The Toriland Trial

A Public Trial on Boundaries of Political Speech

Before the International Tribunal
Sitting at the 11th Congress of the
International Association of Jewish Lawyers and Jurists

Jerusalem, December 29, 1998

Public Trial:
Boundaries of Political Speech


Bach


Caplan


Foighel


Rottenberg Liatowitsch


Trager

Judges:

* Justice **Gabriel Bach**, formerly of the Supreme Court of Israel (Presiding)
* Lord **Philip Caplan**, Senior Appeal Judge, Court of Session, Supreme Court of Scotland
* Judge **Isi Foighel**, Denmark, Judge of the European Court of Human Rights in Strasbourg
* Justice **Vera Rottenberg Liatowitsch**, Supreme Court of Switzerland
* Judge **David G. Trager**, U.S. District Court, Eastern District of New York, USA


Abrams


Dayan


Goldberg


Jakubowicz


Zilbershats

Pleaders:

* Mr. **Floyd Abrams**, Advocate, New York, U.SA
* Dr. **Ilana Dayan**, Faculty of Law, Tel Aviv University, Israel
* Mr. **Jonathan Goldberg**, Q.C., Barrister-at-Law, London, England
* Mr. **Alain Jakubowicz**, Advocate, Lyon, France

Academic advisor for the preparation of the trial and the script:

* Dr. **Yaffa Zilbershats**, Faculty of Law, Bar-Ilan University, Israel

The Facts of the Case

Toriland is a country which obtained its independence over thirty years ago. The majority of its population consists of believers in the Purity faith, while the minority are followers of the Hope faith. Despite the commitment of the citizens of Toriland to their respective religions, they decided, in a referendum held immediately after the establishment of the State, to maintain a secular democratic regime in Toriland, based on a written constitution.

Three political parties were formed, the members of which were elected to Toriland's Parliament: the Purity Party, the Hope Party and the Socialist Party. The Purity Party formed the majority in the Parliament and the first elected Prime Minister belonged to the Purity faith as did all later elected Prime Ministers. The Purity Party and Hope Party each represented members of their respective faiths, however, they believed in the democratic ideal and supported it.

The Toriland Constitution provides for the principle of the separation of powers, and confers a wide range of political and social rights, on the citizens of Toriland. Among these rights, Article 10 of the Constitution provides that "every person has the right to freedom of expression, association and organization", and Article 11 states that: "every person has the right to freedom of religion and worship". Article 20 of the Constitution enables the limitation of the rights, provided such limitation is for a proper purpose and provided that the impairment does not exceed what is reasonably necessary. Article 20 also provides that a law which impairs a right conferred by the Constitution for a purpose which is not proper and/or to an extent which exceeds what is necessary, may be annulled by decision of the Supreme Court.

Notwithstanding the sharp tensions prevailing between members of the Purity faith and members of the Hope faith in the period leading up to the independence of Toriland, it had seemed that the democratic government had reduced the hostility, created a dialogue between the various movements, and enabled a settled lifestyle and peace to reign in the country.

However, the delicate balance in Toriland was undermined by the influence of a religious revolution which took place in a neighbouring country - Maday. A liberal king had ruled in Maday, but he was deposed by the priests of the Purity faith and sent into exile. The priests turned Maday into a theocracy. Thousands died in the ensuing commotion and there was great damage to property.

The disruption of the balance in Toriland was initially reflected in sermons given by priests in the Purity houses of worship. The priests preached to worshippers that they should take action so that all the citizens of Toriland would accept the Purity faith or be condemned as heretics and be faced with an uncompromising civil war. At a later stage, the priests called upon believers to stop paying taxes to the secular government, not to fulfill their duties of military service, and go out on mass demonstrations calling for the eradication of the democratic regime. They called the Prime Minister "the secular Satan who should burn in the fires of hell".

Among the other sectors in the population, and in particular among students affiliated with the Socialist Party, loud voices started to be heard calling for the suppression of the extremist Purity movement. They distributed flyers stating: "Stop the anti-democratic actions in the houses of worship, outlaw the Purity priests and close their Temples".

They plastered posters throughout the city, in which the priests of the Purity faith were depicted in such a way that their faces were clearly identifiable, but each had the body of a naked woman. The students demonstrated and called for "death to provocateurs, death to enemies of democracy", and also "the houses of worship which poison the thoughts of people against democracy - must be closed down".

It should be noted that the wave of tension did not give rise to actual acts of violence. However, as tensions increased, the Director of Public Prosecutions in Toriland decided to take preventative action and he charged the Purity priests with offences under Sections 15, 16, 17 of the Penal Law.

Section 15 of the Penal Law which deals with the offence of Sedition, provides that:

> "A. Any person who does any act with a seditious intention is liable to imprisonment for five years.
> B. Any person who publishes any words or prints or reproduces any publication of a seditious nature is liable to imprisonment for five years and the publication will be forfeited.
> C. For the purposes of this Section, 'sedition' means -
> 1 to bring into hatred or contempt or to excite disaffection against the State or its duly constituted administrative or judicial authorities, or
> 2 to promote feelings of ill-will and enmity between the different sections of the population."

Section 16 of the Law provides that:

> "Any person who publishes in writing or orally praises, supports or encourages any act or acts of violence which may lead to the death of a person or physical injury to him or to his property is liable to imprisonment for three years"

Section 17 of the Law provides for offences of incitement, as follows:

> "Any person who calls, expressly or impliedly, for the commission of any unlawful act or any act of violence is liable to imprisonment for three years"

The Director of Public Prosecutions decided to charge the students with an offence under the Section 17. The Defendants, both priests and students, argue before this Court that they should not be convicted because the laws, on the basis of which the indictments are brought, are contrary to the principles of the Constitution and should therefore be annulled. In the alternative they argue that their acts do not constitute the elements of the offences in respect of which they are charged.

The Defence Case

Mr. Floyd Abrams opening for the Defence noted that he represented two groups of Defendants who had been criminally charged because of what they had said, rather than what they had done. From the material before the Court, it was undisputed that not a single act of violence had occurred in Toriland because of this speech, notwithstanding that in neighbouring Maday a revolution had occurred involving considerable violence. Nor was there evidence before the Court that the law enforcement authorities were unable to deal with civil disorder if it would occur. The warfare in Toriland, was a war of words, not of bullets. Additionally, there was no evidence of a society which was either crumbling or being seriously threatened. It was true that the language referred to in the facts was very emotional and indeed very disturbing. However, the language of the priests was, in a sense, theological language. This was the only way to characterize their description of the Prime Minister as the 'secular Satan', or, their talk of heresy trials and civil war. But this civil war had not begun, nor was there any indication that it was on the verge of beginning. Similarly, the rhetoric of the students was a younger, excited and more secular version of the overheated language of the priests.

While thousands of people had been killed in the neighbouring Maday, on the basis of the same kind of arguments as those made by the members of the Purity faith, Mr. Abrams argued that this was the only factor which in the slightest favoured the suppression of speech and was the only evidence which the Court ought to consider. Countering it, the Court also had to consider that Maday was a foreign nation, no such violence had reached Toriland, and there was no reason to assume that it would.

Mr. Abrams rejected the idea that words do not matter or could not persuade. If they mattered so little, they would not be defended so much. But words had to be judged in context and the context of these words was a defence in and of itself. Section 17 of the Penal Law in Toriland treated as incitement calls for unlawful acts or acts of violence. Section 16 criminalized writings or oral advocacy of acts of violence. Without context, it was true that every time a priest said the Prime Minister should burn in hell, or a student screamed "death to provocateurs," that would be an incitement, but this extravagant, overheated rhetoric should be understood as rhetoric and not read literally as threats.

Similarly, there was no doubt there was a lot of ill-will in Toriland, and that Section 15 providing for the offence of sedition concerned the question of speech fomenting ill-will. However, the language of religion and the language of politics was often allegorical, not literal, and it could not be understood by simply taking particular words out of context, as Mr. Abrams contended had been done by the Prosecution.

Mr. Abrams pointed out that in a number of countries, including Israel and the United States, there could be no finding of incitement absent proof, among other elements, that the language sought to be punished would itself, in some way, cause serious harm and that there was good reason to think it would do so. The language differed in the case law of the various countries, but the substantive requirement that there had to be very good reason to expect harm from the speech was deeply embodied in every democratic State. Justice Louis Brandeis, in one of the most poignant sentences in any judicial opinion, warned that men feared witches and burned women. The Defence sought to avoid burning ideas, and one of the ways to do that was to require real proof, not simple language, that speech would cause harm. In Israel the question asked was: Was the wood dry enough to be ignited by a single match? On the facts of this case, the wood was not dry enough. In the United States the question asked was whether the incidence of the evil apprehended was so imminent that it could occur before there was an opportunity for full discussion. On the facts, that did not apply here either. The language of the legal tests differed, but Mr. Abrams urged that some sort of limiting principal was required.

Mr. Abrams noted that he was not arguing that simply because there was no violence, there could not be violence. Rather, there had to be a very good reason to expect it. It was insufficient to point to a revolution in a neighbouring State and thereby dispose of political and religious speech, which so far had not caused any harm except bruised feelings. This afforded no protection at all for speech. It was necessary to import into the law the requirements of some high probability of harm ensuing, both as a matter of statutory reading of the clauses, and as a matter of constitutional analysis. One way to avoid a real constitutional clash was for the Court to determine that the statutes which did not speak to this issue on their face, should be read so as to incorporate these requirements. If they were not so

read, then Section 16 and Section 17, both of which dealt with incitement, had to be held to be unconstitutional. Section 16, on its face, imposed criminal liability for any publication or statute which praised an act of violence, which could lead to physical injury. That was extremely broad language. If a notion of likelihood of harm, or even certainty of harm, was imported, that would deal with the problem.

Further, Section 15, which dealt with sedition, also raised profound constitutional issues. The statute, on its face, held that any language which was used to "excite disaffection" against the State or its duly constituted administrative or judicial authorities, was a crime. However, in Mr. Abrams' view, it was right, sometimes, to bring the State into disrepute, and attacks on administrative or judicial authorities should be judicially protected. The European Court had addressed this issue on more than one occasion, as had Courts around the world, and the breadth of Section 15, on its face, required either an extraordinary degree of narrowing by the Court or a ruling that on its face it was unconstitutional.

The Defence appreciated that the language used could be seen by people as offensive, discomforting, and perhaps even frightening. But it had to be remembered that the primary protection against lies was the truth; the primary protection against bad speech was good speech and the primary protection against civil disorder was the police and the army. It was not lawyers seeking to suppress speech or judges yielding to the pleas of those lawyers.

With regard to the argument that abuse howled by individuals outside a private home, might cause considerable alarm to the occupants of the house, lead them to retaliate and thereby create public disorder, with resulting prosecutions for breach of the peace, Mr. Abrams accepted that in the United States this would not be unconstitutional. A great body of case law was directed at protecting people in their homes from external abuse, picketing, and the like. However, a distinction had to be drawn between political speech against the leaders of the State made in the streets or in churches, and speech made outside individual homes. There was no area where greater protection was given than to speech in the streets, unless the peace was being disturbed in a more threatening, physical way. The idea that Courts now had to parse through what priests or rabbis said in order to determine what was theological, what was political, and what was dangerous, was very disturbing.

Thus, students shouting: "Death to the provocateurs, death to the enemies of democracy" was not borderline, because it was not at the level of credibility of action immediately following threats. "Let's close the churches that are spreading poison," was the rhetorical language of the streets, rather than imminently threatening language. At the same time, Mr. Abrams conceded that there was some language, in some circumstances, which violated every person's notion, including in the United States, of what was legally protected. An example of this was direct and credible threats of imminent harm. If a priest walked out of a church and the students shouted: "Let's get him", the police would be entitled to stop them. That speech would not be protected speech. There was language which could be imminently threatening, and to the extent that it was, and the threat was credible, and reference was not to a fringe group with no power at all, then in that situation, the speech could be suppressed.

With regard to the priests' description of the Prime Minister as "a Satan who should be burned", Mr. Abrams emphasized that this language troubled him least, and in his view was most clearly protected. What might seem the worst, most extravagant language, was also a sort of rhetorical hyperbole. It was first of all religious talk. "Burn in the fires of hell' could not fairly be taken as a threat of direct action or even as a direct threat that someone else would act. Indeed, it was not necessary to wait until there was action, but the fact that there had been **no** action was an extremely relevant fact for the Court to weigh. The Court needed proof, not that there might be someone who would act, but that there was very good reason to believe that there would, or was likely to be, such a person. Anything else was insufficient. In addition, an intent requirement was necessary.

Finally, with regard to the call to stop paying taxes, or fulfill the duties of military service, Mr. Abrams conceded that this raised closer questions than the issue of the Prime Minister being Satanic, or secular Satanic. However, absent a suggestion that something had occurred beyond speech alone, this too had to be deemed insufficient. The fact that a call had been made for these violations of the law did not in and of itself constitute a threat to the nation or to public order contrary to Section 17.

Dr. Dayan commenced by noting that Gregory Lee Johnson had probably never visited Toriland, but he was present in the heated discussion evolving in the Court Room. Gregory Johnson was an American citizen, in Dallas in the summer of 1984, protesting against the expected nomination of Ronald Reagan as President of the United States for an additional four years. He shouted, with others, "Ronald Reagan, killer of the hour. Perfect example of U.S. power", as well as "Reagan, Mondale, who will it be? Either one means World War III". At some point Johnson also took an American flag and set it on

fire. He was indicted under a Texas law prohibiting the desecration of venerated objects, and making it a criminal offence to intentionally or knowingly desecrate a State or national flag. During the course of oral argument in the U.S. Supreme Court, Justice Scalia asked counsel representing the State of Texas, why the defendant's actions had destroyed the symbol. Counsel tried to argue that an abused symbol was no longer a symbol, but was unable to escape the well-pointed observation of the judge that the law was enacted because Texas did not wish to tolerate the message communicated through flag desecration. That, as Justice Brennan wrote for the majority of the Court, was inconsistent with the bedrock principle underlying the First Amendment, which incorporated the free speech principle, that the government could not prohibit the expression of an idea simply because society found it offensive or disagreeable.

This quotation was echoed by Justice Barak in the famous free speech decision, *Kahana v. Managing Committee of the Broacasting Authority* (41 P.D. (1987) 313) which also concerned offensive speech. There, Justice Barak noted, "Free speech includes the freedom to express dangerous, outrageous and perverted opinions". Justice Brennan, in the closing remarks, in one of his strongest free speech themes resonated in the *Texas v. Johnson case*, said, "One can imagine no more appropriate response to burning a flag, than waving one's own. And no better way to counter a flag burner's message than by saluting the flag that burns".

Dr. Dayan argued that the citizens of Toriland, both priests and students, were doing just that. Their political disagreement was intense, often angry and offensive, but also a vivid celebration of democracy, freedom and freedom of speech. The debate concerned the most crucial issues in the life of the nation, it was a risky debate, but one worth taking and one which, in the circumstances of the case, democracy had to take. Bearing in mind Article 10 of the Toriland Constitution, the notion of free speech was not strange to the Court. Nevertheless, she urged the Court to go beyond the common theories employed in free speech jurisprudence, arguing that the Defendants were the living embodiment of the constitutionally protected principle of free speech. This was so not merely because they celebrated personal autonomy and self-fulfillment nor even because they served the 'marketplace of ideas' metaphor, rather, they deserved the highest free speech protection because they, both priests and students, deviated from mainstream discourse. Both groups sought to attack communal cohesiveness; those customs, manners, ideas and institutions which glued Toriland together. The priests and students did not do this gently; they yelled, cursed and called for action. Dr. Dayan pointed out that dissent tended not to be cool and elegant. Dissenters sought to make the community uncomfortable and defensive, they challenged the very roots of its existence. Dissenters did not salute the flag, they sometimes burned it. The argument went beyond the classic rationales advancing the principle of free speech.

It was possible to argue that the Court had before it a vivid enactment of the 'marketplace of ideas' metaphor: priests and students engaged in the free trade in ideas which, if left unregulated, would presumably lead them to find some objective truth. But it could also be forcefully argued that the free speech of the Defendants was an end in itself. Their human dignity and personal autonomy would suffer intolerable harm if they were censored. This had nothing to do with the search for truth or the process of self-government. It was a right to speak defiantly, robustly, and irreverantly. To speak one's mind just because it was one's mind. Dr. Dayan contended that there was authority for this theory in most of the seminal free speech cases of America and in Israel, at least, as of 1953, subject to the qualification, however, that personal autonomy to express one's views did not apply without regard to the consequences.

Indeed, one could not have an open, robust, uninhibited, rich, democratic, public debate unless people were allowed to speak their mind, provided, however, that the element of the imminence of violence actually happening did not exist. Irritating the *status quo*, or mainstream discourse, was sometimes needed in order for speech to be effective.

A third perspective of free speech theory, was the democratic theory. The production of a rich, wide, open, robust, intensive and fiery public debate lay at the heart of democratic self-government. People were allowed to speak so that others could vote. Under this theory, free speech was a vehicle for citizens' participation in public life. It enabled the production of intelligent political decisions. It facilitated majority rule and provided a check on governmental tyranny and corruption. It also served to preserve social stability.

This theory was identified closely with the American scholar, Alexander Michael-John, who formulated the test that what was important was not that everyone should speak, but that everything worth saying would be said. Dr. Dayan questioned whether this was really what was important? Was it worth saying that whoever kept his faith contrary to the priests' call would be condemned as heretic? Was it worth calling an elected Prime Minister the secular Satan, and saying that he should be burned in the fires of hell? Was it worth saying that people should stop paying taxes, and stop serving in the military? In her view, Michael-John had come up with a good theory, but a bad test for protected speech. Democracy required debate, but

debate needed more than whatever was worth saying, primarily because government was ill-suited to mandate what was and was not worth saying, and also because sometimes irrational, emotional, threatening, twisted, freak, and distorted speech was as important to public discourse as pure intellectual thought. The argument extended beyond the classical rationales of free speech, and Dr. Dayan invited the Court to go beyond the marketplace of ideas, individual liberty, and the relationship between free speech and self-government, and examine the theory that the value of dissent was, in effect, the organizing symbol of free speech jurisprudence. Hundreds of Court decisions in the U.S., Israel, and the UK, looked at free speech in terms of the image of the individual speaker, town hall meeting, or liberal government, but if Article 10 of the Toriland Constitution had to have one image it should be that of the dissenter, because whoever read the case law and the literature understood that free speech was much more than the protector of democracy or even of humanistic values. It was also, and perhaps primarily, aimed at the protection of the Romantics. Those who would break out of the classical forms. The line should only be drawn at harm and the imminence of harm.

With regard to the calls to believers to "stop paying taxes to the secular government and not to fulfill their duties of military service", this was a call to action of the kind seen in the early 1960's in the United States. It was a call for sit-ins and civil disobedience and was the least disturbing implementation of free speech.

Dr. Dayan cited the case of *Laor v. Council for Censorship of Movies and Plays*, (41 P.D. 421, (1987)) where the Supreme Court of Israel, considering an anti-military and anti-patriotic play which the Court held was an obscene mixture of pornography, politics and perversions of all sorts, nevertheless said that free speech was not only the freedom to praise the government, but also to criticize it. It was the freedom to create any form of art, be it with or without artistic value. Dr. Dayan pointed out that dissent did not always carry productive or democratic ideas and indeed could sometimes preclude the useful exercise of power by the State. But on balance, dissent and the threat of dissent, made government less oppressive. In support, she referred to former Israeli Supreme Court President Shamgar's remark, in a case concerning a coalition agreement between the Orthodox *Shas* party and the Labor party which incorporated a clause mandating legislative reaction to any anti-religious ruling in court. According to President Shamgar, this notion of the imposition of *Din Torah* in the Israeli legal system instead of secular law, should be part of the political power play and be accepted as protected speech - *Velner v. Chairman of the Labor Party* (49(1) P.D. 758 (1995)).

Dr. Dayan argued that her approach was not an absolutist one. Speech, being a harm-causing agent, could be regulated to avoid injury. Classifying speech as dissent did not make it totally immune, but it underscored the value of that expression to democratic life. The common method employed by the Courts in free speech cases was the balancing technique. Balancing was relatively easy to apply, logical and universal. One took competing social interests, measured their relative value, and determined which demanded greater protection in the particular circumstances. But balancing, by definition, gave enormous weight to the presumed legitimacy of legislative forces. It was biased in its deference to majority rule, and therefore against dissent. Perceived evils motivating anti-speech legislation always tended to be more tangible than the evils of censorship. Obstruction of the draft, refusal to pay taxes, the threat of violence, collapse of the government all tended to seem more real than the abstract banalities of maintaining freedom of speech. The latter were theories, whereas the harm to be avoided was concrete in the short term, and demanded a response. Thus, technical balancing might overlook the fragility of free speech by naively ignoring the anatomy of censorship.

Accordingly, Dr. Dayan asked the Court not to allow content based regulation of speech and not to regulate emotional speech, and referred to the American case of *Cohen v. California* (403 U.S. 15 (1971)), where the Supreme Court struck down a law under which a defendant who had on a "fuck the draft" jacket was convicted, as well as to *Hustler Magazine v. Falwell*, where the Reverend Jerry Falwell was depicted as an incestuous drunk, and his lawsuit was rejected. She urged the Court to protect symbolic speech such as caricatures and mass demonstrations, and consider possible harm only according to the tests of imminence, clear certainty and clear and present danger with which the case law was replete.

Dr. Dayan accepted that she was asking the Court to embark on a rather risky path, namely, to strike down Sections 15, 16 and 17 of the Penal Law as unconstitutional, and to acquit the Defendants accordingly. This was risky, because of the nature of their protest. The priests had called for the eradication of the democratic regime in the country, the students had called for their death. Both advocated violence through different forms of disobedience. But none had yet materialized. Moreover, speech regulation was an exercise in risk management and that was because the Court had to work with uncertainty. That speech would in fact result in violent actions in this case was uncertain. What was certain, however, was that penalizing speech in the midst of this drama would have dangerous social and political consequences. The very attempt to curb speech could ignite

violence. Dissent did not disappear with censorship. It could be driven underground, and out-of-sight, but not out of existence.

Dr. Dayan noted that in considering the different sets of uncertainty, the Court would probably fall back on some familiar historical experiences. Turning to the Israeli experience, some interesting phenomena were worth alluding to. First, there was the breaking point of November 4th, 1995, the day a young law student of the religious right by the name of Yigal Amir assassinated Prime Minister Yitzhak Rabin. Amir opposed the Oslo Agreement. He killed Rabin to stop the process. There was much criticism, but little evidence, in the aftermath of the assassination, to prove a clear chain of events leading from the often violent demonstrations against Oslo, the harsh terminology calling Rabin a traitor and a collaborator, to the delegitimization of the government and the democratic process and the decision of Yigal Amir to kill the Prime Minister, and thus derail the peace process. Amir had rejected the "chain of events" theory. He would have killed Rabin whether he saw him depicted in a *keffiyeh*, or in SS uniform, or not. He wanted Rabin incapacitated. And he succeeded (*State of Israel v. Amir* 2 P.M. 3 (1996)). Dr. Dayan argued that the Court should not let him succeed any further. Indeed, the confidence once felt in Israel, in the possibility of preventing violent speech from maturing into violent action, had been shaken on November 4th. But that need not lead to the total collapse of principles of free speech jurisprudence. It had yet to be proven that Rabin was a victim of speech. It would be a miserable result if speech would be a victim of Rabin's murder.

Calling a person a traitor and a murderer had to be seen as a red light for the security forces, the police, and those branches of government concerned with law enforcement, and not for speech regulation. Further, looking at the seminal free speech cases in Israel, one had to consider *Kol Ha'am v. Minister of the Interior* (7 P.D. 871 (1953)); *State of Israel v. Kahana*, (P.D. of the Jerusalem District Court, issued on the 24.9.1996 (not yet published)), which concerned an extreme rightist who preached violence against Arabs within the State of Israel; as well as the case of *Shnitzer v. The Chief Military Censor* (42 (4) P. D. 617), which dealt with a publication that was dangerous to national security, but was nonetheless allowed by the Israeli Supreme Court.

The Court did draw on what could be called the "*Brandenburg*" syndrome, the American view. There was also the "*Weimar*" syndrome, where the Court took into consideration defensive Israeli democracy, and judges were mindful of the German experience where democracy's extreme tolerance towards inciting speech brought about its extinction. But one had to consider that in a multicultural society, and in a relatively young democracy, such as Toriland, the regulator tended to overreact in the face of a national trauma, or at a time of high political tension. It was at such times of crisis that the Court had to take the high road, and protect basic rights from the whims of momentary public sentiment.

Finally, Dr. Dayan alluded to the argument that the citizens of Toriland should not accept the American tolerance for extreme forms of political speech, which only a nation such as America, with its inveterate social and historical optimism, could afford - for instance, a Nazi march in a Jewish suburb of Chicago - and which countries with tragic experience of the price of hatred could not afford. This argument could be found in literature, but in her view it was not convincing. America's experience of the price of hatred could not explain its optimistic free speech jurisprudence.

The question to be asked was: Was it really only a matter of history, or the point of time in history? Going back to 1943, America was engaged in the Second World War. The American Supreme Court found the time and courage to turn its back on well-rooted doctrine, and strike down anti-speech laws. One well known case in this regard was *West Virginia v. Barnett*, (319 U.S. 624 (1943)) relating to the flag salute; another, less well-known, was a decision given on the very same day, namely, *Taylor v. Mississippi*, where the defendant was convicted under a statute that criminalized stubborn refusal to salute, honour, or respect the flag, and expressions calculated to encourage disloyalty to the government. All the defendant did was to distribute leaflets condemning flag saluting as the stratagem of a desperate Satan, and as a contemptible form of primitive idol worship. But Taylor himself went so far as to tell two mothers, whose sons were killed in the war, that their sons were shot for no purpose, that Hitler would eventually rule, and that they should cease bowing down and worshipping the flag. The Supreme Court decided that America could take the insult. It applied the First Amendment, in the words of Justice Jackson in the *Barnett case* "with no fear that freedom to be intellectually and spiritually diverse, or even contrary, [would] disintegrate the social organization".

The value of political cohesiveness should not stand in the way of free speech values. Neither should paranoid fear of some abstract threat of violence. The rhetoric of the priests and the students was far less frightening than the censorship instincts of their elected officials. How could one know this? Because in virtually every freedom of speech case involving political dissent which had ever reached the American or the Israeli Supreme Court, no significant harm had ever in fact occurred. None was traceable to the speech of the defendants, in *Schenck*

v. *U.S*. (39 S.Ct. Rep. 247 (1919)), in *Falwell*, in *Debs v*. *U.S*. (249 U.S. 211 (1919)), in *Abrams et al*. *v*. *U.S*. (40 S. Ct. Rep. 17 (1919)), in *Gitlow v*. *People of the State of New York (*268 U.S. 652 (1925)), in *Whitney v*. *California* (47 S. Ct. Rep. 641 (1927)), in *Dennis v*. *U.S*. (341 U.S. 494 (1951)), in *Brandenburg v*. *Ohio* (395 U.S. 444 (1969)), or in *Johnson*. None was traceable to *Kol Ha'am*, to *Kahana*, to *Yardor v*. *The Chairman of the Elections Committee* (19(3) P.D. 367 (1965)), to *Naiman* (I. 39(2) P.D. 225 (1985), II. 42(4) P.D. 177 (1988)), to *Ben-Shalom v*. *Central Elections Committee* (43(4) P.D. 221 (1988)), or *Elba v*. *State of Israel*, (50 (5) P.D. 221 (1996)). Article 10 did not require speakers to be nice and elegant. Rather, it mandated that governments should not be allowed to enact their paranoia into law.

Pleaders (Left to right): Mr. Abrams, Dr. Dayan, Mr. Goldberg, Mr. Jakubowicz

The Prosecution Case

Mr. Jonathan Goldberg, Q.C., appearing on behalf of the Director of Public Prosecution of Toriland, to prosecute the priests began by asserting that the government recognized the right of free speech. It affirmed it, welcomed it, honoured it - but not speech that would lead to violence or, indeed, the overthrow of the State.

One of the best quotations about free speech came from Mr. Justice Oliver Wendell Holmes, who said that the most stringent protection of free speech would not protect a man for falsely crying "fire" in a crowded theater. It was interesting to note that he said that in a case shortly after the First World War, where the American Supreme Court had no problem in upholding a ten year sentence on a man who had done no more than make a speech in public saying that soldiers should not obey the draft. For it was a myth that any other country, let alone the United States, would permit the sort of conduct which was manifested by the priests in Toriland, without prosecution.

Two other quotations were appropriate: "The government need not hold its hand until the putsch is about to be executed, until the signal is actually given." That quotation came from an American Chief Justice, Carl Vinson, in the *Dennis case*, where in 1950 the United States Supreme Court, for all its talk of the First Amendment, had no problem in outlawing the Communist Party, because they were advocating the violent overthrow of the American Constitution.

In the same case, Mr. Justice Frankfurter said, "No government can recognize a right of revolution." And Mr. Justice Jackson: "Conspiracy is not a civil right." So, all democracies, including the United States, possessed laws similar to that applying in Toriland.

Mr. Goldberg invited the Court's attention to the exact facts before it. Toriland was a relatively young nation. It had gained its independence only thirty years before. It was surrounded by neighbouring States who knew nothing of constitutions, democracy, or human rights.

In Maday, since the fall of the Shah, the priests of the Purity faith had replaced his liberal regime with a medieval theocracy, where women failed to wear the veil at risk of their lives, thieves had their hands cut off, thousands had been put to death, and enormous damage to property had occurred. And critically, they sought to export their revolution to Toriland. The Purity priests in Toriland were the brothers of those in Maday. That was a critical factor.

What had these priests done? Firstly, **Count One**, they had preached that all citizens had to convert to the Purity faith, or be condemned as heretics and face a brutal civil war. In short, the clearest advocation of violence. Conversion by the sword, for these were religious Nazis. **Count Two**, they had called on believers to stop paying their taxes, and attack the very heart of the State and its functions. **Count Three**, not to fulfill their duties of military service. **Count Four**, to go out on mass demonstrations, with a view to overthrowing the government. However, the Prosecution accepted that the Court should not uphold the conviction on Count Four, because it had concluded that mass demonstration, without more, was a lawful activity under Article 10 of the Constitution, even though the demonstrators had called there for the eradication of the democratic regime. Since they did not call for its overthrow by violence, the State would draw a line. The State had no problem with vigorous criticism of democracy itself, or even of the existence of a democratic government. **Count Five**, of more importance, charged the priests with saying of the Prime Minister, that he was the secular Satan, who should burn in the fires of hell. This was a thinly veiled call for his assassination. When Henry II of England said to his knights, "Who shall rid me of this turbulent priest?" he knew what he was doing, and the knights knew what he was asking, when they went and murdered the Archbishop of Canterbury, Sir Thomas Beckett.

This was not mere religious language. What religion had to cloak itself with the language of violence? This went far beyond what was tolerable. This was a call to violence to the followers of the Purity faith as surely as if they had said, as did their brothers in Maday, that they would have a guaranteed place in heaven alongside the Prophet and seventy virgin brides if they became suicide bombers.

Turning to Section 15, the offence creating section of sedition, Mr. Goldberg pointed out that every government, in every democratic State in the modern world, had a similar law on its statute books. Whether it was called sedition or incitement, such laws existed uncontroversially through every State of the European Community; in Switzerland, in Norway, Sweden, Denmark, and certainly throughout the common law countries of the British Commonwealth, which had inherited the British tradition. It was true that sedition was defined in different ways. In England, for example - a place where democracy, freedom of the press and freedom of speech were indisputably honoured -

sedition, remarkably, was a common law offence. It was not defined by any statute or penal code.

And what was its definition? Mr. Goldberg suggested that a great statement of the law, and indeed a great piece of literature, almost, was the charge to the jury by Mr. Justice Fitzgerald in a sedition prosecution in 1868, which arose out of the troubles in Ireland, where the Finnians, who were really the predecessors of the Irish Republican Army had been guilty of a number of terrorist acts, such as shooting policemen. In that particular year, the editors of two newspapers in Dublin had published articles, in praise of the assassins. In summing up to the jury the judge said:

> "Sedition is a crime against society, close to that of treason, and it frequently precedes treason by but a short interval. Sedition is a comprehensive term, and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to subvert the government and the laws of the State. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent, or dissatisfaction, to create public disturbance, or to lead to civil war."

And he continued:

> "It has been truly said that it is the duty of the government, acting for the protection of society, to resist and extinguish sedition at the earliest moment."

And he quoted the great Lord Justice Mansfield, in the 17th century, who likened sedition to Pandora's box, the source of every evil. And finally, he said:

> "I feel bound to say that since 1692 there has been complete liberty of the press in Great Britain and Ireland. But by liberty of the press I mean freedom to write and publish without censorship and without restriction, save such as is absolutely necessary for the preservation of society. Our civil liberty is largely due to a free press, which is the principal safeguard of a free State, and the very foundation of a wholesome public opinion. Every man is free to write as he thinks fit, but he is responsible to the law. He is not under the pretense of freedom to invade the rights of the community, or to violate the constitution, or to promote insurrection or civil war, or endanger the public peace, or create discontent, or bring justice into contempt, or embarrass its functions. The liberty of the press is dear to us all, and sure I am that although that liberty may be abused, its true freedom never will be diminished as long as you, the jury of this country, stand between the press and arbitrary power."
>
> But he said, "Lord Kenyon has said, 'a man may publish only what a jury of his countrymen think is not blamable.'"

In England, there had been cases where people were charged with criminal offences just because they wanted to give rise to discontent against the government, or disaffection, or even disloyalty, but they were prosecuted as treason, and not actually as sedition, although for all practical purposes there was no distinction. William Joyce, the German broadcaster who was in fact an Englishman, and who broadcast propaganda in the Second World War in favour of the Germans, and against the British war effort, was tried for treason, and indeed hanged.

Similarly in 1915, Sir Roger Casement was hanged for sedition, for uttering words in favour of Irish terrorism.

Accordingly, the provisions which existed in Toriland's Penal Law, were democratic, constitutional, and existed elsewhere also.

Sedition was, and this could be seen as a criticism of it, a rather elastic offence. A rather difficult concept to define. Of course, in an ideal world the criminal law had to be clear and precise. But unhappily this crime was not like parking a car without lights. It was not easy to define, because it embraced a million different factual possibilities. It could never be looked at in isolation. It had to be looked at in terms of: what were the words spoken? Who spoke them? To what audience? With what intention in mind? And most important, with what historical background? Because the historical background of the country was one of the most delicate balance of opposing parties. And in order to keep public peace in the State, people had to exercise restraint. In the words of the great political philosopher John Stuart Mill: "The liberty of the individual has to be thus far limited. He must not make himself a nuisance to other people."

In this regard reference had to be had to the Israeli Supreme Court case of *Rabbi Elba*. Rabbi Elba was a Rabbi who practiced at a *yeshiva*, or theological seminary, and who distributed to his students in the *yeshiva* a pamphlet which he had written, setting out what was on its face a very learned and distinguished discourse on Jewish law, and the exceptional circumstances in which Jewish law permitted the killing of gentiles. He pointed out that one such circumstance was when Jewish lives were themselves at risk. His pamphlet made it clear that he intended to provoke debate, not action. So he said, at least on the face of his writing. So at first blush it could be seen as surprising that a majority of the Israeli Supreme Court upheld his conviction for incitement to racism, and encouragement of acts of violence calculated to cause death or injury, and a sentence of four years imprisonment, on a man of good character, a Rabbi, only two of those years, suspended. At first sight this could be seen as a miscarriage of justice, a denial of free speech, a negation of democracy, but only until the context was examined. That was

that Rabbi Elba was teaching at his *yeshiva* in Hebron, that it was close to the Tomb of the Patriarchs, and just a few days after the fanatic Baruch Goldstein had carried out the massacre there in Hebron.

True, he was not charged with sedition, but with racism and incitement to terrorism. Had he written this pamphlet at a *yeshiva* in Stamford Hill, in London, would he have been prosecuted? Was it conceivable that he would have committed any offence? The context was all important. And while there was no evidence that his writings resulted in any violence, the Court in fact found there was a high likelihood it would lead to violence. The context was all important, and in the circumstances of Toriland, imperiled as it was, both from without and within, these laws were justified and constitutional in the country.

The Prosecution relied very strongly on the principle of prevention. It also relied on, and invited the Court to have confidence in, a reasonable measure of Prosecution discretion. In other words, the Court had to have confidence that in a democratic State the Attorney General would not permit capricious, malicious prosecutions in a sensitive area such as this, but would use the necessary prosecuting discretion in a measured and responsible way.

Where the Court believed that prosecutors had used their discretion for the deliberate purpose of suppressing the contents of speech they did not like, the Court should not hesitate to rule in a contrary fashion. In a democracy, confidence could be placed in the judges. A democracy had to defend itself against its enemies. Paradoxically, a lot could be learned from modern Germany. Modern Germany had a Constitution which could not be altered in its preservation of democratic rights, even by a majority of Parliament. It had a militant State agency called the Office for the Protection of the Constitution, which was almost a secret police force, but one designed to root out the enemies of democracy. Paradoxically, neo-Nazis found more refuge in neighbouring States such as Denmark and even the United States, than in Germany itself, from which they were expelled. Thus, there was a Constitution in Germany which permitted the court to take away the democratic rights of an enemy of the Constitution. They called this a **militant democracy**, and a lot could be learned from it, in today's unhappy world.

Similarly, international conventions, such as the European Convention on Human Rights, Article 10, recognized the right of free speech, but restricted it in terms. The conventions spoke of the responsibilities and duties of a right such as free speech, and that it could be abridged in the interests of the security of the State, and of public order.

Where was the dividing line? The answer was clear. The dividing line was words or, indeed, conduct, which would provoke violence and public disorder. The test was nowhere better stated than the test now refused by modern American jurisprudence, but nonetheless the test of Mr. Justice Holmes in the First World War cases, where he said, "A clear and present danger of public disorder." There was no better test than clear and present danger, and the context was all important. One had to rely on the Prosecution, and on the judges if the Prosecution got it wrong. To shout "fire" in the crowded theater was one thing. To shout "fire" to an empty seashore - another.

With regard to Section 15A, the wording of the Penal Law did not require any consequence whatever. It was sufficient that the Defendant had a seditious intention. In other words, the Defendant was punished for doing any act with a seditious intention, and it mattered not if the act succeeded. Accordingly, the section which created the offence, did not demand that success ensue if the act proceeded unchecked. In so defining, the Prosecution followed exactly the English common law, which also did not define or demand any consequence, unlike the American cases.

The Prosecution submitted that it should be left to the Prosecution not to prosecute unless there was a clear and present danger. And this met the facts of the instant case. But the offence itself was nonetheless constitutional, because it had to contemplate not just the facts at hand, but also facts which were currently inconceivable but which could arise in the future, and which would demand a greater measure of elasticity if democracy was to protect itself against the enemies from within.

Thus, the case where a possible assassin might not go out immediately with his gun but rather wait for a suitable opportunity for action, *i.e.*, the intention would exist but implementation delayed, would that fall within the categorization of "present danger". This was so because the test depended on the word 'danger'. It was a **clear and present danger** of something happening, not a **clear and present actuality** of it happening.

With regard to the phraseology of Article 20 and the condition that it did not exceed what was reasonably necessary, that was clearly a hangover from British common law. A measure of elasticity had to be retained for the facts that could arise tomorrow. But, Mr. Goldberg argued, even if he was wrong, and the Court wished to interpret the provisions of Section 15A with what he called the consequence test, in other words, that there had to be a real possibility of the facts happening, then that test had been met on the instant facts. The Prosecution had proved anyway, beyond a reasonable doubt, that there was a

clear and present danger of violence in the streets, of violence to the Prime Minister, of civil disorder of a massive kind, and of the kind that had happened next door in Maday. The Prosecution argued as a first position that the Court should not demand consequences in defining this offence, but if it did, they existed anyway.

Mr. Alain Jakubowicz, appearing to prosecute the students, argued that the case that the Court had to deal with was of unusual seriousness. It was for the Court to put an end to a concerted sedition plan directed by some irresponsible fanatics. It was not intended to harm freedom of religion, which was one of the bases of democracy, guaranteed by Article 11 of the Constitution. But this freedom could not serve as a rationale for violent actions, the acknowledged and sought for aim of which was, no more and no less, than to kill democracy in order to replace it by a theocratic State.

The facts upon which the Puritan priests had been charged before the Court were even more unacceptable since they had been perpetrated by men belonging to the Church whose mission was to bring a message and provide an example. Their conviction was not only necessary, it was unavoidable for the sake of the superior principle of public order and social peace.

The case of the students was quite different. They were not at the origin of the affair, since the offences they were charged with were only the consequence of those offences perpetrated by the priests and in reaction to them; although they were not less an offence because of this.

It had also to be made clear that the Prosecution was not asking to condemn the demonstrations organized by the students against the priests; these demonstrations were part of the fundamental freedoms guaranteed by Article 10 of the Constitution. What the Prosecution was asking the Court to condemn were the offences that accompanied these demonstrations in breach of Section 17 of the Penal Law.

The Prosecution contended that this offence had been constituted in fact, as well as legally. With regard to the unconstitutionality exception in the law, raised by the students' defence, Mr. Jakubowicz argued that Section 17 of the Penal Law was perfectly in accordance with the Constitution.

According to Section 17: "any person who calls in an express or implied way for the accomplishment of illegal acts of violence, shall be punished with three years of imprisonment." According to the Defence, this provision was contrary to Article 10 of the Constitution which provided that "any person has the right to freedom of speech, freedom of association and freedom of organization". This argument made meaningless Article 20 of the Constitution which allowed a limitation to be imposed on the rights set out in Article 20 (as well as Article 11 relating to freedom of religion) for a special reason, to the extent that the limitation did exceed what was "reasonably necessary".

In order to argue that Section 17 of the Penal Law was not constitutional, the Defence had to show that the provision harmed freedom of speech beyond what was necessary. It was a question of fact, which was submitted to the sovereign discretion of the judges. Freedom of speech, however, was not an aim in itself and did not have to lead to anarchy. It was a clear principle defined since the French Revolution, according to which there was no room for freedom for the enemies of freedom.

All the international conventions provided for the limits that could not be crossed by freedom in a democracy. Thus:

* Article 29(2) of the Universal Declaration of Human Rights stated: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."
* Similarly, Article 10(2) of the European Convention of Human Rights states: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."
* Even the American court precedents accepted limits to the sacred First Amendment of the U.S. Constitution, in order to preserve public peace in the case of immediate danger or even probable danger (*Brandenburg v. State of Ohio*, delivered on 9/1/69 and 27/2/69).

In the instant case, the Court had to take into account the special situation in which the country found itself. Its neighbours in Maday had recently undergone a revolution in which democracy had been eradicated by extremist priests who had taken power by force; all the fundamental freedoms had been abrogated. The actions led by priests of the same party in Toriland, aimed at the same objectives, and constituted a danger against which democracy had to react. It was a question of survival.

Toriland could avoid a catastrophy only by the power of its institutions. It had to severely punish those who harmed or would harm the integrity of the nation, whoever they were, in order to prevent that harm occurring. That was why more severe proceedings were necessary against the priests, who were at the source of this attempt at destabilization, but also against the students who had exceeded the limits of pure freedom of speech.

The constitutionality of Section 17 of the Penal Law had to be examined in this context. According to the particular circumstances that the State had known, this section was in accordance with Article 20 of the Constitution. Repressing incitement to "the commission of illegal acts or violent acts" did not in any way harm freedom, but rather prevented the State from being transformed into a dictatorship or reduced to anarchy. Section 17 of the Penal Law was moreover perfectly in accordance with international provisions which prevailed in all democracies. The law, in a democratic State, was the guarantor of public freedoms.

Next, Mr. Jakubowicz turned to the right basis for proceedings against the students. He recognized that the reactions of these students to the unacceptable and violent attacks of the priests against democracy might be understandable, and were not punishable reactions in themselves. Rather, they were an exercise of the freedoms of speech and demonstration, insofar as they were not accompanied by offences. However, unfortunately, the students had not satisfied themselves with expressing their opinions. They themselves perpetrated offences. Even if their cause was a noble one, one offence could not justify another. The State and its institutions had to be the sole guardians of democracy as they were the product of universal elections. In bringing charges against the students as well as the priests, while distinguishing between the offences each of them was alleged to have committed, the State remembered that all citizens were equal before the law.

What kind of facts were the students charged with? The first charge related to the distribution of leaflets where one could read: "Stop the anti-democratic actions in the houses of worship, outlaw the Purity priests and close their Temples". The Prosecution agreed that the distribution of flyers alone could not justify instituting criminal proceedings. It was the primary expression of freedom of speech, motivated by actual attacks by the priests against democracy. Further, there was no proof that the students had really prevented access to the houses of worship, which would have constituted an offence under Article 11 of the Constitution. As the Penal Law required strict interpretation, the Prosecution could not ask the Court to hold that this fact alone would constitute an offence within the meaning of Section 17 of the Penal Law.

The second charge presented a different kind of problem: the posters showed the priests with the bodies of nude women, and were displayed on the walls of the city. On this point too, the Prosecution agreed that the facts posed greater harm to Morals than to the Law. A secular State would not want to deal with morals, as these were matters within the personal conception of each citizen, to the extent, however, that public order was not harmed. The Prosecution accepted that the posters might be harmful in moral terms to the students' fellow citizens and particularly to the priests. It was a problem which a great number of democratic States had to face. Recently, in France, an attempt to prohibit a book with a cover page illustration of Christ on the cross, in the form of a nude woman, had been rejected. The implementation of law did not mean censorship. This was the nature of democracy.

The special circumstances in which these pictures had been posted on the walls of the city, *i.e.*, the quasi-insurrection crisis faced by the State required the Prosecution to temper its approach and argue that these pictures had to be directly linked to the third charge against the students, namely, the calls of "death to provocateurs, death to enemies of democracy" and also that "the houses of worship which poison the thoughts of people against democracy - must be closed down".

By these calls, the students had crossed another boundary that marked the frontier between freedom of speech and the commission of an offence. These facts obviously constituted the offence provided for and prohibited by Section 17 of the Penal Law, *i.e.*, incitement to do illegal or violent acts. The fact that the priests were responsible for the first calls to violence could not constitute justification or a defence of *force majeure*; there was no room for any private justice in a democratic State.

The State of Toriland had shown its capacity to prevent sedition using its institutions which guaranteed the preservation of democracy.

The students had argued that these were words only, which were not followed by any action... Fortunately! This did not justify the offence with which they were charged. Words, as well as arms, could kill in certain circumstances! Examples were numerous, including in the recent history of humanity. Even before taking power in a democratic way, Adolf Hitler galvanized the crowd solely by his speeches. Even though he was not physically present during Crystal Night of 9th November 1938, his words guided the hands of those who destroyed the synagogues and the Jewish shops. Could one ignore the mass movements that Khomeini in Iran or Khadafi in

Libya provoked? In France, the hate speeches of Jean-Marie Le Pen, President of the National Front, were at the root of numerous acts such as the desecration of the Jewish cemetery in Carpentras or the crime perpetrated against a young Arab thrown into the Seine on the occasion of a demonstration of the National Front. Was it not speeches and incitement which had guided the hands of Yitzhak Rabin's murderer?

In the context faced by the State at the time of the offences with which the students were charged, there was fear of everything, everything was possible. There was an obvious risk that a few extremists would act in response to these calls to murder, especially because the potential victims were identified by the pictures of the priests who were recognizable. It was also possible that this was the very purpose of these pictures. The danger was indeed immediate and at least probable.

Life was the supreme value that the law as well as democracy had to protect. By asking the Court to convict the students in respect of the calls to murder, the Prosecution was acting not like a freedom killer but on the contrary like a fighter for freedom, for equality and for fraternity!

The Rebuttal

Counsel for the Defendants in Rebuttal

In rebuttal, **Mr. Abrams**, for the Defence, professed astonishment that Justice Holmes' famous aphorism that one could be prosecuted for falsely crying "fire" in a crowded theater, was being cited against him. He denied that his case was a case akin to falsely crying "fire" in a crowded theater. In his view, the factual proof, the materials submitted to the Court, had not come close to making some sort of analogy that Toriland was, as it were, a crowded theater which would explode on the saying of a word, or a few words akin to "fire". Or indeed, that the words used were akin to "fire" in a crowded theater. Rather, he believed that Justice Holmes, in the moments that he was most remembered for, his later opinions, came closer to the Defence case. When in the *Gitlow case*, in 1925, he wrote about a manifesto which was said to be an incitement, it was argued that the very idea amounted to incitement. The only difference between the expression of an opinion and an incitement, in the narrower sense, was the speaker's enthusiasm for the result. Eloquence could set fire to reason. But whatever was thought of the discourse before the Court, it had no chance of starting a present conflagration. And Justice Holmes added: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance, and have their way".

The Prosecution had argued that the Purity religion, at issue before the Court, was represented or run by religious Nazis. What sort of religion, he asked, needed to cloak itself in the language of violence? In the view of the Defence, the Public Prosecutor was not the ultimate arbiter as to which religion was legitimate or not, or how people could choose to express their religious beliefs.

But the heart of the matter lay in the issue of prosecutorial discretion, which in this case was made in a measured and responsible way. The Prosecution had argued that it should be left to the Prosecution not to prosecute, except in the circumstance of clear and present danger. This was not law speaking at all. That was simply abdication. This was no constitution, no protection of free expression, it was simply another way of saying, 'It will be all right. Trust us'. The reason constitutions existed was because Public Prosecutors were not to be trusted. Mr. Goldberg had argued that the legal test was "words which will provoke violence and public disorder", then admitted that he could not meet that test because it could not be proven that these words would provoke public disorder, and finally retreated to the test of clear and present danger of public disorder. But what was the clear danger? What was the present danger on this record? In a court of law, one dealt not with politics but with law and the facts.

Requiring the permission of the Attorney General prior to prosecuting was a sort of safeguard. It was helpful, as it would always be helpful, to have more people in authority focus on these types of issues, rather than allow the local prosecutor to act on his own, but to say that the rule of law should be that it should be left to the Prosecution not to prosecute amounted to judicial abdication.

Mr. Jakubowicz had argued that the facts involved a concerted plan of sedition by a handful of fanatics. This was not shown on the facts. No concerted plan of sedition had been proved nor even alleged here. There were no violent actions of the priests against democracy. There was speech, which might or might not go too far, but there were no actions, unless one made the question-begging assertion that speech was conduct, because one said it was.

With regard to the posters, the Court had been told that the posters were offensive, but it was not for the Court to deal with morality. Thus the allegation against the students was that the language that was used at some point was tantamount to a call for murder. That was indeed a question for the Court to pass upon.

Mr. Abrams closed with a final reference which he recommended to the Court, taken from Justice Brandeis' concurrence in the case of *Whitney v. California*:

> "Those who won our independence believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that the greatest threat to freedom is an inert people. They recognized the risks to which all human institutions are subject, but they knew that order cannot be secured merely through fear of punishment for its infraction. That it is hazardous to discourage thought, hope and imagination. That fear breeds repression, that repression breeds hate, that hate menaces stable government, that the path of safety lies in the opportunity to discuss freely supposed grievances. Fear of serious injury alone cannot justify suppression of speech. Men feared witches, and burned women. It is the function of speech to free man from the bondage of irrational fears. Those who

> won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self reliant people, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."

Dr. Dayan joined in urging the Court not to leave the discretion to the Prosecutors, as throughout the last decades they had brought in front of the courts issues which the courts were not courageous enough to repudiate.

She noted that Mr. Goldberg had chosen to open his remarks with the citation of Justice Holmes from *Schenck*, but this was a case concerning pamphlets preaching Marxism and not calls for action. Men were sentenced to ten years imprisonment. That was in the year 1951, when the Red Scare, McCarthyism, was flourishing in America. On the other hand, one had to consider the kind of expression which was at issue in the *Brandenburg case*. There, a Ku Klux Klan leader called for action against Black people in America. One of the sentences for which he was indicted was the following: "If our President, our Congress, our Supreme Court continue to suppress the White, Caucasian race, it's possible there might have to be some vengeance taken." Despite that expression the conviction was overruled.

With regard to the case of *Elba* in Israel, in which the Rabbi was convicted, and the conviction was affirmed by the Supreme Court of Israel, the charge there was incitement to racism, an offence in which there was no consequential element. No clear and present danger had to be proven. No probability test had to be applied. Further, it had to be remembered that Israel had no written Constitution. It had no Article 10. It gave no constitutional protection to speech. Nevertheless, in the recent case *Yassin v. Registrar of Parties* (50(2) P. D. 45 (1996)) decided by the Supreme Court of Israel, where a party called *Yemin Moshe* wished to run for the *Knesset*, and be entered in the Register of Political Parties, the Supreme Court decided that it had to be registered. It overruled the decision of the Party's Registrar, and held that although the platform of the party called for Israel to be declared to be the State of Jews only and the Constitution to be based on Jewish Law, these ideas had to be subject to competition in the political marketplace of ideas.

Secondly, with regard to the priests' call for the eradication of the democratic State, indeed the State was a defensive democracy, however, the Defence did not recommend that the Court adopt the German concept of a militant democracy. Post-war Germany had not succeeded in preventing hate and hate speech, and the setting on fire of immigrants' neighbourhoods, or the neo-Nazi preaching which still took place there. Speech regulation was often both over-inclusive and under-effective. Rather, the Court should notice the phrasing of Section 17 of the Penal Law of Toriland: "any unlawful act or act of violence". Was peeping included? The section stated "expressly or impliedly", how impliedly would be subtle enough? This was over-inclusive legislation. The Prosecution stated that the fact that violence had not erupted in Toriland was merely good luck, not good management, and it was owed to the fact that the Prosecution had been alert enough to bring these indictments before the Court. But, was it ever too early for the Prosecution to act? Would it always be necessary to thank them for being sufficiently alert? Were there not any less restrictive means to achieve this desired objective? Considering this, the Court had to apply the proportionality test, and it had to do so in accordance with constitutional standards.

Finally, Section 15 of the Toriland Penal Law enforced loyalty to the State. It enforced respect for its symbols. No State could enforce such respect or such loyalty. In a recent decision by the Israeli Supreme Court, where the sedition offence was at issue, Justice Barak took the opportunity to call for the offence of sedition to be struck from the Israeli statute books and replaced with an offence which was better suited to Israel's regime. Indeed, Israel had taken the offence of sedition from the British. But it was a colonial rule. The British Mandate was in Israel. And, said Justice Barak, the existing clause reflected a non-democratic view. It suited a colonialist government, which was not the rule of the people, by the people, for the people. It did not allow sufficient room for freedom of speech. And the same could be said in the instant case, a State that pursued security through repression was both unworthy of salvaging, and unlikely to succeed.

Counsel for the Prosecution in Rebuttal

Mr. Goldberg in rebuttal, noted that Marie Antoinette, as she mounted the steps to the guillotine had said, "Justice, what crimes are committed in thy name". And having heard the Defence, he could say: Free speech, what crimes are committed in thy name. "Convert, or we will face you with an uncompromising civil war. Don't pay taxes. Don't obey your duties of military service. The Prime Minister is a secular Satan, who should burn in the fires of hell. Not who may one day, please God, after he's dead, burn in the fires of hell". What crimes was the Court being asked to condone here? Good justice was preventive justice. Not justice that came after the calamity had occurred, and tried to clear up the mess. Here the State would have failed in its duty, the main duty of government, to protect

the lives and limbs of its citizenry. It would have failed in its duty had it not taken swift preventive action in bringing the charges against the Defendants.

The South African Constitution, a recent, emerging democracy, contained an important provision about free speech. It said "Freedom of expression does not extend to a) propaganda for war, b) incitement of imminent violence, or c) advocacy of hatred." How interesting it was that in a recent emerging democracy such as South Africa they realized the limitations on free speech, the abuses to which it was subject, abuses for which the Defence argued complete and boundless license. The Prosecution said: No. There had to be limits in a democracy, particularly, against the background of the mayhem, the violence, and the death which had been seen across the borders in Maday. The priests had a platform, and they had misused it. They knew the influence their words would carry with their followers. How many of their followers were susceptible and thin-skinned? How many others might behave in a copycat manner? Such privilege demanded responsibility. They were unaware of their responsibilities.

Their disloyalty to the State, their disloyalty to the true principles of the Purity faith, as expounded by proper and moderate believers, was manifest. In order to avert a grave calamity, the State had brought these charges, the law was constitutional, and it was for the Court to uphold all the convictions.

Judgment

Judgment of the Supreme Court of Toriland
Delivered on December 29, 1998
Reasons published in June 1999

Justice Gabriel Bach, President of the Court, recited the facts of the case and held:

1. The Defendants, both priests and students, argue before this Court that they should not be convicted because the laws, on the basis of which the indictments are brought, are contrary to the principles of the Constitution and should therefore be annulled. In the alternative they argue that their acts do not constitute the elements of the offences in respect of which they are charged.

2. We are in this case called upon to strike a proper balance between freedom of speech, which is no doubt one of the basic rights in a democratic society, and which has been described as the "soul of democracy" on the one hand, and the prevention of the disturbance of public peace and the destruction of the social order in society, as well as the curbing of the commission and spread of crime, mainly of violent crime, on the other hand.

Learned counsel for all sides in the case before us have stressed that they accept the importance of the principle of free speech, and that they support the view that the judicial authorities of Toriland should adhere to this principle. They differ only on the pragmatic application of the necessary limitations to the general rule.

We all have to realize that freedom of expression, in spite of its weight and importance, is not an absolute right. It is a relative right, and there are exceptions to it. In all countries we find certain laws, which are justified and necessary in order to protect other public interests which are not less important than the protection of freedom of speech. Examples which come immediately to mind are laws against defamation (libel and slander), laws forbidding contempt of court, in order to prevent interference with proper judicial procedures, Official Secret Acts to protect the essential secrets of a State, laws prohibiting pornographic publications, and laws to prevent incitement to racial hatred. All these constitute specific offences, and are accepted as exceptions to the principle of freedom of speech. (See in this context Articles 19 and 29 of the U.N. Declaration of Human Rights and Article 10, par. 2 of the European Convention on Human Rights.)

This also applies to speech which contains incitement to commit certain crimes. Here it is not the accused who is charged with having personally committed any of those crimes, but the Prosecution alleges that other persons have been incited and influenced by the accused to commit such offences.

Here we have, of course to be very cautious. It is true that violent, unrestrained, inciting speech may cause acts of violence on the part of members of a receptive audience. Israel is still suffering from the trauma caused by the assassination of Prime Minister Yitzhak Rabin and the countless recriminations and counter-accusations resulting therefrom.

But, on the other hand, the curbing of free speech may also lead to violence. In addition, free speech may sometimes be an outlet to avoid violence. Furthermore, permitting free speech may strengthen the belief in positive democratic values. The argument put forward by the Defence, that the most positive way to counter extremist speech is by counter-speech, and not by imposing criminal sanctions, is of considerable weight and should be borne in mind by us when we consider our conclusions.

This said, we now have to examine the special issues before us.

3. The most far-reaching argument for the Defence - and it is therefore the one we should consider first - is the petition addressed to us to annul sections of the Penal Law of Toriland with which the accused are charged, on the ground that those sections are unconstitutional.

This plea is made to us on the strength of Article 20 of the Constitution of Toriland, which enables the limitation of basic civil rights, provided such limitation is for a proper purpose and provided that the impairment of those rights does not exceed what is reasonably necessary. The same Article 20 also lays down that a law which limits such rights and does not comply with the above-mentioned provisos, or one of them, may be annulled by the Supreme Court.

The first provisions of Article 20 of the Constitution of Toriland are actually parallel to those of Section 8 of the "Basic Law: Human Liberty and Dignity" enacted in Israel, and the Supreme Court of Israel, by a special panel of nine judges, has decided that this section enables the Court to annul a law which has not been enacted for a proper purpose or limits a basic right to an extent which exceeds what is necessary.

We, the Supreme Court of Toriland, have decided, unan-

imously, to accept this argument of the Defence, inasmuch as it refers to the request to annul Section 15 of the Penal Law of Toriland, which is the section dealing with the offence of sedition. Sedition is defined under this section as follows: "to bring into hatred or contempt or to excite disaffection against the State or its duly constituted administrative or judicial authorities, or to promote feelings of ill-will and enmity between different sections of the population".

We have come to the conclusion that this enactment is too wide, too unclear, and it includes acts for which, clearly, freedom of speech should be provided in a democratic society. Freedom of speech is not there to protect innocent speech. It is there, rather, to protect unpleasant, extreme utterances. I said in one judgment of mine, "Freedom of speech is not just an ideological flag waved towards the outside, but it is the rule that should be adhered to in our daily lives".

If we take the example of Israel, just imagine what would happen if full use were made of the law according to which people could be tried and sentenced for trying to bring into contempt the duly constituted administration, including our ministers and public officials. How many journalists or people active in public life would remain out of prison if the Prosecution really tried to enforce such a stringent rule?

The section also defines as seditious to promote ill-will between different sections of the population. Now what about communists who try to arouse ill-will against capitalists and *vice versa*? Or secular people against religious ones, or *vice versa*? Or ill-will between *Sephardi* and *Ashkenazi* Jews? All these things happen daily. To say that such behaviour would constitute criminal offences is something which is really not realistic, and it is an anachronism which may have been appropriate in a colonial regime, where they tried to protect the government against natives, but I don't think it is at all suitable for a progressive system as ours hopefully is. Such a draconian law is also not necessary, because for the acts that we really want and need to punish we have other sections of the Law, adequately equipped to deal with such problems. The Penal Law includes offences like threatening behaviour, uttering threats, incitement to crime (with which the defendants in our case are also charged), incitement to racism, defamation and causing a breach of the peace. These are specific offences, not unclear and nebulous ones, that are adequate to protect the values in a democratic society.

I do not recall many cases in which people have been charged in Israel with sedition, although there are sections of the Israeli Penal Law (Sections 133 - 136) which are identical with Section 15 of the Penal Law of Toriland.

In a recent case (Cr. A. 6696/96 *Benjamin Kahana v. The State of Israel*), Justice Barak, the President of the Israeli Supreme Court, also recommended the replacement of this offence by another, more appropriate enactment. He wrote in his judgment as follows:

"It is proper to consider the annulment of the offence of sedition in our Criminal Code and its replacement by another offence which will suit our system of government. The wording of this offence is unclear and the boundaries are too wide. It expresses a general conception which is undemocratic. It fits a colonial power, which does not represent the rule of the people, by the people and for the people. It does not attach sufficient weight to the principle of freedom of speech".

Also university professors, such as Professor Kremnitzer of the Hebrew University of Jerusalem, advocate the annulment of this section, and the use of the charge of incitement to commit crime, in appropriate cases.

However, in Israel the Supreme Court could not annul the above-mentioned sections dealing with the crime of sedition because the "Basic Law: Human Liberty and Dignity," which was passed in 1992, does not relate to existing legislation (to which Sections 133 and 136 of the Penal Law belong), but only to new enactments. On the other hand, there is no such limitation in Article 20 of the Toriland Constitution, and we are therefore empowered to annul any section even of the existing Penal Law of Toriland.

As we have, for the above reasons, decided to annul Section 15 of the Penal Law, we do not have to make a ruling as to whether the priests in fact committed acts constituting the elements of this section of the law.

We do, however, see no sufficient reason to annul the other Sections of the Penal Law of Toriland, namely Sections 16 and 17, with which the priests as well as the students are charged. These are ordinary offences of encouraging acts of violence and incitement to commit crimes, which are known and enforced, in this or similar versions, in all democratic countries. These sections have no doubt been passed by the legislature for a proper purpose, namely the prevention of crime, especially including unlawful acts of violence, and they are, in our opinion not excessive in their context and severity. Therefore we do not accede to the Defence plea referring to the annulment of those sections.

4. We have decided, by a majority of four to one, with the dissent of Judge Trager, to convict the priests of incitement to acts of violence under Section 17 of the Penal Law. We did not do that because they said in their churches that "the Prime Minister is a secular Satan who should burn in hell". We are prepared to accept that this is something which calls but to

some kind of divine sanction after a person's death - and priests do sometimes use that kind of language intimating that people who do this or that will suffer afterwards, and will burn in hell. This is extreme language, but it is not something which would justify enforcement of the criminal law.

But they also preached that worshippers should take action, so that all the citizens of Toriland would accept the Purity faith, or else be condemned as heretics, "and be faced with an uncompromising civil war". Here we have to take all the facts into consideration. The priests knew that in a neighbouring country, Maday, members of the same faith, the same Purity faith, have ousted the king, created a theocratic State, and have killed thousands of people in the process. And now they say, "you have to take action" to convince all the people of the other faith, the Hope faith, to change their religion. That is of course lip service. They know very well that they won't convince all the people of the other faith to accept their religion. And then they say that continued adherence to their "Hope-faith" meant that they have to face "uncompromising civil war," knowing what has happened in the neighbouring country. Section 17 of the Penal Law says, "Any person who calls expressly or impliedly for the commission of any unlawful act or any act of violence" (meaning of course unlawful act of violence), "is liable to imprisonment for three years".

We have come to the conclusion, by a majority, that in all these circumstances, when the priests knew who their audience were, and to what extent as worshippers they were guided by their spiritual leaders, when they realized that tension in Toriland had increased, and were aware of the fact that thousands of people had been killed in the neighbouring country of Maday because of identical religious disputes, that by exhorting the members of their congregations that an "uncompromising civil war" was the only alternative to the members of the other faith accepting the Purity faith, the priests were at least "impliedly calling for acts of violence". As the priests must have known that their sermons would lead most probably to bloodshed, and relying on the legal maxim that people are presumed to intend the natural consequences of their act, the majority of the Court hold that the necessary criminal intent (the *mens rea*) on the part of the priests has also been proved.

5. We have heard from the learned representatives of both sides arguments about the possible results of such incitement.

It is clear from the authorities cited that in order to convict a person it is not enough for the Prosecution to prove that he uttered words which *prima facie* sound or look like incitement. The Court must also be satisfied that there was a real danger that such speech might result in bloodshed or other form of violence.

The degree and the shape of this danger have been described differently by various Judges, especially in leading judgments handed down by American Courts.

In the famous case of *Schenck v. U.S.* (39 S. Ct. Rep. 247 (1919)), in which the appellant was charged with challenging the American involvement in World War I, and the draft into the Army in particular, and was convicted for obstructing the recruitment of soldiers and causing insubordination in the armed forces, Justice Holmes confirmed the conviction, holding that there existed a "clear and present danger that the utterances of the accused will bring about the substantive evil that Congress has a right to prevent". He held that in each case it is a question of proximity and degree.

The "clear and present danger" test was upheld by the U.S. Supreme Court in additional cases, some of them also dealing with speeches constituting illegal acts of obstructing the war effort, like *Frohwerk v. U.S.* (149 U.S. 204 (1919)) and *Debs v. U.S.*, (249 U.S. 211 (1919)).

It was repeatedly held that the "proximity rule" referred to the immediate result of the inciting speech.

So, in *Whitney v. California* (274 U.S. 357 (1927)), Judge Brandeis wrote that: "If the danger of illegal action is not imminent, the remedy to be applied is more speech, not enforced silence".

And in the famous case of *Brandenburg v. Ohio* (395 U.S. 444 (1969)) it was held by the Supreme Court, that "mere advocacy of illegal action could not be punished, only advocacy that is directed to inciting and producing imminent lawless action and is likely to incite or produce such action." The Court felt that Brandenburg's speech, as leader of a Ku Klux Klan group, fell short of such incitement, and therefore reversed the convicting judgment of the lower court.

But in the often cited case of *Dennis v. U.S.* (341 U.S. 494 (1951)), the accent was laid by Judge Learned Hand more on the direct result of the incitement. He wrote: "In each case (courts) must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

I myself do not support the view that the immediate danger is a decisive element. I think there must be a real likelihood of the result happening. The fact that it is not likely to happen immediately or soon may be one of the factors that the Judges should take into consideration when they come to decide whether the real likelihood exists. Maybe, if the possible result of the incitement is not anticipated soon after the speech, and it is only something that may happen in the unforeseeable future, then a doubt may arise whether it is perhaps not very likely that it

could occur at all. But sometimes speeches have a cumulative effect. Sermons in places of worship, which form the subject of the case before us, and which are delivered again and again, and simultaneously in various places, can serve as an example.

A similar view was expressed in the Supreme Court of Israel by President Agranat in the famous case of *Kol Ha'am v. Minister of the Interior*, (7 P.D. 871 (1953)). Although the "clear and present danger" test is mentioned in that judgment, Justice Agranat said (on pp. 890-891): "The test of near certainty does not necessitate that the danger to the public is liable to occur a short time after the publishing of the words in that particular paper."

The majority of this Court has come to the conclusion that in all the circumstances there exists a real likelihood that if the State had not interfered, and the Attorney General had not filed these charges, then those sermons of the accused priests would most probably have led to acts of violence and bloodshed. We therefore decided to find the priests guilty of the offence under Section 17. Because of this conclusion, we did not consider it necessary to consider the possible conviction of the priests of an offence under Section 16 of the Penal Law.

6. The priests have also been charged under the same Section 17 with incitement to unlawful acts, because they called on the worshippers not to pay income tax and not to fulfill their military service. By a majority of three to two, a decision has been given against a conviction of the Defendants. The minority here are Lord Caplan and myself, who were in favor of a conviction, and the three other judges voted for an acquittal.

I shall now explain my position on this point and why I disagree with the opinions of the majority in this respect.

In my view, the guilt of the priests in regard to these two offences has been established in an even clearer manner than their guilt on the previous count. As far as the first offence under Section 17 was concerned, there we came, by a majority, to the conclusion that the priests impliedly incited their worshippers to commit acts of violence, although they did not do so explicitly.

But here the priests, directly and expressly, called on the worshippers to commit serious criminal felonies of stopping the payment of income tax and of refusing to serve in the army. Section 17, which refers to: "Any person who calls, expressly or impliedly, for the commission of any unlawful act..." is therefore clearly applicable.

The three esteemed Judges of the majority do not dispute this. Their decision is based on the provisions of Article 20 of the Toriland Constitution, which enables the limitation of the basic rights under the Constitution, like the right to free speech, "provided that the impairment does not exceed what is reasonably necessary." I understand that my esteemed colleagues are of the opinion that the "victim" of those offences is the Government of Toriland, and as such it has the power to defend its interests without the need to resort to criminal prosecutions of this kind. They can sue the people who refuse to pay income tax and recover the sums concerned, and they can apply administrative and other sanctions in order to deal effectively with draft-dodgers. Therefore our three colleagues feel that the prosecution of the priests on those two counts "exceeds what is reasonably necessary," and the Supreme Court should refrain from convicting the priests of those offences.

7. With all due respect, I differ from this opinion, on the following grounds:

1 Article 20 of the Constitution provides that "a law which impairs a right conferred by the Constitution ... to an extent which exceeds what is necessary, may be annulled by decision of the Supreme Court."

Article 20 refers therefore to a law which may be annulled under certain circumstances. But we have already decided not to allow the plea for the annulment of Section 17 of the Penal Law, and to affirm the validity of this enactment. I do not think that we are empowered by Article 20 to annul or strike out a specific indictment under Section 17, when all the elements of the offence have been proved against a defendant. This holds true even if we believe that the Prosecution could have refrained from filing the action because of policy considerations.

2 But, in addition to this constitutional point, I respectfully differ also from the substantive opinion of the majority in this respect.

The "victim" of these offences is the whole of the Toriland people. If citizens will stop paying taxes due from them, this seriously harms society as a whole, and the possibility, after years of complex investigations and Court cases to recover perhaps part of the money, is not an adequate remedy that can neutralize the harm done.

The position is even worse in respect of the draft dodgers. Inciting people not to fulfill their duty to serve in the Army is universally considered a most serious offence. We have seen in the cases mentioned above (such as *Schenck, Frohwerk, Debs*), that even in the United States, the protagonists of the free-speech doctrine, people were convicted for publicly objecting to the drafting of people into the Army, and were in fact sentenced to prolonged prison terms for those offences.

What remedy does the State have against those draft

dodgers? They can find the people concerned and they can punish them and send them to jail. Instead of these people serving in the Army in a positive and constructive way, they will serve time in jail, with the public having to pay for their upkeep, and will cause the lowering of the morale in the Army. And this in a country where there is tension all around, and where one of its neighbours, Maday, has a non-democratic regime after a violent theocratic revolution. This is a country that needs an army, and people like the priests, who incite people to refuse to obey draft orders, should be duly punished for such incitement.

Finally, I should also like to add, that I regard it as a dangerous precedent, and as contrary to the public interest, to intimate to religious leaders who often tend to express extreme and violent views, that they can incite their worshippers to commit specific offences directed against the public as a whole, with impunity.

As there also was a real likelihood that at least some of the worshippers might have obeyed the rulings of their priests, I should have found the priests guilty of offences under Section 17 as charged.

8. It remains for us to deal with the charges brought against the Socialist students.

Here we have decided, by a majority of four to one, with Judge Trager again dissenting, to convict the students of an offence under Section 17 of the Penal Law.

We have come to this conclusion not on account of the posters they put up, exhibiting the pictures of the priests concerned, with pictures of the bodies of naked women attached underneath. That was very repugnant behavior, but this would not in itself constitute an offence under Section 17.

The learned Prosecutors agreed that they would not have charged the students with any offence in relation to this act alone.

Also the fact by itself that people express calls for "death" or "killing" would probably not have been enough to warrant a conviction. Very often people use such expressions, without a serious criminal intent. If in a boxing match someone in the audience shouts "kill him!", or if someone says: "I'll kill you if you do this or the other"¨ then this will generally not be taken seriously by anyone.

I once saw a cartoon in the "*New Yorker*" depicting someone who carries a huge placard saying: "Death to the Government! Down with Slavery!" and when a policeman comes and asks him to move a few yards for safety reasons, he shouts: "It's a free country, isn't it?"

All this comes to show that sometimes people use words which on the face of it sound or look threatening, but they do this without meaning any harm.

But here there exists a combination of a number of things. We assume, of course, that the Attorney General would not have charged these specific students unless they are the ones who did all the things mentioned in the fact sheet which forms the basis of our deliberations.

We have to look at the picture as a comprehensive whole. First the students distribute flyers saying, "Outlaw the Purity priests". In order not to leave any doubt as to whom they are referring, they then plaster those malicious posters, depicting the specific priests with their faces clearly identifiable, but with each one of their heads attached to the body of a naked woman. This also shows the amount of malice accompanying these acts, so that when they finally demonstrate, calling for "Death to the enemies of democracy", after having clearly indicated whom they meant, they have to be held criminally responsible for incitement to violence.

People who act that way have to realize that it is enough if a few hotheads amongst the crowd take this incitement literally, and will act accordingly.

The facts and circumstances as a whole, including the publication of the posters mentioned above, show that the students were prepared to take the risk that the death of some of the priests could be the result of their actions. Again the maxim that people are presumed to intend the natural consequences of their acts is applicable.

As to the "real likelihood" that the incitement to commit an unlawful act may result in the carrying out of the offence, here we have to consider, amongst the other relevant factors, also the seriousness of the offence in question. When the incitement refers to a most serious offence like causing the unlawful death of a person, the meaning of "real likelihood" should be given a wide interpretation, and a high degree of probability should suffice.

After consideration of all the relevant facts we came, by a majority, to the conclusion that the accused students "called for the commission of acts of violence" within the meaning of Section 17 of the Penal Law, and we decided to find them guilty of that offence.

9. To summarize our findings:

a) Unanimously we have decided not to deal with the offence under Section 15 of the Penal Law, with which the priests were charged, after we came to the conclusion that we should annul Section 15 as unconstitutional.
b) By a majority of four to one we have decided to convict the

priests of calling, impliedly, for unlawful violence, under Section 17 of the Penal Law.

c) By a majority of three to two we have decided to acquit the priests of an offence under Section 17 of the Penal Law for calling on worshippers not to obey the law of paying income tax and serving in the Army.

c) By a majority of four to one we have decided to convict the students of an offence under Section 17 of the Penal Law for calling for the unlawful killing of the Purity priests.

10. Finally I should like to express our appreciation and thanks to the learned pleaders for both the Prosecution and the Defence, who presented their arguments with admirable clarity and power of persuasion.

Lord Philip Caplan:

I have had the opportunity to read and consider the judgment of Justice Bach and I concur with his narration of the facts of this case and the conclusion at which he arrives. I shall therefore content myself with a brief summary of my position.

The case is concerned with the effect of Article 10 of the Toriland Constitution which guarantees to every person the right to freedom of expression, association and organization. However, even that right is expressly qualified by Article 20 of the Constitution which provides that constitutional rights may be limited provided that the limitation is for a proper purpose and that the impairment does not exceed what is reasonably necessary.

In European jurisprudence freedom of speech and expression is regarded as an important constitutional safeguard, but it is only one in a basket of important human rights, and therefore must be balanced against its impact on other rights. This is made perfectly clear in the European Convention on Human Rights. Thus the right of free expression articulated in Article 10 of the Convention is subject:

> "to such formalities, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary."

Thus, the right of freedom of expression must be balanced against the public interest inherent in other human rights such as the right to enjoy the protection of the State against acts of violence. Indeed such is the weighting given to personal security in public perception that history illustrates that even an anti-democratic government will sometimes be tolerated if the alternative is a breakdown in the capacity of the State to protect its citizens against chaos and violence. The point I am making is that "proper purpose" as used in Article 20 of the Toriland Constitution must be construed in a manner which takes account of the well acknowledged exceptions to total freedom of speech, such as are found in the European Convention of Human Rights, and elsewhere in widely accepted jurisprudence.

In Scotland the crime of sedition is not exhaustively defined, because there is a paucity of recent prosecution, but one definition that formerly would have been regarded as authoritative is contained in a case dated 1848 (namely *John Grant & Ors* J. Shaw 51). In that case Lord Justice Clerk Hope said: "the crime of sedition consists in wilfully, unlawfully, and mischievously, and in violation of the party's allegiance, and in breach of the peace, and to the public danger, uttering language calculated to produce popular disaffection, disloyalty, resistance to unlawful authority, or in more aggravated cases, violence and insurrection. The party must be made out not to be exercising his right of free discussion for legitimate objects, but to be purposely, mischievously, without regard to his allegiance, and to the public danger, scattering burning firebrands, calculated to stimulate and excite such effects as I have mentioned - reckless of all consequences". The language has perhaps the flowery quality appreciated in its time, and the application of the test to a modern situation would, no doubt, require a more rigorous assessment of conduct to secure a conviction than might have been the case formerly. Perhaps a less controversial (but more practicable) definition of sedition was that given in the course of a public address by Lord Advocate Thomson (later a very distinguished Scottish judge). He said that the scope of the crime of sedition was, in general terms, "activities directed against the State which either are likely to result in violence or advocate the subversion of the constitution by non-constitutional means."

The recent case of *Chorherr v. Austria* (17 E.H.R.R. 937 (1994) European Ct.H.R.) is interesting because it illustrates the type of interference with free speech which the European Court would consider tolerable and consistent with the Human Rights Code. The accused was distributing leaflets at a military ceremony and was arrested. The European Court held that his arrest was lawful because the interference with the accused was made for the legitimate purpose of preventing disorder. In particular it was held that the risk that the conduct of the accused might lead to a disturbance was "foreseeable" and the measures taken were not excessive.

Like Justice Bach I am not enthusiastic about the immediate danger principle in deciding if incitement to violence can be the subject of State intervention. If the State is entitled to prevent unauthorized violence it seems to me that the harm which it is sought to divert is so critical that there is little to be gained, and much to be lost, if intervention must be postponed until a point in time when there is a risk that it will be too late. The fate of Prime Minister Rabin in Israel is perhaps an illustration of how easy it is to underestimate what may turn out to be genuine threats, or the effective promotion of violence. If the State can foresee, on reasonable grounds, that a particular activity gives rise to a probable risk of public disorder then it is entitled to take steps to avoid such a result by use of the criminal law, if this proves necessary. Whether or not in a particular case apparent incitement to violence is simply an empty gesture that is not likely, nor intended, to lead to a real danger is, of course, for the trial tribunal to determine.

I agree with Justice Bach, for the reasons he gives, that Section 15 of the Penal Law is too wide and inexact to be enforceable in the light of the Constitution. On the other hand I consider along with Justice Bach that Sections 16 and 17 of the Penal Law comply with what are generally regarded as the legitimate requirements of a democratic State.

Justice Bach has clearly set out the facts that have led him to the conclusion that the Purity Party priests have been inciting to violence. For the priests to urge their congregations that they should take action so that all citizens of Toriland would accept the Purity faith, or be condemned as heretics, and be faced with an uncompromising civil war is such a flagrant call to violent action that it can scarcely even be called a coded message. "Action" is to be taken and reinforced with the threat of a civil war if it is not effective. There could hardly be a more serious threat to the capacity of the State to maintain public order than a serious threat of civil war. The risk inherent in the sermons of the priests must be seen in the context of what has recently happened in Maday. The understanding of the congregation as to what they are being expected to do will inevitably be compared by them with the events in Maday. Each time the priests give their message must increase the possibility that it will be taken to heart and for the State to procrastinate until violence actually occurs in my view in not only an unreasonable policy but a dangerous one.

I also agree with Justice Bach that the acts of the priests in urging their congregations to disobey the law represent clear contravention of Section 17. In the first place, if the section represents effective law, what has happened is an explicit violation of the section. The State has a paramount duty, in the interests of all its citizens, to enforce its laws and to prevent crime and public disorder. As Justice Bach has pointed out, in relation to Section 17 we have already proceeded on the basis that the section does not fall to be annulled under Article 20. A serious interference with military recruitment and revenue collection must affect National Security. Indeed in relation to the maintenance of an effective military machine it is common to find that a State has laws rendering the incitement to disaffection a crime. I do not think it has ever been suggested that this offends against Human Rights. Of course the State could possibly enforce its laws by means other than criminal action. However, it is a matter of prosecution policy whether, in a particular situation, the State considers that to protect its vital interests the more serious remedy of criminal proceedings is required than, say, a civil action. In many cases this may prove to be a political decision.

Similarly for the reasons set out by Justice Bach the students must be held guilty of offences under Section 17. The threats against the "enemies of democracy" are given specific (and dangerous) content when the supposed enemies are specified by having their images set out in the posters. This seems a much more serious risk to the public peace than the relatively minor activity which was the subject of the arrest in the *Chorherr case*.

Justice Vera Rottenberg Liatowitsch:

I also agree with the judgment of Justice Bach, except for one point concerning the charges brought against the priests. My reasons for this are as follows:

1. In my opinion, the mere fact that the wording of Section 17 can be understood to cover the priests' call to the worshippers to refuse to pay taxes and serve in the army is not sufficient for a conviction. As Section 17 constitutes an impairment of a constitutional right, it has to be construed according to Article 20 of the Constitution, stating that the impairment may not exceed what is reasonably necessary. Therefore not every speech that may be understood as an invitation to commit an offence is punishable under Section 17. If there are other means available to prevent the offences in question, the necessity required by the Constitution is lacking. The application required by Section 17 is justified if there is a present danger to life and/or property of certain people living in the State and if the State has no other means at hand to protect these people. However, as much as I am convinced that there is no other way but punishing the priests based on Section 17 in order to protect each inhabitant who does not wish to become a Purity adherent from terror and violence and to safeguard his or her religious

freedom, I find it difficult to imagine that curtailing free speech should be the adequate and only means to prevent the actual commission of the unlawful acts described in the facts in so far as they are directed against the functioning of the State.

When balancing the opposing interests, freedom of speech against individual or public safety, peace and security, we have to consider the actual historical, political and social background against which the criminal actions are supposed to take place.

In the past, Toriland had just about managed to maintain domestic peace and to keep the delicate balance between opposing movements. On the other side of the border, though, in Maday, the Purity Faith followers had succeeded in taking power in a revolution that had killed thousands of people. In the name of the same faith, encouraged by success, Purity priests in Toriland, too, had begun to turn their weekly sermons into a very specific direction. Although they may use a somewhat abstract wording and do not specifically encourage the harming of specific individuals, the audience, hearing the same message week after week, will sooner or later understand. Toriland's Purity priests are clearly aiming at the same goal using the same means as did their brothers in Maday. In my view, this is the only realistically imaginable "translation" that the listeners can and will give to the call "to take action so that all the citizens of Toriland would accept the Purity faith or be... faced with an uncompromising civil war". Thus, immediate danger to life and property of the "heretics" must be feared when the worshippers leave the service. The vaguely expressed but clearly directed words of the priests who enjoy religious authority and power cannot have failed their impact on an important part of the worshippers. Emotionally unified by the atmosphere of the service, under the impression of the words according to which non-believers deserve the worst, some of the participants' inhibitions to do harm will be substituted by the conviction that it is their duty to make the uncompromising civil war come true. Under these circumstances, there is hardly a way for the State to grant peace and safety to Hope or any other non Purity people from any acts of "holy" aggression. The danger here, as I see it, is clear and present, imminent and very likely. The impairment of free speech therefore is constitutionally justified.

3. On the other hand, the situation exposed above deserves a different evaluation to the call not to comply with civil duties. First, in this respect we are faced with a call for passive behaviour as opposed to the call for immediate action consisting in hurting other individuals. Moreover, and more important, the State as an entity with organized power has provided for specific enforcement proceedings which take place when citizens fail to perform their duties. I do trust in the functioning of Toriland's institutions. Therefore I believe that when the worshipers actually act according to their priests' calls, the authorities will be strong enough to enforce compliance with the laws. Whereas the call to bring about a civil war is very likely to be heard in a spontaneous collective action, refusing to fulfill a civic duty takes a lonesome premeditated individual decision at a later point in time.

4. As our learned friend Justice Bach has explained, he prefers the test of "real likelihood" to the one of "clear and present" or "imminent" danger. However, in the case in front of us, in my opinion, the two tests will lead to the same conclusion. As time goes by, the voices of the priests in the worshippers' ears become weaker, different ideas may be heard, there is room for other words to outweigh the call of the priests during the days, weeks or months before the Purity faith adherents may be called to serve in the army or comply with their tax duty. The content of the sermon by that time may well be remembered as well as the atmosphere it created, even the emotions it aroused. But a memory is not an actual feeling. The very important impact of the presence of the other believers is lacking. Alone at home, the Purity members have the chance to decide if they are willing to obey the command of the religious leader and accept the unpleasant consequences imposed on them by the State when not complying with their civil duties. Because the danger, as I have explained, is not imminent, there is no "real likelihood" that the people addressed will actually refuse civil obedience in accordance with the call of the priests.

For these reasons I find that the priests should not be convicted for having called upon the believers to refuse to pay taxes and serve in the army.

Judge Isi Foighel:

I too concur with the judgment handed down by Justice Bach; but this is subject to the exception which refers to the offence with which the priests are charged for having called on the worshippers to refrain from paying taxes to the government and from fulfilling their service in the army. On this last point I agree with the opinion of Justice Rottenberg Liatowitsch.

Judge David G. Trager (Summary of oral judgment):

First, I am happy to see that the Court is unanimous that Section 15 is irremediably unconstitutional. With respect to Sections 16 and 17, I think that they are equally unconstitutional, except that I believe that they can be saved by reading into them certain requirements. First, the requirement of a specific intent to cause harm. It strikes me that it matters whether the priests intend to cause the harm that the Court has interpreted their language to indicate. I do not think that any speaker, including a leader of a community, has to be held

hostage to the way his followers might choose to interpret his language. I think the requirement of specific intent protects freedom of speech in that way.

Second, I think the statute needs a requirement of an imminent threat. The only justification for the application of this law would be where there is no opportunity for good speech to correct bad speech, or if the law enforcement community is not in a position to protect society as a whole. Third, I believe that there must be a requirement of a risk analysis. Here I probably depart from the traditional American view, as well as the traditional Israeli view. I think that the real issue is the nature of the interest that is being affected. In effect, that determines how much of a risk one is willing to take. In certain instances, for example of national security, a possibility of an injury to the public is probably enough to warrant intervention by the State. The cost would be so catastrophic to the community that I think a lesser risk occurs. Indeed, I think if one honestly reviews all the decisions of the Israeli Supreme Court as well as the American Supreme Court, notwithstanding that the Israeli Supreme Court uses the likelihood test and the American Court has used the 'clear and present' test, or the *Dennis* test, or the *Brandenburg* test, in fact, the nature of the interest that is affected spells out how much of a risk a Court is willing to accept.

On the other hand, if the issue is a public demonstration, I would require a much higher burden on the State, because they are able to deal with potential violence by having an adequate number of police officers present.

There are also classes of cases that fall in the middle. In suggesting this approach I am saying that the search for absolute rules, is a fruitless search, an exercise in self-delusion, and dangerous. Context is everything. A Court has to take into account the nature of the danger, the likelihood that it will occur, the imminence of the adverse social result, and not insignificantly, the Court's competence to deal with that issue. It strikes me, and I think the case law in both Israel and America reflects this, that it makes a very big difference whether one is concerned with an issue of national security or a protest. It makes a big difference whether a street demonstration that calls the Prime Minister a traitor, and burns him in effigy, occurs in Hyde Park, or at a public assembly point, or around his house.

I think judges feel competent to judge and overrule the police, in that context. It does make a difference whether a Court is being asked to overrule the judgment of the executive or the law enforcement community, or the parliament as the case may be; for example, in relation to whether the Communist Party should be outlawed. To my mind there would be no justification for it, as it was attempted in the United Stated in the 1950's. But I would not say that in Czechoslovakia, before the coup, it would have been wrong for the legislature or the courts to outlaw the Communist Party.

Our case falls, in some respects, on the side of protest, and on the other side as a possible insurrection in the community, alleged civil war. But to me context is everything. Dr. Dayan quoted the *Brandenburg case*, where the leader Brandenburg was in effect saying that if the President did not protect the White community, revenge could be expected. She omitted that this statement was made in an open field, in a farm in Ohio, with twelve men running around in a circle, with hoods over their heads, calling up the local press, in order to try to get some coverage. It strikes me that that is very different from the same statement made in front of a Black church, or a home of a Black family in the South, in a community in which the Black family really cannot look to the law to protect them.

I also wish to mention a matter which has been ignored here, but I think is not insignificant, namely, the cultural background of the judges on this bench. Three of the judges are from countries which are essentially mono-cultural. They have been with the same population, the same groups, and the same culture for hundreds of years. They have the same basic set of values. America and to a lesser degree Israel are multicultural countries. It is important to understand that the rhetoric that my colleagues find so offensive is ordinary political rhetoric. In the United States one has only to turn on certain radio stations, Black radio stations and Black nationalists, to hear phrases which are very similar. One would have heard the same statements from Communists in the thirties. It strikes me that if these groups are going to be prosecuted only because their rhetoric is regarded as offensive, the country will very soon not seem to be very democratic, and indeed it will be using censorship on a content based level.

Of course we are all concerned about the victims. But I think one has to take into account the society and the real risk that we are talking about. In America, anti-Semitic statements by the Nazis in Illinois, by the KKK, or by Black nationalists, are hurtful to me, as a Jew, and I hope for a lot of non-Jews. But I view it as the price that I have to pay so that we can discuss issues of inner city crime and illegitimacy in the Black community, without being prosecuted for racist speech, despite the suggestion by the Defence that because the Black community is in many ways impoverished, and lacks power, this would justify suppressing that kind of speech.

Coming back to this case, we have a record before us. The record puts the burden on the Prosecution to prove each of these

elements of intent, imminence, and likelihood. What does the record show on each of these issues? Ambiguity, possibly intent. How do we know that the priests want violence as opposed to rhetoric? I think there is some proof in the fact that there has been no act of violence by any of their parishioners to date. The same applies in relation to likelihood, and the same in relation to all the other elements. In my view, the Prosecution has failed to prove its case under the appropriate standard.

[Judge Trager intimated that he was in favour of acquitting the priests as well as the students of all the charges preferred against them by the Prosecution].

The Supreme Court of Toriland has therefore decided as follows:

1. The Court held unanimously that Section 15 of the Toriland Penal Law, dealing with the offence of sedition, is unconstitutional, and for that reason decided to annul the validity of this section and not to deal with the charges brought against the priests under it.
2. By a majority of four to one, with the dissent of Judge Trager, the Court decided to convict the priests of an offence under Section 17 of the Penal Law, for calling, impliedly, for the commission of unlawful violence.
3. By a majority of three to two, with Justices Bach and Lord Caplan dissenting, the Court decided to acquit the priests of an additional offence under Section 17 of the Penal Law, for calling on worshippers not to obey the law of paying income tax and serving in the Army.
4. By a majority of four to one, with Judge Trager dissenting, the Court decided to convict the accused students of an offence under Section 17 of the Penal Law for calling for the unlawful killing of the Purity priests.

Judges (Left to right): Judge Trager, Lord Caplan, Justice Bach, Justice Rottenberg Liatowitsch, Judge Foighel