SHOULD VIOLENT AND HATE SPEECH BE PROTECTED? SOME REFLECTIONS ON FREEDOM OF EXPRESSION AND ITS LIMITS

Amos SHAPIRA

Should violence-conducive, anti-democratic or hate speech be placed in a distinct category that falls outside the domain of legally protected free expression?

Although for many of us it seems counter-intuitive and therefore hard to acknowledge, one must realize that hate or violent speech is typically the expression of social and political views. As such, it lies at the core of the free speech constitutional guarantee. Such expressions may indeed be viciously false, extremely unpopular, exceedingly repulsive, offensively pernicious, and reflective of a marginal position held by a fringe political group. Yet this should be irrelevant to the true believer in the fundamental right to freedom of expression. Even an outright advocacy of violence is frequently bound up with a radical socio-political critique which in itself is part and parcel of the legitimate political discourse. Such critique definitely deserves free speech constitutional protection even if direct incitement to violence does not. A system should therefore be devised to distinguish between the two so as to shield radical criticism from undue governmental interference.

Also, we must realize that it is in our human nature that we tend to believe unreservedly in our own truths. By the same token, we are naturally disposed to be intolerant toward the different truths harbored by others. This entrenched predisposition of intolerance rests on a deeply-seated desire to faithfully hold onto our own world views while denouncing all skepticism and denying the need for self-scrutiny. The ethos of free expression can serve as a useful device designed to educate us to recognize the limits of our knowledge, perception and judgment, to acknowledge our inborn fallibility, and to exercise self-reflection and self-

restraint. Viewed from this perspective, freedom of expression forms part of a broad social agenda of reconciliation and compromise. Tolerance, in this view, is tantamount neither to support of a repulsive message nor to indifference toward it. Rather, it is regarded as a virtuous, welcome manifestation of socio-political maturity, self-confidence and self-restraint. And, again, given the imperfections of our human nature, social tolerance is never to be assumed as a matter-of-course. Quite the contrary: We must toil hard in attempting to consolidate a commitment to tolerance. Furthermore, there are those who maintain that emotive, mythical and irrational discourse is not worthless in a participatory, dynamic democracy. Some would argue that even untruthful, malicious and hateful speech might be valuable to an open, pluralistic discourse. Such speech, repulsive as it may be, can still serve the useful purpose of locating pockets of social protest, unrest, discontent, heresy and outright malaise. Conscious awareness of such unsettling socio-political undercurrents is the first necessary step toward containing them effectively.

Yet a totally unregulated, free-for-all flow of expression can sometimes seriously imperil vital individual interests and crucial societal concerns. Evidently, the ethos of free speech and its limits derive from the particular political culture in question and are conditioned by it. Thus, in certain societies, adherence to the principle of free speech is predicated on widespread public recognition that all points of view, including the most pernicious ones, deserve to be tolerated. In other political cultures, however, the very tolerance of extremist opinions is conceived of as tantamount to their endorsement. In such cultures, a not-guilty verdict in a prosecution for incitement to violence is likely to be widely regarded not as a vindication of free speech ideology but rather as a legitimation of the violent message.

Also, in a weak, vulnerable democracy, a virulent violence-conducive speech campaign can indeed perilously undermine societal defense mechanisms and cultivate a dangerous environment saturated with an actual threat to the life and limb of the targeted individual or group. Therefore, life-protecting measures —including, if indeed necessary, restrictions on speech— had better be taken before the danger actually materializes. No one will deny that human life and bodily integrity are supreme values deserving of societal protection. Hence expression, even political speech, that demonstrably poses a real danger to life and limb ought to be curbed.

At the same time, a highly lenient, indulging societal attitude to hate or violence-conducive speech is often indicative of the sense of control typical of strong, well established and mature democracies. Indeed, skepticism as regards society's ability to cope with the impact of violent or hate speech is likely to breed speech restrictions. Conversely, a permissive attitude to such unpalatable expression may attest to society's stability and sense of self-confidence. Also, heterogenious, multicultural societies must strive to accommodate divergent, sometimes polaric and even mutually hostile, communities engaged in their own sociopolitical discourse. An endeavor by the government, representing the value-system of the societal establishment, to suppress non-conformist speech is prone to frustrate and antagonize members of ethnic, religious, cultural or socioeconomic groups who may cherish such speech as an authentic feature of their particular discourse.

The enforcement of speech restrictions must never be taken lightly. Thus, governmental attempts to curtail offensive political expression can hardly reach private, intimate discourse-precisely where incitement is most likely to trigger harmful action. This is so for obvious practical obstacles to efficient enforcement in such a closed-circle setting and because of understandable governmental reluctance to grossly invade people's privacy. Moreover, selective, haphazard or occasional governmental interference with freedom of political expression is bound to cultivate a sense of discrimination and persecution among those whose speech was curtailed and sentiments of frustration and resentment among the victims of offensive speech which escaped governmental banning.

Still, most of us will agree that the observance of certain, if minimal, rudimentary rules of speech conduct is indispensable to a wholesome democratic discourse. And the ever present, and often baffling, dilemma is where should one draw the line between openness and accountability, participation and rationality, reasonable pluralism and devastating subversion, speech and its limitations. Legal restrictions on speech can be preventive (such as administrative measures of prior restraint or licensing), penal (criminal sanctions for speech-related offenses), or civil (such as pecuniary compensation, apology, revocation, non repetition, and the right of reply concerning factual statements). The imposition of such restrictions can be content and/or intent and/or consequence based.

A content-based restriction modality builds on the assumption that speech has a commonly accepted meaning that is objectively discernible

and hence amenable to a priori clear-cut statutory categorization. The legislature is trusted to be able to carve out from the general domain of free expression such speech specimen that are considered illegitimate per se and therefore must be prohibited ex ante regardless of whether or not they are actually prone to cause harm in particular circumstances. A content-based statutory categorization of forbidden expressions presupposes the existence of a broad social consensus as to what should count as politically acceptable expression. If, however, the sociopolitical situation is such that certain communities are politically disenfranchized or marginalized, a pervasive societal consensus regarding prohibited speech can hardly be assumed. Politically disempowered groups are then bound to harbor feelings of alienation and resentment at what they may view as legislative insensitivity to their peculiar perceptions and needs. Also, the pre-determined statutory delineation of proscribed type-expressions inevitably confronts the legislature with hard drafting choices. An overly narrow demarcation is likely to underprotect society from the assumed evils of illicit speech and be vulnerable to manipulation by malevolent speakers, whereas an exceedingly loose categorization is bound to unduly encroach on the domain of legitimate free expression.

A consequence-based speech control paradigm refrains from constructing specific speech categories which are a priori prohibited. Instead, it strives to forge a comprehensive balancing formula that conditions possible speech limitation on the likelihood of substantial damage actually resulting from expression. Such a general balancing formula is designed to guide decisionmakers —*i. e.* administrators, prosecutors and judges— in exercizing their discretion whether to set limits to speech in concrete instances. In contrast to legislating ex ante well-defined categories of forbidden expression, officials of the executive and judicial branches of government are entrusted with the delicate task of applying the general balancing standard ad hoc in light of the particular circumstances of the case at hand. When exercizing their discretion in such an individualized fashion, they are expected to act with perception and responsiveness to the specifics of the situation in question, including the particular sensibilities and predicaments of politically disadvantaged or socially unpopular population groups.

A consequence-based model is best suited for preventive speech regulation through administrative licensing and prior restraint. It does, how-

ever, pose difficulties when invoked in the criminal law process. Admittedly, a nebulous balancing standard cannot provide the extent of predictability and uniformity of result anticipated from hard-and-fast, precisely formulated statutory criminal law proscriptions. But there is a trade-off. What the consequentialist broad criterion for speech control lacks in precision and certainty may well be compensated for by its potential for sensitive and nuanced decisionmaking. Also, an educated familiarity with the enforcement policies guiding the exercise of discretion by prosecution authorities and courts of law could produce a substantial measure of predictability as to their future reaction to certain speech situations.

When resorting to the consequentialist scheme in the administrative context of preventive speech control the speaker's frame of mind as such does not usually count for much or, indeed, at all. Should it be considered a material factor in the criminal law context of remedial speech regulation? Supporters of the consequence-based approach will surely reject any notion of predicating penal liability for speech violations solely on the speaker's mens rea. Yet a requirement of criminal intent could be added to the consequentialist test to form a cumulative, dual-limb condition for criminal conviction. That, of course, would further reduce the government's ability to impose penal sanctions for speech behavior. Paradoxically, it would then be easier for the authorities to enforce prior restraint (depending only on meeting the consequentialist test) than to secure a criminal conviction (conditioned on the satisfaction of both the consequentialist test and the requirement of criminal intent). Even if one wishes to incorporate into a consequence-based regulation modality an element of a criminal frame of mind one need not necessarily insist on specific intent to cause harm as a pre-condition to criminal conviction. Sometimes it would suffice that the speaker was, or should have been, aware of the high likelihood of ensuing harm even if not specifically wishing it to actually materialize.

These days, one frequently encounters the argument that violence-conducive, anti-democratic, group libel or hate speech constitutes low or no value speech that does not contribute to any desirable exposition of ideas. It, moreover, tends to encourage violence, to appeal to the most debased instincts, and to undermine human dignity. According to this argument, violence-conducive or hate speech is inherentlly harmful. The very utterance thereof inflicts injury via its built-in tendency to incite

violence or racial hatred. The words per se are intrinsically dangerous and damaging. Therefore, by dint of its singularly abominable content, such speech ought to be excised from the realm of constitutionally-guaranteed free expression. Thus it has been suggested that an outright public incitement of the commission of a violent crime which is indicative of the speaker's serious expectation that the crime be committed should, without more, be criminalized. This, admittedly, would be an essentially content-based ban on violence-conducive speech. The focus is primarily on the words spoken, on the direct call for violence. A further content-based common justification for curbing hate speech is the asserted or assumed need to shield specific, highly vulnerable and underprivileged groups from degradation, humiliation, harassment, traumatization, discrimination, disempowerment and silencing. Still, a characterization of a population group as week, vulnerable or disempowered is occasionally quite elusive and far from self evident. Thus, for instance, how should one classify the Neo-Nazis group in Skokie, Illinois? Or the American Jewry when it is exposed to antisemitic hate speech? And given the realities of Israel as the state of the Jewish people, can one really explain the criminalization of Holocaust denial on grounds of affording protection to a vulnerable group from intimidation or discrimination? And if this is not the case, what other rationalization can be advanced to justify such a ban? Would the asserted symbolic degradation, painful insult, emotional injury to the deep feelings of the population at large, and particularly of Holocaust survivors, offer a solid justification for the criminalization of Holocaust denial in Israeli law? And, finally, do all, or many, truly vulnerable groups really seek special protection from offensive speech through restrictions imposed by government on free expression?

Under traditional liberal notions, violent or hateful speech is speech nonetheless and, as such, protected in principle. As with other specimen of expression, legitimate legal restrictions —preventive (prior restraint) or remedial (penal and civil)— on violent or hateful speech must always be consequence-based. Namely, restraining speech can only be justified upon convincing demonstration of a high likelihood of resulting substantial harm to a material public interest (such as demonstrably anticipated violations of national security and public peace, as well as, arguably, serious instances of gross harassment, intimidation, degradation and discrimination). According to this view, allowing purely content —or

viewpoint— based limitations on speech will inevitably result in a snowball effect that may ultimately lead to the undermining of the very foundations of freedom of expression. A consequence-based frame for checking harmful speech, though far from being perfect, is better suited to guarantee a more balanced, less detrimental control mechanism.

I must confess to my own preference for a consequence-conditioned approach properly applied. True, a consequentialist test has its own flaws and drawbacks. Thus, it may prove extremely difficult, and rather speculative, for the designated regulating authority (judicial or other) to attempt to foresee the likelihood of the actual materialization of the damage and the extent of that damage. And such attempted foresight could sometimes indeed be affected by irrationality, emotion, and the pressure of inflamed public opinion. Also, as already observed, consequentialist balancing formulae (such as "clear and present danger") are disturbingly vague, notably in the context of the criminal law process. Yet insistence on a requirement of content-neutrality is crucial, I believe, to the endurance of a viable regime of free expression. Therefore, the criterion for speech regulation must always remain result-oriented. It is only the demonstrably grave damaging consequence of speech, anticipated with high proximity in the specific circumstances, that may justify curbing speech. Such a position is also expected to reduce —albeit not to eliminate altogether— the ever-lurking perils of misuse, overuse, and outright abuse of restrictions on free expression. To put it mildly, governmental —including judicial— organs cannot always be trusted to be able to dispassionately distinguish between valuable and allegedly worthless speech. The risk of arbitrary, random, selective and disproportionate governmental banning of expression is forever present.

Surely, in assessing the anticipated impact of hate or violent speech one must always be context-sensitive. No simplistic comparisons ought to be made and analogies drawn from one hate-speech instance in a given place and time to another. The analysis should always be context-specific, sensitive to the unique historical, cultural and socio-political circumstances of the situation at hand. Advocacy of violence may or may not be conducive to the actual creation of a dangerous violent environment, depending on the particular context. Thus, for example, a case can be made in support of criminalizing a public expression conducive to the commission of a violent crime that is made by a speaker

who possesses a special status of authority and influence on his or her audience, such as a religious leader or a military commander. Due to the unique authoritative position of influence they hold, it might indeed be proper to charge such speakers with special, enhanced responsibility to refrain from knowingly exercizing their authority in a manner that is likely, under the circumstances, to lead their followers to commit a violent crime.

A consequence-based regulatory scheme —one that conditions the legitimacy of restraining speech upon a convincing show that it is likely to lead to substantial harm— need not be overly meek. Regulation may be extended to encompass speech that is integrally and inextricably woven into illicit action. Regulation can embrace speech that constitutes direct, immediate and substantial intimidation, threat or harassment in a close target context, such as the workplace or the university campus. Regulation could reach specific, focused incitement to carry out concrete unlawful actions, such as acts of political violence or racism, provided it is really likely, under the circumtances, that such resulting actions might indeed occur. Regulation may seek to minimize or ameliorate a highly likely and substantial injury to group feelings that actually threatens to shatter the prevailing societal order of mutual tolerance. Regulation can interfere with expression that is highly probable to undercut massively the equal protection of a vulnerable social group. Indeed, words in and of themselves can and do create danger. But to warrant restraining speech or its admonition, any such danger must be of a highly likely, concrete, material, grave and demonstrable nature.

The consequence-based test must not be applied in a mechanical fashion. Therefore, the required degree of probability of the actual materialization of the danger (attributable to speech) should be determined relative to the nature and gravity of such danger: The more severe the danger, the lower the level of the likelihood of actual realization required to satisfy the consequentialist yardstick, and vice versa. The speaker's frame of mind could also be relevant to the appliction of the consequentialist test. If the speaker purposely, intentionally and seriously aims at causing the actual realization of the danger, then preventive or punitive steps may be warranted, even where the level of likelihood of the damage actually occurring is not very high. Namely, illicit intent —on the part of the speaker— to cause harm, e.g., the perpetration of a violent crime, coupled with an appropriate measure of likelihood of the harm actually

materializing, could warrant speech restrictions. But illicit intent with no such real, demonstrable likelihood of the harm actually occurring should not justify curbing expression. I would not factor into this formula the "social value" of the particular expression at hand. Indeed, this would come perilously close to the forbidden zone of purely content-based regulation. And, as already intimated, I would shy away from speech restrictions that are entirely devoid of a consequence-oriented indicator.

In sum, the consequence-based yardstick is not perfect. It does not import clarity and precision to the criminal process. It is heavily discretion-laiden. It can be over or under used by administrators, prosecutors and judges. Yet, all things considered, it is the least detrimental normative instrument for demarcating freedom of expression and its limits.

It is commonly known that consequence-based criteria have nourished American First Amendment jurisprudence concerning limitations on speech. And it would appear that a consequentialist rationale is not entirely alien to German constitutional jurisprudence as well. Article 18 of the German Basic Law (Constitution) of 1949 reads as follows:

> Those who abuse their freedom of expression, in particular, freedom of the press..., freedom of teaching..., freedom of assembly..., freedom of association... in order to undermine the free democratic basic order will forfeit these basic rights. Such forfeiture and its extent will be determined by the Federal Constitutional Court.

The Court has never exercized its authority under article 18. In a case decided in 1974, the Court held that the application for forfeiture brought by the Federal Government did not have sufficient factual grounding. The Court emphasized that the dangerousness of an alleged abuser of rights was a decisive factor for the purposes of article 18. In the case at bar, the newspaper involved could hardly be considered a serious danger to the free and democratic order.

Article 21(2) of the German Basic Law provides that "(p)arties which by reason of their aims or the conduct of their adherents seek to impair or do away with the free democratic basic order...will be unconstitutional. The Federal Constitutional Court will rule on the question of unconstitutionality". Here, again, it appears that the constitutional disqualification of political parties ought to be justified on grounds of necessity and meet the standard of proportionality.

A minimalist approach to coercive legal regulation of media freedom can be coupled with a fairly rigorous, self-imposed set of norms of journalistic ethics, such as professional responsibility, credibility, honesty and fairness, truthfulness and accuracy, fact verification, differentiation between news and views, apologies and opportunity to respond. One should note that there is no necessary full correlation between the canons of a journalistic professional code of conduct and the norms of the penal law system. The ethical yardsticks that guide the professional conduct of journalists are often stricter (and sometimes more lenient) as compared to the norms of behavior embodied in the criminal law. A cursory review of the Code of Journalistic Ethics (adopted in may of 1996 by the Israel Press Council) reveals a host of subject matter for which the Code imposes qualifications, restrictions and prohibitions that exceed, frequently significantly so, the parallel proscriptions of the criminal law. Namely, conduct that is perfectly legal may still be deemed unethical. Thus, the "soft law" canons of media professional responsibility, accuracy and fairness mandate, inter alia, a careful distinction between reporting, manipulating, inflating and fabricating news. Serving faithfully the public's right to know, reporting accurately on actual —even if perplexing— occurrences, presenting views and opinions —even if repugnant— fairly is one thing; it is quite another matter to create news through manipulative journalistic initiatives, to amplify marginal phenomena by disproportionate coverage, to cultivate —even if unwittingly— the legitimation of political violence or anti-democratic activity. And reporting need not necessarily always be "neutral". The coverage of a socially reprehensible and potentially dangerous phenomenon should sometimes be augmented by a balancing, even critical, comment. It is common knowledge that the media can be, and often is, subject to manipulation and exploitation by extremist groups seeking to disseminate their message and publicize their exploits. This happens typically where the press consciously restricts itself to pointed reporting on specific, isolated incidents of extremism. A comprehensive, in-depth portrayal of the socio-political phenomenon at hand, including pre-crisis coverage, can serve to present to the public a balanced picture, thus saving the media from distortion and manipulation. It is noteworthy that under article 14 of the Israeli Code of Journalistic Ethics, the print media is admonished not to publish

any matter that tends to incite or promote racism or discrimination based on race, origin, color, community, nationality, religion, gender, occupation, sexual tendency, physical or mental illness or disability, political belief or viewpoint, and social and economic status. The press should refrain from resorting to such characterizations except where relevant to the matter published.

Finally, I would like to make three further observations. I believe it is fair to assume that we all share the desire to curb political violence and protect democracy from its detractors. We are understandably concerned about the disturbing, intimidating phenomenon of violent, anti-democratic, and hate speech in all of its forms. Yet the truth of the matter is that the words and epithets, important as they may be, are but an external manifestation of deep-seated sentiments, beliefs and attitudes. It is emotions and views, if vile and potentially dangerous, that should concern us most. Hateful and violent ideas conveyed by words can certainly prove to be harmful. But can one effectively eradicate abhorrent, harmful ideas by attempting to silence the words symbolizing them? Is focusing on verbal behavior indeed the best way to effectively address the violent perils of anti-democratic activity?

And there is one other matter. The urge to suppress offensive, violent and hateful speech, common to many of us, can at times —perhaps often— be explained by our revulsion and animosity toward political extremists and hate-mongers. We despise racists, sexists, anti-Semites, Holocaust deniers, preachers of political violence, anti democratic heretics. We seek to prevail over them, to overpower them, to bend them to our will, to silence and punish them. There is nothing inhumane or unnatural about harboring such feelings. Yet being aware of this common predisposition should humble us all, at least in regard to the rhetoric imbuing our endeavors to regulate speech for the manifest purpose of preventing political violence and defending democracy.

In the final analysis, censorship and criminal sanctions are enforcement tools of limited utility in dealing with socio-political and cultural rifts that characterize a divided society. Where democratic institutions no longer enjoy widespread public support, sporadic indictments and convictions for violent or hate speech will not save the day. Speech regulation through law enforcement is but a poor substitute for a genuine social commitment to liberal and democratic values.