Free Speech in the Shadow of the Israel-Gaza War

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24.01.2024 doi: 10.59704/ce1eca77ffdf3bb4

Since Hamas' attack on October 7, and the war between Israel and Gaza that ensued, constraints on speech have become more widespread in Israel, both on the formal and informal level. Restrictions on anti-war demonstrations, police violence toward protestors, investigations and indictments for "incitement to terrorism" or "identifying with a terrorist organization" and other speech-restricting measures, have become the norm. At the much less discussed, informal level, Israeli media has largely embraced a non-critical position, failing to provide audiences with information as to the situation in Gaza, and providing almost all the analysis from an internal Israeli perspective. While this cannot be construed as a formal restriction on speech, it nevertheless speaks to the informal mechanisms that render criticism unpalatable during times of war.

War and the "Rally Around the Flag" Effect

Unsurprisingly, the war has enabled the government and other state authorities to constrain individual rights. During wars people tend to "rally around the flag", increasing their support of the state and its leaders, while minimizing dissent. In Israel, this has played out differently. Because a majority holds the government responsible for not preventing the attack, the rally around the flag is not about supporting the current government, but about supporting Israel more generally. This explains the rise in patriotic and national sentiments, very much divorced from those who hold actual power. It is against this background that criticism is perceived as defeatist, unpatriotic, or even treasonous, generating an "atmosphere of fear", whereas rights limitations are perceived as both rational and necessary, as is often the case in emergencies.

Soon after war erupted, the Commissioner of Police said in a briefing about potential protests against the war: "if you want to be a citizen of Israel – welcome. If you want to identify with Gaza, you're invited to do so. I'll put you on buses that go there now". Subsequently, the Commissioner clarified that there will be no permits for demonstrations. Permits for demonstrations against the war or calling for a ceasefire, of the type that would have been granted prior to the war, have been denied, or secured with great difficulty. Yet permits for demonstrations by the right supporting the war or calling for Jewish settlement in Gaza were granted as a matter of course. Small demonstrations that do not require a permit have been violently dispersed or the police demanded permits, even though none were legally required.

A Changed Policy for Speech Offenses

The police and state prosecution have also initiated investigations and indictments on charges of incitement to terrorism and identifying with a terrorist organization, which largely target Israeli Arabs and focus on social media expressions. Importantly, prior to the war, the state prosecution had to sign off before the initiation of a police investigation, due to the sensitivity of criminalizing speech. But when the war began, official policy on speech offenses changed. The approval requirement was dropped, followed by an instruction to prosecute even in cases of a single speech act. Up until the end of November, the police conducted 269 investigations and indicted 86 people for supporting terrorism or for identifying with a terrorist organization.

Some were for speech that was objectionable, though not criminal. Others were for benign speech, for example expressing sympathy for civilian deaths in Gaza. In a particularly extreme case, police interrogated a Palestinian doctor doing her residency in an Israeli hospital, "suspected" of blocking her Jewish friends on Facebook and on Instagram. The investigation revealed that in reality the doctor had deactivated

and then reactivated her account. The doctor was released, but her entry permit into Israel revoked, despite committing no offense. In another case that drew particular media attention, police arrested a Jewish civics teacher who, although condemning the attack of October 7, posted on October 8 on Facebook a picture of a Gazan family killed by an Israeli airstrike, calling to "stop this madness". Ultimately released without charges to date, a magistrate court approved and extended his detention where he spent four days in police custody, on suspicion of "deciding to commit treason". Fired from his teaching position, a labor court reinstated him in January, finding a host of due process violations and of his speech rights. In yet another case, the police detained, for two days, an Israeli Palestinian standup comic for posting a "story" on "Instagram," captioned "the eye cries for the residents of Gaza". While none of these cases led to an indictment, the mere prospect of being in police custody is sufficient to create a chilling effect, which is probably what motivates these detentions.

Further Formal Limits on Speech

Another mode of speech regulation significantly limited the possibility to generate speech in the first place. Since the war began, Israel has prohibited entry into Gaza through Israel without military approval, preventing foreign journalists from covering the war. Permits are granted occasionally, but only when the journalist is accompanied by military personnel and only to designated areas, arguably to ensure both the journalist's safety and the safety of the troops on the ground. Notwithstanding the reasonableness of these claims, it hampers reporting from Gaza, by relying exclusively on journalists who were in Gaza prior to the attack (whose credibility is often challenged inside Israel) or social media. On its end, Egypt has also closed the Rafah border crossing to journalists.

Limits on speech rights are not limited to individual speech, but also extend to institutions. On October 20, the government issued emergency regulations that allow the Minister of Communications, with the consent of the Minister of Defense and the Ministers Committee on National Security, to shut down the broadcast of a foreign channel in Israel, which the Minister of Defense deems to be seriously harming the security of the state. The regulations also allow the Minister to seize all of the channel's Israeli assets. So far, the Minister relied on the regulations to shut down "Al-Mayadeen", a satellite channel aligned with Hezbollah. Initially, there were also plans to shut down Qatari based "Al Jazeera", though those were shelved in light of Qatar's mediation role in the release of hostages held in Gaza.

The Supreme Court's Approach

During wars, the sense of urgency, loss of security, and a host of cognitive biases, facilitate the adoption of more restrictive policies. Crucially, these biases are shared by both the general population and the experts tasked with policy administration. It is thus not surprising that the state apparatus sought to constrain individual rights after war broke out. Courts too have not always been successful in sufficiently protecting speech rights.

Early on, the police refused to grant permits to demonstrations in two Arab cities calling for a cease-fire and an end to the war. The Organizers petitioned the Supreme Court, arguing that the refusal violates their right of free expression. The police responded that the demonstrations would incite violence and might escalate an already tense situation. Furthermore, police forces were already strained, and allocating additional police to secure the demonstrations would create undue hardship on the police especially in a time of war.

The Court, despite its liberal record on demonstrations, sided with the police. Although it recognized the demonstrators' right to demonstrate, it held that resource constraints meant that the risk to public safety would be almost certain, thus diverging from its decades-long case law that viewed such arguments skeptically. However, the Court tried to cabin its decision to the unique circumstances at hand, stating explicitly that future cases will be examined on a case-by-case basis.

In subsequent decisions, the Court retreated. In a case concerning an anti-war demonstration in Tel Aviv,

Judge Amit (who wrote the decision in the previous case) stressed the importance of the demonstration taking place to " remove the perception that the Arab sector and that side of the political spectrum don't receive demonstration permits". Furthermore, on January 18, the Supreme Court issued a brief decision authorizing an anti-war demonstration in Haifa. While the decision was not substantive, merely giving effect to an agreement reached between the police and petitioners (although the Court pressured police during oral argument to retreat from its initial decision), the Court concluded its decision by stating:

> *"We cannot end without stating what should be obvious: the possibility to demonstrate is not a special privilege, but a fundamental right. This applies even during war, even if practical aspects could limit the scope of the permit. Moreover, threats of violence from third parties cannot serve as a consideration that undermines the right to demonstrate".*

While these two decisions indicate that the Court is returning to its pre-war stance, it is misaligned with the reality on the ground. The Haifa organizers petitioned the Court only when the police issued their third refusal. It is unclear how many demonstrations did not take place because organizers failed to petition the Court, or even decided not to hold a protest assuming it would be dismantled.

The Court also embraced a deferential approach in the foreign journalists' case, described above. Upholding the Israeli ban on entering Gaza without military escort, the Court dismissed a petition filed by the Foreign Press Association in Israel, seeking unaccompanied and uncoordinated entry in order to cover the war. The Court stated that independent journalistic activity might compromise the safety of forces on the ground and thwart various military activities by exposing the location of Israeli troops. Moreover, granting the journalists' request would require setting up an entry mechanism, which would require both diverting resources dedicated to the war effort, but also place the lives of those working there in danger.

Informal Restrictions on Speech

Aside from these formal restrictions on speech, there is another, more pervasive, self-imposed and perhaps more ominous type of silence, emanating from mainstream Israeli media (press, radio and television) since October 7. With few important exceptions, Israeli media has embraced a non-critical position, with few dissenting voices being heard. Almost all panelists and publicists are Israeli Jews, despite a 21% Israeli Palestinian minority. Gazans are not interviewed. Virtually no one challenges the continued war, nor the price it exacts from Israelis or Palestinians, unless it is from the perspective of releasing the hostages or disagreements about particular strategies. As one reporter said anonymously:

> *"This doesn't come as an explicit instruction. It's a type of vibe that doesn't leave room for stories about victims in Gaza... "It's surrendering to the public atmosphere that says that after such the disaster that happened to us, the enemy shouldn't be heard. The problem is that this hurts the reporter's role, because the audience gets used to not treating the other side as human, and then they don't understand why the whole world, which does see the pictures from Gaza, considers Israel as the aggressor".*

Mainstream news adopted an explicit patriotic stance, which filters reports and editorial decisions. For example, during oral arguments at the ICJ proceedings instituted by South Africa against Israel, Channel 12 news, Israel's leading channel, decried the "hypocrisy" of proceedings against Israel and not Hamas, failing to mention that Hamas cannot be sued, only states can, and that no one initiated proceedings against Palestinians.

While the "rally around the flag" effect might explain this behaviour, journalists, contrary to ordinary citizens, possess a different role morality, which requires them to report facts, however unpleasant those may be. A second explanation might thus be that the press is deliberately suppressing statements and opinions in order to fit with prevailing and dominant

views, leading to what Noelle-Neuman called the "spiral of silence" , for fear of being marginalized. The commercial model of the press, which renders it dependent on viewers, ratings, and ad revenues, increases the likelihood of this. Because deviation from the views of the median viewer risks alienation and audiences turning to more mainstream alternatives, self-silencing follows.

This self-censorship or limited dissent is consonant with shifting public attitudes. A series of public opinion polls conducted by the Liberty & Responsibility Institute at Reichman University reveals that the commitment to democracy and human rights has declined since the war began. For example, in July, 56% of the Jewish population believed that the government needed to do more regarding equality of Israeli Arabs. In November, a month into the war, this figure dropped to 41%. In July, 67% of respondents believed that freedom of speech should be guaranteed to people "speaking against the state". In November, only 54% stuck to that belief. Similarly, in July, 37% of Jewish citizens believed that civil society organizations that harshly criticize the state should be banned, rising to 47% by November. In July, 45% of Jews thought that the right to vote should be revoked for those who refuse to declare that Israel is the nation state of the Jewish people. In November, 61% held that view.

Conclusion

Free speech restrictions in Israel, both formal and informal, have increased significantly since the outbreak of the war following Hamas's attack on October 7. After some initial waffling, and as the war progressed, the Supreme Court assumed a more decisive position on anti-war demonstrations, moving to protect free speech. Yet despite two favorable decisions, it is unclear that police have changed course and internalized these decisions. Moreover, the state (police and prosecution), buttressed by public sentiments, has succeeded in creating a chilling effect, where the mere voicing of criticism, especially when coupled with empathy toward Palestinians, can be conflated with treason and trigger harsh responses, from police questioning to hate speech and attacks on social media.

In emergencies, there is always the risk that exceptional measures to confront a crisis will be normalized long after the crisis has passed. It remains to be seen what will become of free speech policy, both formal and informal, once the war ends. And yet, many of the measures could have been avoided given what we already know about civil liberties in wartime. This is as regrettable, as it was foreseeable.

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SUGGESTED CITATION

Shinar, Adam: Free Speech in the Shadow of the Israel-Gaza War, Verfassungsblog, 24.01.2024, doi: 10.59704/ce1eca77ffdf3bb4.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20240125-004244-0.