

**RESPONSE OF THE ISRAELI DELEGATION  
TO THE THIRD STUDY COMMISSION QUESTIONNAIRE 2022**

**64th Annual Meeting of IAJ – Tel Aviv (Israel)**

**By Tomer Orinov, Beer Sheva regional Court Judge**

1. The right to freedom of speech in Israel is not enshrined in any law, but has been recognized by the Supreme Court as a supreme right. After the enactment of the Basic Laws, the principle of freedom of speech was recognized as part of the set of rights in the Basic Law: Human Dignity and Liberty. By virtue of the Basic Laws, the principle of freedom of speech has a supra-constitutional status, to the extent that ordinary legislation may be disqualified if it disproportionately violates the principle of freedom of expression or is not for a proper purpose.

It is very important to clarify that freedom of speech in Israel also extends to harsh and outrageous and even racist statements.

2. The Israeli Penal Code imposes criminal liability for expressions that incite racism or violence.

Section 144B (a) of the Penal Code stipulates that anyone who publishes anything with the aim of inciting racism is liable to imprisonment for up to five years, and there is no doubt whether the publication led to racism or not.

Section 144D of the Penal Code stipulates that anyone who holds a publication of anything for the purpose of inciting racism, is liable to up to one year in prison.

In this context racism is defined as "persecution, humiliation, incitement to hostility, or violence, or indictment of the public or sections of the population, all due to color or belonging to a race or national-ethnic origin."

However, the publication of a quotation from religious writings and prayer books, or the observance of a cult of religion, shall not be construed as an offense under section 144B, provided that it is not done for the purpose of inciting racism.

Also, section 144D2 (a) provides that whoever publishes a call for an act of violence, or words of praise, sympathy or encouragement for an act of violence, support for it or identification with it, and according to the content of the provocative publication and the circumstances in which it was published, has a real possibility of committing an act of violence, is sentenced up to five years in prison.

In this context, an act of violence is defined as an offense that harms a person's body or puts a person at risk of death or serious injury.

3. As stated in the answer to the previous question, the Penal Code in Israel establishes offenses of incitement to racism or violence, and by virtue of them it is forbidden to publish expressions intended to incite racism or violence.

In addition, there are a number of other offenses that are defined in the law and that have the effect of restricting freedom of speech, although for a proper purpose, and they are:

A. Threats - Section 192 of the Penal Code prohibits a person from threatening in any way unlawful harm to his body, liberty, property, good name or livelihood, his own or another person's, intentionally intimidating or taunting the person and violating this prohibition is punishable by up to three years imprisonment .

B. Insulting a public employee - Section 288 of the Penal Code prohibits insulting, in words, gesture, or deeds, a public employee, when he is performing his duty or regarding the performance of his duty. The penalty for this offense is up to three years in prison.

Anyone who commits one of these offenses out of racist motive, or out of motive of hostility towards the public because of religion, religious group, ethnic origin, sexual orientation or today foreign workers, is likely to double the fixed sentence for that offense or imprisonment for 10 years, according to the lighter sentence.

C. Defamation - Section 6 of the Defamation Prohibition Law prohibits the publication of defamation with intent to harm, to two or more persons other than the victim. The penalty for this offense is up to one year in prison. The law defines defamation, in among, by publishing something that may demean a person because of his race, origin, religion, place of residence, age, sex, sexual orientation or disability.

D. Racist utterance during sports games - Section 15 of the Prohibition of Violence in Sport Act prohibits the utterance of racist remarks during a sporting event, where racist utterance is defined as the reading of words, sounds or growls, as well as visual gestures, by a person, alone, with another or in a choir. Because of threat, humiliation, contempt, manifestation of hostility, animosity, violence or indictment against a person, public or part of the population, all due to color or belonging to a race, religion or national-ethnic origin.

The law applies to all population groups equally and does not exclude any of them, so no group enjoys greater freedom of speech than others. It will be recalled, however, that the publication of a quotation from religious scriptures and prayer books, or the observance of a ritual of religion, shall not be regarded as an offense under section 144B, provided that it is not done for the purpose of inciting racism.

4. All the prohibitions mentioned above have been found to fulfill a proper purpose - to protect the national security and the public order - and are therefore absolute prohibitions.

However, these prohibitions are perfected only if an element of intent to incite racism, or violence, or to intimidate or harm is proven.

In the Supreme Court ruling, opinions were divided as to whether close certainty was required for actual incitement in order for the offense to be perfected. The explanation has not been decided, to date, in the courts' rulings. These things were also discussed in academia, and the conclusion seems to be that the courts read the Supreme Court ruling in a way that the phrase should be required to be "distinctly racist," and without requiring any probability or result on the publication side.

5. The legislation has kind of ambiguousness because it's lack of clear definition that categorize which expression has element of intent to incite racism and which is lack of that element. As mentioned above, a phrase is to be classified as a phrase with intent to incite racism only if it is "distinctly racist". This test has a subjective aspect and can lead to interpretation disagreements. As to be given the fact that there is kind of ambiguousness in the legislation, I assume that it doesn't help to deter the citizens from making statements.
6. As mentioned above, the legislation has kind of ambiguousness and that makes a platform to interpretation disagreements and for different outcomes. Judge with liberal personal philosophy will reach to a specific outcome and judge with more conservative personal philosophy will reach to a different outcome, in the same case.