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## Free speech? What are you talking about?

By [Yuval Yoaz](#)

In 1919, writer Yosef Haim Brenner published a controversial article in the socialist journal Hapo'el Hatzair (The Young Worker), under the pen name Yosef Hever. In his article, which was entitled "In Journalism and Literature (Comments and Notes)," Brenner responded to the ferment among columnists caused by the issue of the conversion to Christianity by a number of young Jews at that time. "There is no need to get excited about an apostate," Brenner wrote, and expressed his attraction to the New Testament and the spiritual and religious presence of Jesus Christ.

His article elicited sharp reactions. "The Lovers of Zion Committee of Odessa" ceased its support for the journal and conditioned the renewal of the funding on editorial and content changes. On the other side, a number of writers from the land of Israel came out in Brenner's defense and stressed the connection between the freedom of expression to which he was entitled and the aims of the national liberation that formed Zionism's basis.

This affair, which became known as "the Brenner incident," indicates that the struggle over the freedom of expression is coeval with the Zionist movement, which drew some of its ideas from the national liberation movements of the 19th and 20th centuries. Is it possible to talk about a rooted tradition of freedom of expression in Israel today? The outstanding representative of this tradition, insofar as it exists and is stamped into the national consciousness, is Supreme Court President Aharon Barak. At the basis of his approach are two principles - aspiring toward the constant expansion of the freedom of expression through the reduction of legal and social restrictions; and attempting to assimilate the assumption that a well-rooted tradition of freedom of expression already exists in Israel.

"I believe that in Israel today it is possible to talk about a social culture of freedom of expression," wrote Barak in a 1996 article. "I believe that we are entitled to think in Israel in terms of freedom of speech."

Is Barak correct, or is he speaking of his deepest wishes? Among legal academic circles, the president of the Supreme Court is challenged infrequently; here too it may be possible to identify an issue that has to do with the applied freedom of expression. However, in an article recently published by Professor Eli Salzberger, the dean of the law faculty at the University of Haifa, and Dr. Fania Oz-Salzberger, a lecturer in the school of history and the law faculty at that university, Barak's declaration of principle is put to a real test. The article on the history of the freedom of expression in Israel appears in the book "Quiet, They Are Talking" (Hebrew, Ramot Publishers, 2006), edited by Dr. Michael Birnhack, which deals entirely with issues of freedom of expression. (The book is part of the Law, Society and Culture Series initiated by the law faculty at Tel Aviv University.)

### Dissenting voice

"We would like to disagree with Barak's assessment concerning the existence of or a tradition of freedom of expression in Israel," write Salzberger and Oz-Salzberger. "The tradition of freedom of expression about which Barak spoke barely reaches beyond the borders of the legal and academic elite. Outside this elite it is difficult to find traces of that tradition, and it is hardly discussed at all in the context of the perception of universal human rights."

By this, the authors mean that the discourse on the freedom of expression tradition has hardly developed outside of the elites, and that those who are not familiar with it inevitably derive less benefit from it. The authors argue that freedom of expression in Israel - even in the opinion of those who are for it - is not consistent when it comes to various social sectors.

"Freedom of expression for members of the Arab minority or Palestinians from East Jerusalem and the territories is different from that which is discussed regarding Jewish citizens of Israel," they write.

With respect to the legal norms on the matter, the ones that expand freedom of expression and afford it living space - all were created at the hands of the Supreme Court and not by legislation. As opposed to the famous Kol Ha'am ruling of 1953, which revoked the interior minister's decision to shut down two newspapers with communist slants, Salzberger and Oz-Salzberger state that there are many laws embodying the opposite ethos. These include the Mandatory Press Ordinance, which was adopted into Israeli legislation; the libel law of 1965 and its expansion in 1998 in a way that enables the courts to grant compensation over the damage to a person's "good name" even if damages are not proven; the expansion of the definitions of incitement to violence or terror, and even the absence of the right to freedom of expression in the Basic Law on Human Dignity and Freedom, from 1992.

The problem, however, is not just the absence of legal norms but rather the absence of an orderly culture of debate in the Israeli public discourse.

"A social norm and culture of freedom of expression means giving legitimacy to varied, different, contradictory, unpopular and even annoying statements," write the authors. However, a unique model of speech culture has developed in Israel, characterized by "a very powerful combination of variety, openness, stonewalling and aggressiveness," which derive from "tough treatment, verbal violence and the silencing of rivals during the course of debate, the lack of refinement and depth, blindness to nuances and insensitivity to fine points." This picture is very different from that of most Western democracies: "In Israel there is a great abundance of opinionated voices, arguers and responders, many of whom wish to limit their opponents' freedom of expression."

The results of this public sentiment can be seen on the various television channels and on the Internet. "People who view current affairs programs like 'Popolitika' must admit regretfully the gradual return of crude aggressiveness of the sort that characterized such programs before the assassination of prime minister Yitzhak Rabin," write the authors of the article, "despite the commitment by the producers, editors and moderators to refrain from returning to the level of aggressiveness that preceded November 1995. Other channels of expression - opinion pieces in the press, readers' letters and surfers' reactions on the Internet in blogs, forums and talkbacks - are also full of sharp and even violent statements. Paradoxically," say Salzberger and Oz-Salzberger, "the freedom of expression granted to respondents on the Internet often serves them to call for the silencing of people whose opinions are different from their own."

What is the source of the prevailing, intolerant spirit in the culture of speech in Israel? Perhaps the frequent calls for "national unity" contribute to the creation of an atmosphere of repugnance toward any intellectual discourse that entails exchanges of opinions and an encounter between opposing ideas.

"Despite the sterling polemic heritage that has its roots in Talmud and Gemara," write the authors, "Israeli public opinion does not have tested tools for dealing with opposing opinions by means of humor, wit and civilized optimism. Disagreements are perceived as a matter that is painful and anxiety-provoking.

Conflicts of interests on the political religious level are perceived as a dispute that requires 'reconciliation.' Political debate is often a matter that is devoid of enjoyment."

And speaking of enjoying the freedom of expression in the broadest sense, it is afforded only to the groups that form hegemonies in Israel. The minority sectors enjoy a more limited and fragile version, if at all.

"The freedom of expression takes on a different nuance when those who seek it are not from the Jewish majority," write Salzberger and Oz-Salzberger, "but rather belong to the Arab minority in Israel, or [Palestinians] in the territories. This state of affairs does not allow us to join wholeheartedly the celebration of the freedom of expression in Israel."

They review the rulings of the Supreme Court in matters that have to do with the Israeli Arabs' political and cultural freedom of expression over the years of the state's existence - from the disqualification of Arab Knesset lists based on a justification concerning the Jewish character of the state of Israel, through the closure of Arab newspapers because of "danger to public safety" to the deliberations on the matter of incitement and encouragement of terror from the past decade.

An exception in this respect is the ruling from November 2003, in the matter of the film "Jenin, Jenin" directed by Mohammed Bakri, in which the High Court of Justice reversed the decision of Council for the review of Films and Plays to prohibit the distribution of the film to movie theaters. However, despite the bottom line in the court ruling, "The court takes the trouble to enter into a lengthy polemic with the facts that are presented in the film and stresses the extent to which the film is fraudulent and truly a nd deeply hurtful to the feelings of 'extensive circles in the Israeli public.'" This ruling, conclude the authors, does stress the importance of the freedom of expression but in fact it is laden with a rhetoric that could have led to the opposite outcome.

"It appears that the glorious tradition of the Supreme Court concerning the freedom of expression," they write in summation, "is not applied in an equal way when those who seek the court's protection are not from the group of the Jewish majority."