



## **Hate in the Name of God** **Religious Hate Speech in the “Jewish and Democratic State” of Israel**

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In this paper, I would like to share with you some of the dilemmas we face concerning hate speech against the Arab minority in Israel. In particular, I wish to focus on the incitement to racism by Jewish religious leaders, most of whom are well known and influential figures in the Israeli public arena.

Freedom of expression is, of course, one of the key liberties we strive to protect.<sup>1</sup> Nonetheless, on several occasions ACRI has held lengthy internal discussions in order to clarify our position on issues in which freedom of expression clashes with other basic rights so as to enable us to decide whether and how to act in cases of hate speech.

In the 1980s, for example, we witnessed outbursts of blatant racism by "Rabbi" Meir Kahane, whose style and content brought to mind the racist incitement of Europe in the 1930s. In light of this terrifying phenomenon, ACRI desisted from opposing the legal ban blocking any political party which incites racism from participating in public elections.

There are situations in which the "free marketplace of ideas" mechanism does not work. In these cases, unlimited freedom of expression could lead to serious violations of human rights and to the collapse of the democratic framework. In such circumstances, some limitations on freedom of expression may be justified.

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<sup>1</sup> Examples of cases in which ACRI worked to safeguard freedom of expression include: *ACRI v. the Minister of Interior* (2005): following this appeal, the State committed to cancel the Press Ordinance which requires that all newspapers obtain a permit from the State; *ACRI v. Chairman of the Central Election Committee* (2003): ACRI succeeded in overturning the ban on election campaign broadcast material in which the Palestinian flag appeared; *Jabareen v. State of Israel* (1999): ACRI's legal intervention brought about the acquittal of a journalist who was charged with publishing praise of violence in his newspaper article on the Intifad; *ACRI et al v. Minister of Education* (1997): in response to ACRI's petition, the Minister of Education revoked the ban on broadcasting a program about lesbian and gay youth on Educational Television; *Golan v. Israel Prisons Service* (1996): as a result of ACRI's intervention, a decision by the prison authority to bar a prisoner from publishing a column in a local newspaper was overturned.

Needless to say that even when the market of ideas fails, we still have to find the most effective remedy and to avoid excessive measures. We may assume that racist incitement is usually generated by political or social forces, without which there is no real danger. Therefore, placing legal restrictions on hate speech will not nullify all its seriously harmful results, and will certainly not eliminate every form of racial discrimination. Yet, given its serious potential effects, it would be incautious to view incitement as merely being symptomatic of something larger. We should not ignore the likely possibility that incitement also intensifies the already troubling circumstances that surround it and the social political context from which incitement arises.

The scope and scale of the harmful effects that might be generated by hate speech – including physical injury to a targeted group, or severe infringements of their dignity, autonomy, and equality – are largely dependent on the overall societal attitude toward that group. When the society leans toward racist and discriminatory opinions and practices, it fans the flames of hate speech and heightens its effects. Unfortunately, neither the Israeli government nor society has created conditions for guarding against the effects of hate speech without legal regulation.<sup>2</sup>

Israel declares itself to be a "Jewish and democratic state." While legally preserving its ethnocentric character, the state guarantees each of its citizens equality and suitable representation in its bodies and institutions. However, the complex relationship between the democratic nature of the state and its manifested Jewish identity has countless normative and practical implications which result, *inter alia*, in the members of the Arab minority being treated like second class citizens. Perhaps the clearest illustration of the limitations of Arab Israeli citizenship is the legal ban on political parties that negate the principle of "Israel as a Jewish state".<sup>3</sup> This legislation reflects a situation in which Arab citizens are entitled, at least in the formal wording of the law, to enjoy basic civil liberties but are restricted from taking part in shaping the character of the nation and determining the criteria for membership in the community.<sup>4</sup>

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<sup>2</sup> See for example: Ilan Saban, "Offensiveness Analyzed: Lessons for Comparative Analysis of Free Speech Doctrines" 2 *J. Int. & Comparative Law at Chicago-Kent* (2002) 60, 74.

<sup>3</sup> Section 7A of the *Basic law: the Knesset*: "A candidates' list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following: (1) negation of the existence of the State of Israel as the state of the Jewish people; (2) negation of the democratic character of the State; (3) incitement to racism". available at: [http://www.mfa.gov.il/MFA/MFAArchive/1950\\_1959/Basic%20Law-%20The%20Knesset%20-1958-](http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Basic%20Law-%20The%20Knesset%20-1958-)

<sup>4</sup> Yoav Peled, for example, claims that there are two kinds of citizenship in Israel: a republican citizenship for Jews and a liberal citizenship for Arabs: "...while Jews and Arabs formally enjoy equal citizenship rights, only Jews can exercise their citizenship as practice, by attending to the common good." Yoav Peled, "Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State," 86 *American Political Science Review* (1992) 432.

In reality, however, Israel's Arab minority suffers from exclusion and entrenched discrimination in the distribution of resources. These are not only the claims of frustrated human rights activists; such claims have also been made by government authorities and officials. For example, following the violent incidents of October 2000, in which 13 Arab citizens were shot to death by the police, the government established an investigating commission headed by Supreme Court Justice Theodore Or. In its report, the commission noted, among other things, the severe institutional discrimination against Arab citizens that has characterized generations of Israeli governments, and it stressed the need for immediate and long-term corrective measures to address the situation. Over two years have passed since the report was published, but its recommendations have yet to be implemented.

Moreover, Israeli civil society is marked by deep-seated segregation between Arabs and Jews. Mixed marriages are rare, as are everyday social relations. Most Arabs are not employed in the Jewish sector, and they are generally of a lower socioeconomic status than Jews. Surveys have shown that a significant portion of Israel's Jewish population holds racist and discriminatory attitudes towards Arabs.

This situation creates a fertile breeding ground for racism and discrimination in which incitement can flourish and lead to even more serious actions against Arab citizens and thereby to the erosion of Israel's democratic foundation. To avoid such outcomes, extensive affirmative action is required. A limited regulation of hate speech might be a measure of this kind, even if it is not the most important or effective one.

While we may take a stand, in principle, in favor of supporting some degree of regulation for hate speech, we are liable to face challenges when it comes to employing such a stand in our work. For a human rights organization that is used to confronting the police and Attorney General's office over their restrictions on freedom of expression, we are naturally hesitant about approaching these authorities with a request to enforce the state's monopoly on power in order to limit freedom of expression.

To complicate matters, the legal tool is already a difficult method for bringing about social change, and it can have unexpected results: "You know how you're going to enter a courtroom, but you never know how you're going to come out." For example, in the most important judgment on incitement to racism, one of the Supreme Court justices opined that the criminal prohibition against racist incitement is not only intended to protect minorities but also to protect all persons and all groups. Thus, incitement to anti-semitism is also an offense of incitement to racism, even though Jews form a majority in Israel and are not subject to anti-semitism in the same way as they have been in the

Diaspora.<sup>5</sup> In light of the justification I mentioned earlier for regulating hate speech as a form of affirmative action, this judicial statement – if adhered to by the attorney general – is likely to impose unjustified and unnecessary limitations on freedom of expression and to cause further injury for the already discriminated minority.

This example also shows why we are deterred by the "slippery slope" argument in the course of our work. Even if we succeed – through rational discussions like the one in which we are now engaged – in agreeing on a proper balance between freedom of expression and other rights and crucial interests, we have very little chance of placing law enforcement authorities directly on that balancing point.

We have even greater fear of going down that slippery slope when we attempt to change the policies and practices of bureaucratic institutions less rational than the Supreme Court, such as the police, or when we try to change public discourse, which is not sensitive to these sorts of significant nuances.

In light of all this, in our efforts to promote full and equal rights for Israel's Arab minority, we prefer to invest most of the resources at our disposal to combat material instances of racial discrimination and the institutional and legal mechanisms responsible for it.

When we do tackle hate speech, we usually focus on statements made by opinion shapers and decision makers. We do not limit ourselves to extreme, clear cases of incitement. We also address "softer" public expressions of racism that do not necessarily violate the ban on racist incitement – references to the Arab minority as "a demographic problem," for instance.

Hate speech is a widespread phenomenon among key public figures in Israel. As the Or Commission Report noted, "In the 1990s, there were many public references and statements in various forums expressing stereotypical negative – even racist – attitudes toward Arabs. During this period, these types of references became more prevalent and were perceived as more legitimate. Severe racist statements were also made by public figures".<sup>6</sup>

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<sup>5</sup> Cr.A. 2831/95 *Elba v. The State of Israel*, 50(5) P.D. 221 (1996, Matza, J.).

<sup>6</sup> Commission of inquiry appointed to investigate the clashes between Israeli security forces and Israeli citizens during the riots in October 2000, Introduction, Section A, clause 66

This troubling phenomenon is not being addressed by the attorney general's law enforcement policies. Indictments for racist incitement handed down in recent years were directed toward ordinary citizens who cried "Death to Arabs" at soccer matches or carried signs with similar slogans at demonstrations.<sup>7</sup> Racist statements by public figures rarely drew the attorney general's attention, despite the lobbying efforts of several NGOs. The attorney general was slow to instigate investigations against public figures, mainly rabbis, and even the few investigations he did initiate were long, drawn-out processes that usually led nowhere.<sup>8</sup>

This type of enforcement policy is highly problematic. Assuming that regulation of hate speech is justified and beneficial, as the legislators who banned hate speech believed, then criminal sanctions must be brought against social and political leaders as well. Selective enforcement of any law is wrong, especially when ordinary citizens are the only ones being prosecuted.

Most of the complaints about racist incitement or racist statements by public figures can be divided into two categories: the first are against members of the Knesset and the second against rabbis, many of whom hold official government positions or are active in political life and many of whom head government-funded yeshivas and religious centers.

I would now like to focus on the racist incitement of these rabbis and leave the discussion of incitement by Knesset members for another occasion. Although the phenomenon is far from new, the only time a prominent rabbi was criminally charged was in the mid 1990s. In this case, an expanded panel of Supreme Court judges confirmed the conviction of Rabbi Ido Elba for an article he published that was titled, "An Examination of Religious Directions Concerning the Killing of Gentiles" in which he claimed that Jewish Law does not always forbid the killing of Arabs.<sup>9</sup>

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<sup>7</sup> For an official summary of this matter see: Reports Submitted by Israel Under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD/C/471/Add.2) Sep. 1<sup>st</sup> 2005, 26-32. <http://www.ohchr.org/english/bodies/cerd/cerds69.htm>

<sup>8</sup> For criticism relating to this issue, see, for example: *One Gunman, Many to Blame, Israel's Culture of Racism prior to the Shefa'amr Massacre and the Role of the Attorney General*, The Arab Association for Human Rights (HRA) October 2005. Available at: [http://www.arabhra.org/publications/reports/PDF/RacismReport\\_%20Report\\_English.pdf](http://www.arabhra.org/publications/reports/PDF/RacismReport_%20Report_English.pdf)  
The Response of the Attorney General's Office to the report. Sep. 22, 2005 available at: [http://www.arabhra.org/publications/reports/PDF/RacismReport\\_GeneralAttorneyResponse\\_22.9.02\\_English.pdf](http://www.arabhra.org/publications/reports/PDF/RacismReport_GeneralAttorneyResponse_22.9.02_English.pdf)

<sup>9</sup> Cr.A. 2831/95, see: supra note 5 above.

Since that incident, the attorney general's office has refrained from indicting rabbis for racist incitement, despite many instances no less blatant and deplorable than that of Rabbi Elba.<sup>10</sup> Only within the last two months, after a petition relating to this matter was submitted,<sup>11</sup> did the attorney general indict two rabbis serving in official capacities and initiate investigations of several others.

One of the rabbis recently indicted is Shmuel Eliyahu, the Chief Rabbi of Safed and a member of the Council of the Chief Rabbinate of Israel. Despite years of incitement by the rabbi against the city's Arab residents<sup>12</sup>, the attorney general required years of investigations (and, as I mentioned, the added pressure of a petition against him) before handing down an indictment.

On several occasions during this period, ACRI demanded that at least as a first and immediate step, the attorney general instigate disciplinary charges against the rabbi and remove him from his post. Yet even today, when the indictment has already been served, no steps have been taken to suspend the rabbi.

The case of Rabbi Eliyahu is especially infuriating because he holds a senior position in the civil service. It is inconceivable that a government official should use his status and prestige, granted to him by the state, to violate the dignity and basic rights of people on the basis of their national affiliation. The state cannot sit back, arms crossed, while one of its public servants is inciting to racism and undermining its basic laws and values.

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<sup>10</sup> For example, in 1998 Rabbi Ginzburg, a head of a Yeshiva in a Jewish settlement in the West Bank, published a book *Baruch Hagever* ("Baruch the Man" – a play on words which also means "Bless the Man"), which praised Baruch Goldstein for the massacre of Palestinians while they were praying in the Tomb of the Patriarchs in Hebron. The police instigated an investigation against Ginzburg, but in the end, after he apologized publicly, the state prosecutor decided not to indict him. In 2001 Ginzburg published a new book *Tipul Shores* ("Root Treatment"), in which he reiterated his support for Baruch Goldstein's 1994 massacre. In addition he claimed that the land of Israel belongs only to the Children of Israel and that no "goy" (gentile) has the right to live in the area unless he is a convert or a righteous Gentile. The book contains calls for the Arabs to be expelled from Israel and for the land to be "cleansed" of foreigners. In 2003 Ginzburg was indicted but later the indictment was canceled for vague reasons.

<sup>11</sup> HCJ 05/6702 *The Israel Religious Action Center of the Reform Movement v. The Attorney-General* (pending).

<sup>12</sup> Among his numerous racist statements, which have appeared in recent years in the media and on the Internet, Rabbi Shmuel Eliyahu praised Jews who murdered civilian Arabs: "In Judaism", he said, "killing a murderer is justified." He also called to expel all Arab students from the college in his town, and all Arabs who were considered by him to be terror supporters. On another occasion he declared that Jews shouldn't sell or let apartments to Arabs: "any renting of an apartment for an Arab ... is liable to provide a hiding place for murderers or their evil weapons." "...[I]t is forbidden to employ them. It is forbidden to buy a tomato from them or to sell them a car". Replying to a question as to whether a Jew should burn a copy of the Koran, he replied: "All the writings of the heathens should be burned."

Silence and inaction in the face of racist incitement by a senior official could be interpreted as lending official support to his words and legitimizing racism, injury to the Arab minority, and continued discrimination against that population. Therefore, the government must end the term of any rabbi serving in an official capacity who is guilty of racist incitement or other forms of racist expression – regardless of whether or not he faces criminal prosecution.

The excessive restraint exercised by the state in relation to rabbis, however, is not limited to cases of racist incitement. The attorney general is equally hesitant to indict rabbis who incite against the legitimacy of the state. This was particularly evident in the 1990s, when the Oslo Accords were signed and implemented, and during this past year as well at the time of the Gaza disengagement.<sup>13</sup>

In the 1990s, the Supreme Court deliberated on two petitions challenging a decision by the attorney general not to indict two prominent rabbis: one had incited against the Supreme Court justices themselves and the other had called on Israeli soldiers to refuse orders to evacuate settlements in the occupied territories. In both instances, the Court decided not to interfere with the decision of the attorney general who explained, that prosecuting a prominent rabbi for a ruling based on Jewish Law is liable to cause significant social damage, lead to serious polarization between religious and secular people, and create a rift in society.<sup>14</sup>

To understand the fears and considerations that led the state to show such restraint toward inciting rabbis, we must consider the way religion and the religious establishment are intertwined with the government mechanism. I will try to generally explain the situation, with the help of some key examples.

The project of building a modern Jewish nation, and other national projects later undertaken by Israel, were accompanied by Jewish symbols and values. With the establishment of the state, the religion and its leadership were incorporated into the

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<sup>13</sup> For example: In March 2005, Rabbi Ovadia Yosef, a major Haredi figure (“Posek”), a former Sephardic chief rabbi of Israel, and the spiritual leader of the Shas political party in the Israeli parliament, made comments that were widely interpreted as praying for Prime Minister Ariel Sharon’s death: “Let God strike him down... he is torturing the people of Israel... The Holy One wants us all to return to the Torah, and then he will strike him with one blow and he will die. He will sleep and never wake up.” See: “Rabbi says God will punish Sharon” *BBC* 9 March, 2005, available at: [http://news.bbc.co.uk/2/hi/middle\\_east/4333099.stm](http://news.bbc.co.uk/2/hi/middle_east/4333099.stm)

<sup>14</sup> HCJ. 588/94 *Shlanger v. The Attorney-General*, 48 (3) P.D. 50 (1994); HCJ 3087/99 *The Movement for Quality Government in Israel v. The Attorney-General*, 54(1) P.D. 414 (2000).

legal and bureaucratic structure of the state. Authorities were created to provide religious services, and these authorities also provided jobs for many rabbis and others. The personal status of Jewish citizens is determined solely by religious law and the religious courts. Approximately half of all Israeli Jewish citizens define themselves as religious or traditional and a significant section of the Jewish population is influenced to some degree by the religious establishment.

At first, the religious establishment staunchly opposed the Zionist enterprise because it believed that the redemption of the Jewish people could only be brought about through an act of God and his Messiah. Slowly but surely, however, it withdrew its opposition and charged the new Jewish nationality with mystical and Messianic meaning. This process was accelerated following the Six Days War in 1967, when the country's religious leadership became the flagship of ideologically-based settlement in the occupied territories. Today, many rabbis are key players on the political field, as Knesset members and spiritual leaders of religious parties, most of which are on the ultra-nationalist side of the political spectrum

This is the backdrop, then, for discussing the issue of regulating hate speech by rabbis in Israel.

We can find some claims in the literature calling for governments to protect more stringently hate speech that constitutes part of a broader comprehensive form of life such as religion ("deeply rooted" hate speech) than other types of hate speech.<sup>15</sup> When hate speech is part of a broader and a more comprehensive form of life, regulation may be perceived as an authoritative condemnation not only of the views or opinions censored, but also of the whole value system on which they are based.

Another argument for a more tolerant approach toward deeply rooted hate speech is that external legal intervention is less likely to be effective in eradicating the sentiments of hatred, while internal forces are more likely to succeed in eradicating it.

In my opinion, these arguments are not always convincing. The multicultural approach that underlies them brings us back to the familiar "liberal dilemma" regarding the degree of tolerance we should have toward the *lack* of tolerance of some cultural and religious communities. This dilemma should trouble us the most, in my view, when the intolerance of a community threatens to prevent some of its own members from

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<sup>15</sup> See: Alon Harel "Hate Speech and Comprehensive Forms of Life"  
[http://www.cardozohatespeech.com/pdfs/hatespeech2\(1\).pdf](http://www.cardozohatespeech.com/pdfs/hatespeech2(1).pdf)



enjoying the advantages (as we perceive them) offered by modern, democratic societies. Given these circumstances, we should weigh the advisability of interfering to "save" these individuals, who we perceive as "deprived." And yet, I believe that even the most enthusiastic multicultural approach would not be able to accommodate permitting members of a cultural community to injure irreversibly their fellow members (e.g., murder of "adulterer" woman, or female genital mutilation).

In any case, the government cannot afford to be tolerant of religious leaders who air deeply hate-filled speech and incite their followers to degrade and injure individuals from other communities within the broader society. Such a "multicultural" approach undermines the basis of the societal structure, and leads to unfair distribution of the protection and dignity that the state must supply to all its members.

In addition, it is not clear that hate speech directed toward a group of followers can be transformed into a benign, harmless message. It is true that Judaism, like other religions, contains the values of tolerance and compassion. Yet, when a religious leader stigmatizes the targeted group's members as less than human or as murderous enemies, he is essentially calling on his followers to avoid the "mistake" of letting those "others" benefit from the tolerant and human aspects of Jewish tradition. For instance, when a rabbi equates Arabs to "Amalek" - the historic and archetypal enemy of the Jews that God ordered to be wiped out without a trace and shown no mercy.

As to the claim that denouncing hate speech by religious leaders may be perceived by followers as denouncing their faith: this claim can also bring us to judge with particular harshness racist incitement by religious leaders. The connection these followers make between the words of their leaders and the principles of their faith is liable to magnify the effect we associate with racist incitement. Rabbi Eliyahu, for example, is a popular public figure with a large following. As such, his religious rulings, which he claims are backed by religious law, can be perceived as highly valued, obligatory commands. Unchecked, these messages pose a high risk to the peace and security of the Arab population that is the target of his hate speech.

Above all, most of the justifications I mentioned are not valid in the case of incitement by rabbis, who play a central role in politics, public affairs, and everyday life. One cannot hope to enter the political field and influence it without submitting to the rules of the game, and without being exposed to the influences of opposing political forces.

It is worth noting that many times, those who demand that no limit be placed on religiously-based hate speech demand, at the same time, to ban speech that attacks their

own religious faith and sensibilities. Any society attempting to meet both of these conflicting demands will quickly cease to be democratic and cease to be multicultural.

Democratic societies also have interrelated and interdependent values and principles, even if they are not part of a comprehensive form of life. A democratic society should guarantee substantive equality to members of religious communities, and it should make an effort to satisfy their special needs. Nonetheless, it cannot allow them to abuse governmental mechanisms and violate the rules of the democratic game on purpose in order to impose their agenda on society. It cannot allow them to undermine the democratic foundation or harm other members of society

Therefore, even when we speak about regulating the hate speech of rabbis, we need not be especially cautious, no more than we are when carefully weighing limitations on others cases of hate speech for fear of unnecessarily violating freedom of expression.

From the above analysis one can conclude that democracy and human rights in Israel are not as ensured as it may seem to the outside observer. The burdensome relations between the religious establishment and the state threaten the legitimacy of the regime and the stability of democracy. This flaw of Israeli democracy takes us back to the flaws I mentioned at the beginning, namely the entrenched discrimination against the Arab minority. Israeli society must cope with the tension between its liberal-democratic and ethnocentric elements and find a better solution which will ensure the stability of its democracy and the protection of human rights of all its citizens.

Regulation of hate speech might moderate, at least temporarily, further deterioration in the status of Israel's Arab minority and the erosion of the country's democratic character. It is no substitute for efforts to find real solutions for eliminating serious institutional discrimination against Arab citizens, and it certainly cannot camouflage the racist message that this discrimination transmits.