



19 May, 2013

To: Members of the Knesset

**Re: Draft Anti-Defamation Bill (Amendment – Defamation against IDF Soldiers)
2013**

We are writing to caution you against the draft bill in question, according to which **"slandering any operational activity performed by IDF soldiers" would constitute grounds for a civil lawsuit even if it does not harm the reputation of any of the soldiers.** This proposal, unparalleled amongst other democratic countries, is a deliberate and disproportionate blow to freedom of expression.

The "Jenin Jenin Bill" is a direct response to Mohammad Bakri's film (Jenin Jenin), and to the court judgment that rejected the libel suit against it filed by a group of soldiers who had fought in Jenin. The explanatory notes accompanying the draft bill claims that the amendment is necessary to prevent **"serious harm to IDF soldiers who possess no other method with which to protect their reputation"**. This premise is fundamentally flawed: the court ruling regarding "Jenin, Jenin" rejected the libel claim after the judges reached a conclusion that the slanderous elements of the film were not with regards to any soldier individually, but only about the army unit as a group.

The Anti-Defamation Law protects an individual's fundamental right to dignity and as a result imposes limitations on freedom of speech that are far more strict than on those laws that protect general public interests, such as public safety or the sanctity of the judicial process. These limitations on freedom of expression meet the test of the Basic Law: Human Dignity and Liberty, because it serves "a proper purpose, to an extent no greater than required". As has been stated time and time again in case law, "individuals are substantially more vulnerable to harmful expressions affecting their good name than the public as a whole, and are therefore are more worthy of a higher level of protection." However, where no personal injury is caused to the individual as a result of the harmful expressions, the constitutional balance is altered, and the permissible harm to freedom of expression is reduced.

The provision regarding "class defamation" – which is the provision the draft bill is attempting to "fix" – is foreign to the Anti-Defamation Law. The use of this already controversial exception may be justified only to protect members of disadvantaged minority groups that suffer from a negative stigma in society, such as Ethiopians, Arabs and the ultra-orthodox, and not used as a propaganda campaign to protect groups that enjoy full dignity and respect.

The bill seeks to create a legal fiction that would require the courts to accept claims by "victims" whose name was not slandered (and is not likely to be slandered). Any publication that criticizes the IDF or "IDF forces" following an operational action will allow any IDF soldier that took part in the operation to launch a **civil libel action**, even if no harm was caused at all to his good name. This fiction increases the risks borne by anyone publicizing a report and exacerbates the harm caused to freedom of expression. Placing this amendment in the statute books will corrupt both the Anti-Defamation Law and the Class-Actions Law. A class-action lawsuit is possible only if many injuries are caused to many people of which the representative plaintiff is one of the injured parties. If the amendment is adopted, it would enable a group to launch a class action lawsuit even if no member of the group had suffered any direct personal injury.

Worse yet, plaintiffs may drag fellow class members into legal adventures they had no interest in, especially if the other combat soldiers feel that there is indeed truth to the publication and that they're better off not bringing the events in question under a court's scrutiny.

The fiction of the proposed amendment is designed to exploit a limitation that the law allows to be placed on freedom of expression in order to defend the rights of an individual. The state would like to use this exception for the benefit of maintaining its image. According to the amendment's explanatory notes, its purpose is to prevent **"serious harm caused to Israel by false accusations leveled against the IDF."** Recruiting combat soldiers in an effort to exploit their personal rights as tools in a propaganda war is improper and unconstitutional.

The objects of the amendment are the protection of the state's image and the silencing of criticism of operational activity. But these purposes are not "consistent with the values of the state of Israel" as they do not meet the criteria set by the Basic Law for limiting freedom of expression. Moreover, the harm caused to the right to free expression is not proportionate to the purpose of the limitation, especially since there are alternative means for defending the state's image. As the court in *Jenin, Jenin* noted, the state was able to use its own powerful propaganda tools to convince international bodies of inquiry that the bulk of the movie was inaccurate.

A civil cause of action is no less powerful than a criminal indictment in limiting free expression. Enormous economic and emotional costs are exacted upon defendants to defamation suits. With this in mind, the Supreme Court warned that the "privatization" of the right to sue for public defamation will encourage baseless claims and have a chilling effect on the debate of important public issues such as the state's use of military force. The threat and effects of this silencing will be brought to bear not just against publications like *Jenin Jenin* but also against whomever dares criticize, publish testimony about, or express an opinion on a unjustifiable use of force by enemy soldiers or even Palestinians or settlers in the occupied territories.

Because of the sensitivities inherent to limitations placed upon freedom of expression, the power to take legal action against publishers for public defamation is entrusted to the Attorney General. The restraint that Attorneys General have historically shown when it comes to using this power is born of the same constitutional sensitivity but also of an awareness of the potential for a boomerang effect and the serious harm that

could befall the public and the state's image. Even if the trial yields a guilty verdict, in the eyes of others, especially those outside Israel, it will be seen as an adventure of persecution and as revenge against the publisher; it will encourage the further dissemination of the slanderous publication and divert public attention from findings that disprove the defamation. If the trial ends in acquittal, the damage would be immeasurably worse.

In the *Jenin Jenin* case, the justices expressed regret that the feelings of combat soldiers were hurt. But contrary to what is claimed in the proposed amendment, the Court's opinion does not even hint at a recommendation to privatize the tort of public defamation and make it into a civil cause of action. Rather, the Supreme Court warned of the dire consequences of such a course. It explained that despite the difficulty, "the court must rise above the concrete circumstances of the instance brought before it and deliver an opinion on the implications of its judgment on other cases, including both those that can be predicted and those that cannot." These words apply *a fortiori* to legislation. The film *Jenin Jenin* is not a sufficient reason for legislation that will "encourage baseless claims and transfer what should be public dialogue into the courtroom." The 'Jenin Jenin' Draft Bill is dangerous and undemocratic and we call on the Knesset to refrain from approving it.

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