CrimFH 1789/98

State of Israel

v.

Binyamin Kahane

The Supreme Court Sitting as the High Court of Justice

[November 27th, 2000]

Before President A. Barak, Vice-President S. Levin, Justices T. Or, E. Mazza, Y. Kedmi, D. Dorner, J. Türkel

Petition to the Supreme Court sitting as the Court of Criminal Appeals

Facts: Further hearing in the judgment of the Supreme Court (President A. Barak and Justices A. Goldberg and E. Mazza) dated March 2, 1998 in CA 6696/96 *Benyamin Kahane v. State of Israel*, in which Benyamin Kahane was acquitted of offenses based on sections 133 and 134(c) of the Penal Code 5737-1977. The acquittal overturned a conviction in the District Court which in turn had overturned an acquittal in the Magistrate's Court. Two main issues were under consideration in the further hearing. The first dealt with the characteristics of the protected value or values in the offense of sedition in general and in section 136(d) in particular. The second was the question of the presence of a probability test within sections 133 and 134(c) of the Penal Code. These questions were dealt with particular emphasis on their implications for freedom of expression.

Held: In the majority opinion, written by Justice Or, the acquittal was overturned and the defendant was convicted of the offenses with which he had been charged. It was held that the protected values in the offense of sedition is not limited to harm to the structure of the regime but also includes protection of the value of "social cohesiveness" as defined by the court. It was further held that sections 133 and 134(c) contain a probability test. As for the degree of probability required, the court stated that while it was inclined to prefer the near certainty test, since the court held that this more stringent test had, in any event, been met it did not see it necessary to determine conclusively what the appropriate degree of probability was that was required.

President Barak in a separate opinion was of the view that the value protected in the offense of sedition is limited to the prevention of harm to the stability of the regime. President Barak was also of the view that given the broad view of sedition taken by the majority he agreed with the tendency of Justice Or that the proper proportional test would be that of near certainty, but that this test had not been met in the circumstances of the case. In the view of President Barak, the further hearing should have been denied.

Vice-President S. Levin in a separate opinion stated his general agreement with Justice T. Or and referenced his opinion in CrimFH 8613/96.

Justice Y. Kedmi in a separate opinion agreed with the outcome of Justice Or's opinion but was of the view that sections 133 and 134(c) did not contain a probability test.

Justice D. Dorner in a separate opinion agreed with the outcome of Justice Or's opinion but was of the view that the offense of sedition does not contain a probability test.

Justice J. Türkel in a separate opinion was of the view that the further hearing should have been denied.

Justice E. Mazza in a separate opinion was of the view that offenses of sedition do not include a probability element.

For petitioners—Talya Sasson, Eyal Yannon

For respondent—Yair Golan

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Legislation cited:

Penal Code 5737-1977, ss. 19, 20(a), 34Q, 34U, 133, 134, 134(c), 135, 136, 136(1), 136(2), 136(3), 136(4), 138, 144B, 173, 198, ch. H, section A.

Penal Code Ordinance 1936, s. 60(1).

Prevention of Terrorism Ordinance 5798-1948, ss. 4, 4(a).

Draft legislation cited:

Proposed Penal Law (Amendment number 24) 5745-1985, *Hatzaot Hok* 1728 of April 17, 1989.

Israeli Supreme Court cases cited:

[1] CA 6696/96 *Kahane v. State of Israel* IsrSC 52(1) 535.

[2] CrFH 8613/96 *Jabarin v. State of Israel* (not yet reported).

[3] HCJ 2722/92 *Alamrin v. IDF Commander in Gaza Strip*, IsrSC 46(3) 693,705.)

[4] HCJ 7351/95 *Munier Navuani v. Minister of Religious Affairs and Others* IsrSC 50(4) 89.

[5] CA 2000/97 *Lindorn v. Karnit* IsrSC 55(1)12

[6] EA 2, 3/84 *Neiman v. Chairman of Election Committee for Eleventh Knesset* [1985] IsrSC 39(2) 225.

[7] HCJ 73, 87/53 *Kol Ha'am Ltd. v. Minister of Interior* [1953] IsrSC 7, 871; IsrSJ 1 90.

[8] HCJ 399/85 *Kahane and Others v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255.

[9] CrimA 2831/95 *Rabbi Ido Elba v. State of Israel* IsrSC 50(5)221.

[10] HCJ 2481/93 *Yosef Dayan v. Commander Yehuda Wilk, Jerusalem District Commander* IsrSC 58(2) 456.

[11] CrimA 697/98 *Tatiana Suskin v. State of Israel* IsrSC 52(3) 289.

[12] HCJ 14/86 *Laor and Others v. The Council for Film Censorship and Others*, IsrSC 41(1) 421.

[13] CrimA 53/54 *ESH"D Temporary Center for Transportation v. Attorney General*, IsrSC 8 185.

[14] CrimA 677/83 *Borochov v. Yafet* IsrSC 39(3)205, at p. 213, 218-219.

[15] CrimA 506/89 *Naim v. Rosen* IsrSC 45(1)133.

Israeli District Court cases cited:

[16] CrimA (J-m) 243/94 *State of Israel v. Benyamin Kahane* (not yet reported).

[17] CrimC (J-m) 361/93 *State of Israel v. Benyamin Kahane* (not yet published).

American cases cited:

[18] *Schenck v. United States*, 249 U.S. 47 (1919).

[19] *Whitney v. California*, 274 U.S 357 (1927).

[20] *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

[21] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Israeli books cited:

[22] S.Z. Feller *Foundations in Criminal Law* (Volume 1, 5745-1984).

[23] Itzhak Kugler *Intent and the Law of Expectation in Criminal Law* (1998).

Israeli articles cited:

[24] Professor Kremnitzer and Khalid Ghanayim "Incitement not Sedition" (Israel Democracy Institute, 1997).

[25] Alon Harel 'Offenses which Limit the Freedom of Expression and the Test of Probability of Realization of the Damage: Renewed Thinking' *Mishpatim* 30 (1999) 69.

[26] Professor Kremnitzer's article 'The *Elba* Case: The Law of Incitement to Racism' 30 *Mishpatim* (1999).

Foreign books cited:

[27] J.F. Archbold *Pleading, Evidence and Practice in Criminal Cases* (London, 42nd ed., by S. Mitchell and others, 1985).

Foreign articles cited:

[28] Dean Ely, 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis', 88 *Harv. L. Rev.* 1482 (1975).

[29] David R. Dow and R. Scott Shieldes, 'Rethinking the Clear and Present Danger Test', 73 *Ind. L.J.* 1217 (1998)].

JUDGMENT

Justice T. Or

1. Further hearing in the judgment of the Supreme Court (President A. Barak and Justices A. Goldberg and E. Mazza) dated March 2, 1998 in CA 6696/96 *Benyamin Kahane v. State of Israel* [1] (hereinafter: "the *Kahane* Judgment [1]"). In the judgment Benyamin Kahane (hereinafter: "Kahane") was acquitted of offenses based on sections 133 and 134(c), specified in Title A of Chapter H of the Penal Code 5737-1977 (hereinafter: "the Penal Code") titled Sedition. Two central issues are to be considered in this further hearing. One deals with the characteristics of the protected value or values of the aggregate of alternatives in section 136, which defines "sedition", and of subsection 136(4) in particular. The second is the question of the presence of a probability test within sections 133 and 134(c). The special importance of these issues stems from their implications for freedom of expression. The offenses we are dealing with restrict this value via the criminal prohibition they establish. These issues have ramifications on the scope of the deployment of these offenses, and thereby also have ramifications on the degree of infringement on freedom of expression.

2. The issues will be presented by chapter headings in the following order: a. the factual background and the proceedings; b. the characteristics of the protected values in sections 133 and 134 and their interplay with the phrase "incite to rebellion" in section 136 overall (hereinafter: "the offense of treason"); c. identification of the specific protected value in section 136(d); d. the question of the presence of a probability test in the framework of articles 134 (c) and 133 of the Penal Code including the totality of issues entailed; e. the mental element required in articles 134 (c) and 133; f. the distinction between this case and CrFH 8613/96 *Muhammad Yosef Jabarin v. State of Israel* [2]; G. the result.

A. *The Facts and the Proceedings*

3. In the course of the election campaign for the 13th Knesset, even before the list of "Kahane Lives" was disqualified from participating in the elections, Kahane, who was at the top of the list, distributed a pamphlet which stated as follows:

> "Bomb Umm El Fahm! Why is it that when Arabs came out of Umm El Fahm and slaughtered three soldiers – the government sent out to bomb the Hezbollah in Lebanon instead of bombing the hornets' nest of Umm El Fahm
>
> Why is it that every time a Jew is killed we shell Lebanon and not the hostile villages within the State of Israel?
>
> For every attack in Israel -- bomb an Arab village – a nest of murderers in the State of Israel!
>
> Only Kahane has the courage to speak the truth!
>
> Give power to Kahane and he will take care of them."

Kahane was indicted in the Magistrate's Court in Jerusalem for distribution and possession of the pamphlet. Kahane was charged with committing acts of sedition, an offense under section 133 of the Penal Code, and with possession of seditionary publications, an offense under section 134(c) of the law. The Magistrate's Court acquitted Kahane of both charges. The appellant (hereinafter: "the State") filed an appeal on the judgment to the District Court. The District Court overturned the acquittal and convicted Kahane of the offenses which were attributed to him. The applicant, after obtaining leave, filed an appeal to the Supreme Court. In the Supreme Court (CA 6696/95[1]) Kahane was acquitted of these offenses by the majority

opinions of President Barak and Justice Goldberg, as against the dissenting opinion of Justice Mazza.

On March 17, 1998, the state requested a further hearing as to two central issues that were decided in the *Kahane* Judgment [1]. The first deals with the characteristics of the protected value in the offense of sedition in general and in section 136(d) in particular. The second deals with the question of the presence or absence of a probability test within the framework of sections 133 and 134 of the law

On July 17, 1998 Vice-President S. Levin determined that a further hearing on the *Kahane* Judgment [1] would take place.

B. *The Protected Value in the Offense of Sedition*

4. Section 136 of the law includes four different alternatives for defining the term to "incite to seditious acts". Despite the fact that Kahane was charged with offenses which relate only to the term "to incite to seditious acts" in section 136(4), conclusions were drawn in the *Kahane* Judgment [1] with implications for the characteristics of the protected value in the aggregate of alternatives listed in section 136. I will, therefore, first discuss the question of the characteristics of the value or values protected in the offense of sedition. After that, I will examine the status of these values relative to the value of freedom of speech. Finally, I will relate to the scope of the deployment of the offense of sedition.

The Various Approaches

5. Sections 133 and 134 of the Penal Code deal with acts of sedition and seditious publications respectively. Section 136 defines sedition. The section establishes that:

> "For the purposes of this section, 'to incite seditious acts' is one of the following:
>
> (1) To bring about hatred, contempt or disaffection against the state or its duly constituted administrative or judicial authorities;
>
> (2) To incite or to provoke inhabitants of the State to attempt to procure otherwise than by lawful means the alteration of any matter established by law;
>
> (3) To promote discontent or resentment among the inhabitants of the land;

(4) To promote feelings of strife and enmity between different segments of the population."

In the *Kahane* Judgment [1] a difference of opinion arose as to the question, what is the value or values which are protected in the offense of sedition when integrated with the aggregate of alternatives in section 136 and section 136(4). In particular, Justice Goldberg was of the opinion that the protected value in the offense of sedition is the structure of the regime and does not extend out over its values as well. A number of reasons supported this opinion. He clarified that this conclusion was strengthened by the legislative history. Similarly, in his opinion, this is also the conclusion to be drawn from a review of the alternatives in section 136. The provision of section 136(1) read together with section 136(2) strengthens the supposition that the protected value is the structure of the regime and not its values. This also has ramifications for the construction of the rest of the alternatives, as it is to be presumed that the various alternatives that were established in the same statutory provision express various forms of harm to the same value, and not to other protected values. The existence of the offense of incitement to racism which is established in section 144B of the Penal Code, an offense directed specifically at preventing harm to core values which are at the foundation of a democratic regime, enables this construction. Furthermore, narrowing the offense of sedition to one protected value contributes to the clarity of the prohibiting norm, which is consistent with the logic of the principle of legality (for detailing of his reasons see paragraphs 13-15 of his judgment).

Justice Goldberg dismissed the State's position, as it was presented at the time, from which the bundling of the stability of the regime and the core values which characterize it was inferred. In his opinion, the argument that any call against the core values necessarily endangers the stability of the democratic regime is excessive. He even dismissed a more qualified argument, which isolates the value of equality from other core values and bundles it with the stability of the regime, as in his opinion, such overlap is not obligatory. According to him, triggering the offense of sedition would only be justified when the violation of equality melds with harm to the stability of the regime.

President Barak agreed with Justice Goldberg's viewpoint on this matter. He also is of the view that the offense of sedition is limited to endangering the order of the government and the regime and the protected value is

prevention of harm to the stability of the regime (paragraph 11 of his judgment).

Unlike them, Justice Mazza, in a minority opinion, was of the opinion that the offense of sedition is not limited to protection of the structure of the democratic regime. In his opinion, the protected value in section 136 extends out over the social values that are at the foundation of this regime. He does not accept the differentiation between the structure of the regime and the basic social values at its core. He dismisses this differentiation for two reasons. First, unlike the first three alternatives of the section, which deal with activities directed at causing harm to government authorities, the provision of section 136(4) deals with activities that are not directed against governmental authorities, but against segments of the population. Limiting the protected value to the structure of the government will deplete this provision of content. Second, this differentiation is neither possible nor desirable. If one seeks to protect the structure of the regime, its foundations must also be protected. Putting the core values on which democracy is based in potential danger also endangers the structure of the regime. In Justice Mazza's opinion, the addition of the offenses relating to racism, do not detract from the scope of the span of the existing offenses (for detailing of his position see paragraphs 17-18 of his judgment).

As for Justice Goldberg's determination according to which there is not necessarily overlap between harm to the structure of the regime and harm to the values of society, Justice Mazza comments that in his view, no link at all is needed between the harm to values and the harm to the structure of the regime, as they both are protected by the offense of sedition (see paragraph 19, **Ibid**.).

6. The government's position in the further hearing before us, as to the protected value in the offense of sedition, has changed direction somewhat relative to its original position at the time of the discussion in the *Kahane* Judgment [1]. Now it proposes a middle position that is found midway between the majority opinion and the dissenting opinion in the *Kahane* matter. The State ostensibly joins the opinion of the majority in its approach according to which the protected value in the offense of sedition is indeed the "character of the democratic regime". However, the State is of the view that the content with which the majority filled this term, according to which the protection of the section spans only the structural and organizational arrangements of democracy is overly narrow. According to the State's view, it is appropriate that the protection afforded in section 136, including 136(4),

extend out over the democratic character of the State of Israel both from the structural perspective and the value-content perspective.

What is the content of said "value-content perspective" with which the State seeks to fill the value protected in the offense of sedition? The State proposes, on this matter, adopting the approach according to which it is not a matter of protection of the range of values which characterize a democratic regime. It is a matter of the "hard nucleus" of those values, values which are of the "first degree" or "supra" values. This position, by definition, raises the question as to what those values are which constitute the hard nucleus of democracy. In this matter, the State does not take a position and throws in its lot with this court for it to determine what those "supra" values are which are protected by the offense of sedition.

If this is so, the issue that is before us is examination of the characteristics of the protected value in section 136 overall. Whether, as the majority justices hold, the protected value that runs like a common thread through all the alternatives in the section is the structure of the regime, or whether the protected value is not exhausted by this purpose. If the protected value in the offense of sedition is not exhausted by the structure of the regime, then what the value is or what the values are that are protected by it must be examined.

Is the Protected Value in Offenses of Sedition Only the Structure of the Regime?

7. The view, according to which the protected value in section 136 is the structure of the regime, relies, *inter alia*, on the language of section 136. Justice Goldberg, in this judgment, surveys the various alternatives in section 136 and his conclusion is that the provision of section 136(1), which in his view is the most pivotal alternative, also "radiates" on the manner of construction of the other alternatives in the section. Since this alternative deals clearly with the structure of the regime, in his view, one is to infer from this as to the rest of the alternatives, as it is makes sense that the section is made up of "one piece" as to the value protects.

The Achilles' heel of this argument is that it is not consistent with the phrasing of section 136. The first alternative is indeed intended to protect the value of the structure of the regime. However, the conclusion that the protected value in section 136 in the aggregate is the structure of the regime is further and further undermined the more we continue to survey the other alternatives in the section. The second alternative is already not consistent with the conclusion according to which the exclusive value protected by it is

the structure of the regime, since it deals with the alteration of "any matter established by law" and not necessarily the structure of the regime. However, even if the second alternative can also be attributed to the structure of the regime, this is not the case as to the third and fourth alternatives. These, according to their language, do not focus on the structure of the regime at all. If so, from the plain reading of the alternatives in section 136 it arises that it is not made up of one piece. While the protected value in the first alternative is the structure of the regime and its institutions, the other alternatives do not inherently tie in, on the basis of their language, to this value.

8. Counsel for Kahane, advocate Golan, suggests that we learn about the content of the protected value from the use of the term "sedition" to describe the offense. The accepted literal meaning of the term "to incite seditious acts" is to bring about an uprising against a governmental authority. From here we learn that this term, in its regular meaning, relates only to the relationship between the citizen and the government. Therefore, in his opinion, section 136 in the aggregate is to be construed in this vein.

This argument would be well-reasoned, if it were not for the fact that this term has been defined in the statute itself. Once the term has been defined in the statute, the regular, literal meaning of the term is not be sought , but one is to adhere to the definition shaped by the legislator, even if it deviates from the regular meaning given to it. Therefore, it would be appropriate that identifying the protected value in the offenses of sedition be done based on the definition of the term "sedition" in the law and not by its accepted dictionary definition.

9. An additional argument which supports narrowing the protected value in section 136 exclusively to the structure of the government is tied to the overall legislative system. According to this argument, the existence of the offense of incitement to racism, which is established in section 144B of the Penal Code, provides support for the position that this offense was intended exclusively for situations of instigating strife and enmity which are not related to undermining the stability of the regime, while the offenses of sedition were designated exclusively for activities whose aim is harm to the structure of government.

I do not accept this approach. The existence of partial, or even full, overlap, among various offenses is not an extraordinary phenomenon in the criminal legislative system. Therefore, I agree with my colleague, Justice

Mazza, that it is certainly possible that there is a broad area of overlap between the offense of incitement to racism and the offenses of sedition. Support for this approach can be found in the explanatory notes of the Proposed Penal Law (Amendment number 24) 5745-1985 (*Hatzaot Hok* 1728 of April 17, 1989 pps. 195-196) in which adding the offense of "incitement to racism" to the Penal Code was proposed. According to the explanatory notes:

> "The Penal Code 5737-1977 prohibits acts of sedition and seditious publications (sections 133 and 134); **the term 'incite to seditious acts' includes 'promoting strife and enmity among various segments of the population (section 136(4)) and can punish for expressions of incitement to racism.** As long as the phenomenon of incitement to racism was marginal, it was possible to make do with said provisions and with the provisions in the Prohibition against Defamation Law 5725-1965, and primarily the one dealing with defamation of the public. **However, once incitement to racism became a disturbing phenomenon, the educational need was created to amend the penal law and include within it a provision which explicitly prohibits the publication of incitement to violence** . . .
>
> other countries have also legislated statutes in this area, taking into consideration the character and social structure of each country" (page 196) (emphases mine-T.A.).

From the above it can be inferred that the drafters of the law were of the opinion that the prohibition on incitement to racism does not narrow the scope of the offense of sedition, which includes within it incitement to racism. The offense of incitement to racism is not to be construed as intended to exclude from the offense of sedition the totality of cases in which the harm is not exhausted by harm to the structure of the government. In this matter my opinion is like the opinion of Justice D. Cheshin in the District Court, according to which the offense of sedition which relates to the alternative found in section 136(4) is broader in this context than the offense of incitement to racism, because its protection extends over causation of strife and enmity among segments of the population on the basis of difference which is not included within scope of the offense of incitement to racism, such as difference on the basis of ideological, sociological, sexual

background and the like (see CrimA (J-m) 243/94 *State of Israel v. Benyamin Kahane* [16] paragraph 12 of the judgment.)

10. We are not to learn from the above that a situation in which there is substantive overlap between various offenses is ideal. The opposite is true. This is the existing situation, but it is not the ideal situation. The existing situation indicates the lack of a guiding hand geared to instituting maximum harmony in the penal legislative system in the subject area we are dealing with. As to this and as with other words of criticism which I will discuss later, I join the approach of Professor Kremnitzer and Khalid Ghanayim in their article "Incitement not Sedition" [24] when they commented that:

> "Given that the offense of incitement to racism is defined in the Penal Code as a separate and independent offense and that defamation of a segment of the population constitutes the criminal offense of defamation, it is imperative that we amend the offense of sedition and define the aggregate and overlapping relationships between this offense and other offenses in order to prevent disharmony among the offenses." (**Ibid.** P. 7).

11. As for the legislative history of the offense of sedition, Justice Goldberg holds, as stated, that it strengthens the supposition that the offense of sedition was not intended to protect the core values which characterize the regime. He explains that in the Penal Code Ordinance 1936, the offense of sedition was placed within the chapter "Treason and other Offenses against the Ruling Authorities and Government." The title of the chapter was changed to "Harm to the Orders of Society and Regime" whereby addition of the segment "Society" was necessitated in light of the inclusion of additional titles in the chapter, in which harm to the social order is separate from harm to the order of the regime (see paragraph 13 of the judgment). It thus appears that his conclusion is that the legislator of the mandate period, when it legislated the offense of sedition, intended to limit its application to protection of the structure of the regime only. Justice Zilbertal, in the Magistrate Court's judgment strengthens this conclusion in that he references English law, which fathered this offense. The English case law limited the protected value in the offense of sedition to the structure of the regime (See CrimC (J-m) 361/93 *State of Israel v. Benyamin Kahane* [17] pp. 25-27 of the judgment). Justice D. Cheshin, in the District Court, also presumed that from an historical perspective, it was indeed possible that the primary objective which the legislator in the mandate period had before him when he legislated the sedition sections was prevention of harm to the state government.

However, in his opinion, this was not necessarily the exclusive objective in legislating the statute. In light of the sensitive social-political situation which existed at that time in the Land of Israel between the Jewish and Arab nations, it is possible to explain the provision of section 60(1) of the Penal Code Ordinance 1936, which is the source of the alternative specified in section 136(4), as a provision that was intended to prevent acts of strife and enmity between these populations, as an objective in and of itself. I also agree with the words of Justice D. Cheshin, according to which when interpreting the offense of sedition against its legislative history, one is to focus on the conditions that existed in the land when it was legislated, more than on the conditions that existed in England, from where it was originally extracted.

12. An additional argument which supports limiting the protected value to harm to the structure of the regime is based in the desire to minimize the violation of freedom of expression. Limiting the protected value to the structure of the regime only, significantly reduces the deployment of the offense and the violation of freedom of expression is thereby significantly reduced.

Without ignoring the "supra" status of freedom of expression, the clearly understood need to protect this freedom does not indicate that to achieve this one may ignore the existence of competing values which occasionally clash with it. The characteristics of the protected values in various statutory provisions, and in our case, the Penal Code, are determined by their purpose. Protection of the special status of freedom of expression is expressed in the defenses and statutory conditions of the offense of sedition which limit the scope of its deployment. These mechanisms reduce the violation of freedom of expression to the extent that is necessary, an extent that does not go beyond what is needed. I will expand on this below.

13. Finally, an additional argument which supports limiting the offense of sedition exclusively to harm to the structure of the regime relies on the principle of legality. This principle, *inter alia*, seeks to prevent the creation of vague criminal prohibitions, and requires that the content of a criminal offense be coherent and clear. It is clear that limiting the offense of sedition exclusively to one protected value contributes to the clarity of the proscribing norm, and is thereby consistent with the logic of the principle of legality. It cannot be ignored that applying section 136 to the value content of the democratic regime as well may cloud the application of said prohibition.

Despite what has been said above, in my opinion, the claim regarding the principle of legality does not necessitate depleting from all content the values which the offense seeks to protect. The means to be employed in this case should be clear definition of the protected value and delineation of the boundaries of its deployment. In the words of Professor Feller:

> "When the language of the criminal norm is cloudy. . . clarity and reasonableness is to be restored to the norm in accordance with the purpose of the norm. . . as statutes were meant to be carried out not concealed." (S.Z. Feller *Foundations in Criminal Law* (Volume 1, 5745-1984) [22] at p. 178.)

Indeed, the definition of the term "sedition" in section 136 is far from satisfactory. This conclusion is magnified if we recall that the statutory sections dealing with sedition are meant to reflect a balance between the need to protect public peace and freedom of expression. Against this background, it becomes necessary to adapt the offense of sedition, an offense that is an anachronistic relic from the Mandate period in the State, to the current reality of a state with a democratic character, in this matter it is appropriate to mention the words of my colleague President Barak, who commented on this in his opinion in the *Kahane* Case [1]:

> "It is appropriate to weigh the repeal of the offense of sedition in our penal law and replacing it with an offense that is suited to our regime. The phrasing of the statute is too vague and its boundaries are too broad. It reflects a world view that is not democratic. It suits a mandatory government which is not a government of the people, by the people, for the people. It does not grant sufficient weight to freedom of expression." (Paragraph 13 of his judgment).

The President references in this matter the proposal of Kremnitzer and Ghanayim in their article *supra* [24], to replace the offense of sedition with a number of criminal prohibitions whose scope is narrow and which are more clearly defined. Indeed, it is proper that the legislator weigh this proposal or other appropriate proposals. However, as long as the offense of sedition stands as is, it is my opinion that the arguments that support limiting it exclusively to the structure of the regime are not convincing. My position is that the offense of sedition does not protect this value alone.

The Other Values Protected in the Offense of Sedition

14. The conclusion that the offense of sedition is not only limited to harm to the structure of the regime is not sufficient, we must explore and establish what the other value or values are which are protected in the framework of the offense of sedition and what is the area of the deployment of these values. As said, Justice Mazza determined that the offense of sedition protects the values of the democratic regime. As to this matter, the State suggests adopting the "hard nucleus" test, according to which only "supra" values of the democratic regime are to be drawn in to the offense of sedition while it leaves to this court the task of determining the "supra" principles that pass the threshold of the offense of sedition.

This position of the State has been subjected to piercing critique by advocate Golan, Kahane's counsel. He cautions that creating an umbrella offense that will encompass the substantive and primary values of a democratic regime, values that at the present time are not defined, may bring about the creation of a criminal prohibition which will apply to broad areas of public discourse in Israel. It is his claim that the character of society in the State of Israel, a society replete with segments and schisms has led to a situation where the many and varied population groups who live in it are used to sharp and piercing public discourse. His position is that this public discourse is not to be clouded by placing limitations on the freedom of expression, especially when the scope of these limitations is not clear. Lack of clarity as to the extent of the limitations also contains harm to the principle of legality.

15. It is a reasoned argument that the test proposed by the state for exposing the identity of the values protected by the offense of sedition is difficult as it requires that the court pick and choose from a "basket" of core principles that are at the foundation of the democratic regime – those principles that will be drawn into section 136. Ostensibly, according to the State's position, this sifting of principles is meant to take place apart from the language of section 136, and in reliance on a value "meter" that will be adopted by the court, according to which it will pick, choose, and determine which are the core values that belong to the "hard nucleus". I have difficulty with this approach. In my opinion, the identity of the values protected by the offense of sedition is not determined in accordance with their classification as part of the hard nucleus of democratic rights in a democratic regime. The identity of these values is to be determined according to what is said in the various alternatives specified in section 136, which express the intent of the legislator and its purpose. In other words, the values protected by the offense

of sedition are only those that are anchored in the alternatives of section 136. The essence of the distinction between my approach and the State's approach is clear: the State seeks to pick and choose the protected core values from a basket of existing core values, without this being anchored in the language of section 136, while according to my approach, choosing the protected core values will be undertaken in a concrete manner according to what is said in the various alternatives of the section.

16. I am not disregarding the fact that this determination I have made does not contain enough to provide a clear definition of the values protected within the framework of the offense of sedition. The language of the alternatives is not always sufficiently clear to enable clearly identifying the value which each alternative is to protect. Moreover, as I commented above, at times, the protected value in these alternatives, according to their plain language, is not consistent with the democratic character of the regime. Possibly the most blatant example of this is specified in section 136(3). The term "to incite seditious acts" is defined in it as "to promote discontent or resentment among the inhabitants of the land". As Professors Kremnitzer and Ghanayim correctly comment in their article *supra* [24], discontent or resentment on their own, deal with emotions and feelings which belong to the purely internal realm which generally is an area the criminal law does not set foot in. Moreover, discontent or resentment is not a negative situation that is necessarily to be avoided (see their article above, pp. 9-10). We clarified above that this departure from the role of criminal law in a democratic state stems from the fact that the offense of sedition is a relic of the Mandatory Regime, which as is known, was not based on democratic principles. As to the construction of statutes from this period it has been determined:

"Statutes which were born in the Mandate period. . . had one interpretation in the Mandate period, and they had another interpretation after the establishment of the State, as the values of the State of Israel -- a Jewish, free and democratic state – are entirely different from the core values that the one in charge of the Mandate imposed in the land. Our core values – in our days -- are the core values of a democratic rule-of-law state which strives for freedom and justice, these principles are the ones that will breathe life into the interpretation of these statutes or others. This has been so since the establishment of the State, and certainly so following the Basic Law: Human Dignity and Liberty which bases itself on the values of the State of Israel as Jewish and Democratic state." (HCJ 2722/92 *Alamrin v. IDF Commander in Gaza Strip* [3] at 705.)

(See also: HCJ 7351/95 *Munier Navuani v. Minister of Religious Affairs and Others* [4] at paragraph 35).

On this matter, my colleague the President said recently:

> "The law melds with the new reality. In this way old law speaks to the modern man. From hence the interpretive approach that the law is 'always speaking' (see F. Bennion, Statutory Interpretation 686 (3rd ed. 1999)). Interpretation is a renewing process. Modern content is to be given to old language, in this way the gap is reduced between the law and life. Against this background, it is appropriate to say, as Radbruch has said, that the interpreter may understand the law better than the maker of the law and the law is always wiser than its maker (see G. Radbruch, Legal Philosophy, The Legal Philosophy of Lask, Radbruch and Dabin 141 (1950)). From here we have the accepted interpretive approach in England, according to which one is to give the law an updating interpretation. (Bennion, **Ibid**., p. 686). Indeed, the law is a living creature, interpretation must be dynamic. It is to be understood in a manner that will integrate with and advance the modern reality (see A. Barak, *Interpretation in Law*, Vol. 2, *Legislative Construction*, (1993) at p. 264,603)"
>
> (CA 2000/97, [5] LCA 4247/98, 4324/98, 4196/98 *supra*, paragraph 18).

In light of the above, determining the protected value in each of the alternatives is to be done according to what is stated in them, against the background of the reality of our times and taking into consideration the core values that are to be given appropriate weight in statutory construction.

Offenses of Sedition and their Status in Relation to Freedom of Expression

Sections 133 and 134 of the law establish a criminal sanction for acts of sedition and seditious publications. The provisions established in them thereby place limitations on freedom of expression. All recognize the special status of freedom of expression in a democratic society. As to the characteristics and breadth of scope of this freedom it was said in the case law of this court.

> "In every society one finds a variety of differing views and opinions; in a free society the diversity is manifest, in a totalitarian society the diversity is masked and concealed. Exchange of opinions, clarification of views, public debate, the urge to know, learn and convince - all these are essential tools in the service of every opinion, view and belief in a free society. The act of classifying citizens and distinguishing between them, some of whom are granted rights and others not, contradicts the truth that underlies the freedoms and, in its theoretical essence, manifests the same internal contradiction as does a person who decries democracy while utilizing the rights it confers. **Even with unpopular views and opinions must one contend and seek methods of persuasion. Prohibitions and restrictions are extreme devices of the last resort**."
>
> (President Shamgar EA 2, 3/84 *Neiman v. Chairman of Election Committee for Eleventh Knesset* [6]; emphasis mine-T.A.)
>
> (See also HCJ 73, 87/53 *Kol Ha'am Ltd. v. Minister of Interior* [7]; HCJ 399/85 *Kahane and Others v. Broadcasting Authority Management Board* [8] at p. 280).

A difference of opinion arose among the judges as to the question whether freedom of expression also extends out over racist expression. President Barak is of the opinion that freedom of expression in its "internal" sense, includes within it expression with racist-political content as well, which spreads strife and enmity among segments of the population (see HCJ 399/85 [8] **Ibid**. pp. 281-282, CrimA 2831/95 *Rabbi Ido Elba v. State of Israel* [9] (hereinafter: "the *Elba* case", paragraph 4). Justice Mazza thought otherwise (see his opinion in the *Elba* case, paragraph 24). In any event, even according to the approach that racist expression takes cover under the shade of the broad wings of freedom of expression in its "internal" sense, all recognize that there occasionally are other values which come up against the value of freedom of expression, and which may clash with it, and that under certain circumstances, their importance may override the interest that lies within it.

As to expressions of the type we are dealing with, difficult and extreme expressions against segments of the population, it has been said by my colleague President Barak:

> "The aberrant expression in this matter may harm the dignity of a group of people in our state and the feelings of people in it. It may aim to undermine the social order, social tolerance and public peace. It contains a contradiction to the essence and foundation of a democratic state, and the principle that applies in it of equality among people. It contradicts our national character, our "I believe". . These harms can be gathered under the rubric of "social order". Indeed, the aberrant expression may harm the social order, as it may harm democracy, the security and peace of the public, the feelings and the dignity of members of the public, whether they are religious and moral feelings , or communal feelings, or other feelings." (HCJ 399/85 [8] above, pp. 285-286).

The "aberrant expression", as it is described by my colleague the President, may thus harm the values which crowd together under the rubric of harm to the public order, which our law protects:

> "We have seen that the aberrant expression may harm the public order, which is none other than a system of values (democracy, public security and peace, human dignity and the feelings of the public). . . Israeli law does not just defend freedom of expression, it defends an additional system of values, which are dear to its heart and reflect our "I believe". . . This conclusion is strengthened by the various provisions in our statutes. Thus, for example, publication of something out of incitement to racism constitutes a criminal offense (section 144B (a) of the Penal Code 5737-1977) Harm to religious feelings (section 173 of the Penal Code) and publication of profanity (section 214 of the Penal Code) also constitute criminal offenses. Indeed, alongside the protection of freedom of expression the Israeli law also protects a system of values which are folded into the 'public order'." (HCJ 399/85 [8] p. 286).

It is clear that offenses of sedition are counted among the criminal offenses that protect these values. And the additional weight of protection of public order in the clash between it and the principle of freedom of expression has already been established more than once (see HCJ 2481/93 Yosef Dayan v. Commander Yehuda Wilk, Jerusalem District Commander [10] paragraph 211; CrimA 2831/95 [9] *supra*). Giving preference is expressed in the fact that if there is a probability – at a level to be determined

in accordance with the essence of the clashing interests – of harm to public order by a certain expression, freedom of expression will be limited, to the extent that it endangers, at said level of probability, the public order. Indeed, the real dilemma that stands before us, is in establishing the proper balancing formula between the scope of the deployment of the offenses of sedition on the one hand and the degree of protection of freedom of expression on the other.

Limitation on the Scope of the Deployment of the Offense of Sedition

19. The offense of sedition, as the rest of the provisions which impose bounds and prohibitions which limit the freedom of expression, raises a concern of harm to this principle beyond that which is necessary. We have also already mentioned the concern of harm to the principle of legality as well. In light of these concerns, it is important to clarify that the limits of the deployment of the totality of the offenses of sedition are bounded via several limitations which will be mentioned below.

(A) The offense of sedition is bounded by statutory limitations which limit its application. My colleague Justice Mazza has explained these limitations at length in his opinion in the *Kahane* Case [1] (paragraphs 12-15 of his opinion). In summary, it is a matter of the defenses which are established in articles 135 and 138 of the Penal Code. Section 138 which is entitled "Lawful Criticism and Propaganda" limits the offenses of sedition in the substantive realm. It removes from the framework of the applicability of the offense of sedition an act, speech, or publication whose intention is one of those listed in its four alternatives. Section 135 limits the offenses of sedition in the procedural realm in three ways. First, criminal prosecution for offenses under sections 133 and 134 of the Penal Code cannot be begun except within six months of the day the offense was committed. In accordance with the provision established in it as to offenses of sedition, a statute of limitations has been established of only half a year; second, prosecution for the offense of sedition requires the written consent of the Attorney General; third, a person is not to be convicted of the offense of sedition on the uncorroborated testimony of one witness.

My colleague Justice Mazza also discussed the limitations on the bounds of the deployment of the offense of sedition by the general provision of section 34Q of the law, which establishes the defense of de minimis. This defense is applied when the court is of the opinion that in light of the quality

of the acts, its circumstances, results and public interest, the act is of little worth.

Interim Summary

20. Until now I have deliberated, generally, about the offense of sedition. In the framework of the protected values in the offense of sedition, I have expressed my opinion, according to which the protected value in the offense of sedition is not limited to the structure of the regime alone, and that identifying the characteristics of the additional values protected by it must take place according to what is said in the various alternatives of section 136. Similarly, I have discussed the balance that is needed between the values protected by the offense of sedition, being part of the values protected by the "public order" and the competing value of freedom of expression, in order to determine the scope of the deployment of the offense. In addition, I have discussed, generally, the limitation on the scope of the deployment of the offense through the statutory defense specified in the statute, and the general provision of "de minimis".

Identifying the Protected Value in Section 136(4)

21. As said, the offense of sedition, as in the example of other offenses such as incitement to racism, harm to religious feelings and the like, is an offense which protects various values which take cover under the umbrella of the rubric of "public order." I will now turn to investigating what is the specific value protected by the offenses of sedition which are established in sections 133 and 134 of the Penal Code, where the alternative defining the term "to incite to seditious acts" relating to our matter is specified in section 136(4). We will also note that the definition for the term "incite to seditious acts" in this alternative is:

"To promote feelings of strife and enmity between different segments of the population."

It appears to me, that the value that lies at the basis of this alternative is ensuring the ability of different segments of the population in the State to live side by side in peace and security, a value which we shall term hereinafter: "social cohesiveness". The purpose of this value is ensuring the ability of population groups, which differ from one another in various and varied aspects, to live together under the roof of a single state. Incitement which is directed against a population group on the basis of a racist or ideological background which incites enmity against it and calls for violence against it as a group, using violent means, constitutes a violation of the same value of

social cohesiveness in the sense described. Such incitement causes social polarization against a background of hatred and violence. In extreme circumstances such incitement can entirely weaken the basic "glue" which connects the various segments of the population, and prevent the possibility of living together in the same state.

22. The value of "social cohesiveness" according to the stated meaning is of particular importance against the background of a society with a varied social mosaic like the State of Israel, in which minorities, and members of various religious sects, live side by side and in which the differences between the various population groups that live in it are significant. Its value is in ensuring the existence of a multi-cultural, pluralistic society, and in preventing the disintegration of the social fabric. It is worth noting that ensuring and advancing this value is not the only legacy, nor even the natural one, of the criminal law. The role of introducing tolerance, love, and good neighborliness between people, is clearly reserved for the educational and social systems which are meant to work perseveringly and persistently on the cultivation and absorption of these values in society. However, the criminal law can also have a contribution in this area. The criminal law may serve as a tool for handling the dark, polar potential, buried within a society with a heterogeneous social fabric. In this context, its role is to deal with behaviors which plant hatred and violence among various segments of the population and which strive to sabotage the delicate fabric of relations between various population groups.

Such illegitimate behaviors may, in appropriate cases, take the form of verbal expressions that can, taking into account their content and circumstances, harm the said social cohesiveness. The power and force of words is not to be disregarded. Words can inflame urges and hatred and lead to violence and thereby undermine the basic cohesiveness of society.

23. Indeed, public discourse in a democratic society is meant to be exposed, open and piercing. However, even the openness of public discourse is to have boundaries placed on it. In my opinion this is the context in which the proscriptions established in section 133 and 134 of the Penal Code, enter the picture, when integrated with the definition specified in section 136(4). In this formulation, the role of these provisions is to establish the boundaries of freedom of expression in public discourse, and remove from the framework of this freedom, a publication that has the potential to promote strife and enmity among different segments of the population. Public discourse, which is at the foundation of democracy, is not to be allowed to be

turned into a double-edged sword, and to sabotage public order. In a similar context, it was stated by my colleague, President Barak, in HCJ 399/85 [8] *supra*:

> "Indeed, freedom of expression comes to protect democracy, but at times there is no escape from the conclusion that it may also harm it. Such harm may occur when the expression is racist, and it brings with it harm to the feelings of the public, enmity which brings about disruption of the public peace, and similar harsh harms, which may stem from publication of racist expression. An enlightened democracy seeks to protect itself from a cancer that seeks to destroy it. **Indeed, the democratic regime is ready to protect the freedom of expression, as long as freedom of expression protects democracy. But where freedom of expression becomes an axe for harming democracy, there is no justification for democracy stretching out its neck for the one who will cut it off**. . ." (**Ibid**. pp. 286-287) (Emphasis mine – T.A.).

Indeed, even open, piercing and harsh public discourse cannot be entirely unrestrained. The sections which deal with acts of sedition along with the definition of sedition in section 136(4), are intended to place the limit on freedom of expression at the same point at which this freedom is likely – with a level of probability that will be determined as to this matter – to cause violence or plant hatred among the different segments of the population, hatred which may pull the rug out from under the possibility of living in unity.

24. It is not a simple question, when does a harmful expression which is directed at a population group on the basis of a background of difference, contain a "harm" in the meaning of section 136(4)? Is a condition for this that the expression contain potential for immediate violent acts, or perhaps is it sufficient that the expression arouses enmity and an easy climate for the outbreak of such acts? Is it necessary that it be possible to tie the expression to expected acts of violence, in accordance with the appropriate level of probability (a separate topic which I will deal with below) or perhaps is it sufficient that there are expressions which promote enmity toward a segment of the population or call for acts of violence against it, even if the probability does not exist that such violence will be undertaken soon, but the seeds of hatred and enmity are planted, which by their quality and type may lead in the future to such acts (for detailing of the different types of harms see: Alon

Harel 'Offenses which Limit the Freedom of Expression and the Test of Probability of Realization of the Damage: Renewed Thinking' [25] at pp. 89-91).

The answer to this question will impact the balance established in the section between freedom of expression and the value protected in it. We clarified above that freedom of expression retreats in the area over which the offense established in section 134(c) is deployed. However, we commented that this determination does not spare the real dilemma and the accompanying disagreement which are tied in to the matter before us, which is the attempt to find the proper balance between the defense of the protected value in the section and freedom of expression. The root of this dilemma is to be found in the concern that the criminal sanction established in section 134(c) will cut off at their source ideological disagreements and arguments whose possibility of taking place constitute the life force of democracy, this very same piercing "public debate" which constitutes a building block of a democratic regime.

My opinion is that a publication that seriously and in a clear language calls for violence toward a segment of the population can "promote hostility and enmity" within the meaning of the section, and buried within it is that same harm the section seeks to prevent. This is so even if the publication does not call for immediate violence, but includes a general call for violence against that segment of the population. Such a publication can lead to hatred and to creation of a social climate that may lead, ultimately, to an outbreak of violent acts. Such a publication creates the potential for violence or contributes to such potential which may break out at a time over which the publisher has no control.

My conclusion, therefore, is that section 134(c), as with section 134 in its entirety, also protects against publications whose cumulative impact on the social climate is harsh, even if they do not have the potential to arouse immediate acts of violence, and they may bring on, because of the hostility and enmity which they arouse toward a segment of the population, acts of this type, with a timing that cannot be foreseen in advance. The purpose of the section, therefore, includes the objective of cutting off at the outset, a process that may end, eventually, if not necessarily in an immediate manner, in violence.

Two emphases are to be added to this.

First, in order for an offense to materialize under section 134 in connection with section 136(4), it is necessary that the harm to the value of social cohesiveness in its said meaning **have force**. In a heterogeneous society it is not possible to entirely prevent the existence of any tensions between different population groups. These tensions are inherent to its very existence. Therefore the phrase "to promote strife and enmity" is to be interpreted as referring to an expression whose impact on the social mesh between the various segments of the population is severe in the sense that it may lead to a deep social schism between the various segments of the population. It is necessary, therefore, that the message be of the type of message that is able to arouse intense hatefulness or a call to violence.

Second, the attempt to minimize the damage of the violation of freedom of expression is also expressed in terms of **the scope of the potential violation**. In our case, the expression "to incite to seditious acts" found in section 136(4) requires that the violation promote social polarization among various segments of the population. From hence, that the protected interest in the offense we are dealing with is the interest of segments of the population and not the interests of one individual or another within those segments of the population. Meaning, it is not sufficient that the statement include potential to promote hatred between one private person and another private person, against the background of his difference. It is necessary that the statement promote the potential for hatred among segments of the population.

To summarize this point, in my opinion the general value which is protected in section 136(4), is the value of social cohesiveness in its described meaning, and in the framework of protection of this value, the provisions of sections 133 and 134(c) come to protect, *inter alia*, from incitement of strife and enmity among the various segments of the population.

C. *The Question of the Presence and Quality of the Probability Test in Articles 134(c) and 133*

26. Is there a probability test in the framework of sections 133 and 134(c) of the Penal Code? There was also disagreement regarding this question in the *Kahane* Case [1]. We will first discuss the question of the presence of such a test in section 134(c) and the quality of this test, and then the question of its presence in section 133.

The Probability Test in Section 134(c) – The Different Positions in the Kahane Case [1]

27. Section 134(c) which is included among the offenses that deal with publications of a seditious nature establishes that:

> "Whoever has in his possession, without legal justification, a publication **of a seditious nature** -- is liable to imprisonment for one year and the publication shall be confiscated." (Emphasis mine – T.A.)

The section includes two factual foundations: the one, the conduct element – "whoever holds", and the second the circumstantial element, "a publication of a seditious nature". The mental element in the offense is mens rea, meaning awareness of the physical quality of the conduct and awareness of the circumstantial element.

Among the justices deciding the *Kahane* Case [1] there was unanimity of opinion as to the classification of this offense as a conduct offense as opposed to a consequential offense (see paragraph 21 of the opinion of Justice Goldberg; paragraph 2 of the opinion of Justice Mazza; paragraph 3 of the opinion of the President). It was further determined that the element of "of a seditious nature" is a circumstantial element (paragraph 21 of the opinion of Justice Goldberg; paragraph 4 of the opinion of Justice Mazza; paragraph 3 of the opinion of the President). There is no difference of opinion on this. The question which was subject to debate to which we will now turn is – is there a probability test within section 134(c), in the framework of the circumstantial element, and to the extent that there is, what is its nature, and what is the degree of probability that is needed within its framework.

(A) Justice Goldberg, who was of the opinion that the protected value in the offense of sedition is the structure of the regime, determined on this issue:

> "from the determination we made above as to the high level of endurance of the public interest in the stability of the regime, it is necessary to raise the "bar" of the degree of the potential for sedition so that **only a publication whose potential to incite to rebellion is real will be proscribed. Since the criminal process takes place retroactively, and the publication is in front of the court's eyes, it does not need external probability tests, and it is within its grasp to determine if the said potential exists in the publication or not, according to its own assessment (HCJ 806/88 Golan Globus v. The Council for Review of Films and Plays, IsrSC 43(2) 22 at p. 41). This assessment will take place,** *inter alia***, based on its content,**

> **language, and context of the publication**" (my emphasis-T.A.).

When Justice Goldberg applies the criterion determined by him above to the specific case before him he determines:

> "The pamphlet under discussion contains slanderous statements against the Arab sector in Israel. However, it is a long way from here to the statement that this infantile pamphlet has real potential for sedition, that is, that it poses a real danger to the structure of the democratic regime. The nonsense in the pamphlet is not worthy of having such weight attributed to it, such that it might raise doubts as to the robustness of the democratic regime in Israel."

(B) Justice Mazza, according to whom the protected value in the section also includes the values of the ruling authority determines as to this matter:

> "**The phrase 'of a seditious nature' is directed at the content of the publication, and not at the level of probability that the publication will cause sedition.** It is to be noted the Justice Goldberg (as clarified in paragraph 22 of his opinion) also does not find it necessary to apply the probability test to the offense of publications of a seditious nature" (emphasis mine – T.A.).

On this matter, Justice Mazza reversed the position, which he expressed in obiter dicta in the *Elba* case, according to which there must be a probability that the publication will promote strife among the various segments of the population, and determined that the offenses in accordance with the various alternatives of section 134 do not include a probability test (section 8, **Ibid**.).

(C) President Barak, who agreed with the opinion of Justice Goldberg as to the protected value, makes this determination as to the requirement of a probability test:

> "My starting point is that the wording 'of a …. nature' points to the weight of the things that were published. This weight is determined relative to their power to bring about an actualization of the sedition. . . It is a matter therefore of a probability requirement. . . **It is necessary therefore that the things that were published will have sufficient weight to impact the actualization of the** sedition. . . This weight reflects the power of the words to bring about the proscribed

> conduct. It reflects the impact potential that the content of the publication has on the sedition" (emphasis mine – T.A.).

Once the President determined that the sections apply a probability test, he turned to examine the level of probability required. He clarifies that this question comes up since the need is created to balance between the value of freedom of expression and the value of public peace, and the key question is what is the appropriate balance in this clash (paragraph 4 of his opinion). After weighing the conflicting values he determines:

> "After a difficult internal struggle, I have reached the conclusion that it is appropriate to adopt the reasonable (or actual) probability test. That, so it appears to me, is also the test that my colleague, Justice Goldberg, adopts. I would not adopt this test, were I to have given "sedition" a broader meaning as does Justice Mazza. As opposed to this, my approach – which joins with the approach of my colleague, Justice Goldberg, narrows sedition to endangerment of the order of government and the regime, and sees in it harm to the stability of the regime. In this narrow area it is appropriate to give effective protection to public peace. Such protection is given via the test of reasonable (or actual) probability. Indeed, the interest worthy of protection is so important and weighty, that there is justification to infringe on freedom of expression if there is a reasonable probability of harm to this interest" (paragraph 11, **Ibid**.).

In relating to the criteria that were established by his fellow judges in the discussion as to the circumstantial element of "of a seditious nature" the President remarks that in his opinion they too undertake a probability test. The test of Justice Goldberg, which examines if the potential for sedition is actual, according to the content of the publication on the day of publication, is a probability test in terms of its substance, even if Justice Goldberg does not title it as such. Justice Mazza's approach can also be catalogued, according to the President, in the framework of the probability test. The difference between his approach and the approach of Justice Mazza lies in the degree of probability required. Justice Mazza makes do with a "tendency" of the publication to bring about sedition ("the negative propensity" test).

When applying the criterion that he established to the publication that was before him, the President agreed with the opinion of Justice Goldberg that possessing the publication does not create an actual danger of sedition

(paragraph 14 of his opinion). It is to be noted, despite the fact that the President used the wording **possession** of the publication, it is clear that he was referring to the fact that under the circumstances it is not to be presumed that **the content of the publication** is likely, at the level of reasonable possibility, to impact the robustness of the structure of the regime.

Rationales for the Presence of the Probability Test in Section 134(c)

28. I am of the opinion that section 134(c) includes within it a proportionality test in the framework of the circumstantial element. The presence of the proportionality test is well anchored in the literal language of the section. The phrase "of a . . . nature" indicates the presence of this test. Denial of the presence of the proportionality test in the framework of the section in practice depletes it of its content. Indeed, in similar circumstances when the court was to interpret a phrase whose language indicated the presence of a proportionality test, such as "is likely to" or "may cause harm" the court assumed the presence of a probability test, and focused its discussion on weighing the degree of proportionality needed for the occurrence of the infringement of the protected value (see HCJ 73/53; 87/53 [9] *supra* at p. 882 between the letter E and F, as well as CrimA 697/98 *Tatiana Suskin v. State of Israel* [11] paragraph 22).

The presence of a proportionality test in the framework of section 134(c) is also supported by the provision of section 34U, which is the anchor for purposive construction in criminal law. The section establishes that:

> "Where a law is open to several interpretations based on its purpose, the matter will be resolved according to the interpretation which is more lenient with the person who is to bear criminal liability based on that law."

Even if our baseline is that it is possible to interpret section 134(c) – as one of the possible explanations – in a manner that denies the existence of the probability test, then according to section 34U we are directed to prefer the interpretation which protects the liberty of the defendant more broadly, meaning the interpretation which requires the presence of a probability test. All the more so, when the interpretation that is more lenient with the defendant reflects the simple literal version of the section.

29. The State in its arguments raises the concern that application of the proportionality test will place the burden of proof on its shoulders, and it is unlikely to be able to meet it. The state further questions how the prosecution will lift the burden, proving beyond a reasonable doubt, possible

influence in the mental realm of the prohibited statement on any given listener? The answer to this is that testing the probability of the sedition will be done according to the circumstances of each case. It will not always be possible to collect the full data for examining the probability just from the content of the publication itself. At times, there is importance to the public atmosphere in which the act of publication took place, the location of the publication and its timing, and who the public is that is exposed to the publication. All these may demonstrate the probability that the publication will constitute sedition in the sense of section 136(4).

It is also important to emphasize the difference between the existence of the probability test and the question of the burden of proof that is necessary in each and every case. The probability test examines the existence of potential for harm in accordance with the strength of the probability determined for this harm. The difficulty in proving the said potential in one specific case or another is dependent on the circumstances of each case in itself. The probability test checks for the existence of potential for harm based on the strength of the probability determined for such harm. The difficulty in proving the potential in one case or another is dependent on the circumstances of the case itself. There is no need to "enter" the mind or the heart of the public in order to conclude the effect that the content of one publication or another created in actuality. The court will reach its conclusions in this matter out of the totality of existing circumstances. Applying the proportionality test also does not require, necessarily, reliance on external evidence beyond the content of the publication and the circumstances of the publication. At times, the determination can be made based on the assessment by the court of the content of the publication alone, relying on judicial knowledge and experience. When the court examines the publication, it will weigh and decide what the possible ramifications are of the publication on a specific public or publics, with an effort to draw out of the publication and its circumstances an answer to the question whether the publication has the power to achieve the worthless objective. Therefore, there is not much substance to the concern, expressed by the State, that applying the proportionality test will impose on the prosecution, a heavy burden of proving actual influence of the publication on a given individual or given public, and that this would not enable, or would make it very difficult, to prove criminal liability. In its essence the proportionality test is a test of logic and common sense. The manner in which the test is applied is no different than the manner in which the court operates in other subjects on a

daily basis, including in the realm of criminal law. There are circumstances, in particular in cases in which the content of the expression is particularly harmful, in which the court will easily conclude the existence of potential for harm from the publication itself. On the other hand, there may be circumstances in which the task of proof is more complex, and it is possible that in special cases, the need will arise to turn to expert opinions.

I had the opportunity to relate to a similar issue in CrimA 697/98 [11] *supra*. In that case, *inter alia*, the offense, under section 173 of the Penal Code, of harm to religious feelings was under consideration, and the question of determining the potential for harm to feelings arose. That matter raises the same difficulty which the State presents, as in that offense it was clearly necessary to examine the potential for harm. As to the question of evidence required to prove harm to religious feelings and its force I expressed my view that:

> "In assessing the latent potential in a publication, the court will look to the totality of circumstances which impact its possible effect. It is a matter of assessing the possible operation of the concrete publication, when it is done. First and foremost the court will look to the content of the publication both in terms of its meaning, and in terms of its style. The court will also look to the circumstances surrounding the case – what is the medium used, what is the target audience, where was the publication made, and when was it made. There may also be non-negligible importance, in this context, to the question whether the audience is a 'captive audience'. Against the background of all this, it is possible to determine, whether the publication has actual potential for egregious harm to religious feelings (compare, on this matter, the words of Justice E. Goldberg, in paragraph 22, in his opinion in the *Kahane* Case [1].)

It is true, it will not always be possible to make a finding – positive or negative – as to the harm hidden in a certain publication. In cases which are not clear on their face, it is possible to prove the latent harm in the publication using expert testimony. Looking to such testimony may be desirable, for example, when there may be doubt as to the meaning of the publication, its content or potential latent effect. . ." (Paragraphs 23-24 of the judgment).

My conclusion is, therefore, that the presence of the proportionality test is well anchored in the language and purpose of section 134(c).

Does Section 133 Contain within it a Proportionality Test

30. Section 133 establishes:

"Acts of Sedition	133	**Whoever does** an act for the purpose of sedition, or attempts, makes any preparation to do, or conspires with another to do, such an act, is liable to imprisonment for five years" (emphasis mine, T.A.).

The offense under section 133 of the Penal Code is also a conduct offense. The question that is being tested here is whether the factual element of the offense, "whoever does an act" contains within it a proportionality test.

It will be noted that Justice Goldberg was of the opinion the conduct component of section 133 is to be interpreted such that publication, possession and import, to which section 134 applies, were taken out of the definition of "act" under this section (see paragraph 20 of his opinion). This position was not agreed to by the President and Justice Mazza (see paragraphs 4-6 of the opinion of Justice Mazza and paragraphs 17-22 of the opinion of the President). However, they disagreed as to the interpretation of this section, a disagreement whose roots were already exposed in the *Elba* case. The factual element in section 133 is phrased in a brief and laconic manner- "whoever does an act". Justice Mazza was of the opinion, as per his approach in the *Elba* case that "section 133 does not include any requirement relative to the character of the act" (paragraph 4 of his opinion). On the other hand the President, in continuation of the same path he delineated in the *Elba* case, was of the opinion that it would be appropriate to interpret this element as containing within it the requirement that the quality of the act, on the basis of its context, will arouse sedition. Beyond this, it is necessary that the act is of sufficient weight to influence the actualization of the sedition. From hence, that in the framework of the factual element in section 133 it is necessary that the act of sedition can, as a reasonable possibility, bring about

sedition. In this context the President reiterated and quoted his position in the *Elba* case.

> "Imposing liability for an innocent statement which is accompanied by a goal of inciting to racism, comes dangerously close to violating the rule that does not allow prohibiting matters that are in one's thoughts (nullum crimen sine actu). In a democratic state, which seeks to grant the individual liberty to think as he desires – whatever those desires may be, and however difficult the thoughts may be – is not to impose liability on the thinker if he expresses his thoughts in an utterance that is innocent in and of itself' (my judgment in the *Elba* case, paragraph 3) Moreover, infringement on freedom of expression just due to criminal thought that accompanies an innocent act, is an infringement on freedom of expression that goes beyond the degree necessary for protection of the values of the regime. Indeed, the approach according to which a very innocent expression which is accompanied by an illegitimate goal is illegal violates freedom of expression beyond the degree necessary (see *Elba* case, paragraph 4)" (paragraph 18 of his judgment in the *Kahane* matter. (See also Professor Kremnitzer's article 'The *Elba* Case: The Law of Incitement to Racism' [26] 105, pp. 112-113)."

On this topic of the construction of section 133, I agree with the view of the President and his rationales that section 133 includes within it a probability component.

The Degree of Probability Required

31. After determining the existence of the probability test in the framework of sections 133 and 134(c), there remains for further discussion the issue of the probability threshold required for the purpose of limiting expression. This threshold also influences the balance between the value of freedom of expression and the value protected by the section.

The framework of doubt is as to the question whether to adopt the stringent test of "near certainty," in our case or the more lenient test, of the reasonable or actual possibility. The ideological foundation for the application of the test of near certainty was laid by Justice Agranat in the Kol Ha'am case (HCJ 87/53; 73/53 [9] *supra*). In that case this test was determined as the test which reflects the proper balance between freedom of

expression and other competing values. However, the near certainty test does not constitute the only proportionality measure used when the value of freedom of expression is being weighed. When it is assessed that the value that is being weighed against freedom of expression is one of the values of the "first degree" the test that is used is the reasonable or actual probability test (see for example, the President's judgment in the *Kahane* Case [1] as to the value of the structure of the regime, paragraph 10, **Ibid**.). As to determining the degree of probability needed, the approach is therefore accepted, according to which it is desirable for there to be an inverse relationship between the importance of the protected interest and the level of probability required. The higher the protected social value ranks on the ladder of importance, so too the degree of potential required for the realization of the harm is to be moderated and vice versa.

In this matter, my tendency is to adopt the test of near certainty. Two primary reasons lead me to lean in this direction. First, it appears to me that it is appropriate to balance the harm to freedom of expression that is created as a result of the definition of the type of the harm in offenses of sedition as including harm which is not followed by immediate violence, by establishing the rigid threshold of a degree of near certainty. Second, the degree of near certainty is accepted in case law as the proper balancing formula for the values that clash in our matter, the freedom of expression on the one hand and the public order on the other. From hence, determining this criterion, in the case before us as well, advances the normative harmony that we are to persevere in cultivating. However, in the circumstances of the present case, there is no need to make a determination on this issue. As I will detail below, my view is that the publication we are dealing with also meets the more stringent probability test of "near certainty". Therefore, in our case, I will apply the near certainty test, while leaving the determination as to the issue of the probability threshold for a case in which it is necessary.

D. *The Mental Element in Articles 134(c) and 133*.

32. The mental element in the offenses we are dealing with is not up for discussion in the framework of this further hearing. Therefore, I will relate briefly to this issue, in connection with each of the offenses under discussion.

Section 134(c) does not explicitly establish a mental element. Under such circumstances, mens rea is required (section 19 of the Penal Code). Under section 20(a) of the Penal Code, in a conduct offense of the type we are dealing with, the required mental element is of awareness (in fact) to the

quality of the act and the existence of the circumstances. In our matter, there is thus required awareness of possession of the publication; awareness of the publication itself; awareness that possessing the publication will, with near certainty, cause sedition. In this matter, it was determined by Justice D. Cheshin in the District Court that Kahane was aware of the nature of his conduct and its circumstances. There is no basis, and we have not been asked, to intervene in that conclusion. From hence, that as to this matter, it is proper to adopt the determination of the District Court.

The mental element required in the framework of section 133 for the offense of sedition, is a special result ("for the purpose of sedition") Specific mens rea is required whose content is the desire or aspiration for achieving the aim. In the District Court it was determined that Kahane was aware of the nature of his actions, meaning the potential for incitement to racism in the pamphlet and that he wanted the realization of the aim in the result, i.e., to arouse feelings of hatred toward the Arab public. In the appeal it was also determined that the mental element was fulfilled in this case. From here that in the matter of the existence of the mental element required in section 133 the determination of the District Court stands, which was also accepted by this court in the *Kahane* Case [1].

E. *From the General to the Specific*

33. At this stage, it remains for us to examine, whether in point of fact, the publication we are dealing with is within the prohibition established in articles 134(c) and 133. Following the analysis we have conducted so far, the question which must be answered is, whether the said publication, which calls for acts of violence against the Arab population, may, at the probability level of "near certainty" plant deep feelings of enmity toward the population against whom it is directed and incite acts of violence toward it.

In paragraph 3 above I brought the wording of the pamphlet Kahane had in his possession. It is easy to see that it contains a message soaked in explicit and harsh violence. It calls for the bombing of Arab villages found within the territory of the State of Israel. It refers to the Arab population, in its totality, as a fifth column. Thereby it opens them up to attack. There can be no argument that it contains within it a general call to violence, without distinction, against the Arabs of Israel.

This expression did not stand alone. It is to be remembered that it constituted part of the campaign of Kahane's party before it was disqualified from participating in the Knesset elections. The expression in this pamphlet

was not a one-time expression, but part of a well-planned network of expressions which were intended to plant the seeds of calamity that contain within them potential for creating a deep social schism between the Arab population and the Jewish population in Israel.

From the content of the pamphlet one can learn that it is directed at the totality of the Jewish population. From hence, that it is intended to ingrain within this population, or a portion of it, intense enmity toward another population, the Arab population.

34. Does this pamphlet, and others like it, have the potential to influence the consciousness of the Jewish population exposed to it? The near certainty test as to the actualization of the harm is measured based on existing reality. It is a matter of a dynamic test which is applied against the background of the character of the society, or relevant groups within it, according to its situation when it is applied (see HCJ 14/86 Laor and Others v. The Council for Film Censorship and Others [12] at p. 443). Occasionally there may be disagreements as to society's strength to bear freedom of expression, without the matter bringing after it the potential, at the level of near certainty, for the realization of the protected harm.

Justice Mazza who objected to narrowing the protected value to the structure of the regime, and saw before him broader social values, asks in his judgment that we not be trapped in complacency. In his piercing words on this topic he states:

> ". . . Indeed, the star of the democratic process has shone on the State from its first days and its light has continued to brighten. But the continuation of this blessed process, which is certainly the desire of anyone who is a loyal citizen and a decent person, is not lacking in risks. The first signs of the existence of anti-democratic streams in Israeli society were evident, with the appearance of Kahanism, about twenty years ago, and within several years their strength grew. The legislator and the court coming through has possibly led to a slowing down of the spread of the phenomenon. But the phenomenon, even if it was slowed down, has yet to disappear from our lives. Bitter enemies have risen against Israeli democracy from within. One of these massacred tens of Muslim worshippers during their prayer. Another murdered the Prime Minister of Israel. Signs of bearers of evil such as these are not to be permitted to weaken

> our faith in our moral strength as a free society. But we are also not to ignore their existence. . .
>
> There were times in which we could place our faith in the inner strength of our democracy, and were not required to defend it with legal means. But the days are no longer as they were. . .
>
> Times have changed and the bad winds which blow within us are more than passing winds of the moment that the court, in its way, tends to ignore (paragraph 21-22 of his opinion)."

Indeed, some of the worst of the angry prophecies have been realized and have become reality. Innocent Arab workers, seeking to make a living for their households, have been shot at waiting and gathering points. Arab worshippers have been murdered while still bowed in prayer. The Prime Minister was murdered. It is not possible therefore to accept that expressions that contain within them a violent message, such as the expression we are dealing with, do not permeate the public consciousness, bring on enmity and severely sabotage the mesh of relationships between Jews and Arabs. Indeed, the influence of these pamphlets is primarily on extreme marginal groups, where they and individuals within them may, a result of these publications, achieve actual acts of violence. But this is not sufficient to rule out the criminal character of the expressions.

35. In conclusion, the pamphlets seized in the offices of Kahane were part of a well planned campaign whose goal was clear: to ingrain a feeling of hatred in the Jewish population toward the Arab population. The expression in said pamphlet was not a one-time expression but part of a well-planned campaign of expressions intended to create a deep social schism between the Jewish and Arab populations. The cumulative effect of the content of these expression, is likely, at the level of near certainty, to contribute to the fanning of the flames of hatred among portions of the Jewish population toward the Arab population in Israel and, as a consequence, also to acts of violence. As for myself, I find it difficult to see the said pamphlet as an infantile pamphlet that is to be taken out of the framework of the criminal realm.

F. *What of Kahane Compared to Jabarin*

In CrFH 8613/96 *Mohammad Joseph v. State of Israel* [2] my view was that the applicant (hereinafter: "Jabarin") was to be acquitted of his conviction in an offense under section 4(a) of the Prevention of Terrorism Ordinance 5798-1948 (hereinafter: "Terrorism Prevention Ordinance"). The subject of the conviction was an article that Jabarin published during the

period of the Intifada which included words of praise for throwing stones and throwing Molotov Cocktails. There is no doubt that this article contained a violent and dangerous message. In light of what has been said, the question arises, what is the reasoning behind the different results I reached in the two cases? The answer to this is that the difference between the two cases lies in the different offenses with which Kahane and Jabarin were charged. As said, in CrFH 8613/96 [2], Jabarin was charged with an offense under section 4(a) of the Terrorism Prevention Ordinance, while in our matter, Kahane was charged with sedition. The purpose of each of these offenses is different.

In CrFH 8613/96 [2] I analyzed at length the purpose of section 4(a) of the Terrorism Prevention Ordinance, and I will make do here with highlights of those words. This section, when read apart from the ordinance in which it is specified and the historical background for its legislation is a draconian section that is difficult to accept in a civilized democratic society to which freedom of expression is dear. The section does not include a probability test which ties the publication to the potential for realization of any harm. It grants a presumption of dangerousness to any publication that enters its framework. Thereby, it severely infringes on freedom of expression. As was argued in that matter, the offense established in section 4(a) of the ordinance also covers, based on its language, a publication which praises, for example, the Bar Kochba Revolt, as such a publication includes praise for acts of violence which may (the actions of violence) cause the death or harm of a person. After I examined the ordinance in its totality, and section 4 and the aggregate of its alternatives and the historical background of the ordinance, I reached the overall conclusion there that the unusual severity of the sections can be explained against the background of its purpose, as it is reflected by these sources. This purpose was and remains to fight against the foundations of terrorist organizations. On this matter I wrote.

> ". . . The prohibition specified in section 4(a), as the rest of the prohibitions in the Ordinance, was intended to defeat the foundation of terrorist organizations. Against the background of the special severity of this risk, the legislator was of the view that it would be proper to go even further and to also consider publication of praise for violent acts of a terrorist organization as an offense, even if they were done in the past, and even if the publisher of the words of praise is not a member of such an organization himself and does not pose a danger himself. Moreover, and this is to be emphasized, the section does not

> require the existence of potential for the realization of any harm as a result of the publication. One can become accustomed to such a prohibition in a democratic society, although it contains a significant infringement on freedom of expression, when we are dealing with terrorist organizations, with the great and unique risk they embody.." (Paragraph 9 of my judgment).

Application of this conclusion to Jabarin's article led to the conclusion that his actions were directed to the overall public and not to terrorist organizations. Therefore, Jabarin was acquitted of the offense established in section 4(a) of the Ordinance. It should be noted that the discussion of this matter took place in the framework of a further hearing, and the question was not examined there whether Jabarin's actions constitute an offense according to another statutory section.

On the other hand, Kahane was charged with the offense of sedition according to the alternative established in section 134(4) of the Penal Code. This offense was analyzed by me at length above. Its purpose is to enable the continued existence of Israeli society, with all the many and varied population groups which live within it. As said, the offense of sedition includes statutory limitations on the extent of its deployment. So too, the scope of its application is limited both by the requirement of a harm of significant magnitude and in the narrowing of the extent of its application. Moreover, it contains within it a probability test. Application of the elements of the offense on said case, leads to the conclusion that Kahane is to be convicted of this offense.

In conclusion, the offenses with which Kahane and Jabarin were charged are different from one another in the elements of the offense and the values which every offense comes to protect. Under these circumstances, there is no room for analogy between the two cases. Every case is considered according to the elements of the specific offense which was attributed to the accused, while examining whether those elements were proven.

F. *The Result*

The result of all of the above is that if my view is to be heard, the result of this appeal would be changed and the conviction of Kahane in the offenses under sections 133 and 134(c) of the Penal Code, as the District Court decided, would be upheld.

After convicting the respondent, the District Court ordered the return of the case to the Magistrate's Court for sentencing. On February 27, 1995, the

Magistrate's Court sentenced Kahane to 16 months imprisonment, of which four months are of actual imprisonment and the remainder on probation, when the terms of probation are that he not commit an offense under sections 133 or 134 of the Penal Code for a period of three years from the day the sentence is handed down. In the State's arguments before us it was emphasized that in light of the time that has passed and the course of the criminal proceedings to date, the State no longer has an interest in the portion of the sentence which imposes imprisonment on the respondent. In consideration of the length of time that has passed since the criminal proceedings were initiated against the respondent and the position of the State, my suggestion is that the sentence be changed such that the sentence of imprisonment imposed on the respondent will be cancelled and the probationary portion of the sentence will remain as is.

President A. Barak

1. I have studied the opinion of my colleague Justice Or. I have gone back and studied my opinion in the criminal appeal the subject of this further hearing (CrimA 6696/96 *Kahane v. State of Israel* [1] (hereinafter: "the *Kahane* Case" [1]). I have reached the conclusion that there is no room for a change in my position. I am of the view, as was Justice Goldberg in the criminal appeal, that the offense of sedition by its very essence is limited to endangering the order of government and law, and that the value protected in it is the prevention of harm to the stability of the regime. This position is strengthened in light of the opinion of my colleague, Justice Or in CrimFH 8613/96 *Jabarin v. State of Israel* [2] (hereinafter: "the Jabarin case"). Here as there, a restrictive approach to the broad language of the statute is called for, in order for the interpretation of the statute to be consistent with the basic premises of Israeli democracy, including freedom of expression and the principle of legality. Just as in the Jabarin case, here too the approach that is called for is that harmful speech alone is not sufficient, and that an additional element is required in order to transform the harmful speech into a criminal offense (compare to a similar approach in CrimA 53/54 *ESH"D Temporary Center for Transportation v. Attorney General* [13] in which Justice Silberg held that a "public mishap" (section 198 of the Penal Code 5737-1977) means a mishap to the public by public authorities). In the Jabarin case the additional element was expressed in that the harmful speech ("praise, sympathy, or encouragement of acts of violence") is to encourage acts of violence of a terrorist organization. In the matter before us, it is necessary

that the harmful speech ("to promote strife and enmity among different segments of the population") will endanger the orders of government and law. I am, of course, aware of the fact that in the Jabarin case section 4(a) of the Prevention of Terrorism Ordinance 5798-1948 was under consideration, while in the *Kahane* Case [1] before us section 134(4) of the Penal Code is under consideration. Despite the difference in the wording of the two sections, they raise similar problems of construction, and justify utilizing a similar technique of construction. For myself, it appears to me that the *Kahane* Case [1] before us is even "stronger" – in terms of the ability to restrict harmful speech – than the Jabarin case, as the statement "to incite to seditious acts" when it is interpreted against the background of the legislative history and the foundational values of the system, radiates from within it an act of rebellion which endangers the orders of government and law and points to the fact that the protected value is preventing harm to the stability of the regime.

2. In the *Kahane* Case [1] I discussed the factual element in an offense under section 134(c) of the Penal Code, which establishes that:

> "Whoever has in his possession, without legal justification, a publication of a seditious nature, -- is liable to imprisonment for one year and the publication shall be confiscated."

I noted that the statement "of a . . . nature" points to the weight of what was published. This weight is determined relative to its potential to bring about realization of the sedition (**Ibid**. p. 579). We find that we are dealing with a probability requirement. I added that there exist substantial reasons for favoring the near certainty test (**Ibid**. p. 581), despite this I determined that in the overall balance the more lenient test of reasonable (or actual) possibility is to be adopted. In explaining this approach I noted that "I would not adopt this test, were I to have given 'sedition' a broader meaning" (**Ibid**. p. 582). I added that it was possible to turn to the less stringent test of "reasonable probability" because the circumstantial element of the "sedition" was narrowed to sedition which endangers the orders of government and law, and which harms the stability of the regime. The view of the majority in this further hearing is that, it is not appropriate to narrow the statement "sedition" as suggested by the majority in the criminal appeal. Against this background, I agree with the tendency of my colleague Justice Or that the proper proportional test is that of near certainty. In my view, this test is not met in the circumstances of the case before us. The probability that Kahane's publication -- which calls for the bombing of Arab villages – indeed will

bring about strife and enmity between various segments of the population (even without the requirement that such strife and enmity will bring about endangerment of the orders of government and law) is, against the background of its occurrence – distant and not real (it constitutes just a "bad tendency" in the words of Justice Agranat in HCJ 73/53 *Kol Ha'am v. Minister of the Interior* [7]). And note: I am not of the view that words of this type will always be distant and not real. It all depends on the circumstances of the time and the hour. The circumstances of the publication of Kahane's words in the time and place, in which they were published, do not create a risk at a level of near certainty or of reasonable and real possibility of the realization of the risk.

If my opinion were heard, we would dismiss this further hearing.

Vice-President S. Levin

I agree with the opinion of my hon. colleague Justice Or. In light of his reasoning I do not see a need to express an opinion whether section 133 of the Penal Code 5737-1977 includes within it a probability element, and if so what is the degree of probability which is required. My agreement here is subject to what has been said in my opinion in CrimFH 8613/96 [2] that was written in that case.

Justice Y. Kedmi

I accept the position of my colleague Justice Or according to which:

(A) First – "the protected value in the offense of sedition is not limited to the protection of the structure of the regime alone."

(B) Second – "the protected value that lies at the basis of the alternative that defines the term sedition is ensuring the ability of different segments of the population in the State to live side by side in peace and security, a value which we shall term hereinafter: "social cohesiveness."

(C) Third – "a publication, that seriously and in clear language calls for violence toward a segment of the population can arouse hostility and enmity within the meaning of the section (section 134(c) of the Law Y.K.) and buried within it is that same harm the section seeks to prevent."

(D) And fourth – that "in the framework of protection of this value (the value of social cohesiveness – Y.K.) the provisions of sections 133 and

134(c) come to protect, *inter alia*, from incitement of hostility and enmity among the various segments of the population."

2. As for the probability test, which according to my colleague's view is latent in the "character" of the publication that is subject to the prohibition in articles 134(c) and 133 of the Law, I accept the position presented in the appeal by my colleague Justice Mazza, according to which: "… The phrase 'of a seditious nature' is directed at the content of the publication, and not at the level of probability that the publication will cause sedition."(**Ibid**. [1] at p. 565).

According to my approach, the said phrase speaks of an "attribute" and "character imprint" of the publication and not it's potential to create a risk, at this or another level of certainty, of realization of the sedition. As for me, the fact that the publication is characterized by an inherent objective "attribute" to incite to sedition is sufficient to create the risk which the legislator seeks to prevent. So it is regarding section 134(c) of the Law and so it is regarding the phrase "for the purpose of sedition" which defines the prohibited act according to section 133 of the Law.

If the legislator had wanted to establish a probability link to the realization of the risk inherent in the "character imprint" that it established for the prohibited act according to the two sections, it would do so explicitly; and would not suffice with establishing a "characterizing imprint" which is directed at the uniqueness of the act and not its potential to bring about the realization of its characteristics in fact.

The risk lies first and foremost in the "character" of the prohibited act. And this character is not conditioned on the level of reasonableness of its realization in fact.

Indeed there is a strong affinity between the illegitimate "characteristic" – as a component of the element of the crime – and its power to fulfill itself: as the risk inherent in the "characteristic" is what is at the basis of the prohibition, whose purpose is to prevent its realization. However, this is not sufficient to create the basis for a requirement of the existence of a probability link between the two: the risk in the character imprint and the possibility of its realization. According to the language of the definition of the two sections under discussion here, the legislature himself made do with the very existence of the risk as a "characteristic" of the prohibited matter; and did not say a word as to the chances of the realization of this risk. The realization of the risk is dependent, in a non-negligible manner, on outside

factors; and these may change from place to place and timeframe to timeframe. It would be far-reaching to add to the definition of the offenses a requirement as to a probability link between the risk and the possibility it will be realized where the legislature did not say a word on the matter.

According to each of the two said sections, such a constriction may wreak havoc; and has the ability to bring on an overall missing of the target of the offenses established in these sections.

In this case, my colleague was of the opinion that the requirement of meeting the "probability test" has been met; and therefore there is no practical significance to my differing position in this matter.

Given this situation, I agree with the result reached by my colleague, Justice Or.

Justice D. Dorner

1. The respondent, who stood at the head of the "Kahane Lives" movement, distributed among Jewish voters, in the course of the campaign conducted by this movement for the elections to the 13th Knesset, a pamphlet containing the following language:

> "Bomb Umm El Fahm! Why is it that when Arabs came out of Umm El Fahm and slaughtered three soldiers – the government sent out to bomb the Hezbollah in Lebanon instead of bombing the hornets' nest of Umm-el-Fahm?
>
> Why is it that every time a Jew is killed we shell Lebanon and not the hostile villages within the State of Israel?
>
> For every attack in Israel -- bomb an Arab village – a nest of murderers in the State of Israel!
>
> Only Kahane has the courage to speak the truth!
>
> Give power to Kahane and he will take care of them."

The respondent was convicted in the District Court for possession of a pamphlet in accordance with the offense of possessing publications of a seditious nature under article 134(c) of the Penal Code 5737-1977 (hereinafter: "The Law"), and for distributing the pamphlet in accordance with the offense of committing acts of sedition under article 133 of the Law. The District Court held that the respondent was aware of the power of the pamphlet to incite seditious acts against the Arab citizens of the State of

Israel, and he distributed the pamphlet amongst Jews with the goal of arousing in them hatred toward the Arab public. On the basis of these facts the respondent was acquitted, by a majority, in this court. This, since the pamphlet did not have the objective potential (according to the view of Justice Eliezer Goldberg) or a real or reasonable possibility (according to President Barak) to cause harm to the structure of our democratic regime and to its stability.

In his opinion in the further hearing, my colleague Justice Theodor Or, reached the overall view that **first**, the term "sedition", according to its meaning in article 136 of the law in which it is defined, is not limited to causing harm to the order of government, but rather also includes generating hostility among portions of the population as said in article 136(4) of the law; **second**, a probability test is present within the framework of the elements of the offense, and that the test is one of near certainty. And **third**, the pamphlet may, at the level of near certainty, plant hatred towards the Arab public and incite acts of violence against it.

The conclusion of Justice Or was that the appeal is to be accepted and that the conviction of the respondent is to be left as is, according to the judgment of the District Court.

On the other hand, Justice Barak, who did not change his view from the original discussion in which he held that the respondent is to be acquitted of the offenses attributed to him, commented that even if we were to accept the broad definition of the phrase "sedition" in accordance with the view of Justice Or, then still, not only is the more stringent test of near certainty not met, but the publication of the pamphlet does not even create a risk on the level of a reasonable or real possibility, for the realization of the risk, but rather only something on the level of a "bad tendency".

2. I agree with my colleague, Justice Or, that the appeal is to be accepted. I also agree with his interpretation of the term "sedition" in article 136 of the Law. In addition, in my view, inciting to seditious acts against a minority by a party running for elections to the Knesset during the course of a campaign, whose purpose is to bring about de-legitimization of that group, harms the structure of the democratic regime.

However, while like my colleague, Justice Or, I also believe that freedom of expression encompasses expressions of sedition, I do not see fit to interpret the offenses established in articles 133 and 134(c) of the Law as including an element of probability that the expressions of sedition will

arouse strife toward segments of the population. In my view, the seditious content of the publication, combined with the required mental element in the offense of committing an act of sedition, which is a "purpose" offense, the awareness of the seditious content, which is of the elements of the offenses of sedition, and the defense in article 138 of the Law, which applies to both offenses, and which was intended to ensure freedom of expression and of political discussion – ensure that the degree of harm to the freedom of expression will not exceed that which is necessary.

3. In my view including a probability test for offenses that are not "consequential" offenses is problematic. First, balancing formulas which are determined based on assessment, do not create a test which in regular cases enables the creation of a basis for objective findings. Second, proving this element beyond a reasonable doubt, which is the level of proof required in criminal law, is close to impossible.

The case before us exemplifies this well. Thus, Justice Or, who explained that the probability test is a "test of logic and common sense" determined that there is near certainly that the publication of the pamphlet will bring about strife and hatred among the Arab population and will encourage undertaking acts of violence against it, and that the respondent was aware of this, while President Barak was of the view, that the probability that the publication would lead to that result is distant and not real, and constitutes only a "bad tendency", meaning, that there is not even a reasonable (or actual) probability of causing this result. It is clear that President's Barak's conclusion is also based on logic and common sense.

Under these circumstances, when two Supreme Court justices have a difference of opinion as to the existence of an objective circumstance that is one of the elements of the crime, it will be difficult to reach the conclusion, at the level of proof required for a criminal case, that the respondent was aware – to a near certainty – that the pamphlet was expected to arouse hatred toward the Arab population.

Under these circumstances, if I were of the opinion that the probability test was an element of the offense, I would find it difficult to agree with the conviction of the respondent of the offenses that were attributed to him.

4. Balancing formulas fit within constitutional-administrative law in the framework under which there is the concern, which is forward looking, that the realization of the protected human rights will harm one public interest or another. Balancing formulas, in their essence, are not exact. Their

application involves exercising discretion by the authority. In the words of Justice Shimon Agranat:

> ". . .It must be admitted that even the test of "near certainty" does not constitute a precise formula that can be easily or certainly adapted to every single case. . . The most that is demanded . . . is only an **assessment** that that is how things are likely to turn out." [HCJ 73/53 (hereinafter: "HCJ *Kol Ha'am*" [9]), at pp. 888-889 (emphasis in the original)].

The court, in the framework of its critique of the decision of the authority, examines whether its assessment falls within the framework of the range of reasonableness, and does not establish on its own if there exists one specific probability or another for harm to the expression of a protected interest.

On the other hand, a circumstantial component, which is part of the factual element of the offense, reflects an objective and definitive situation. Professor Feller defines this element as "data found in the objective reality at the time of the conduct" (S.Z. Feller, *Foundations in Penal Law* (Volume 1, 5748-1984) [22] at 376). In contrast, as stated above, the formula of near certainty, is based on the likelihood of a future occurrence, and requires an estimation of the probability of this likelihood. This assessment, by its nature, is not exact, and under its framework different judges are likely to reach different results. Having this assessment made by the court in the framework of the criminal law is not consistent with the requirement of the principle of legality that there should exist an objective certainty as to the circumstances of the offense. Justice Eliyahu Mazza discussed this in relating to the offense of incitement to racism:

> "the assump[tion]. . . that the near certainty test constitutes an appropriate criterion for establishing the limit of the said criminal prohibition, has no basis. The near certainty test is a causal test. It serves as a criterion for determining the bounds of different basic liberties as necessitated by critical public interests such as state security and the preservation of public peace . . . this test does not and cannot have application in establishing the limits of a purely conduct related offense, whose actualization, as is apparent from the provisions of article 144B (b), first part, is not conditioned on the occurrence of a certain result. [CrimA 2831/95 *Elba v. State of Israel* [10] (hereinafter: "CrimA *Elba*") at p. 267].

5. Indeed, in Israel, balancing formulas were developed in constitutional-administrative law. First and foremost is the judgment of Justice Agranat in HCJ Kol Ha'am [9] *supra*, in which, under the inspiration of American case law, he established the balancing formula of a "near certainty of real danger for the clash between freedom of expression and the public peace". With that, Justice Agranat was of the opinion that the requirement in American law for the immediacy of the expected harm was too far-reaching, and also was not consistent with the language of the authorizing statute. See **Ibid**. at p. 891.

Indeed, the balancing formula of clear and present danger was coined by Justice Holmes in 1919, when the Supreme Court had to determine the constitutionality of a criminal law that limited the freedom of expression .(*Schenck v. United States*[18]). The immediacy requirement was made more stringent in 1927, when Justice Brandeis in the judgment of *Whitney v. California* [19] determined that the expected danger had to be imminent.

However, despite the immediacy requirement, which makes the judicial determination easier, the application of the American balancing formula has been problematic. Indeed, the assessments made by the court were influenced by the individual perspectives of the judges. In the professional literature criticism was voiced as to the formula of "clear and present danger", claiming that its vagueness allows for its manipulation and does not sufficiently protect the freedom of expression. (See for example, Dean Ely, 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis'[28] (1975)).

In 1942 the "fighting words" doctrine was added. It establishes a content test which is based less on the individual assessment of the judges as to the degree of probability of realization of the danger. (See *Chaplinsky v. State of New Hampshire* [20]). It was established that the use of speech that by its content causes or incites immediate harm to public peace, is not protected by the constitution. In 1969, in the case of *Brandenburg v. Ohio* [21], after critical reference to the clear and present danger test, it was determined that a criminal prohibition which limits the freedom of expression, requires proving specific intent on the part of the doer to achieve the prohibited result. [See also David R. Dow and R. Scott Shieldes, 'Rethinking the Clear and Present Danger Test' [29](1998).]

In English law as well, from where we absorbed the offense of sedition, it was established that the protection of freedom of expression requires

interpreting the law which defines this offense as requiring "intent" (in the sense of the desire or aim of sedition), and an expectation of the realization of the result at a high probability is not sufficient. [See Archbold, *Pleadings, Evidence and Practice in Criminal Cases* (42nd ed., Mitchell, Richards & Buzzard ed.,1985) [27] at 1170.]

6. In our matter in article 134(c) of the Law it was established:

> "Whoever has in his possession, without legal justification, a publication of a seditious nature, -- is liable to imprisonment for one year and the publication shall be confiscated."

I am not of the opinion that one is to conclude that the words "a publication of a seditious nature" implies a probability test. In my view, these words refer to the content of the publication. It is clear that unlike with an innocent publication, even if in the opinion of the doer it is seditious, and even if has it in his possession with the intent of sedition, a prohibited publication must have seditious content. Meaning, that the text in its ordinary meaning and context must include seditious words, and in the language of Justice Eliezer Goldberg in CrimA 6696/96 *Kahane v. State of Israel* [1] at p. 559 must have "seditious potential". President Barak also wrote, that "only a publication that from within it, or the background of its context, the sedition itself arises, is the necessary factual element fulfilled." (**Ibid**. at p. 579). This is in addition to the probability element which, according to his view, is necessary.

At the center of article 134(c) of the Law we thus find the seditious content of the publication and the doer's awareness of this content.

To these, the defense established in article 138 of the law, entitled, "lawful criticism and propaganda" is to be added. And this is what is written in the clause:

> "An act, speech or publication is not seditious if it intends only:
>
> (1) To prove that the government has been misled or mistaken in any of its measures; or
>
> (2) To point out errors or defects in the laws or organization of the State or in one of its duly constituted institutions or in its administrative or judicial orders with the objective of remedying such errors or defects; or

> (3) To persuade the citizens or inhabitants of the State to attempt to procure, by lawful means, the alteration of any matter by law established; or
>
> (4) To point out, with the objective of the removal of, any matters which are promoting or have a tendency to promote strife or feelings of hostility between different segments of the population."

This defense, which was intended to preserve the freedom of expression and political discussion, is an expression of an accepted legislative technique for narrowing the extent of the criminal prohibition. It is in place of the requirement of proving the desire to achieve the result or alongside such a requirement, which comes to narrow the criminal prohibition. [See Itzhak Kugler *Intent and the Law of Expectation in Criminal Law* (1998) [23]at 335.] From here it arises, that a publication that has seditious content will not form the basis for an offense, despite the doer's awareness of the nature of this content, if the goal of the doer was not to be seditious but rather to conduct a political dialogue.

Adding this defense to the requirements of the seditious content of the publication and the doer's awareness of it, properly balances between the freedom of expression and the protection of the public peace.

7. The offense of committing a seditious act, according to article 133 of the Law is a "purpose" offense. Its mental element is the desire of the doer to achieve the said result. The question is whether the "rule of expectation" (which substitutes actual intent with the expectation that the said result will occur) applies to "purpose" offenses which prohibit expression. The question has yet to have been resolved in the case law. In CrimA *Elba* [11] *supra*, where the desire to incite to racism was proven, it was referenced in a number of obiter dicta. See, on the one hand, the words of Justice Mazza at p. 281, and the words of Justice Gavriel Bach, **Ibid**. at pp. 307-308. And on the other hand, the words of Justice Goldberg at pp. 309-310, and words that I wrote at pp. 319-320. Also in the offense of libellous publications, the denial of the application of the expectation rule was reasoned by the need for protection of freedom of expression. See CrimA 677/83 *Borochov v. Yafet* [14] at p. 213, 218-219; CrimA 506/89 *Naim v. Rosen* [15] at p. 139. Dr. Kugler, who is of the opinion that the expectation rule is to be applied to purpose offenses based on policy considerations, including value-based considerations and justice-based considerations, gives as an example of

offenses to which the expectation rule should not be applied, while noting opinion in comparative law, criminal prohibitions which limit freedom of expression. See **Ibid**. 335-336.

It is my opinion as well, that the expectation rule harms the proper balance between freedom of expression and the interests which clash with it. As explained above, the requirement of the existence of a purposive mental element, in addition to the seditious content – which therefore requires that the doer will operate to achieve the prohibited goal – reduces the harm to freedom of expression, and one is not to be satisfied with a substitute for it.

8. In our matter, as shown by my colleague Justice Or, the content of the publication is its own proof that it arouses hatred and strife, and that the respondent, who distributed it in the course of his party's campaign, strove to achieve this aim.

Therefore, I join my view with the view of Justice Or that the appeal is to be accepted as proposed in his opinion.

Justice J. Türkel

Like my colleague, President Barak, I am of the opinion that section 4(a) of the Prevention of Terrorism Ordinance 5798-1948, that was considered in CrFH 8613/96 *Muhammad Yosef Jabarin v. State of Israel* [2] – and section 136(4) of the Penal Code 5737-1977 – which is under consideration in the further hearing before us – "raise similar problems of construction, and justify utilizing a similar technique of construction." For the reasons of the President as well as for my reasons in my opinion in the Jabarin case, which is to be delivered together with the decision here, I join my view to his view that the further hearing is to be denied.

Justice E. Mazza

I agree to accepting the appeal, as proposed in the opinion of my colleague Justice Or. The approach of my colleague, as to definition of the protected value at the foundation of the prohibitions on "sedition" according to its meaning in section 136(4) of the Penal Code, is consistent with the approach I expressed, in a minority opinion, in the judgment under appeal (see CrimA 6696/96 *Kahane v. State of Israel* [1] at p. 566 and on); and I also accept the reasons of my colleague on this matter. On the other hand, I cannot agree to some of the positions of my colleagues, the President and Justice Or, that the realization of the offenses of sedition is conditioned on the existence of a circumstantial element. In my opinion in CrimA 2831/95 *Elba* v. State of Israel [9] I explained at length (at pp. 266-268, 275-276) why the offense of incitement to racism according to section 144B of the Penal Code, does not require proving probability of the occurrence of a harmful consequence to any degree. For those same reasons I again determined, in the judgment under appeal before us (see: **Ibid**. at pp. 564-566), that the offenses of sedition also do not include an element of potential consequence, whose existence is to be determined using one probability test or another. For the reasons stated in the two said judgments, and for the reasons of my colleague, Justice Dorner, in her opinion in the further hearing before us, I am of the opinion, that offenses of sedition do not include a probability element.

It was decided by a majority of opinions as per the opinion of Justice Or.

29 Kislev 5761

November 27, 2000

Editor's notes: 1. The Hebrew verb *lehasit* has been translated as 'to incite seditious acts'.

2. Following the judgment in HCJ 8613/98 and the Court's determination that section 4(a) of the Prevention of Terrorism Ordinance 5798-1948 applies only to sedition by a terrorist organization and does not apply to sedition by individuals, the Ordinance was amended such that section 4(a) of the Ordinance was nullified and in its stead an offense of sedition to violence or terror was established in the Penal Code.