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Scope of Protection of Political Speech Under  
Israeli Freedom of Speech Jurisprudence: A  
Comparative Analysis and an Alternative  
Perspective**

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Incitement to Violence under Israeli Law and the  
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Analysis and an Alternative Perspective

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**Abstract:**

Under First Amendment jurisprudence speech which may incite to violence enjoys a wide constitutional protection, as long as it does not meet the criteria of the “imminent clear and present danger test”. My purpose is to suggest an alternative approach for legally curbing speech which incites to violence, based on foreign legal systems that adopt various restrictions on free speech. These limitations include criminal laws prohibiting expressions, which under certain circumstances would lead to violence. My aim is to use the Israeli experience in curbing dangerous threats and the legal ways adopted to combat this speech. I believe this paper presents a novel and original perspective, providing an alternative view of inciting expressions by suggesting placing a few narrow limitations on freedom of speech. This alternative is based on striking a proper balance between the exercise of freedom of speech rights and the need to protect potential victims of inciting speech against dangerous speech. This approach may sound antithetical to American jurisprudence, rendering the paper novel and original. Nonetheless, examining a different approach presents an interesting insight, which sheds a different light on the legal treatment of expressions, which incite to violence, providing an important contribution to existing legal scholarship.

## **Introduction:**

The State of Israel, unlike the United States, does not have a written constitution. Fortunately, lack of a constitution does not mean human rights, specifically freedom of speech rights fall short of constitutional protection. Limitations on freedom of speech face strict scrutiny, but the basic premise is that the legal protection does not derive from a constitution, but rather from the democratic values Israel has adopted ever since its establishment in 1948. Israeli legal system has always regarded Freedom of Speech as the essence of democracy, thus enjoying a special status as a “supra-legal right”, nonetheless, a relative rather than an absolute right. The basic test adopted by the Israeli Supreme Court in the landmark decision “Kol Ha’am” in 1953, rejected the American “clear and present danger”, and adopted instead a probability test: the “near certainty” test.<sup>1</sup> This was the applicable test since 1953 until 1995 when Israel was stunned by a traumatic murder: Prime Minister Rabin was assassinated because of his peace endeavors and political agenda. The assassination was the culmination of what has been referred to as vicious incitement to violence aimed at de-legitimizing Rabin himself and his political ideology. The assassination raised the issue of the relationship and possible connection between words and actions, namely: is there a casual link between expressions inciting to violence which were carried out in demonstrations, rallies and protests pursuant to the signing of the Oslo Accords and the assassination. As an outcome of a premise that there exists such a casual link the government adopted a prosecutorial policy which significantly increased indictments based on political expressions. Subsequently, the Penal Law was amended in 2002 and a specific prohibition was enacted, proscribing incitement to violence.

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<sup>1</sup> H.C. 73/53 Kol -Ha’am v. Minister of the Interior, 7 P.D. 871

At the outset it is worth noting that in this paper I focus solely on political speech in Israel. The protection of freedom of speech in Israel in other areas is beyond the scope of this short paper. Moreover, in this paper I focus solely on the incitement to violence criminal provision. An additional provision in the Penal Law proscribing incitement to racism is a separate vast issue which is beyond the scope of this paper.

This paper is aimed at examining the proper scope of limitations upon political speech inciting to violence in Israeli law, under the amended criminal provision. My purpose is to address the question of whether the current freedom of speech jurisprudence is too limited, and whether the scope of infringement upon the exercise of freedom of speech rights is too large, or rather is freedom of speech in Israel faces strict scrutiny and thus protected sufficiently under the special circumstances Israel faces. I will attempt to address these issues using a practical insight, in light of my previous experience in Israeli law enforcement, since I have been doing legal counseling for the Israeli National Police during the years 1996-2005, and I have been dealing specifically with freedom of speech issues throughout that period.

Finally, I would like to stress an introductory comment with respect to the relationship between social and political structures and national conditions and legal changes. A comparative analysis between the legal treatment of freedom of speech in American jurisprudence and in Israeli law, must take into account the fact that the different treatment derives from two sources: the first and obvious is the different legal regime, namely: the lack of constitution in Israel. The second has to do with the specific unique features and characteristics of Israel's political and social climate, and traumatic national events which shape the legal treatment of freedom of speech.

## **General: Relevant Features of the Israeli Legal System with respect to Freedom of Speech Law compared to American Freedom of Speech Jurisprudence**

In order to gain a better understanding of the Israeli treatment of political speech which incites to violence and the enactment of the incitement to violence provision in the Israeli Penal Law, it is important to consider some of the basic relevant features of the Israeli legal system, namely: the special treatment of freedom of speech in light of lack of a formal written constitutional and a bill of rights protecting human rights.

The most prominent basic feature of Israeli law is the lack of a formal written constitution. Nonetheless, the lack of a constitution and a bill of rights did not result in a lack of protection of freedom of speech rights. Rather, without a constitution to rely on the Israeli legal system relied on different sources to ground free speech jurisprudence, namely: freedom of speech as emanating from Israel's democratic nature. Based on the democratic nature of Israel the Israeli Supreme Court has been surprisingly protective of freedom of speech rights. Israeli case law gave effect to human rights in Israel since the early days of the State of Israel. The status of freedom of speech has been regarded as a "Supra-right" and the "Essence of Democracy".

The benchmark case of Kol- Ha'am issued by the Israeli Supreme Court in 1953 has set the stage for subsequent decisions, and established the test for violating freedom of expression.<sup>2</sup> The basis on which the constitutional status of freedom of speech is founded is a probability test which is known as the "near certainty probability". In Kol-Ha'am, the government attempted to suspend the Communist party's Newspaper named "Kol Ha'am" (translated: The voice of the People) in response to articles denouncing the Israeli government for allegedly volunteering Israeli soldiers to the United States should

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<sup>2</sup> Kol-Ha'am case, Supra note 1

war break out between the United States and the Soviet Union. The Israeli Supreme Court denounced the suspension and upheld the newspaper's free speech rights.<sup>3</sup> The Kol Ha'am court announced the balancing test which the Israeli Supreme Court has applied since then, until the enactment of the new criminal provision in 2002: incitement to violence, discussed below. The balancing test inquires into the extent of the injury that justifies the restriction, and the probability that the injury will occur if the speech at issue is not curbed. Only when the harm is "severe, serious and grave" and the danger of the harm rises to "near certainty" will the government be permitted to suppress the speech.<sup>4</sup>

**The Israeli probability test: near certainty, as opposed to American "clear and present danger" immanency test"**

As mentioned above, the test adopted by the Israeli Supreme Court for limiting the scope of freedom of speech is the probability test of "near certainty". Under this standard freedom of expression will retreat only in the face of national security concerns, where there is a near certainty that national security and public safety will be harmed, and where the harm is grave, serious and severe. As opposed to Israeli law's adoption of the "near certainty probability test" under American freedom of speech jurisprudence, the case law refused to allow infringing upon freedom of speech rights unless a clear and imminent danger to national security or public safety was proved. *Brandenburg v. Ohio* states the "clear and present danger test": the government may not forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such

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<sup>3</sup> Kol-Ha'am, Supra note 1, in 891-892

<sup>4</sup> Id

action.<sup>5</sup> The Brandenburg court created the test for incitement by drawing a distinction between incitement and mere advocacy. The court defined incitement as advocacy directed to inciting or producing imminent lawless action and likely to incite or produce such action, while abstract advocacy remains within the scope of the First Amendment protected speech, incitement does not and may be prohibited by law. Central to the test is the requirement that before speech can be restricted, its harmful consequences must be sufficiently imminent and grave. The value or type of speech is not an element of the test. Under the Brandenburg formulation speech must threaten imminent harm to be regulable, and the imminence element has been interpreted quite strictly. The gravity of the harm is also a threshold requirement: if a harm does not rise to a certain level, the clear and present test cannot be invoked to restrict speech even if the harm is imminent.<sup>6</sup> The Fighting Words Doctrine was acknowledged by the Supreme Court in *Chaplinsky* as an exception to the Clear and Present Danger Test.<sup>7</sup> It is important to note that in the wake of the traumatic 9/11 events and the acknowledgment that additional measures should be legislatively adopted to enable effective combating with terrorist threats, anti terrorist legislation was adopted in the USA PATRIOT Act. The act was premised on the acknowledgment that security authorities were insufficiently equipped to deal with terror, because of constitutional restrictions, and therefore constitutional solutions had to be found to create a different balance between human rights and the security needs of

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<sup>5</sup> *Brandenburg v. Ohio*, 395 U.S. 444, at 447 (1969)

<sup>6</sup> Endless literature has been written on the Brandenburg clear and imminent danger. For a representative example: Some articles I read include: Tom Hentoff, *Speech, Harm and Self Government: Understanding the Ambit of the Clear and present Danger Test*, 91 *Colum. L. Rev.* 1453,

For an example of the fighting words doctrine see: Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 *Columb. L. Rev.* 1527 (1993)

<sup>7</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)

America.<sup>8</sup> Nonetheless, the issue of the scope of protection of human rights, among them freedom of speech rights under the PATRIOT ACT is a separate enormous issue, and is beyond the limited scope of my paper, which focuses on the Israeli experience.

Prima facie, the Israeli test provides less protection to freedom of speech than the test of “clear and imminent danger”. American law took a far reaching approach protecting freedom of speech in dealing with prior restraint, establishing a presumption that every prior restraint is unconstitutional, whereas Israeli courts apply the test of near certainty with respect to prior restraint cases. In the United States criminal liability could attach only when the speech was seditious and might cause an imminent breach of the law.<sup>9</sup> The requirement of imminence in American law thus protects freedom of expression to a greater extent than the requirement of the near certainty test in Israel. However, despite of the different tests applied it seems that in practice, application of the near certainty test by the Israeli Supreme Court has led to similar results as that achieved in American law under application of the “clear present and imminent danger.

Subsequent decisions pursuant to the Kol Ha’am landmark case followed its line, applying the “near certainty” probability test. For example: in the case of Levi and Amir v. Southern District Police commander, petitioners wanted to hold a memorial demonstration in honor of the late Emil Greenzweig, who had been killed by a hand grenade thrown into a demonstration held a month earlier. The Supreme Court upheld the right to hold the demonstration, applying the probability test, and finding that the

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<sup>8</sup> Michael Rosenfeld, *Judicial Balancing in Times of Stress: comparing the American, British and Israeli Approaches to the War on Terror*, 27 *Cardozo L. Rev* 2079 (2006), Emmanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 *N.C.J. Int’l L. & Com. Reg.* 1 (2002)

<sup>9</sup> Hentoff, *Supra* note 6, at 1456-1461.

balancing of interests lay in the demonstrators' favor.<sup>10</sup> The Court emphasized that the “probability test” does not necessitate a clear or immediate certainty, but neither a theoretical possibility suffices. What is required is substantial evidence, based on known facts, including past experience. Speculations and apprehensions are not enough, nor is a plea of substantial possibility of harm to public security. The actual circumstances must point to a substantial likelihood of danger, leaving a possibility of “setting off” the degree of likelihood against the measure of gravity of the apprehended harm.<sup>11</sup>

All Israeli Supreme Court decisions emphasized that the scope of protection of the constitutional right to freedom of speech is broad. Nonetheless, the basic premise of Israeli freedom of speech jurisprudence is that freedom of speech is not an absolute right, but rather a relative constitutional right which calls for striking a proper balance between protecting freedom of speech and enhancing other important rights. Under the freedom of speech jurisprudence developed by the Israeli Supreme Court the scope of protection given to freedom of speech is broad, and the guidelines for limiting expression are determined in accordance with the relative social values and principles, namely: the maintenance of public peace and safety and national security concerns.<sup>12</sup> The Israeli Supreme Court has held that freedom of Speech includes opinions which are dangerous, irritating and racist. The only harm which justifies limitation of freedom of speech is real, material, severe and dangerous, bearing in mind the likelihood of its occurrence, which is “near certainty” that the harm will occur.<sup>13</sup>

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<sup>10</sup> H.C. 153/83 Levi and Amir v. Southern District Police Commander , 38 (2) 126

<sup>11</sup> Levi and Amir, Id, at 120

<sup>12</sup> Gross, Supra note 8, at 53-55

<sup>13</sup> Aharon Barak, Freedom of Speech in Israel: The Impact of the American Constitution, 8 Tel Aviv U. Stud. L. Rev. 241, at 246-247 (1988) and also: H.C. 234/84 Chadashot Ltd. V. The Minister of Defense, 38 (2) P.D. 477

## **The “Constitutional Revolution” and its debated impact on freedom of speech jurisprudence**

In 1992 two central laws were enacted termed “basic laws”: Basic Law: Human Dignity and Freedom/Liberty and Basic Law: Freedom of Occupation. The enactment has been termed “a constitutional revolution” in Israel, and it is generally regarded as a part of Israel’s future constitution, once all constitutional rights are embodied into additional basic laws. The idea behind these basic laws was that all constitutional rights should be derived from these basic laws. Nonetheless, the most prominent feature of these laws is that freedom of speech is not mentioned under none of these laws <sup>14</sup>(There is a scholarly controversy in Israel as to whether the Basic Law: Human Dignity and Freedom/Liberty consists of the right to freedom of speech despite the fact that freedom of speech issues are not even mentioned under this enactment.<sup>15</sup> The controversy is beyond the scope of this paper, but it suffices to say that there is a serious doubt whether freedom of speech gained an additional protection under these basic laws, and there is considerate evidence to conclude that the enactment of this basic law has nothing to do with the scope of protection of freedom of speech rights in Israel. In my view, the amendment of the basic laws has **not** changed the scope of protection of freedom of speech rights in Israel, and protection of freedom of speech derives from the case law and the basic democratic values, rather than emanating from the Basic Law: Human dignity and Freedom/Liberty.

Regardless of the above mentioned controversy, it is important to note that the basic laws are not constitutive, and they are not the primary source of human rights in

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<sup>14</sup> Neither are other basic rights such as the right to equality and freedom of religion. These are termed “the missing rights”, although this is not accidental, but carefully crafted omission based on political pressures

<sup>15</sup> A representative writing:: Joshua Segev, Who Needs a Constitution? In Defense of the NON-Decision Constitution Making Tactic in Israel, 70 Albany L. Rev. 409 at 457-476 (2007)

Israel. Rather, there is a common understanding that the basic laws raise the normative standard of human rights to a constitutional standard, and since their enactment the normative source of human rights in Israel is constitutional and clear, emanating from a specific act of Parliament. Nonetheless, the controversy still remains as to the status of constitutional rights which are not mentioned in the Basic Laws themselves, namely: the fact that the Basic laws do not mention freedom of Speech as part of the constitutional rights the Basic Law aim at providing. Some scholars have argued that despite the lack of mentioning of freedom of speech in the language of the Basic Laws, it is nonetheless included as part of human dignity, and thus implicitly a part of the protection provided under the Basic Law: Human Dignity and Freedom.<sup>16</sup> On the other hand, other scholars have argued that this argument has no textual support in the language of the Basic Law: Human Dignity and Freedom, and the fact that other constitutional rights are explicitly protected under this Basic Law point to the fact that freedom of speech rights are not covered under this law, and thus their constitutional normative status has not changed pursuant to the enactment of the Basic Law: Human Dignity and Liberty.<sup>17</sup>

To sum up: Despite the lack of a formal written constitution, Israeli Freedom of speech jurisprudence in its first 50 years of existence was based on a relatively broad protection of political speech. The turning point was pursuant to Prime Minister Rabin's assassination in 1995, culminating in the enactment of a new criminal provision in 2002: incitement to violence.

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<sup>16</sup> Judith Karp, Basic Law: Human Dignity and Liberty: A Biography of Power Struggles, 1 Law & Gov't in Isr. 323 at 338-340 (1993), Aharon Barak, Protected Human Rights: Scope and Limitations, 1 Law & Gov't in Isr. 253, at 256-261 (1993)

<sup>17</sup> David Kretzmer, The New Basic Laws on Human Rights: A Mini Revolution in Israeli Constitutional Law? 26 Isr. L. Rev. 238, at 146 (1992)

### **The Turning Point: Prime Minister Rabin's Assassination in 1995:**

Prime Minister Rabin's assassination in 1995 signals a turning point, pursuant to which the scope of the protection of freedom of speech has changed, at least temporarily, and limitations on freedom of speech have been expanded. The turning point consists of two steps: the first step, taken immediately pursuant to the assassination, focuses on practical implications: law enforcement endeavors to bring charges against individuals based on incitement of violence. Second, legislative endeavors, pursuant to Department of Justice initiative and pressures to enhance a new specific legislation aimed at targeting expressions which incite to violence, culminating in the 2002 enactment of the incitement to violence provision as part of the Israel Penal Law.

### **Social and Political Backdrop to the 2002 Amendment: Incitement to Violence**

In order to gain a better understanding of the changing process mentioned above it is important to consider some socio-political features of Israeli society. Israel's legal treatment of freedom of speech is a direct outcome of the country's social structure, cultural and political environments, and a result of national events which help in shaping the relevant context enabling the amendment. Generally, legislation is always dependent upon the unique specific characteristics of a given society, and delving into the reasoning behind a new enactment calls for a consideration of the features and characteristics of the Israeli socio-political climate, a necessary backdrop against the amendment.

## **The State of Israel: National , Ethnicity and Religious tensions and frictions and extreme divide among its population**

Israeli society has always been facing extreme divide and vast conflicts between different parts of its population, being a multi-cultural society.<sup>18</sup> On the one hand, the religious – secular divide among the Jewish population within itself, and on the other hand, the national and ethnical divide between its Jewish and Arab population, and the conflict between the Israeli Left and Right wing over the borders of the State of Israel, its relations with the Arab population and the occupied territories.<sup>19</sup>

### **Tensions between Jewish and Arab population in Israel and coping with terrorism**

In the last decades, there has been a dramatic rise in religious radicalism and extremist fundamentalism in the Middle East. The Israeli experience is one illustration of the relationship between religious extremism and increase in violence. The State of Israel has known terrorism ever since its establishment in 1948. Terrorism has significantly increased since the first Intifada in 1987, and later since the second Intifada in 2001. 1130 Israelis have been killed by Palestinian violence and terrorism since September 2000 until this day.<sup>20</sup> Following the first Intifada, the tensions between Jewish and Arab population intensified and frictions increased especially in the occupied territories, and specifically focusing on the control of holy places to both Jewish and Islamic religions, a terrible massacre occurred in Hebron. On February 25, 1994, Baruch Goldstein, an Israeli Jewish physician and part of the military reserve, broke into a tomb place in Hebron, known as

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<sup>18</sup> Ehud Sprinzak, *Extremism and Violence in Israel: The Crisis of Messianic Politics*, 555 *Annals Am. Acad. Pol& Soc. Sci.* 114, at 116 (1998)

<sup>19</sup> Id

<sup>20</sup> The Arab term “Intifada” means: uprising or “shaking off the filth”. The common usage of the word refers to violent Palestinian endeavors directed against. The first Intifada began in 1987 and ended with the signing of the Oslo Accords in 1993, and the creation of the Palestinian National Authority. The second termed Intifada Al Aqsa” began in September 2000 and lead to an unprecedented waive of terrorist attacks, mainly suicide bombing aimed at Israeli citizens, resulting in the death of at least 1130 Israelis.

“Hebron’s Cave of Patriarchs” a sacred place to both Muslims and Jews, and murdered 29 innocent Palestinians Muslims who were praying there. The murderer Goldstein was a product of the ideological schooling of Rabbi Meir Kahane, the founder of “Kach” movement, which has been by far, the most violent Israeli political movement. The religious school of “Kach” was based on racist ideology which encouraged violence acts of Jews against Arabs. Goldstein, an American citizen, immigrated to Israel in order to carry out Kahane’s ideology. The political movement “Kach” was finally banned from participating in the elections to parliament, and subsequently declared by the Israeli Government a “terrorist organization”, similar to Muslim terrorist organizations such as Jihad and Hamas.<sup>21</sup> The State of Israel was deeply shocked by the massacre, and the government established an official commission of inquiry, chaired by the then Chief Justice of the Israeli Supreme Court, which was aimed at investigating the circumstances related to the massacre. The commission’s recommendations pointed out several flaws in the administration of law enforcement in the occupied territories. Following the acknowledgment of these deficiencies an interdepartmental committee was established, whose roles were aimed at coordinating, supervising and ensuring effective law enforcement, especially with respect to the occupied territories and the tensions between the Arab and the Jewish population there. The committee consisted of representatives from the Department of Justice, Israeli Defense Forces, The Israel National Police, and the Israeli General Security Service (the State’s internal security agency). The Committee was chaired by a senior Deputy to the Attorney General Talia Sasson.<sup>22</sup>

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<sup>21</sup> Ehud Sprinzak, *Supra* note 18, at 120-121

<sup>22</sup> I was not a formal member of the committee itself, but I did take part in some of its meetings, so the following discussion on law enforcement endeavors pursuant to Rabin’s assassination is based on my personal knowledge of the prosecutorial policy.

### **Religious – Secular divide within the Jewish population:**

Since its establishment the State of Israel has been facing a societal conflict between secular and religious Jews. The Religious-Secular divide intensified over the years, and focused mainly not on theology, but rather on the political aspirations of the religious community. The religious extremists stress the fact that Israel as a Jewish state has the right to the occupation of the whole biblical land of Israel, including the occupied territories. Based on those ideas political movements which called for settlements in the occupied territories emerged, increasing the conflicts with the Arab population there. The secular population on the other hand focused on the democratic nature of the Jewish state, believing that the Israeli occupation over the territories had to end. The tensions and conflicts between religious extremists and the secular population increased in 1993, pursuant to the Oslo Accords in which Israel agreed to give land to the Palestinians.

On November 4<sup>th</sup> 1995, Yigal Amir, a religious extremist 2L law student assassinated the Israeli Prime Minister Itzhak Rabin following a peace rally. The murderer stated in his interrogation that the reason he decided to assassinate the Prime Minister was because of the Oslo territorial concessions, in which Israel has agreed to turn over to the Palestinian authority parts of the occupied territories.<sup>23</sup>

The murder was a culmination of increased actions of what large part of the Israeli public perceived as incitement to violence personally aimed at Prime Minister's Rabin and his political agenda. Throughout these protesting actions Rabin was portrayed as an SS German officer and as Marshall Petain leader of Vichy France who was sentenced to death for betraying his country by collaborating with the Nazis in pamphlets and brochures carried in demonstrations. Those placards and leaflets were handed out in

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<sup>23</sup> Amir's trial: Cr. C. (T.A.) 498/95 State of Israel v. Amir 1996 (2) P.M. 20

an opposition rally in which Binyamin Netanyahu Rabin's political opponent participated. Rabin was called a "traitor", "murderer" "assassin", a religious Rabbinical curse known as "Pulsa Denora" called on Rabin to retreat his political agenda, threatening him with death, and religious leaders called upon Israeli soldiers to disobey the orders of the Israel Defense Forces to evacuate Jewish settlements. Each Friday demonstrators protested outside the Prime Minister's private home, threatening him and his wife, carrying the signs mentioned above.

Pursuant to the assassination, the Israeli government decided to expand the authority of the interdepartmental committee that had been established after the Goldstein massacre, and instructed it to view and opine whether the criminal law was being sufficiently enforced against individuals involved in incitement and damaging democracy. Accordingly, one of the several roles of that committee was monitoring law enforcement tracking of inciting expressions and ensuring effective legal actions.<sup>24</sup>

Following the assassination, a two pronged change has occurred in law enforcement policy. The immediate response of law enforcement agencies consisted of increased indictments based on expressions which were perceived as inciting violence. The second consisted the legislature's response: endeavors to equip law enforcement with fit arsenal in the war against violent extremists and terrorism, culminating in the enactment of the incitement to violence provision in 2002.<sup>25</sup>

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<sup>24</sup> The chair of the committee has published a discussion of the committee's enforcement policy in: Talia Sasson, *The Prosecution Policy of Enforcement Charges of Incitement and Sedition in the Rule of Law in a Polarized Society*, Legal, Social and Cultural Aspects, 107 (Eyal Yinon ed.) 1999

<sup>25</sup> Sasson, id

### **Immediate Response to the Assassination: a Change in the Prosecutorial policy and Increased criminal charges with respect to political expressions**

The public in Israel was stunned by the assassination, and parts of the population perceived it as an illustration of the link between the dangerous incitement which took place earlier and the assassination itself, termed in the layman mantra: “words can kill”. This belief was embraced by the Department of Justice and the Attorney General. Under these circumstances, the immediate effect of Prime Minister Rabin’s assassination was increased focus of law enforcement authorities on investigating what was termed as vicious inciting expressions aimed at de-legitimizing Rabin’s policy and his de-legitimizing his personal existence, and prosecuting individuals under criminal provisions accordingly.<sup>26</sup> Most indictments were brought against individuals who expressed praise for the assassination of Rabin. It is important to note that up until that moment, criminal charges based on political expressions have never been brought under the incitement to violence theory, and the Attorney General faced the issue of lack of a proper criminal provision that would fit such acts.

### **Criticism of the Emerging Law Enforcement Policy: Lack of Empirical Data on the Casual Link Between Inciting Expressions and Violent Acts.**

Scholars argue that the amazement among the people of Israel, led to a hasty and immediate response on part of law enforcement.<sup>27</sup> It is argued that in those moments of national hysteria unjustified and miscalculated prosecutorial decisions were made. Specifically, scholars argue that generally, the casual link between inciting words and

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<sup>26</sup> Avi Weitzman, A Tale of Two Cities: Yitzhak Rabin’s Assassination, Free Speech, and Israel’s religious-Secular Kulturkampf, 15 *Emory Int’l L. Rev.* 1, in 32-35 (2001)

<sup>27</sup> Miriam Gur-Arye, Can Freedom of Expression Survive Social Trauma: The Israeli Experience, 13 *Duke J. Comp. & Int’l L.* 155, in 164 (2003), and also: Weitzman, *Supra* note 26.

violent actions pursuant to them have never been proven.<sup>28</sup> There is a little empirical data on political speech inciting to violent acts, and many scholars dispute the casual connection between political speech and violent actions. Some scholars argue that the violence is casually linked to ideo-theological position of the settler society and their belief that Israel should not compromise over West Bank land.<sup>29</sup> The late Ehud Sprinzak, who was a renown Israeli political science expert argued that the assassination was a reaction to two factors.<sup>30</sup> First, signing of the Oslo Accords caused increased hatred of Rabin and intensified the division in society by serving as “complete falsification” of the settlers messianic aspirations with respect to the “maximal belief in the greater land of Israel”. Second, Palestinian terrorism was a necessary condition to the assassination by intensifying fear among Israelis and permitting Amir, the murderer to become a “zealot”.<sup>31</sup> In addition, in his interrogation, Amir himself rejected the possibility that there was a casual connection between the inciting expressions and the assassination. On the contrary, Amir stated that after he felt that political speech and demonstrations and protests were an ineffective means to end the peace process he decided to act and personally make sure that land is not given away by assassinating Rabin.<sup>32</sup> Based on these arguments the critics contended that the premise establishing the link between expressions and acts, which led to the change in prosecutorial policy with respect to inciting expressions was seriously flawed.

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<sup>28</sup> Frederick Schauer, *Speech, Behavior and the Interdependence of Fact and Value*, in *Freedom of Speech and Incitement Against Democracy*, 247 (David Kretzmer & Francine Kershman Hazan, eds. 2000) , at 50. Schauer argued that one should not label speech a cause of an assassination if the assassin had been planning the act for some time before the speech).

<sup>29</sup> Sprinzak, *Supra* note 18, at 122-126

<sup>30</sup> Ehud Sprinzak, *Supra* note 18 at 120-122

<sup>31</sup> Sprinzak, *Supra* note 18, at 125. Professor Sprinzak argues that the Jewish doctrine of zealotry permits a Jew to kill the person endangering the Jewish nation, without prior rabbinical permission, if there exists extreme circumstances and impending disaster.

<sup>32</sup> Amir’s trial, *Supra* note 23

The counterargument to the critics is that at least some blame for the assassination may be based on the preceding inciting expressions. Some psychological studies established a casual connection between aggressive speech and violent action.<sup>33</sup> There is a common understanding that inciting speech is an aggravating factor, and possibly one of the primary causes of the assassination.<sup>34</sup>

### **Criminal Provisions Available in 1995 for Prosecuting Praising the Assassination and the Hebron massacre**

In 1995, there was no criminal provision in the Israeli Penal Code which explicitly proscribed incitement to violence. Based on the premise that incitement to violence enabled the political and societal climate leading to the assassination, the Department of Justice and the Attorney General first turned to existing criminal provisions. The Attorney General relied on two main criminal provisions in an attempt to enforce criminal sanctions against political expressions which incite to violence.<sup>35</sup>

The first one was an old provision in the Prevention of Terrorism Ordinance – 1948, specifically section 4 (a) of that ordinance which is titled “supporting a terrorist organization” and provides as follows: A person who – (a) publishes, in writing or orally, words or praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence... shall be guilty of an offense and shall be liable on conviction to imprisonment for a term not exceeding three

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<sup>33</sup> George Comstock & Haejung Paik, *The Effects of Television Violence on Aggressive Behavior: a Meta analysis*, 21 *Comm. Res.* 516( 1994)

<sup>34</sup> Weitzman, *Supra* note 26, at 19

<sup>35</sup> Sasson, *Supra* note 24

years or to a fine....<sup>36</sup> It should be noted that this provision did not proscribe an express call to commit an act of terror or violence, but rather prohibited only implicit incitement.

Another criminal provision individuals were charged with was Sedition, an ancient offense which dates back to the British Mandate in Israel.<sup>37</sup> The Sedition provision proscribed in sections 133-136 of the Israeli Penal Law prohibits publishing or possessing “any publication of a seditious nature”. “Sedition” is defined in section 136 (4) of the Penal Law as follows: “For the purposes of this article, Sedition means .... To promote feelings of ill-will and enmity between different sections of the population”.<sup>38</sup>

Another offense the Attorney General’s officer prosecuted individuals with was incitement to racism. This was a relatively new offense, enacted in 1986 pursuant to legislative responses to stop Rabbi Kahane’s racist ideology, and efforts to ban his participation in the election to Parliament. The offense proscribes in section 144B of the Penal Law that “a person who published material with the intent to incite to racism is liable to imprisonment for five years”.

Based on the above- mentioned provisions individuals were charged with respect to a couple of types of expressions. They all had one thing in common: the expressions did not explicitly and expressly incite to violent acts. The premise behind these charges was that they were based on implicit indirect incitement.<sup>39</sup> The first type of implicit incitement was expressions praising the assassination of Prime Minister Rabin or the massacre in Hebron’s tomb of the Patriarch. Several well-known right-wing activists

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<sup>36</sup> Prevention of Terrorism Ordinance 1948, available at [http:// www.israel-mfa.gov.il/mfa](http://www.israel-mfa.gov.il/mfa)

<sup>37</sup> The United Kingdom ruled in Israel until 1948, once the State of Israel was established prior to a United Nations resolution. Pursuant to the declaration of Independence the State of Israel adopted the preceding legal British regime. The British Penal Law was adopted, among other laws, including the “sedition” offense, drafted in the beginning of the 20<sup>th</sup> century, and which has not been amended since then.

<sup>38</sup> Sections 133-138 of the Penal Law 1977, available at: <http://www.israel-mfa.gov.il/mfa>

<sup>39</sup> Avi Weitzman, *Supra* note 26, at 36-38

were charged under section 4 (a) of the Prevention of Terrorism Ordinance for praising the assassination.<sup>40</sup> In addition, while some individuals were indicted for those charges, many others have been arrested and interrogated for suspicion of expressing implicit indirect inciting expressions, but charges have not been brought against them. Those cases usually involved camouflaged words of praise, as opposed to overt words of praise. Where the words of praise seemed only implied and hinted the prosecution refrained from charging, but nonetheless interrogations and arrests have been carried out.<sup>41</sup>

Another type of political expressions that has been prosecuted as incitement pursuant to the assassination was based on name -calling and personal insulting attacks on political leaders, specifically Prime Minister Rabin. The prominent examples were the depiction of the Prime Minister wearing SS Nazi uniform, expressions calling Rabin “worse than a Nazi”, a “traitor and murderer”. These expressions were posted on signs, leaflets, placards and other written materials distributed throughout protests and demonstrations held against giving away land which were very common at that time.<sup>42</sup>

In sum, the increased number of criminal charges led to a circuit split with respect to the limits and interpretation of the criminal provisions and the scope of proper enforcement of political expressions which were perceived as inciting to violence.

This Circuit split eventually called for the following Supreme Court’s response.

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<sup>40</sup> Cr. C. (Jm) 4456/96 State of Israel v. Ben Chorin (unpublished decision, November 26, 1996, Cr. A. 549/97 State of Israel v. David Axelrod (Unpublished opinion, July 15, 1997), Cr. C. (Jm) 827/96 State of Israel v. Eskin (unpublished opinion May 28, 1997). Following the Jabarin acquittal, these convictions were quashed by the Supreme Court, pursuant to the prosecution’s consent.

<sup>41</sup> Jerusalem Post Newspaper, May 23, 1997, and December 22, 1997, and also Weitzman, Supra note 26

<sup>42</sup> These cases were cited in the Sasson’s report, Supra note 24

## **Supreme Court Response: Jabarin and Kahane Decisions: Narrow Construction of the Praise of a Violent Act and Seditious provisions**

Jabarin, a journalist from the Israeli Arab town of Umm El Fahm, published in 1990-1991 a series of articles in Arabic newspapers which included expressions of praise and sympathy for the throwing of stones and Molotov cocktails by Palestinians during the first Intifada. Jabarin was convicted in the lower courts, and his case reached the Supreme Court which first upheld the conviction for an offense pursuant to section 4 (a) of the Prevention of Terrorism Ordinance.<sup>43</sup> In a further hearing in the Supreme Court held before an extended session of the Court: 7 justices (instead of the usual 3 justices) the defendant was acquitted.<sup>44</sup> The majority held that the offense under section 4 (a) of the Prevention of Terrorism Ordinance should be narrowly construed in accordance with the purpose of the ordinance, rather than broadly construed as the wording of the section suggests. The Supreme Court held that the ordinance was designed to prevent danger inherent in organized terror, and accordingly the offense in section 4 (a) should not be construed to include praise for the violent acts of an individual who does not belong to a specific terrorist organization.<sup>45</sup> The Court held that section 4 (a) is a draconian section which is difficult to accept in a proper democratic society that values freedom of speech. The Court stressed that the section does not comprise a probability test that ties the publication for a potential for any harm whatsoever. The section attributes a presumption of danger to any publication which falls within its compass, and as such it severely infringes freedom of expression.<sup>46</sup> The dissent held that there is no justification for a

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<sup>43</sup> Cr. A. 4147/95 Jabarin v. The State of Israel, 50 (4) P.D. 38 (October 10, 1996)

<sup>44</sup> Cr. F. H. 8613/96 Jabarin v. State of Israel, 54 (5) P.D. 193 (November 2000). (Hereinafter: Jabarin)

<sup>45</sup> Jabarin, *id* at paragraph 12

<sup>46</sup> Jabarin, *Id*

distinction between a praise of the violent acts of members of terror organization and praise for acts of the same type perpetrated by persons who are not members of a specified terrorist organization. The dissent stressed that the purpose of the prohibition was to prevent carrying out acts of a terrorist nature, whoever the perpetrator may be.<sup>47</sup>

### **The Kahane decision:**

Binyamin Kahane, the son of Rabbi Meir Kahane, founder of the racist political movement “Kach”, attempted to follow his father’s path, ran in the election for the Parliament. His party was disqualified from participating based on section 7A (3) of the Basic Law: the Knesset (Parliament), which bans from participation in the elections movements which incite to racism.<sup>48</sup> Before its disqualification Kahane Jr. distributed a pamphlet which called for Jews to respond for attacks carried against them by Arabs by bombing the hostile Arab Israeli villages, a “nest of murderers in the Israeli State”. The pamphlet further contended that “only Kahane has the courage to tell the truth and that “he will take care of you”. Kahane was indicted under sections 133 and 134 of the Penal Law: the sedition provisions, under the theory that distributing the pamphlet was likely to promote feelings of ill-will and enmity between the Jewish and Arab populations as prohibited under the Seditious provisions. The trial court acquitted Kahane, the prosecution appealed and the decision was reversed by the Court of Appeals, the defendant appealed and the case reached the Supreme Court, that acquitted Kahane of the sedition charges, holding that the offense of sedition should be limited to publications

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<sup>47</sup> Jabarin, id, at 17

<sup>48</sup> Section 7A in the Basic Law: The Knesset provides: “ A candidate shall not participate in elections to the Knesset if its object or actions, expressly or by implication, include... negation of the existence of the State of Israel as the State of the Jewish people... negation of the democratic character of the State, or incitement to racism”. It should be noted that incitement to racism is a separate criminal provision proscribed in section 133B of the Penal Law. Discussing the incitement to racism, and disqualification of political movements are beyond the scope of this paper.

which endanger the stability of the democratic regime.<sup>49</sup> Moreover, the Supreme Court held that the sedition provision should be construed as referring to a publication which has the potential to cause a deep social schism between broad segments of the population.<sup>50</sup> In addition, the Court held that differences of opinion on political or social matters, strident as they may be, do not fall within the compass of the offense of sedition.<sup>51</sup>

### **Legislative Response: Amending a Penal Provision in Light of Jabarin and Kahane decisions**

Immediately after the acquittal of Jabarin, the Department of Justice proposed to amend the penal law.<sup>52</sup> The Department of Justice argued that the State of Israel tries to fight terrorism with “one arm tied behind its back”, and since the issuance of the Jabarin and Kahane decisions there are no criminal provisions which are fit to cope with inciting expressions, whether direct and implicit or indirect and implicit. The Department of Justice contended that after Jabarin and Kahane the law enforcement authorities were left without a proper means to combat inciting expressions, even in the most clear and explicit cases of direct incitement to unlawful act of violence. The Government argued, both in the briefs in Jabarin case, and in the explanatory comments in support of its draft bill proposal to amend the penal law, that the limited approach adopted by the Supreme Court in Jabarin left the prosecution “without tools for contending with the phenomenon of incitement to perpetrate severe acts of violence of a terrorist character by

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<sup>49</sup> Cr. F. H. 1789/98 The State of Israel v. Kahane, 54 (5) 145 in paragraph 5 (hereinafter: Kahane)

<sup>50</sup> Kahane, Id

<sup>51</sup> Kahane, Id

<sup>52</sup> Emmanuel Gross, The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001, 28 N.C.J. Int'l L. & Com. Reg. 1, in 58 (2002)

individuals”.<sup>53</sup> The dissent in Jabarin agreed with the government’s position and opined that: “it effectively terminates the options for conviction for an offense of severe incitement to acts of violence... when there would appear to be no recourse to any other legal source in order to convict a person who commits the act”.<sup>54</sup>

The position taken by the government was indeed accurate, since the Israeli Penal Law was lacking with respect to direct and explicit advocacy to violence. There was no criminal provision addressing expressions which explicitly incite to unlawful violence. This gap amounted to a bizarre legal regime in which the Israeli freedom of speech law with respect to expressions inciting explicitly to violence by advocacy of unlawfulness acts, was even more protective than the American freedom of speech jurisprudence under the Brandenburg standard. The Brandenburg standard acknowledges that direct and explicit advocacy to unlawful acts may be criminally proscribed, and does not face First Amendment concerns. Moreover, American case law has acknowledged the “Fighting words” doctrine as an exception to the Brandenburg “clear and present danger” test.<sup>55</sup>

Based on this position, the Israeli government unsuccessfully tried to pass this amendment a couple of times, until the proposal has been adopted in May 15, 2002. The new criminal provision states as follows:

**Penal Law (Incitement to Violence (Amendment No. 66), 2002**

(a) Any person who publishes either a call to commit a violent act or terror, or a praise, support or encouragement of violent acts or terror (for the purpose of this section: “an inciting publication”) and according to its contents and the circumstances in which it

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<sup>53</sup> Explanatory comments to the Draft Bill amending the Penal Law, no. 58 (1999), and also Jabarin case: oral arguments, and Gross, Supra note 52

<sup>54</sup> Jabarin, Supra note 44, in paragraph 3

<sup>55</sup> Chaplinski, Supra note 7. For discussion of the “fighting words” doctrine: see Manheimer, Supra note 6

was published there is a real possibility that it will lead to a violent act or terror, shall be liable to imprisonment for five years.”

The amendment adopts an expansive approach, which seems, at least at first glance, to place significant limitations on freedom of speech. The expansive approach is illustrated in several aspects, discussed below:

**Criminalizing the creation of a “climate contributing to violence”: The distinction between direct explicit advocacy of illegal actions and indirect and implied incitement:**

The provision adopts a two pronged prohibition: a narrow one which proscribes an explicit call to commit an act of violence or terror, and a much broader in scope one which criminalizes what scholars have termed as “preventing a climate which contributes to violence”, i.e.: prohibiting indirect implicit expressions beyond the express advocacy to unlawful acts of violence.<sup>56</sup> The first part of the provision proscribes an explicit call to commit a violent act or terror. It should be noted that this part is a novel prohibition, since section 4 (a) of the Prevention of Terrorism Ordinance failed to proscribe explicit call to commit an act of terror or violence, and proscribed only implicit indirect incitement. This part is easily justified and is consistent with the American prohibition against explicit direct advocacy for an unlawful act. This is the basis for a distinction between indirect incitement as opposed to direct incitement, which is explicit advocacy of illegal action, and does not easily implicate free speech principles.

The expansion of the prohibition is based on the second prong: proscription of praise, support and encouragement of a violent act. The second prong adopts the wording and the prohibition previously stated in section 4 (a) of the Prevention of Terrorism

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<sup>56</sup> Gur-Arye, Supra note 27, at 172-175

Ordinance, only expanding the prohibition against every individual, not necessarily a member of a terrorist organization. Another difference between the language of section 4 (a) and the 2002 amendment is that the current provision substitutes “support” of a violent act, for “sympathy” to a violent act. This prohibition goes further beyond prohibiting explicit express incitement to a violent act, by proscribing expressions that implicitly and indirectly may lead to what has been termed as “a climate of violence”.<sup>57</sup> Expressions that praise acts of violence influence the beliefs or opinions of the audience as to the legitimacy of such acts, and thereby contribute to the creation of a social climate that may produce violent acts in the future. They are distinguished from expressions explicitly inciting violent acts which are intended to and are likely to influence the audience to act violently. Moreover, the expansion is justified based on the assumption that incitement today tends to be more indirect and less explicit, as speakers infrequently explicitly advocate lawlessness actions.

**“Objective Dangerousness” Test in Lieu of the “Near Certainty Probability Test”.**

The amendment applies the “objective dangerousness” test to the expression at issue, refraining from a probability test: the “near certainty test” acknowledged in Kol Ha’am. The test provides for an inquiry into the dangerousness of a particular publication on the basis of its content and the circumstances in which it was published. The purpose of this amendment was to relax the evidentiary hurdle of the prosecution’s burden to prove “near certainty”, and to expand the scope of liability to cases in which the prosecution’s burden to prove “the near certainty probability test” seems impractical and impossible.<sup>58</sup> Omitting a probability test, and adopting instead the “objective

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<sup>57</sup> Miriam Gur-Arye, *Supra* note 27, at 176-178

<sup>58</sup> Explanatory notes to the Draft Bill amending the Penal Law, 1999

dangerousness test” was intended to enable law enforcement authorities and accordingly the courts to take into considerations all the circumstances relevant to the specific expression, and turn the charging decision into a clear context fact specific decision. The probability test of “near certainty” is aimed at minimizing the limitations on freedom of speech. The amended provision omits the probability test, acknowledged ever since the benchmark decision in Kol Ha’am adopting instead a consequentialist approach based on the “totality of circumstances “objective dangerousness test”, which is broader and open ended standard, as opposed to a bright line rule.

### **Public Incitement as Distinguished from Soliciting an Individual**

Under the law of complicity, solicitation imposes criminal restrictions upon speech intended to influence another to commit a crime. The solicitor will be held liable as an accomplice in that offense upon proof that the actor was indeed influenced by the solicitor’s speech, adopted the idea, and perpetrated the crime. Unsuccessful solicitation occurs when the solicitor’s speech does not motivate another to perpetrate a crime.<sup>59</sup>

Legal Israeli scholars have been debating for years whether the criminal law should distinguish between public incitement and soliciting an individual to commit an unlawful act of violence. The debate is illustrated in the writings of two leading Israeli criminal law experts: Professor Kremnitzer and Professor Gur-Arye.

Professor Gur-Arye argues that public incitement may be characterized as an attempted solicitation, under general solicitation doctrine.<sup>60</sup> The argument with this respect is that liability for attempted solicitation is applicable in cases in which the

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<sup>59</sup> Section 30 of the Israeli Penal Law (Amendment no. 39 to the Penal Law) 1994 proscribes: a person who causes another to commit an offense by persuasion, encouragement, demand entreaty or by any means that comprises an element of applying pressure is an instigator of an offense.

<sup>60</sup> Gur-Arye, *Supra* note 27, at 193-194

incitement does not lead to violence, i.e.: this is an unsuccessful solicitation, or in the alternative liability should be appropriate in cases where it cannot be proven that the ensuing violence was caused by the incitement.<sup>61</sup> In Gur-Arye's view, instead of prosecutions based on a provision which proscribes a praise, support or encouragement of a violent act, the prosecution could have indicted individuals after the Rabin assassination based on conspiracy doctrine, under the theory of an attempted solicitation, where the causal link between the speech and the assassination could not be proved.<sup>62</sup> Moreover, Professor Gur-Arye argues that the common law does not distinguish between an appeal to an individual and an appeal to unspecified audience with regard to incitement.<sup>63</sup> The offense of incitement proscribes conduct, including speech, intended to influence another to commit a crime. The common law does distinguish between incitement cases in which the appeal reaches the intended audience and attempted incitement cases in which the appeal is not received. The Model Penal Code expressly abolishes this distinction: the definition of Criminal Solicitation under section 5.02 includes "uncommunicated solicitation" as well.

As mentioned above, the increased law enforcement pursued by the prosecution pursuant to Rabin assassination, focused on charging individuals based on section 4 (a) in the Prevention of Terrorism Ordinance and the sedition provision, and no attempt has been made to indict individuals based on the law of complicity under the theory of an attempted solicitation. Professor Gur-Arye argues that the amended provision is

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<sup>61</sup> Gur-Arye, Id at 192-194

<sup>62</sup> Gur -Arye, Id

<sup>63</sup> Gur -Arye, Id at 199

superfluous since the prosecution is already provided with a tool to combat inciters to violence.<sup>64</sup>

This prosecutorial policy reluctance to employ the attempted solicitation theory was based on adopting a common view expressed by legal scholars, among them the leading criminal law expert professor Kremnizer who argues that under solicitation doctrine the person solicited must be either a particular individual or an identifiable specific group, while incitement is directed towards a large unspecified audience.<sup>65</sup> Professor Kremnizer argues that this doctrinal distinction between solicitation of the individual and public incitement aimed at unspecified general large crowd is deeply rooted in German law, which proscribes incitement to violence.<sup>66</sup> Kremnizer argues that the reason for adopting the distinction between public incitement and soliciting an individual, as well as a specific group, is based on the effectiveness of the solicitation. The influence exerted by a solicitor is more effective than the influence of an inciter on a public audience, due to personal connection between the solicitor and the person solicited, which is absent in public incitement.<sup>67</sup>

The amendment of the incitement to violence provision has ended the scholarly controversy over the proper distinction between soliciting the individual and incitement of the general public, adopting a broad view in which public incitement to a violent act is a specific offense, and prosecution of inciting behavior does not require the government to prove attempted solicitation under the law of complicity, a difficult burden to satisfy.

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<sup>64</sup> Gur -Arye, Id at 198

<sup>65</sup> Mordechi Kremnizer and Khaled Ganaim, Incitement not sedition, in Freedom of Speech and Incitement

<sup>66</sup> Kremnizer, Id, at 160-165

<sup>67</sup> Kremnizer, Id at 160-209

### **Comparative Law Supporting the Broad Legislation:**

While a couple of European countries adopted provisions prohibiting the praise of acts of violence, most are more restrictive than the Israeli provision. In countries such as Germany, Austria and Italy a criminal provision proscribes a praise of a crime already committed, and the prohibition does not apply to any act of violence.<sup>68</sup> Canada, on the other hand adopted broad provisions criminalizing statements which incite hatred “likely to lead to a breach of the peace”.<sup>69</sup> Canada has one of the most progressive laws against hate speech. Canadian law acknowledges the fundamental importance of free speech, making it subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Public incitement to hatred is criminally punishable.<sup>70</sup> The provision proscribes: “every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offense and is liable to imprisonment for a term not exceeding two years or (b) an offense punishable on summary conviction. The Canadian provision prohibits any statement which is “likely to lead to a breach of the peace”, which is a very limiting standard for freedom of speech. Bare “likelihood” is enough for the criminal prohibition, which is much broader than the previous near certainty probability test adopted in the Israeli Kol Ha’ am decision. The Canadian Supreme Court has confirmed the constitutionality of these provisions in several cases.<sup>71</sup>

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<sup>68</sup> Section 140 of the German Criminal Code, Section 282 of the Austrian Criminal Code and Section 414 of the Italian Criminal Code. For an elaborate discussion of the European provisions see Kremnitzer, *Supra* note 65 at 205-207

<sup>69</sup> Canadian Criminal Law, R.S.C. ch. C-46 section 319 (1) (2) (1985) (Can)

<sup>70</sup> Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 *Cardozo L. Rev.* 1523 (2003) at 1542

<sup>71</sup> Rosenfeld, *Id*

### **Criticism of the New Legislation:**

Critics of the amended provision argue that the provision is too broad in scope, and its infringement upon freedom of speech significantly limits the exercise of that right.<sup>72</sup> The criticism is derived from two jurisprudential perspectives: criminal law arguments, and freedom of speech arguments.

**The Criminal Law perspective:** Some criminal law experts critique the amendment based on the argument that the provision is too broad in scope, and exceeds the general justification of criminal law. It is argued that while criminal law restrictions upon speech aimed to bring about violent conduct are justified, restrictions upon expressions aimed to influence opinions and beliefs should not be criminally sanctioned and should be countered with opposing opinions or beliefs, not by criminal law.<sup>73</sup>

In addition, critics claim that the scope of the offense is over broad, viewed from a criminal law perspective due to a lack of a specific intent requirement. It is argued that the fact that the mens rea for incitement to violence is based on the default rule: recklessness as opposed to a specific intent requirement such as in the solicitation and attempted solicitation, unjustifiably expands the scope of liability. The argument is that liability under the incitement to violence provision should be based on the actor's actual intentions to incite to violence, rather than on the inciter's conscious disregard as to what ideas and beliefs his expression may establish in people's minds.<sup>74</sup> Additionally, as already discussed above, some argue that the amendment is superfluous since cases of public incitement should be prosecuted under the theory of attempted solicitation.<sup>75</sup>

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<sup>72</sup> Gur-Arye, Supra note 27, at 157-158

<sup>73</sup> Gur-Arye, Supra note 27 at 177-178

<sup>74</sup> Gur -Arye, Id, at 199-200

<sup>75</sup> Gur -Arye, Id, at 198

**The Constitutional law perspective:** From a freedom of speech jurisprudence perspective the argument is that the provision places substantial limitations on the scope of freedom of speech since it proscribes indirect and implicit expressions which praise, encourage or support a violent act, which exceed the scope of a prohibition against an act which explicitly calls for violence.<sup>76</sup> Professor Gur Arye argues that criminal restrictions cannot be justified in order to prevent what she refers as “preventing a climate of violence”.<sup>77</sup> The argument is that the proper way to combat a “climate of violence” created by expressions praising acts of violence is by attempting to create a counter-climate of tolerance in which opposing views, even those that are emotionally charged, may be aired. A tolerant social atmosphere can be achieved through explanation and education rather than by oppression of speech.<sup>78</sup> Moreover, the opponents of the amendment claim that the true test of freedom of expression is when beliefs, opinions, and views are expressed that provoke anger and disgust. Allowing the opportunity to express provocative opinions and beliefs obliges those who are offended to denounce them and voice contrary opinions. The contrary opinions will help to expose the truth and thereby contribute to creating a different social climate.<sup>79</sup>

Critics argue that other legal systems which adopted criminal provisions proscribing praise for violence have limited the scope of the prohibition. In Germany for example, the prohibition is limited solely to a praise of a crime (generally one of violence) already committed and not to any act of violence.<sup>80</sup>

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<sup>76</sup> Gur-Arye, Id

<sup>77</sup> Gur Arye, Id at 177-178

<sup>78</sup> Gur Arye, Id at 180-181

<sup>79</sup> David Kretzmer, Freedom of Speech and Racism, 8 Cardozo L. Rev. 445, at 467-491 (1987)

<sup>80</sup> Section 140 of the German Criminal Code. For a comparative analysis of similar offenses in Europe see also: Kremnitzer, Supra note 65

**Practical Implications: Freedom of Speech Jurisprudence Pursuant to the incitement to Violence Amendment and Procedural Safeguards Employed to Ensure Limited Enforcement of the Provision**

As a practical matter, and based on my practical experience, I believe it is safe to conclude that the existence of the broad provision does not necessarily lead to an increase in the prosecutions brought against individuals for political expressions. In practice, procedural safeguards ensure a very limited and restrictive law enforcement of criminal sanctions aimed at expressions. As mentioned above, the amended provision may look at its face as being over broad, adopting an expansive approach which favors prosecution and applies vast restrictions on political expressions. In my view, reality has proven that the amendment did not lead to an increase in indictments brought, or to a change in restricted prosecutorial policy with respect to political speech, and the concerns with regard to the scope of freedom of speech have not materialized in practice.

In my opinion, Israel's freedom of speech jurisprudence which was established prior to the amendment and prior to the assassination has not changed in any significant aspect. Empirical evidence suggests that only a few indictments, about a dozen in 5 years, have been brought by the State's Attorney's office since the 2002 amendment.

Moreover, in practice, enforcement of the incitement to violence provision is limited in scope and narrowed significantly according to specific directives and instructions issued by Department of Justice and the Attorney General. The procedural safeguards focus on two aspects limiting the scope of enforcement: the investigation decision and the prosecutorial decision, expressed in two pronged instructions.

**Limitation on the decision to open up an investigation by the Israel National Police:**

The Department of Justice issued specific detailed instructions to the Israeli National Police, prohibiting it from deciding upon an investigation based on its own discretion. The decision whether an investigation should be conducted pursuant to a specific expression is solely in the hands of the Attorney General's Deputy. This is a personal decision, which cannot be delegated to others. The directions instruct the Israeli National Police to transfer each and every complaint which raises suspicions based on political expressions which may incite to violence, to the examination and decision of the Attorney General's deputy. Police is instructed to transfer to the Attorney General's deputy all investigatory material it has obtained, such as recording of the expressions, along with a legal opinion and the recommendations of the Investigation department. Until the Attorney General's Deputy decision is made, Police is prohibited from taking any investigatory action with respect to a complaint which involves political speech.

**Second: Instructions to all prosecutorial authorities,** including all District Attorney offices in the State of Israel. As mentioned above, the decision whether to issue an investigation is the personal authority of the Attorney General's Deputy, as well as the decision whether to prosecute a specific case. Accordingly, no District Attorney in Israel is authorized to indict an individual prior to the decision of the Attorney General's Deputy. These directives and instructions are aimed at achieving uniformity and centralization by limiting the discretion of Police and D.A offices ensuring that only the highest ranking authority is vested with the authority to charge an individual with a criminal offense which limits freedom of expression based on political speech.

### **Are procedural safeguards enough to ensure the exercise of freedom of speech?**

As a matter of empirical evidence it is undisputed that the number of indictments charged by the Israeli prosecution is very limited, and in practice charges are brought only in severe and unique cases, under circumstances in which an explicit call to commit an act of violence is presented. Nonetheless, the issue is whether the procedural safeguards taken by the Department of Justice and the Attorney General's office suffice to ensure the full and genuine exercise of freedom of speech rights.

In my personal experience, the answer is in the positive, and the specific directives and instructions adopted do provide adequate safeguards against the infringement upon freedom of speech rights. Nonetheless, it should be acknowledged, that in some cases, erroneous application of the instructions happen, and mistakenly law enforcement may take investigative steps in the absence of a prior approval and instruction of the Attorney General's Deputy. In my experience these cases are rare, since the directives and instructions to law enforcements authorities are very clear. For example, once a protest demonstration is held, and one of the participants is apprehended carrying a sign which may look as a call to commit a violent act, the police in the scene is instructed to refrain from interrogating the suspect under the incitement to violence provision, and wait for the Attorney General Deputy's further instructions, which are often given, over the telephone, since instructions are needed immediately, on the spot.

A counterargument to the empirical evidence which indicates a low indictments rate is that the fact that in practice only a limited number of charges are brought is not sufficient evidence that freedom of speech rights in Israel are fully exercised. It may be argued, that the bare existence of the broad criminal provision is in itself a practical

deterrence for many individuals. I think there is a possible argument that the criminal provision creates a “chilling effect” on people’s behavior, which may limit the free expression of ideas, by suppression of ideas which may be provocative. The concern is that a person who is sufficiently sensitive to the possibility that his words might lead someone to violent action must refrain from expressing his views, just because of the deterrent effect the criminal provision creates and the possible “chilling effect” it creates for law abiding individuals.

In my view, this possible argument is a strong one, since procedural safeguards may provide only a limited response to that concern. Despite the fact that in practice, criminal charges based on expressions inciting to violence to violence are rare, there is no empirical evidence as to the possible deterrent implications and the chilling effects the criminal provision creates. Nonetheless, in my opinion, a democratic society has to strike the proper balance between the exercise of individual rights such as the freedom of speech and the government commitment to protecting its citizens against expressions inciting to violence. The inherent dangerousness implicated by calls to commit an act of violence, and praising of violent acts under circumstances which illustrate that there is a real possibility that the inciting expression will lead to an act of violence justify the cost. In my opinion, this cost-benefit analysis, which calls for striking the proper balance in each and every case, based on the specific circumstances and the content of the expression, is a justified means a democratic society who constantly faces terror and violence may employ.

**Conclusion:**

My purpose in this paper was to examine the scope of freedom of speech rights in Israel and specifically the scope and breadth of the limitations placed upon the exercise of these rights. The core issue was whether the change in prosecutorial policy i.e.: increased prosecutions of political expressions under the theory of incitement to violence has survived, and whether the amendment of the incitement to violence provision has been followed by a subsequent increase in prosecuting political expressions.

In my view, despite a short period in which a change took place in the prosecutorial policy pursuant to Rabin's assassination, current freedom of speech jurisprudence illustrates that the previous balance has been restored, and the government retreated back to a pretty broad scope of protection and to a narrow application of the incitement to violence provision. Pursuant to the enactment of the incitement to violence provision, there was a considerate concern that the scope of protection of freedom of speech in Israel would be narrowed, giving way to expanding the limitations on the exercise of the right. In my view, this fear has not materialized, and the amendment has not changed significantly the scope of freedom of speech, and empirical evidence illustrating only a handful of indictments strongly support that conclusion. Similarly, in my view the enactment of the Basic Law: Human Dignity and Liberty has not worked to expand the scope of freedom of speech protection. Thus my conclusion is that freedom of speech jurisprudence is an established doctrine, adopted once Israel was established and its scope has not changed significantly ever since, even pursuant to amending the incitement to violence provision.

In my opinion, despite endless terrorist attacks and in light of the fact Israel has been coping with terror for years, Israel's legal system has not compromised its commitment to protecting constitutional human rights, namely: freedom of speech. Israeli legal system continues to give deference to freedom of speech concerns, acknowledging that democracy is truly tested in times of crisis, emergencies and national security threats and terrorism, and the right is a crucial component in a democratic regime. I believe the legal system has not resorted to hysteria and to an unjustified increase in prosecuting political expressions, despite severe and significant threats of violence, both verbally and physically, and repeated terrorist attacks. In my view, the Israeli legal system has struck the proper balance between protecting individual human rights and specifically freedom of speech rights, and protecting the public against dangerous expressions illustrating a real possibility that they may lead to violent actions injuring human life and limb.

The core issue which sheds a light on the discussion of limits on freedom of speech rights is whether the same legal standards and tests adopted in times of peace, in the absence of emergency or unique circumstances are still applicable under stressful circumstances, specifically, whether they are forcefully applicable when a state is coping with terrorist threats. Although this paper focuses on the Israeli experience I believe the issues and concerns which are raised here are forcefully relevant to the American legal system which is coping with terrorist threats, and has to re-examine whether its previous jurisprudence is still applicable and provides a fit and suitable response in light of new threats of terrorism. At this point, it may be too early to draw conclusions with respect to the American experience but it is my guess that this issue will remain a core concern in the following years.

