The Protonia Trial

IN THE HIGH COURT OF PROTONIA

At the Eighth Congress of the International Association of Jewish Lawyers and Jurists, Jerusalem, Dec. 1989.

Before:
Justice Moshe Landau, former President of the Supreme Court of Israel
M. le Juge Pierre Drai, Premier Président de]a Cour de Cassation, Paris, France
Justice Miriam Ben-Porat, State Comptroller, former Deputy President of the Supreme Court of Israel
The Rt. Hon. Sir Harry Woolf, Lord Justice of Appeal, London, England.
His Honor Judge Abner Mikva, United States Court of Appeals for the District of Columbia Circuit

IN A PETITION
by
Samuel Meyer and 18 others — PETITIONERS

Against
1. The National Broadcasting Authority
2 "Channel I", a Television Station
3. Siegfried Heintzhammer — RESPONDENTS

For the Petitioners:
Professor Irwin Coder, of McGill University, Montreal, Canada, and Harvard University, Cambridge, Mass. U.S.A.
Dr. Amnon Goldenberg, Advocate, Tel Aviv, former President of the Israel Bar,
M. le Professeur Sauveur Vaïsse, of Paris University and of the Paris Bar, France.

For the Respondents:
Mr. Stanley Godofsky, Attorney-at-law, New York, N.Y., U.S.A.
Mr. 1. Amihud Ben-Porath, Advocate, Israel.

Freedom of expression and its limitations

A feature of the Congress was a trial of a moot case involving issues of freedom of expression in an Imaginary country known as Protonia. (Text prepared by Adv. Yair BenDavid).

The case involves efforts of Jewish community members to halt broadcasts of a television documentary series that denied the reality of the Holocaust and blamed catastrophic events on Jewish intrigue.

The broadcasts to which the petitioners took offense claimed, among other things,

that Jewish intrigues and attempts to dominate the world caused World War 1. Another installment laid the stock market crash of 1929 to Jewish manipulation.

The climax of the series was a pair of chapters dealing with World War 11 and the Holocaust. These chapters denied that mass extermination of Jews took place. The program claimed that Zionist leaders concocted the story of the Holocaust to further their aims of establishing a Zionist state in Palestine.

The series enjoyed popularity, and the broadcasts were followed by a rise in anti-Semitic manifestations, such as graffiti and a call for boycotting Jewish-owned stores,

According to the scenario, the Jewish community members went to court after the station refused to stop broadcasting the program, and after the National Broadcasting Authority rejected their request to cancel the station's license.

The petitioners asked the High Court to declare that freedom of speech does not include a right to promote racism and anti-Semitism, nor to engage in racial incitement.

Here follow summaries of the pleadings in the case, along with the full text of the judgment.

Summary of arguments

for the respondents

Mr. Stanley Godofsky

Adv. I. Amihud BenPorath

The views expressed on Channel I are without a doubt false, irresponsible, reprehensible, atrocious and outrageous. It is inconceivable that anyone but an anti-Semite would say these things, and the National Broadcasting Authority and its counsel totally repudiate each and every one of those views. Nevertheless, we assert that Siegfried Heintzhammer is and should be entitled to assert them and to assert them on Channel 1.

The issue cannot be seen in a vacuum. There is no evidence to prove neo-Nazi membership has increased even incrementally since these broadcasts. Protonia is a democracy; that a few thousand neo-Nazis exist in a population of six million is itself evidence of its people's devotion to democracy. Although there was a rise in anti-Semitic sentiment, there has been no violence against property or lives of Jews, and, significantly, the broadcasts did not issue calls for such violence. Nor from the nature of the television medium can immediate violence be anticipated.

Many tools are available to deal with the broadcasts short of lifting Channel I's license: Organizing an advertiser boycott, scheduling counter-propaganda programs on a different channel, pressuring the owners of other private stations to put on educational programs, buying advertisements, holding mass meetings, and others.

Unless these things are tried and fail, we should not start limiting freedom of expression by engaging in what is clearly prior restraint, because what the plaintiffs seek here will ultimately lead to a revocation of the TV license.

Petitioners are requesting a declaration that freedom of speech does not include the right to premote racism or anti-Semitism and to engage in racial incitement. This is too broad a statement of principle and inconsistent with well-developed concepts of free speech. If the judges grant the petitioners that statement, the next step would be prior restaint and the eventual withdrawal of the license.

Freedom of speech includes the right to promote racism and anti-Semitism, and even to incite violent behavior unless the incitement is of an immediate nature. However, nothing in the record of this case indicates any of the respondents has ever called upon anyone to do anything of a violent nature.

There is a point where the state must act to protect democracy. But according to the facts of this specific case, we are nowhere near it.

As precedents, there are several cases that went through the U.S. courts, including the flag burning incident, Terminello vs. Chicago (where the concept of Clear and Present Danger was developed), and Collins vs. Smith (the Skokie case). In the last case the court noted that if civil rights are to remain vital for all, they must protect not only those society deems acceptable but also those whose ideas it quite justifiably rejects and despises.

Legally, freedom of speech in both Israel and the United States includes certain common propositions: 1) it is recognized judicially as the indispensable condition for almost every other freedom in a democracy; 2) it contributes to the search for truth even if somebody is engaged in spreading falsehood. The very act of countering falsehood sharpens the search for truth, if there is time for the truth to be developed in the market-place of ideas.

Israeli Supreme Court Justice Barak's opinion in the case of Kahane vs. the Broadcast Authority held that racism is false, but this truth can emerge only through free competition of ideas and views; through a free debate with racism on the stage of opinions and views, racism will be exposed in all its ugliness and man's equality and dignity strengthened.

Freedom of speech is not a right; it is a liberty. You are at liberty to lie, and other people are at liberty to set you straight.

Does an anti-Semite have a right to say anti-Semitic things? He hasn't got a right to say that. He has a liberty to say that. And Jews have a liberty and a duty to show him for what he is.

Absent a formal constitution, the Supreme Court of Israel took the role of instilling into the constitutional organism of the country the thinking and concepts of a democratic society.

In a landmark decision in Kol Ha'am vs. the Ministry of Interior, Justice Agranat took up the principle of freedom of expression and its meaning to a democratic society. The case dealt with a provision of the press ordinance which authorized public officials - with or without a warning - to suspend the publication of a newspaper if in their opinion it was likely to endanger the public peace. In this case, the Minister of Interior decided to close two communist newspapers - one in Hebrew and one in Arabic - because they published articles the Minister considered likely to endanger the public peace. Justice Agranat, in his decision, applied the standard of likely danger to the peace of a democratic public. Likely, in this decision, means a likelihood much greater than mere possibility. The likelihood had to be sufficiently close to actual danger to warrant administrative action.

And public peace means persons are enabled to act within their liberties. If there is no immediate and tangible danger which eliminates the possibility of debate, public liberty is damaged when public speech is damaged.

The question of the point at which the danger is sufficiently likely to warrant administrative intervention has been put to the Israeli Supreme Court; many incidents of non-democratic expression were protected by the court. As to Protonia, the line is fine but

we are nowhere near it. Protonia has a legislature and it could pass some laws forbidding group libel, laws which could be wisely enforced to prevent the great harm and pain caused to individuals by broadcasts such as these. The great value of freedom of speech is the ability to counteract and expose the bigots for what they are.

In Laor vs. the Film and Plays Supervisory Board, about a 1985 play which depicted the image of the military government in a distorted way, including comparisons with the Nazi regime, Justice Barak says in his decision that freedom of speech is also available to those who act against democracy. It is also freedom to express deviant speech.

We cannot allow the muzzling of expression for the simple reason that by doing so we are committing two wrongs to the fabric of democratic life: We are allowing the people who are muzzled to go on with their convictions and we are avoiding an intrinsically democratic process of discussion and clarification. Society emerges stronger from this.

Another case is a decision taken by the Supreme Court to order the Speaker of the Knesset to allow Rabbi Meir Kahane to table a bill. Rabbi Kahane wished the Knesset to discuss two bills. One related to the Israeli citizenship and Jewish-Arab population exchange law which, among other things, would have deprived Arabs of their basic civil liberties and imposed taxes and bondage on them. The second was a law to prevent the intermingling of Jews and non-Jews; it proposed, among other things, to force couples of mixed marriage to separate, and would not allow Jews and Arabs on the same beaches. The speaker and the Presidium of the Knesset refused to table the measure, which was reminiscent of anti-Jewish legislation. The Court ruled that the Knesset was bound by the rule of law and there was no right vested in the Presidium to prevent placing before the Knesset a bill drafted by a party elected on that platform. Later, however, the Knesset passed legislation to prevent a recurrence.

As to group libel: To define speech which is unpalatable to a part of the population as group libel is dangerous; among other things, it will give the government an instrument to muzzle opposition.

In conclusion: The petitioners are asking the court to make a declaration that is constitutionally unsound, because it is meaningless unless coupled with a remedy, which would be the denial of freedom of speech. At that level, there is a prior duty to counteract the statements first by counter- statements and, second, perhaps by the careful enactment of legislation.

Summary of arguments for the petitioners

Prof. Irwin Cotler
Prof. Sauveur Vaïsse
Dr. Amnon Goldenberg

It is now perhaps common ground between the parties that freedom of speech has its own limitations. 'Me question is where the line should be drawn, and we shall invite the court to rule that the television program in question falls beyond the line. The program, the way it was presented by the broadcaster, falls outside the ambit of the expression of freedom of speech. If it does fall within the term 'speech,' then it offends a number of the limitations which any civilized country would impose, and, therefore, the declaration has to be granted as requested by the petitioner.

The limitation which is a part of the concept of any liberty is expressed in a number of Israel] cases. The courts in Israel recognize the fight of a democracy to protect itself against anti-democratic elements which deny the basic tenets of a democratic society. More than once it has happened in history that states with democratic governments were overcome by various fascists and totalitarian movements which used all those fights of freedom of speech, press and association which the state grants them to conduct their dectructive activity under the state's protection.

The specific question is whether racist expressions are excluded from the right to freedom of expression, or whether a probability or near certainty of harmful consequences must be proven.

Racism in general and anti-Semitism in particular are not protected under either alternative.

Jean-Paul Sartre wrote that anti-Semitism does not fall within the category of ideas protected by the right of free expression.

As to the question of harmful consequences, and whether probability or near certainty of harmful consequences must be proven before freedom of expression can be restricted: It would be grossly naive in our time and age to ignore or even underestimate the power and reality of words. One example is the Protocols of the Elders of Zion and the harm they have caused throughout the century. But they are not an isolated phenomenon. They were preceded by a long list of pseudo-scientific or pseudo-historical documents which purported to reveal the "true face" of the Jews, just as the so-called documentary series of Channel I is purporting to do.

The danger inherent in the systematic use of lies disguised as historical truth was recognized by the court in the Ein-Gal case.

If a government or a society fails to take immediate decisive steps against the spreading of racist lies, this allows for the repetition of the lie which, as we have seen, is one of the necessary ingredients for its success. Otto Kirchner, in his book Political Justice, examines the possibility that, in 1924, the Munich courts could have been a break in the link of the chain that led Adolf Hitler to power.

Comparative law allows one to perceive universal reason as a source of law. There should exist a common law in civilized countries about the elimination of all forms of racism and racial discrimination. In 1972, France introduced and ratified the elements of the convention it signed in New York in 1966, and has had to use that law frequently because of the springing up of revisionist, xenophobic and racist theories.

In France, one of the first Holocaust revisionists placed on trial was sentenced in 1980 to six months for provocation of hatred and racial discrimination. His conviction was based on a statement he made expressing doubt that six million Jews were murdered.

The decision did not discourage other revisionists. If the 1980 defendant only put in doubt the reality of the Holocaust, Robert Faurisson simply said Auschwitz was a lie. The first Faurisson case, in July 198 1, was interesting because he was tried not on the penal code but on the civil code. Under the civil code of 189 1, a person could not be charged with racial defamation unless 1) there was a specific, public allegation directed at honor or respect, 2) the allegation was aimed against a group of people, and not against one person, and 3) the allegation had the specific goal - of inciting hatred among the citizens.

The law of 1972 lifted the 1881 restrictions and now the following is punishable:

provocation to discrimination, hatred or violence against one person or a group of people because of their origin or their belonging or not belonging to a specific ethnic group, a nation, a race or a religion.

Canada also provides an appropriate framework for guidance because the Canadian Parliament has enacted the most comprehensive legislative base in the world with respect to prohibiting incitement to racial hatred. Canada also has the broadest textual protection for freedom of speech of any democratic society in the world. In four of five recent cases, anti- incitement provisions were sustained against a constitutional challenge.

To determine what forms of expression are excluded from the ambit of protected speech, Canada uses the following criteria: 1) that incitement to racial hatred, racism and the like, constitutes an assault on the very values and principles that underlie a Western-style democracy, and 2) that hate-mongering - of which incitement to racial hatred is the worst kind - constitutes an assault on the very values and interests sought to be protected by freedom of expression itself.

If Protonia is party to the 'International convention on the elimination of racial discrimination, it is then obliged to enact domestic measures with respect to protesting against incitement to racial hatred.

In the Kach case, the definition given by Israeli law with respect to racism is persecution, degradation, humiliation, a manifestation of enmity, hostility or violence or incitement to hatred toward the public or parts of the population only because of their color or their racial or national ethnic origin.

Incitement to racial hatred is inherently violent communication, and incitement of racial hatred is not only a near certainty of injury but constitutes injury.

The respondent advises there is nothing wrong with Holocaust denial as long as we can teach our children about the Holocaust. But this is a false equivalent. Any free and democratic society can and should choose to proscribe such incitement to racial hatred on the one hand and indeed engage in education about the Holocaust on the other. These are not mutually exclusive and to offer them as equivalences is to engage in false analogies.

The empirical data from all studies that have been done on racist incitement show that there is demonstrable harm to the target groups.

A legal system does not constitute only a means of control or only a link in the chain of repressive action. It plays an important role in establishing norms, in giving us a sense of what is inside and what is outside of the sphere of legitimate, rightful human experience.

Unfortunately, anti-Semitism is not a thing of the past. It is on the rise in many countries.

In Freedom of Speech and Racism, David Kretzmer wrote that in modern times, racism has led to or facilitated the commission of unspeakable crimes and caused untold human suffering, and that historical experience teaches us that racism is an evil that can take on catastrophic proportions.

Petitioners ask the court to deny this seed of evil its existence.

Judgment

Delivered on December 26, 1989
Reasons published on June 14, 1990

JUSTICE MOSHE LANDAU
JUSTICE MIRIAM BEN-PORAT
LORD JUSTICE H. WOOLF

1. The Facts stated in the Case submitted for decision by this Court are as follows:

   The case is tried in the State of Protonia, an imaginary country of six million, with a Jewish community of fifty thousand.

   Protonia, with a Western-style, democratic forrn of government, does not have a written constitution. Freedom of speech and expression were held by the Supreme Court of Protonia to be essential liberties deriving from its form of government. Administrative action limiting or denying freedom of speech was held to be invalid.

   Several television stations, both public and private, are being operated in Protonia, the latter by a licence granted by the State.

   One of the most popular stations is "Channel I", owned by Siegfried Heintzhammer, a wealthy businessman, associated with the extreme Right. Mr. Heintzhammer is an ex-leader of the neo-Nazi organisation which is still active in Protonia, and today consists of a few thousand members.

   At the beginning of 1988, "Channel I" started to produce and transmit a weekly documentary program called "A Small Window in History". The producers of the series declared that its purpose was to "reconstruct and shed new light, the true light, on what really happened in the chain of important, historical events that influ enced the history of mankind."

   It soon became apparent that a common motif pervaded the chapters: concentrating on events in which the "Jewish Factor" was highlighted as the cause of worldwide catastrophic events. Thus, one chapter identified Jewish intrigues and attempts to dominate the world as being the cause of World War 1. Another chapter "estab lished" that behind the economic crisis and the stock market crash of 1929 in the U.S., were "Jewish tycoons" who wanted to topple the American economy for their own gain.

   The climax of the series were two chapters dealing with World War 11 and the Holocaust. In these chapters, the producers claimed that the "story" of the massive extermination of European Jews occurred only in the imagination of Zionist leaders, who tried to artificially create feelings of regret in the minds of world leaders in order to raise, in this way, their support for establishing a Zionist state in Palestine.

   Following the broadcasts which according to a TV viewers' survey became one of the most popular TV series in Protonia, concerned members of the community started to report on the rise of anti-Semitism: Repeated complaints of the drawing of hate graffiti and swastikas on the walls of Jewish institutions, and posting placards calling to

boycott stores and companies owned by Jews.

The leader of the Jewish community in Protonia, Mr. Samuel Meyer, appealed by letter to the management of "Channell" and to its owner, Mr. Heintzhammer, requesting that they immediately stop broadcast of the series which he defined as "clear anti-Semitic propaganda under the guise of a television broadcast."

Mr. Heintzhammer did not bother to reply, but the management of the station wrote to Mr. Meyer in reply that the series was faithful to the historical facts, and that the producers are under the "obligation to report the historical truth, even if it was distorted during those years by tendentious factors."

Nineteen leaders of the community sent a petition to the Chairman of the National Broadcasting Authority, authorized to allocate licenses to private bodies, in which they demanded the immediate revocation of the license of "Channel I" claiming that the license was being used to incite racism and anti-Semitism which seriously affected and endangered the Jewish community in Protonia and was disruptive of public order.

In his reply, the Chairman of the Broadcasting Authority expressed his sorrow for "the inconvenience caused to the Jewish community", which he greatly respected; however, it became clear upon verification that "Channel I" did not infringe the conditions of the license, and as the principles of freedom of speech and press are basic constitutional freedoms, there is no possibility to take action against "Channel I" and he could only hope that the managers of the station will, in the future, not offend the feelings of the Jewish minority. In an emergency meeting, held by the leaders of the Jewish community, it was decided to apply to the High Court in Protonia, in a petition for a declaration that the right of freedom of speech does not include the right to promote racism, anti-Semitism and to engage in racial incite ment, and that all liberties flow from the basic universal principles protecting the dignity of man.

2.

The members of this Court are able to draw on their experience of various systems of law, both in Common Law and in Civil Law jurisdictions. They will decide this case which raises momentous questions concerning the Freedom of Expression and its limi tations in the light of that experience, basing their conclusions on general principles common to all those legal systems and consequently also to that of Protonia which is part of the democratic Free World.

3. It is agreed on all sides that freedom of expression is a fundamental principle to which the State of Protonia adheres in order to maintain its democratic character. But it is also agreed - and so we hold - that freedom of expression is not a legal absolute: it is subject to limitations which flow, no less than the principle itself, from the requirements of any viable Western-style liberal democracy. It must there fore be stated from the outset that the first Respondent, the National Broadcasting Authority (hereinafter: NBA), clearly misdirected itself in law when its Chairman wrote in his reply to the complaint of the first Petitioner that "as the principles of freedom of speech and press are basic constitutional freedoms, there is no possi bility to take action against "Channel I". The proper question before the NBA was whether this is a case for imposing legal limits on the freedom of speech and expression.

4.

expression have to be narrowly circumscribed, so as not to encroach unduly on the realization of the governing principle. There is therefore in case of doubt a strong presumption in favour of giving full effect to the liberty of men to express their thoughts and their opinions freely, without let and hindrance. The line to be drawn in a specific case, or in a class of cases, between the principle and its limitations has been variously defined in the Jurisprudence of jurisdictions in the Free World. It may be embodied, in general or in more specific terms, in a written Constitution which is superior to ordinary legislation or, in the absence of such a Constitution, by Statute enacted by the sovereign legislature. Protonia possesses no written Constitution nor are we aware of any Protonian Statute governing the subject. This Court will therefore decide the case before it on general principles of constitutional and administrative law, untrammelled by any statutory enactment. In doing so, it will also pay heed to principles of international law, as embodied in relevant inter national treaties. We shall also refer to judicial pronouncements and to statutory enactments from other democratic countries which carry persuasive weight in this Court, in order to illustrate our own opinion and to put it into proper perspective.

5. On the facts stated this case raises the problem if, and to what extent, freedom of expression should be subject to limitations imposed by the law, in order to prevent breaches of the public peace, by publication of racist and more specifically of anti-Semitic propaganda. The common motif of the weekly broadcasts emitted by "Channel I" is the story of a Jewish worldwide conspiracy to subject the whole world and its peoples to Jewish rule, thus causing catastrophic disasters to mankind. Obviously, this is nothing but a rehash of the notorious "Protocols of the Elders of Zion" which have been exposed time and again as a fabrication concocted towards the end of the 19th Century by the Okhrana, the Tsarist Secret Political Police. The nature of this fabrication, which has become the stock-in-trade of anti-Semitic hate propaganda, was thoroughly explored before a Court of Law in Berne, Switzerland, in 1934/5 which heard the evidence of competent Russian émigré witnesses on the circumstances surrounding its provenance. In summing up the case the Presiding Judge there said that "these 'Protocols', for all the harm that they have already caused and may yet cause, are nothing but a ridiculous nonsense." (See "An Appraisal of the Protocols of Zion", by John S. Curtiss, Columbia University Press, 1942; Vernichtigung einer Fälschung, by Raas/Brunschwig, Zurich, 1938). Again, in 1973, the "Protocols" were branded by a Paris Court as a defamatory publication compiled by the Tsarist Police. (See E. Litvinoff, Soviet Antisemitism, The Paris Trial, Wildwood House, London, 1974). Quite recently, proceedings were instituted before a Court in Stockholm, Sweden, which bear a striking resemblance to the facts presented to this Court: The "Protocols" were there used for a series of virulent anti-Semitic and anti-Zionist broadcasts by a Radio Station calling itself "Radio Islam", operated by one Ahmed Rami. Rami was found guilty of the criminal offence of incitement against the Jews as a National Group and was sentenced to six months imprisonment. The judgment, delivered on 14.11.89, is now pending on appeal, both by the Defendant against his conviction and by the Prosecution against the leniency of the penalty imposed.

6. It will be noted that the management of "Channel I" wrote to the first Petitioner, in reply to his demand to stop the broadcast of the series in question that "the series was

faithful to the historical facts". In their oral pleadings learned Counsel for the Respondents very properly abandoned this position and admitted freely that the broadcasts of "Channel I" were factually false. Instead they based their argument squarely on the principle of freedom of speech which - so they pleaded - gave Respondents 2 and 3 also freedom to spread lies.

7.

The Court will take judicial notice of the proven fact that the so-called "Protocols of the Elders of Zion" are a forgery and that by repeating the allegations contained in them Respondents 2 and 3 are spreading malicious falsehoods.

8. According to the facts of this case the climax of the series were the two chapters in which the producers claimed that the Holocaust occurred only in the imagination of Zionist leaders who invented it in order to obtain international support for the estab lishment of a Zionist state in Palestine. Denial of the Holocaust of European Jewry or belittling its extent has in recent years also become the fashion for anti-Semitic propaganda which parades as historical „revisionism". Suffice it to say that the Supreme Court of Western Germany ruled in 1979 (BGH VIZR 140/78 - Vol. 75, p. 160) that any attempt to justify, to gloss over or to dispute the facts of the Holocaust meant contempt for every person identified with the persecuted and denies to every Jew the respect to which he is entitled. The case concerned the publication of a poster stating that the murder of millions of Jews in the "Third Reich" was a Zionist swindle and that the fie about the gassing of Six Million Jews could not be accepted. The Court declared that "no one making allegations which deny the historical fact of murder of the Jews in the 'Third Reich' can rely on the guarantee of freedom of opinion in the Basic law" (the Constitution of the Federal Republic). In 1981 a civil case was instituted in the Paris Court of First Instance against one Robert Faurisson, of Lyon University, who had declared, as the result of his historical "researches" that "the existence of gas chambers as a means of extermination used by the German regime during World War 11 and the genocide of the Jews were nothing but "a historical lie". The Court declared that these allegations were "hurtful for the survivors of the racial persecution and of the deportation as well as outrageous to the memory of the victims which the general public is incited to ignore or even to doubt; and that they are obviously liable to provoke vehement reactions of aggres siveness against those who are thus implicitly accused of lying and deceit."
9. Anti-Semitism and anti-Zionism have become interchangeable terms of invective used by anti-Semites and detractors of the State of Israel, with the one disguised as the other. Thus it was already in the 'Protocols' which were presented by their forgers as the record of the deliberations of the first Zionist Congress in 1897, and thus it is also with the broadcasts by "Channell" which offer to its listeners a mixture of denial of the Holocaust with anti-Zionist insinuations.
10. We now pass to a consideration of the law applicable to the facts of this case. As has already been indicated, the Respondents base their entire argument on Freedom of Speech and of Expression, as a cornerstone of the legal structure of liberal democracies. What are the principles, the rationale, underlying those freedoms? They have been expounded in leading judicial decisions of Courts in Western democracies, notably in opinions in the Federal Supreme Court of the United States, such as Mr. Justice Holmes's opinion in Schenck v. U.S. (249 U.S. 47) in the year 1919, his dissenting opinion in Abrams v. U. S. (250 U.S. 616) of the same year and

The ideas there enunciated also inspired the Israeli landmark decision of Mr. Justice Agranat in Kol Ha'am v. Minister of the Interior (H.C. 73 & 87/53 - 7 P.D. 871). These ideas may be summarized as follows: Democracy consists in government by consent. The democratic process therefore requires the selection of the common aims of the people and the means of achieving them, by open debate and the free exchange of views on matters of public interest. Only thus will the truth emerge through discussion and "the free trade of ideas in the marketplace of ideas". Obviously, such competition between ideas can become meaningful only, if the individual citizen is given the fullest possible freedom to express his opinions in that "marketplace". In addition to these political and social grounds for ensuring freedom of expression in any liberal democracy there is also the personal interest of every citizen to give full expression to his opinions and thoughts in public, in order to enable him to realize and to develop his own faculties to the full.

11. Can these principles be applied, by any stretch of the imagination, to racist hate propaganda of the kind broadcast by "Channel 1"? Surely, the answer is an emphatic 'No': Racist hate propaganda constitutes the very negation of the political, social and personal interests of the citizen protected by freedom of expression. Such propaganda does turn to the marketplace, but not for the purpose of orderly compe tition between conflicting ideas. In the apposite language of the Petitioners in their written Brief in this case: "It seeks not to inform, but to incite; not to discuss, but to degrade; not to debate, but to defame." It thus disrupts the peaceful co-existence of various groups in a democratic society, by engendering communal strife. Moreover, it constitutes an assault on the self-realization of the group attacked and its members, who are being debased and deprived of their honour in the eyes of their fellow-men.

12. But it is said that freedom of expression is also the freedom to express dangerous, annoying and deviant views which are hateful to us (see Barak J. in Kahane v. The Broadcasting Authority (H.C. 399/85 - 41 (3) P.D. 255, at p. 28 1, para 20 and Douglas J. in Dennis v. U.S. 341 U.S. 494, 584 (1951). Yet, it would be an egre gious "nonsequitur" to equate "Ideas which we hate" with "ideas that preach hatred". It may be added here that a genuine and bona fide search for historic truth and publication of the facts discovered, will not prima facie be regarded as racism or incitement to racism, even if those facts arouse adverse feelings and are thus harmful to the ethnic group or to the race concerned. Needless to say, this is not the case we are dealing with.

13. Learned Counsel for the Respondents also sought to find support for his argument that racist speech is within the protection to be afforded to freedom of expression in further decisions of the U.S. Supreme Court, such as the recent case of Texas v. Johnson (109 S. Ct. 2533 (1989)) where it was held that a State Statute forbidding the desecration of the national flag was unconstitutional as being inconsistent with the First Amendment, and the Skokie case (Collin v. Smith, 447 Fed. Suppl. 676; 578 F. 2d 1197 (1978)) in which both the Federal District Court and the Federal Court of Appeals affirmed the right of neo-Nazis to march through a predominantly Jewish neighborhood, again on the strength of the First Amendment which forbids the making of any Law abridging freedom of speech. That case did not reach the Supreme Court. However, in 1952 the Supreme Court upheld a criminal libel statute

which forbade publications "exposing a class of citizens of any race, color, creed or religion to contempt, derision or obloquy." (Beauharnais v. Illinois - 343 U.S. 250 (per Frankfurter J.)) Doubts have been thrown on the correctness of that decision, but when certiorari was denied by the Supreme Court in the Skokie case (436 U.S. 953) Blackmun J., dissenting, stated that "Beauharnais has not been overruled or formally limited in any way".

14. Be that as it may, Protonia, like Great Britain and Israel, has no written Constitution. The opinions expressed in the Supreme Court of Israel in the Kahane case (supra), allowing racist speech, constitute no doubt a highwater mark in the protection of freedom of expression. That case has now to be considered subject to subsequent legislation by the Knesset outlawing "publications with intent to incite to racism." (see below, in para. 23). In any event, the opinion of Barak J. fully recognizes the right of the Court to intervene where "the broadcast creates a near certainty of real injury to public order."
15. Anti-Semitism is the most vicious form of racism. It does not seek to convince by rational argument, but by appealing to base instincts, nourished by irrational motives of xenophobia, of envy and of sadism. To quote Jean-Paul Sartre in his "Réflexions sur la Question Juive", (Gallimard, 2nd ed. 1954 at p. 22, English trans lation published by Schocken Books, New York, 1965, under the title "Anti-Semite and Jew"):

> "They (the anti-Semites) want no acquisition of opinions, they want them to be innate; since they are afraid of reasoning, they wish to adopt a way of life where reasoning and research play only a subordinate role, where one only searches for what one has already found, where one never becomes anything other than what one already has been. It is nothing but passion. ... The Antisemite has chosen hatred, because hatred is a faith; he has chosen from the outset to deprive words and reasons of their value. ... for them it is not a matter of persuading by valid argument, but of intimidating and of confusing."

There lies the explanation of the popularity which the anti-Semitic broadcasts emitted by "Channel I" are enjoying. They were followed by a rise of anti-Semitic activity in Protonia - the drawing of hate graffiti and swastikas on Jewish institu tions and posting placards calling for the boycott of stores and companies owned by Jews. In Hitler's Germany such exactly was the first stage in the "practical" applica tion of that final abomination which was reached by the National -Socialist brand of racism: that Jews are subhuman, intent on defiling the purity of the German master-race and have therefore to be destroyed like vermin, A straight line led from that first stage, in April 1933, to the Crystal Night of 1938 and to the "Final Solution" in the gas chambers of Treblinka and of Auschwitz. As Justice Bach justly observed in the Kahane case: "I do not believe that ... in the light of our people's tragic and trau matic experience, I have to explain the destructive nature of racist hatred." Indeed, there is no more glaring antithesis to the belief in the equality of all human beings which lies at the very base of liberal democracy than the pernicious teachings of that form of anti-Semitism to which the Respondent No. 3 adheres as an ex-leader of the neo-Nazi organization which is still active in Protonia. Racist hatred is per se, by its very nature, outside the sphere of values protected by freedom of expression.

16 If nevertheless racism could somehow fall within the province of freedom of expres-sion, then the further question would arise where the limits to that freedom are to be

drawn. Precedents of the U.S. Supreme Court apply in that regard the test of "clear and present danger" of a breach of the peace as the result of the ideas expressed, whereas Israeli decisions following the Kol Ha'am precedent, prefer the test of "near certainty of substantial injury to the preservation of public order." But protection will be withdrawn from speech which involves "an extreme, gross and deep-going injury to the feelings of the public" (Barak J. in Laor v. The Film and Plays Supervisory Board - H.C. 14/86, 41 (1) P.D. 42 1, at para 24). At any event, the publication of calculated falsehoods is not protected, either in the U.S. (see Garrison v. Louisiana - 370 U.S. 64 (1964) or in Israel: M.I.L.A.N. v. the Broadcasting Authority (H.C. 259.84 38 (2) P.D. 673, 684). To quote Mr. Justice Brennan (for the Court) in the Garrison case: "Calculated falsehoods fall into that class of utterance which are no part of an exposition of ideas, and are of such slight social value as a step to truth, that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality ... Hence the knowingly false statement and the statement made with reckless disregard of the truth, do not enjoy constitu tional protection".

17. In the final analysis, questions concerning freedom of expression, like any other of the recognized civil liberties, cannot be measured by any fixed yardstick, but should be decided having regard to the nature of the competing values concerned and the relative importance to be attached to each of them (see Daher v. Minister of the Interior - H.C. 448/85 40 (2) P.D. 701, 708, per Ben-Porat D.P.).
18. But it was argued on behalf of the Respondents that the events which took place in Protonia as the result of the inflammatory broadcasts by "Channel 1" are still a far cry from what happened in Hitler's Germany. After all, the neo-Nazi organization in Protonia consists today only of a few thousand members out of a population of six million, and they are very far from seizing power in the country. The proper remedy against those broadcasts should be counterpropaganda to be initiated by the Jewish community who are at present more numerous than the neo-Nazis, by exposing, through broadcasts from other radio and television stations, the falsehood of the propaganda spread by Channel 1.
19. We reject these arguments. It is true that as yet the neo-Nazi movement in Protonia is still comparatively small in numbers. But so was National Socialism in Germany during the 1920's when it could still have been stopped in its tracks by outlawing it. The very failure of Governmental authorities in Germany during that time to take decisive steps against the danger when it was still in its incipient stage, played a major role in bringing about the catastrophic consequences which ensued. The test of immediacy is useless in the case of a danger of such magnitude to the public peace. When the stage of actual violence becomes immediate as the result of racist incitement, it is too late to take counter-measures. The Latin adage "principiis obsta" (Resist at the outset!) is fully applicable here.
20. Certainly the truth should be made known to the general public. But it is a vain hope that the use of reasonable argument based on the truth will convince persons whose primitive instincts have been aroused by hate propaganda. Neither is this a case for applying the doctrine disfavouring prior restraint which holds that instead of taking preventive measures the Court should punish offenders in criminal proceedings to be instituted ex post facto. The answer to this argument is to be found in Justice Barak's opinion in the Kahane case (at paras. 33 and 36): The cumulative effect of

past speech should be considered and if there is a real danger of serious injury to the feelings of a section of the public, then the Court must take preventive, instead of corrective measures.

21. The lessons to be drawn from the Holocaust of European Jewry are ever present to the minds of survivors who have had first-hand experience of those horrors. But these lessons must also be transmitted to future generations, to serve them as a stern warning against the evils of racism. It is this attitude which pervades instruments of international law which contain express prohibitions of racist incitement. Thus, the International Covenant on Civil and Political Rights, of 1966, provides in Article 20 (2) that "any advocacy of national, religious, racial or religious hatred that consti tutes incitement to discrimination, hostility or violence shall be prohibited by law." The International Convention on the Elimination of all Forms of Racial Discrimination, of the same year, has so far been ratified by 126 States, including all the Western democracies, except the United States and apparently, on the facts stated before us, Protonia itself. The Convention states in its preamble that the States Parties to it consider "that the Charter of the United Nations is based on the principles of the dignity inherent in all human beings" and that it is one of the purposes of the United Nations "to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". By Article 4 of the Convention

> "State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or to promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end ... inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin .."

By Article 6:

> "...States Parties shall assure to everyone within their Jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination, which violate his human rights and funda mental freedoms contrary to this Convention ..."

This Convention has, of course, binding force for all the States which have ratified it. It is out of place to put it on equal footing with the infamous Resolution No. 3379 of the General Assembly of the U.N., as learned Counsel for the Respondents sought to do in order to belittle the importance of the Convention. The General Assembly is not invested with any legislative power (see Oppenheim on International law, 7th ed. p. 386).

22. Within Western Europe 21 States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 10 of that Convention provides that

1. Everyone has the right to freedom of opinion. This right shall include freedom to hold opinions and to receive and impart information and ideas without inter ference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television of cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions and penalties as are prescribed by law ... for the protection of the reputation or rights of others ...

23. We shall now illustrate by way of examples chosen by us the manner in which States Parties have implemented the obligations undertaken by them under these instruments of International Law, in order to provide by their respective national legislation for the prohibition of incitement to hatred against identifiable groups of persons:

Argentina: "Those who participate in an organization or spread propaganda based on ideas or theories of superiority by one race or group of persons of a particular religion, ethnic origin or colour, for the purpose of justifying or promoting racial or religious discrimination in any form will be punished by a prison term of one month to three years."

"The same punishment will be incurred by anyone who in whatever way encourages or incites to persecution or hatred of a person or group of persons for reasons of their race, religion, nationality or political views."

Belgium: passed a law in 1981 "On the Suppression of Certain Acts prompted by Racism or Xenophobia", prohibiting incitement to discrimination ... or hatred or violence against any group, community or their members on the grounds of the race, colour, descent or national or ethnic origin of their members or some of them.

Canada: The Canadian Charter of Rights and Freedoms, enacted in 1982 "guarantees the Rights and Freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Section 1). Section 2(b) includes among the fundamental freedoms "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." By Section 15(l)

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

More specifically in the context of our subject, the Canadian Television Broadcasting Regulations, 1987, provide in Regulation 5 (b) that a licensee of a television station shall not broadcast

"any abusive comment or abusive pictorial representation that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, or mental or physical disability."

Great Britain: The English Common Law does not recognize a criminal offence or a tort of libel directed against a group as such. Yet, it is of interest to note an old English case of the year 1732 (R. and Osborne - 25 E.R. 584) the report of which recounts how an English Court dealt with a blood libel against Jews in the City of London 250 years ago:

"Information was moved against the Defendant for publishing a Paper entitled, A true and surprizing Relation of a Murder and Cruelty that was committed by the Jews lately arrived from Portugal; showing how they burnt a Woman and a newborn infant the latter end of February, because the Infant was begotten by a Christian ... and that the like Cruelty has often been committed by the Jews, notwithstanding an Act of King Car. 2 to prevent Murders etc. committed by the Jews. It was objected that admitting that this Paper was libellous, yet the Charge was so general that no particular Persons could pretend to be injured by it."

To that plea the Court replied that: "This is not by way of information for a Libel, but for a Breach of the Peace, inciting a Mob to the Destruction of a whole Set of people; and tho' it is too general to make it fall within the Description of a Libel, yet it will be pernicious to suffer such scandalous Reflections to go unpunished ... in the present Case several Affidavits were made, that this Paper has so much incensed the Mob against the Jews that they had assaulted and beat in a most outragious manner the Prosecutor who was a Jew. The Court made a Rule absolute for an Information" (i.e. it allowed criminal proceedings to be brought against the Publisher of the libel for a breach of the peace).

Coming to modern times, Part III of the Public Order Act, 1986 deals with "racial hatred". That term is defined by section 17 of the Act as "hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins." This definition follows closely the defini tion of a "racial group" in Section 3(l) of the Race Relations Act, 1976. In the case of Mandla v. Dowell Lee (1963) 2 WLR 620, a question arose in the House of Lords whether the Sikhs are a racial group. In his speech Lord Frazer described the following characteristics of a racial group (at p. 625): "(1) a long shared history, of which the group is conscious as distinguishing it from other groups and the memory of which it keeps alive; (2) a cultural tradition of its own including family and social customs and manners, often but not necessarily associated with religious obser vance." Needless to say, this description fully fits the Jews of our days.

Section 22 of the Public Order Act, 1986 would be applicable to the facts of this case:

"22. (1) If a programme involving threatening, abusive or insulting visual images or sounds is

broadcast ... each of the persons mentioned in subsection (2) is guilty of an offence if

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) The persons are:

(a) the person providing the broadcasting service,

(b) any person by whom the programme is produced or directed, and

(c) any person by whom offending words or behaviour are used."

The section thus outlaws incitement to racial hatred by applying, alternatively, a subjective, intentional test and also an objective, factual test.

France: Law No. 72-546 of 1972, on Combatting Racism, added para 5 to Article 24 of the Law of 1881 on the Freedom of the Press, in the following terms:

> "Anyone who by any of the means described in Article 23 [i.e. written or printed material, drawing ... picture or any other means of pictorial representation] incites to discrimination against a person or group of persons on the grounds of their origin or their belonging or not belonging to a specific ethnic or national group, race or religion, shall be punished by imprisonment of one month to one year and a fine of 2,000 to 300,000 Francs or only one of these two punishments."

The same Law of 1972 also added Article 32 (2) to the Law on the Freedom of the Press, defining a criminal offence of "Defamation of a person or group of persons, because they belong or do not belong to a given ethnic group, nation, race or religion."

Under these provisions the International League against Racialism and Anti-Semitism (L.I.C.R.A.) instituted in 1973 criminal proceedings in the Paris Court of First Instance against the responsible Publisher of a "U.S.S.R. Bulletin" which reprinted a viciously anti-Semitic, anti-Zionist and anti-Israeli propaganda campaign which the Soviet Union was then waging, basing itself to a large extent on a repetition of the "Protocols of the Elders of Zion" (on that aspect of the case see above, at para 5). After hearing the evidence of Professor René Cassin, of Chief Rabbi Jacob Kaplan and of other witnesses, the Court found the Publisher guilty of the offence of public defamation of a group of persons, viz. the Jews, as a race and a religion, by reason of their origin or of their belonging to a specific ethnic group, race or religion, and of the further offence of incitement to discrimination, hatred or racial violence.

Israel: In 1986 the Legislature added section 144B to the Penal Code, as follows:

"144 (a) Anyone who published any matter with the intent of inciting to racism is liable to five years imprisonment.

(b) For the purposes of this Section it matters not whether the publication led to racism and whether it contained the truth or not."

The term "Racism" was defined by Section 144A as
"Persecution, humiliation, degradation, manifestation of enmity, hostility or violence, or causing strife toward a group of people or parts of the population, because of their colour, affiliation with a race or national-ethnic origin."

Section 4 of the Prohibition of Defamation Act, 1965, recognizes the criminal offence of group libel.
Sweden: In 1982 Chapter 16, Section 8 of the Criminal Code was amended in the following terms:

"Anyone who publicly or otherwise in a declaration or other statement which is disseminated to the public threatens or expresses contempt for an ethnic group or some similar group of persons, with allusion to race, colour, national or ethnic origin or religious creed, shall be sentenced for agitation against ethnic groups by imprisonment of up to two years or, if the crime is petty, to a fine."

Under this section the City Court of Stockholm in the recent criminal case against Ahmed Rami (which has also already been referred to above, in para 5) found the Accused guilty of incitement against a National Group, by reason of his broadcasts by the "Radio Islam" radio station. In giving its Judgment the Court stated that "Freedom of Speech is fundamental to a democratic society and restriction thereof must be made with the greatest caution. The provision concerning agitation against an ethnic group which constitutes a restriction of Freedom of Speech has come into being primarily in view of the fact that a democratic society cannot tolerate racism. Statements which threaten or express disrespect for a certain ethnic group cannot be pardoned by referring to Freedom of Speech".

24. This brief review of national legislation enacted in Western-type Democracies, in accordance with their obligations under the International Treaties adopted by them, and of judicial application of such legislation, discloses a wide consensus on the need to stem the tide of malicious incitement to racial hatred which is rising again in some countries in recent years, in spite of the catastrophe which befell mankind only a generation ago as the result of racial hatred carried to the extreme. These obligations which began by being consensual on the part of an overwhelming majority of the civilized States of the World, are now in the process of becoming obligations of customary international law. Thus they should be adopted also by the State of Protonia which for some reason unknown to us has not as yet ratified the 1966 International Convention Against Racial Discrimination.
But also apart from the aspect of international law, it is the conclusion of this Court that by virtue of the general principles underlying the legal concept of freedom of expression, and first and foremost the all-embracing principle of the equality of men, the malicious and inflammatory racist propaganda broadcasts emitted by "Channel I" must be discontinued.

25. The Petitioners pray for a Declaration by this Court in terms set out in their Petition which has been quoted in full at the commencement of this Judgment. This Court finds that for the reasons stated in this Judgment they are entitled to a Declaration in their favour and

DECLARES THAT all civil liberties flow from the universal principles protecting the dignity of men and their equality under the Law, and that accordingly freedom of speech and expression does not include any right to promote malicious racial incitement;

THAT THEREFORE the National Broadcasting Authority, the First Respondent, is required, in exercising its powers to grant and revoke or to impose conditions on licenses for the operation of Television Stations, to take into account, in the interests of Society, not only the need to protect the principles of free speech and expression, but also the need to prevent the licenses granted being misused to endanger seri ously the security of identifiable sections of the population of Protonia;

THAT THEREFORE the present is a proper case for this Court to exercise its supervisory powers over administrative action, viz. the refusal of the First Respondent to enter into the merits of the complaint lodged before it by the First Petitioner against Respondents 2 and 3;

THAT ACCORDINGLY the decision of the First Respondent not to enter into the merits of the said complaint is hereby set aside and the case is remitted to it for reconsideration in the light of the Judgment of this Court and for a new decision in conformity to it.

PREMIER PRESIDENT PIERRE DRAI (CONCURRING)

LA COUR,
constate:

- Que la liberté d'exprimer des idées et des opinions et d'assurer leur diffusion constitue le fondement de la vie en démocratie,
- Que c'est]A le principe auquel il faut se référer de façon normale et habituelle et que, dans le doute c'est la liberté qu'il faut consacrer,
- Que toute exception A 1'excercice de cette liberté et A 1'effectivité des droits qui en découlent, dolt être interprétée de façon restrictive,
- Que, par voie de conséquence, tout ce qui constitue une agression injuste, illégitime et excessive contre un homme, pris individuellement ou comme membre d'une collectivité ou d'un groupe aisément identifiable, doit être refusé par la loi, de façon générale, et par le juge, de façon concrète et particulière,
- Qu'il en est ainsi de 1'expression et de la diffusion d'idées ou d'opinions qui d'opinions qui, par la façon dont elles atteignent le public, ont pour finalité ou pour résultat immédiat et direct, de diminuer la considération due A tout homme, d'abaisser celui-ci dans l'esprit de son voisin ou de son prochain, de créer un senti ment de haine contre lui ou de le frapper de discrimination, - Que, dans une telle hypothèse, il entre dans la mission des juges de prendre toutes les mesures propres ii proteeger la victime des agressions injustes et des mensonges averes et incontest6s,
- Que ces mesures doivent &re limit6es A leur objectif imm6diat et adapt6es it f6tat de trouble provoqu6 par I'auteur de I'agression ill6gitime,

C'est A la lurni6re de ces consid6rations pr6alables que
la COUR juge:

- Que les 6missions de t6l6vision sur CHANNEL 1, propri6t6 de Zigfried HEINTZHAMMER,
intitul6es: "A SMALL WINDOW IN HISTORY", &s lors qu'elles se pr6sentent comme une contribution A I'Histoire, sans aucun accompagnement d'une 6tude critique, loyale et objective, d6s lors aussi qu'elle n'autorise aucun d6bat contra dictoire et aucune confrontation d'id6es ou de th~ses contraires ou diff6rents, d6s lors enfin qu'elles se produisent de faqon r6guli6re et p6riodique, ont pour finalit6 de conduire A la haine et A la discrimination contre Mornme de confession juive, pris ut singuli ou dans son appartenance ~ une collectivit6 imm6diatement identifiable.
- Que ces 6missions de t6l6vision ont directement et imm6diatement provoqu6, dans

le public, des manifestations d'hostilité (apposition de graffiti, de croix gammées) ou de discrimination (appels ou boycott contre des magasins appartenant à des juifs),

- Que "CHANNEL 1" ne conteste pas que ces manifestations sont le r6sultat de 1'6mission incrimin6e et qu'~ aucun moment, "CHANNEL I" n'a condamn6 ces rn~me manifestations,

- Qu'iI en d6coule ainsi que "CHANNEL I " ne saurait poursuivre dan son entreprise, qui n'est qu'une entreprise de propagande fond6e sur]a haine ou la volont6 illicite de discrimination.

EN CONSEQUENCE
LA COUR
d6clare et dit pour droit:
1. Que les requ6rants sont fond6s ~ se plaindre de ce que 1'6mission de t6l6vision sur CHANNEL 1, intitul6e "A SMALL WINDOW IN HISTORY", tend ~ propager des id6es et des opinions fond6es sur la haine et la discrimination et ~ nier les principes fondamentaux du respect de la dignit6 de Fhomme et de celui de 1'6gallit6 entre les hommes,
2. Que cette 6mission ne peut se poursuivre sans que les producteurs aient propos6 et fait accepter par la Cour les moyens et modalit6s propres A assurer, dans Fesprit du public, une vision claire, objective et loyale du probl~me que cette 6mission a la pr6tention de poser et de r6soudre,
3. Que, dans un d6lai de ... X ... jours, cette proposition de moyens et modalit6s devra ~tre sournise A la Cour et aux requ6rants et que, jusqu'~ cc moment, 1'6mission est suspendue.

Pierre DRAI
Premier President de la Cour de Cassation
(English translation of the 0pinion of M. le Premier President Drai):
<u>The Court rules -</u>

- That the freedom to express ideas and opinions and to ensure their dissemination constitutes the fundament of the democratic way of life ,

- That this is the principle to which reference is to be made normally and habitually and that in case of doubt it is this freedom which must be secured ,

- That any exception from the exercise of this freedom and from the effectiveness of the rights deriving therefrom must be interpreted restrictively ,

- That the democratic way of life implies respect for the person, with the dignity and the individuality belonging to it,

That in consequence everything constituting an unjust, illegitimate and excessive aggression against a person, committed against him individually or collectively, or as a member of an easily identifiable group, must be rejected by the law in general and by a judge in a concrete and specific case ,

- That this applies also to the dissemination of ideas and opinions which, by the manner in which they reach the public, have the final or the immediate and direct result of diminishing the respect due to every human being, to humiliate him in the eyes of his neighbours or his fellowmen, to create a feeling of hatred towards him or to expose him to discrimination,

- That accordingly it is part of the duties imposed on the judges to take all measures proper for the protection of the victim of unjust acts of aggression and of proven and uncontested lies,

- That such measures must be restricted, so as to attain their immediate object and be adapted to the extent of the disturbance caused by the initiator of such illegitimate aggression.

In the light of the foregoing considerations the Court decides,

- That the television broadcasts on "Channel 1 which is owned by Siegfried Heintzhammer, under the title "A Small Window in History" - since they purport to be a contribution to History, without being accompanied by any critical, fair and objective study and since they do not admit of any discussion or confrontation of ideas or of contrary or different allegations and since finally, they are being produced regularly and periodically, have as their final aim the creation of hatred and of discrimination against persons of the Jewish faith, taken individually or as belonging to an immediately identifiable group,

- That these broadcasts have directly and immediately provoked amongst the public manifestations of hostility (the drawing of graffiti and swastikas) or of discrimination (appeals for boycotting shops belonging to Jews),

- That "Channel I" does not deny that these manifestations are the result of the broadcasts complained against and that "Channel I" has at no time condemned those manifestations,

- That in view of the foregoing "Channel 1" must not persist in its enterprise which is nothing but propaganda based on hatred or on an illicit desire to discriminate.

ACCORDINGLY THE COURT DECLARES THE LAW TO BE

(1) That the Plaintiffs have cause for complaint that the television broadcasts on - Channel 1" entitled "A Small Window in History" tend to propagate ideas and opinions based on hatred and discrimination and on the denial of the funda mental principles of the dignity of men and of equality between men -

(2) That these broadcasts cannot continue without the producers having proposed, for acceptance by the Court, ways and means in order to ensure, in the minds of the public, a clear, objective and fair view of the problem which these broadcasts purport to pose and to resolve -

(3) That within a period of X days those proposals of ways and means shall be submitted to the Court and to the Plaintiffs and that until then the broadcasts shall be suspended,

JUDGE ABNER MIKVA (DISSENTING)

The majority aptly states the problem to be resolved in this case to be "if, and to what extent, freedom of expression should be subject to limitations imposed by law, in order to prevent breaches of the public peace Maj. Op., par. 5 (emphasis added). My problem with the majority's approach to resolving this admittedly nettlesome issue is the source of the law the

court uses to justify restricting the challenged speech.

I have no quarrel with much of the majority's reasoning. It is beyond cavil that freedom of speech is a cornerstone of the legal structure undergirding liberal democ-

racies. Even in the absence of constitution or statute, therefore, one may legitimately maintain that freedom of speech is so essential to a democratic society that there is law for the court to apply in protection of that freedom. The fundamental role of free expression in a democracy 'Justifies a court's willingness to deviate from the legitimate Judicial function of applying the laws enacted by legislative bodies in order to find "law" to defend this freedom - even without constitutional or statutory guidance. The same principle that validates extraordinary judicial action in the defense of free speech demands exacting scrutiny of ordinary legislative initiatives designed to curb free expression; that principle renders unguided judicial efforts at such limitations on speech presumptively invalid.

I cannot Imagine a worse group of censors or procurators of a nation's speech than a group of judges. Judges - appropriately isolated from the political winds that blow, disciplined to curb their passions about all causes, large or small, accustomed to rigidly narrow forms of expression in their opinions and other writings, obliged to remain aloof from much human contact and 'intercourse - these are hardly the people to determine the boundaries needed to balance the right to speech against its excesses. Yet, this is precisely the role that the majority has assumed.

The court looks for comfort in its uncomfortable role by following the ordinary Judicial regimen of marshalling precedents to justify its extraordinary incursion into the legislative domain. The one common ingredient in the cases the majority cites is that they are bottomed on statutes or ordinances which limit speech. Much is made of Beauharnais v. Illinois, 343 U.S. 250 (1952). That case, whatever its dubious validity as current precedent in the United States. upheld the constitutionality of an Illinois statute which limited speech. Similarly, in Garrison v. Louisiana, 379 U.S. 64 (1964), the U.S. Supreme Court upheld the speech limitations contained in a Louisiana criminal libel statute. None of the precedents cited by the majority exemplify the raw declaration of power to limit speech claimed by the court in the case sub judice.

Occasionally, courts have attempted to create judicial limits on speech out of whole cloth, most notably by classifying the challenged behavior as "non-speech" or "unprotected expression." In the United States, for example, the Supreme Court once declared that motion pictures did not enjoy any free speech protection under the U.S. Constitution because motion pictures were a "business" and not involved in speech activities. See Mutual Film Corp. 1'. Industrial Comm'n, 236 U.S. 230, 243-44 (1914), overruled by Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). Similarly, the United States Supreme Court cast itself for a time in the untenable role of pornography censor, screening various films to determine what was, vel non, protected speech. The perils of allowing a body of unelected, isolated jurists to serve as society's moral arbiters is perhaps most strikingly revealed in the oft-quoted admission by one Justice that although he could not define pornography, he knew it when he saw it. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). To the majority's credit, it does not resort to such sophistry; the court acknowledges that the conduct of Channel I involves speech. The majority concludes, however, that it is dangerous speech and therefore should be prohibited. But whence came the law on which that conclusion can be based?

My learned colleagues list an exemplary survey of the statutes enacted in various countries in compliance with international treaties against racial and religious

discrimination. Significantly, the treaties all called for the participating states to meet their treaty obligations "by law", an obligation which these states satisfied by enacting the statutes cited by the majority. Tellingly. the majority falls to cite any precedent for a court acting sua sponte to meet its country's treaty obligations.

Is this some kind of jurisdictional quibble that I am advancing, unworthy of a group of international jurists seeking to bridge procedural differences to resolve an important question of great moment and substance'? Not at all. The absence of a statutory framework for limiting speech (and the absence of precedent allowing courts to proceed without such a framework) is the gravamen of my dispute with the majority's decision. Because limitations on free speech are so dangerous, they ought to be imposed only by elected policy-makers who can and do reckon the price of the limitation against the right being protected. That policy judgment is not something that judges ought to be making, even judges willing to stretch the common law toleration for judicial lawmaking.

Why is it important for judges to stay their hand in this free speech area? It is precisely because judges are independent of the political will; their judgments are considered too final, too infallible to be imposed independently of the body politic in deciding what speech can be limited. It is true that a political body can make its own mistakes. In the United States, a state legislature denounced and prohibited the teaching of the theory of evolution; a court upheld the statute which so ordained (see Scopes v. State, 289 S.W. 363 (Tenn. 1927)); but because it was a political judgment, the people were able to object, to criticize, and ultimately to change their political minds. Court decisions are presumed to be altogether right and proper, as if they were written on Mount Zion or Mount Olympus; they are not as easy to change, nor should they be. Again, to use the United States as an example, it took the Civil War to undo the mischief caused by the Supreme Court's now-infamous decision in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856), in which the Court struck down a political compromise dealing with fundamental human rights, and opted to exalt the property right instead. It took the better part of a century for the Supreme Court to correct its most fallible decision that racially separate facilities could be equal by overruling Plessy v. Ferguson, 163 U.S. 537 (1896). and holding unanimously, in Brown v. Board of Education, 347 U.S. 483 (1954), that separate schools were inherently unequal.

It can hardly be disputed that imposing limits on the freedom of speech can be injurious to the freedom of a democratic state. The majority does not take its responsibility lightly; the court justifies its action on the ground that "(r)acist hate propaganda constitutes the very negation of the political, social and personal interests of the citizen protected by freedom of expression." Maj. Op., par. 11. Yet, what kind of measuring stick does the quoted language provide to determine what other kinds of speech can be limited by court order? may a court prohibit someone from saying "I hate the Arabs"? How about the use of terms of opprobrium, like "Kike" or "Nigger" or "Schvartze"? May a newspaper call the President of a country a "baboon"? May we ban speakers who extol the virtues of Resolution No. 3379 of the United Nations (referred to in the majority opinion)?

If each of these repugnant terms is to be prohibited because it promoted the notion that certain racial groups are inferior, do we then move to restricting the equally troublesome advocacy of "superior" racial groups? Arguably, Hitler did almost as much damage by promoting the notion of the superiority of the Aryan race as he did by denigrating, and declaring the inferiority of other races. Is this kind of Ubermann-ism to be banned speech? What about Hindu Brahmans' claims to having special rights against other Indians? I need not exhaust the parade of horribles to point out how limitless the limitations on speech can be in light of the general principles laid out in the majority opinion.

I am deeply disturbed by the propagation of racial and ethnic hatred that inevitably flows from broadcasts like those made by Channel 1. Nonetheless, for the reasons noted, I am even more troubled by the prospect of an unelected judiciary divining appropriate limitations on the exercise of free speech. My conclusion that this court may not limit sua sponte the dissemination of pernicious and fallacious propaganda does not resign us to relive the horrors of Nazi Germany or other historic episodes of genocide. Although history confirms that unchecked hatred can be dangerous, I am given courage by an incident that reveals the power of free speech as an engine of truth. Many years ago, a famous American industrialist, Henry Ford, discovered the Protocols of Zion, and printed them along with other anti-Semitic tracts in a newspaper owned by him. I have no doubt that his activities did considerable damage to the Jewish population of the United States. But it was not legal action that caused Henry Ford to shut down his anti-Semitic activities. It was concerted boycott activity by American Jews, and those others who found Ford's activities reprehensible, and the patient, slogging force of truth that finally revealed Ford's publications as lies.

Milton's beautiful Areopagitica suffers from one defect that has made it difficult to quote as a literal answer to the advocates of censorship. When Milton assured us that truth conquers falsehood in a fair encounter, he should have acknowledged how long it takes and how impatient some advocates of truth become.

I would affirm the decision of the Authority.