uphold the power of the state to regulate. Though he did not admit it, Holmes had evidently changed his view since the *Debs* decision. He saw now that speech was not like other activities that he would allow legislatures to limit; laws against free speech prevented the very experimentation that he thought must be allowed in democratic societies. What moved Holmes to change his mind? It is a matter of endless speculation. Professor Vincent Blasi of Columbia Law School suggests that he saw the 'red scare' after the Bolshevik Revolution - saw the United States gripped by fear - and understood the danger to democracy in punishing speech.

Not that Holmes believed in absolute freedom of speech. As a limitation he offered the formula that has become famous: 'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.'

Justice Holmes really was prepared to allow speech that he loathed, so long as it was not likely to produce imminent lawlessness. His resolve was shown in a dissent, again joined by Brandeis, when the Court, in 1925, upheld the conviction of Benjamin Gitlow for publishing a manifesto that called for mass

action to bring about a 'revolutionary dictatorship of the proletariat'. Holmes's words bear on the work of this conference.

> 'It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement... The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.'

Remarkable words to be uttered by a product of the New England aristocracy. On the one hand, Holmes dismisses Gitlow's work as a 'redundant discourse', as if to say that a harmless crank can be indulged his freedom. On the other, he says with near-fatalism that a democracy must allow itself to be replaced by proletarian dictatorship if in the long run its citizens so desire.

Holmes's image of various believed truths competing in the marketplace comes close to John Stuart Mill's classic argument for freedom of speech. To silence another opinion as false, Mill said, is to assert our own infallibility. Usually, the prevailing opinion on any subject is only partly true, 'and it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied...'

A different reason for a society to value freedom of speech was given by Holmes's great collaborator in the struggle to apply the First Amendment, Justice Louis Brandeis. The argument emerges from Brandeis's separate opinion in the 1927 case of *Whitney* v. *California*, which even against the eloquence of Holmes has to stand as the most luminous expression of American belief on the subject. Again, I must ask you to indulge some quotation:

> 'Those who won our independence believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed... that the greatest menace to freedom is an inert people... They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances... Fear of serious injury alone cannot justify suppression of free speech and assembly... Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears... Those