

# Les certitudes du droit

# Certainty and the Law

*Sous la direction de*  
*Ejan Mackaay*  
*Editor*



Les Éditions Thémis



Université de Montréal  
Faculté de droit  
Centre de recherche  
en droit public

# Limits to Freedom of Speech : The Case of Incitement<sup>1</sup>

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Raphael Cohen-Almagor<sup>2</sup>

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1 Elaborated version of this essay appears in Raphael COHEN-ALMAGOR (ed.), *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin*, Ann Arbor, University of Michigan Press, 2000.

2 Department of Communication, University of Haifa; Fulbright-Yitzhak Rabin Scholar and Visiting Professor, UCLA School of Law (1999-2000).



On November 4<sup>th</sup> 1995 Prime Minister Yitzhak Rabin was assassinated in the main square of Tel Aviv. It was at the close of a large demonstration that had called for peace and protested against violence. Following the assassination people felt the need to ponder their own activities and statements before the assassination. Questions were raised about whether the leadership, the media and others were responsible for the atmosphere which might have been conducive to the rise of people like the assassin Yigal Amir. People who had a say in public forums utilized the media to ask themselves whether they had a share in creating a violent atmosphere that nourished murderous thoughts. Voices were raised declaring that there was "too much freedom in Israel," too much freedom of expression, too much freedom on the part of the media.

In this essay, the issue of inciting speech is discussed, focusing attention on four examples of incitement prior to Prime Minister Rabin's assassination that required intervention but in which insufficient measures were taken to forestall them or to punish the individuals involved. These cases occurred after the signing of the Oslo Accords in September 1993, which increased the rift between the political "left" and "right" in Israel. The first two are examples of stark political extremism. The other two are examples of incitement under religious disguise. The four cases do not exhaust all cases of incitement that took place during the heated early 1990s. Rather, they are illustrative of the incitement campaign against the Rabin government and the peace process.

## **I. Incitement: Examples from the Recent Israeli Experience**

### **A. Stickers carrying the slogan "Rabin Should Be Killed"**

On October 30<sup>th</sup> 1993 stickers were circulated in a small town called Or Akiva during a visit of the then Minister of Labor, Ora Namir. The stickers conveyed the following statement: "Rabin Should Be Killed." A target was mapped, and a clear statement conveyed as to what the target's fate should be. It was an explicit call for murder. Moreover, the social setting was such that it increased the likelihood of taking

harmful action. The stickers were distributed during a visit of a minister in Rabin's government and there was a likelihood that one or more of the people in the public, many of whom objected to the Oslo Accords and the policies of Rabin's government, might take measures to kill Rabin's representative. This statement constitutes incitement that should not be protected under the Free Speech Principle.

The two who circulated the stickers, Ahuva Vaanunu and Gil Sharon, stood trial for conducting seditious actions (under section 133 of the Penal Law, 1977) and for circulating seditious publications (under sections 134a, 26 and 499 of the Penal Law, 1977). They received very lenient sentences. Judge Amiram Sharon sentenced them to three months imprisonment; six months probation and a fine of NIS 1,500 each (roughly \$ 500).<sup>3</sup> This sentence could not be regarded as a proper deterrent against those who incited the murder of Prime Minister Rabin. Instead of raising a loud voice that the courts would not tolerate explicit calls for murder, the court dismissed the issue as a mistake made by the two defendants, ignoring the context in which the stickers were circulated and the heated atmosphere that required law-and-order intervention to calm it down.

## **B. Rabin in black S.S. uniform**

In October 1995, during a large demonstration by the Israeli political right protesting against the Oslo Accords, some extreme right wing activists associated with the *Kach* party<sup>4</sup> waved photomontages of Rabin dressed in a black S.S. uniform. The Prime Minister's face was placed over the body of the notorious Nazi leader Heinrich Himmler. The legal authorities took no steps to curtail those incitements or to prosecute those who waved the alarming pictures. In the Israeli culture it is clear what the fate of a Nazi should be. Nazis are the most vehement enemies of the Jews and, therefore, have no place within Israeli society. They should be eliminated. In this context, the

3 Criminal file 152/94. *State of Israel v. Gil Sharon and Ahuva Vaanunu*, Hadera Magistrate's Court.

4 See R. COHEN-ALMAGOR, "Vigilant Jewish Fundamentalism: From the JDL to Kach (or 'Shalom Jews, Shalom Dogs')", (1992) 4 *Terrorism and Political Violence*, N° 1, 44.

difference between calling a group "Nazis," and targeting one individual by this revolting title and dressing him in a black S.S. uniform is emphasized. The legal authorities ignored this clear incitement. Only after Prime Minister Rabin's assassination were measures taken to track down the inciters and to investigate them.

The two activists stood trial for brandishing the photomontage. Defendant 2 was also accused of writing the slogans "Rabin A Victim of Peace, Peres Is Next" and "Peres Continues the Way of Nazi Hitler."<sup>5</sup> Judge Ben-Dor noted that the two defendants had no previous criminal records and that the behavior stemmed from their ideological convictions. In his opinion, the balancing formula required withdrawal of freedom of expression when the harm to public order was severe and serious, as was the case here. The defendants' offense severely damaged public order. The photo of Prime Minister Rabin dressed in S.S. uniform evoked outrage in every Jew. People who conceive the prime minister as a traitor, as a person whose policies might lead to the destruction of Israel as the Nazis brought about the destruction of the Jewish people, are urged by this photomontage to harm Prime Minister Rabin. Graffiti such as "Rabin A Victim of Peace, Peres Is Next" evoked similar feelings in like-minded people. Both defendants were accordingly convicted. The sentence of Defendant 1 was three months conditional imprisonment for one year and 152 hours of communal work. Defendant 2 had just opened a new business and needed to devote his time and energy to this enterprise, so the considerate judge sentenced him to three months conditional imprisonment for one year and a fine of NIS 950 (roughly \$ 300).

With all due respect I think that these are ludicrous sentences. Incitement must be excluded from the Free Speech Principle and regarded as a criminal offense carrying severe punishment. Today there is room for legislation in Israel which would sharpen the distinction between incitement and advocacy. A meticulous analysis is required. The Penal Law must be amended to exclude incitement. It is important to add an article concerning calls for the death of a certain person or people, to

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5 Criminal file 673/95, Magistrate's Court, Jerusalem, March 17<sup>th</sup> 1996, judgment delivered by Judge Uri Ben-Dor.

determine a severe punishment by law for such a transgression, and to ensure its proper and serious implementation. The legal establishment has refrained from enforcing the Sedition Law because it is not specific enough. As the former government's legal advisor, Professor Yitzhak Zamir was quoted saying that which he had repeatedly stated in private conversations, namely, that the broad definition and ambiguous wording of the Sedition Law would justify daily legal actions against newspapers which publish what could be interpreted as incitements. The fear of the slippery-slope syndrome has caused legal paralysis. It is important that the law be corrected, the sooner the better. It is further noted that article 138 of the Penal Law reads that an act, speech or publication must not be considered seditious if its purpose is to prove that the government was misled or mistaken, or to point out imperfections or flaws in the laws of the state; it also states that the means by which these observations are presented must be *kosher*, i.e. proper, within the law.<sup>6</sup>

I also support the amendment of the Penal Law to the effect of prohibiting the use of Nazi symbols in the Israeli political culture (possibly within the Law Prohibiting the Denial of the Holocaust, 1986). It seems that Israeli legislators did not consider passing such a law previously, assuming that Jews would refrain from using Nazi symbols for political purposes. The last months of 1995 proved them wrong. Legislation must say its words clearly: there is no room for Nazi symbols in the Israeli social arena/political culture.

It should be added that apparently not all the facts of this affair were revealed to the public. There is room to suspect that the lenient sentences were handed down also because of the involvement of the Israeli Internal Security Service (SHABAC) in the circumstances. It appears that the ideological zealots were acting under the directives of a SHABAC agent named Avishai Raviv. The SHABAC actually helped to found a terrorist organization named *Eyal* that was headed by Raviv. I repeat: it was not a case of installing an agent into an existing terrorist organization in order to disclose its activities and warn against violent actions. Rather it was a case of founding a **new** terrorist organization that was extremely instrumental in generating an

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Chapter Eight, Article One, Section 138 (1) (2) (3) of the Penal Law. Laws of the State of Israel, Special Vol.: Penal Law, 5737-1977.



atmosphere of hatred and incitement that was conducive to the assassination of Prime Minister Rabin. Raviv was one of the leading figures in the radical camp that fought against any compromises for peace and for the unity of *Eretz* (the Land of) *Israel* since the mid-1980s. His activities included not only hate speech but also violent attacks on Arabs. I confess that the logic of assisting such a person, making him a leader against the foundations of Israeli democracy, and financing a terrorist organization by a prominent government agency is beyond my understanding.

A further note has to be made with regard to the role of the media in the Rabin/Himmler affair. In the Israeli culture and social context, printing photos showing Prime Minister Rabin in Nazi uniform is unethical. It is one thing to report that during a demonstration pictures of Rabin dressed in a Nazi uniform were waved, and quite another to actually print the pictures in the newspapers and by this serving the interests of the inciters. The media should not serve as a platform for spreading hatred and violence.

Indeed, Moshe Vardi, Editor of the major Israeli newspaper, *Yedioth Ahronoth*, applied self-censorship and refrained from printing these pictures. This is an example of applying ethical codes without the need for governmental or legal interference.

### C. Rabbi Ginsberg's seditious pamphlet

In September 1994 Rabbi Yitzhak Ginsberg published a pamphlet entitled "Baruch the Man: Five General Commandments (*Mitzvot*) that are Intrinsic Perspectives in the Act of Saint Rabbi Baruch Goldstein" in which he set forth *Halachic* (derived from Jewish law) and ideological justifications for the murder in the Cave of *Machpellah* (the burial place of the Patriarchs and their wives in Hebron) in February 1994.<sup>7</sup>

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7 On February 25<sup>th</sup> 1994, Dr. Baruch Goldstein entered the Cave of *Machpellah* and massacred in cold blood some twenty-nine Palestinians praying in the mosque inside the Cave.



The five *Mitzvot* which were the impetus for Dr. Goldstein's act, according to Rabbi Ginsberg, were revenge, removal of evil, *Kiddush Ha'shem* (sanctification of the Holy Name), deliverance of souls, and war. Such a pronouncement calls into question whether Judaism is compatible with humanism. It was for Attorney General Ben-Yair to examine whether this praise constituted sedition according to the Penal Law.

The Penal Law defines "sedition" *inter alia*, as:

*arousing discontent or resentment amongst inhabitants of Israel or promoting feelings of ill will and enmity among different sections of the population.*<sup>8</sup>

I am not too happy with the language of this law, which provides great latitude to restrict essential freedoms. The law should be reformulated in more restrictive terms. Nevertheless, it is argued that, on some occasions involving incitement, it is better to apply the law as it is than to convey an indulgent message to inciters that their malicious declarations may be voiced and nothing will be done to curb them.<sup>9</sup> In my view Rabbi Ginsberg's pamphlet arouses discontent and resentment amongst Palestinians and Israelis and it prompts feelings of ill will and enmity among different sections of the population. There was room to try him for sedition.

Moreover, Rabbi Ginsberg should have stood trial for violation of two other laws. He should have been prosecuted for violation of Section 4 of the Prevention of Terrorism Ordinance, 1948, which says:

*a person publishing praise, sympathy or encouragement for acts of violence calculated to cause death or injury, and a person assisting the organization in its activities,*

8 Chapter Eight, Article One, Section 136 (3) (4) of the Penal Law. Laws of the State of Israel, Special Vol.: Penal Law, 5737-1977.

9 For further discussion see R. COHEN-ALMAGOR, "Combating Right-Wing Political Extremism in Israel: Critical Appraisal" (1997) 9 *Terrorism and Political Violence* N° 4, 82.

*is subject to criminal proceedings and a maximum penalty of three years' imprisonment and/or a fine of L1,000.*

Alternatively or additionally Rabbi Ginsberg should have been charged for "incitement to racism" under sections 144 (A-E) of the Penal Code. In August 1986, in its fighting against the *Kach* movement established by Meir Kahane,<sup>10</sup> the Knesset passed a law that specifies "incitement to racism" as a criminal offense.

*Anyone who publishes anything with the purpose of inciting to racism is liable to five years imprisonment (144B);*

and:

*anyone who has racist publications in his or her possession for distribution is liable to imprisonment for one year (144D).*

The term "racism" is defined as:

*persecution, humiliation, degradation, manifestation of enmity, hostility or violence, or causing strife toward a group of people or segments of the population — because of color or affiliation with a race or a national-ethnic origin (144A).<sup>11</sup>*

The reading of Justice Matza's recent judgment in *Rabbi Ido Elba v. State of Israel*<sup>12</sup> leads me to infer that today, after Prime Minister Rabin's assassination, Rabbi Ginsberg might have been charged for inciting to racism.

10 For discussion on Meir Kahane's ideology see his most comprehensive book *Uncomfortable Questions for Comfortable Jews*, Secaucus, N.J., Lyle Stuart, 1987.

11 For critical discussion of this law see R. COHEN-ALMAGOR *The Boundaries of Liberty and Tolerance*, Gainesville, Fl., University Press of Florida, 1994, chapter 13.

12 Criminal Appeal 2831/95. *Rabbi Ido Elba v. State of Israel* (September 24<sup>th</sup> 1996).

However, at that time Rabbi Ginsberg did not stand trial neither for incitement to racism nor for sedition, nor for contravention of the Prevention of Terrorism Ordinance. Only after the abominable assassination did the authorities take action against him. On March 10<sup>th</sup> 1996 Rabbi Ginsberg was put under administrative detention, one of the most anti-democratic measures in the legal framework of Israel, for a period of two months. The grounds for his detention order were classes in which Rabbi Ginsberg told his students that there was a *Halachic* duty to take revenge against Arabs for the massacres conducted by the *Hamas* and the *Islamic Jihad* in Jerusalem, Ashkelon and Tel-Aviv.

Rabbi Ginsberg appealed to the Supreme Court against the detention decision.<sup>13</sup> His main contentions were that nothing in what he said could serve as basis for the assumption that a probable connection existed between his statements and harm inflicted upon Arabs by his students. Rabbi Ginsberg maintained that his views were not one sided. In support he brought evidence showing that in one of his publications he said that:

*it is forbidden to harm a non-Jew who is not at war with us.*<sup>14</sup>

The state representative argued in response that Rabbi Ginsberg exercised strong influence on his followers and that his preaching to take revenge on Arabs established grounds to suspect that the students might act upon their Rabbi's instructions.

Justice Dalia Dorner accepted Rabbi Ginsberg's appeal. She explained that there was scope for administrative detention when standard measures were deemed insufficient to secure public peace. Thus, when it was impossible to issue an indictment because the evidence, though reliable, was inadmissible and a near probability existed that forbearance from detention might bring about substantial harm to public and

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13 A.A.D. (Appeal Against Administrative Detention) 4/96. *Rabbi Yitzhak Ginsberg v. Prime Minister and Minister of Defence* (March 28<sup>th</sup> 1996).

14 *Id.*, paragraph 3.

state security, then detention was justified. In the present matter it was not claimed that Rabbi Ginsberg might do things that would endanger public security. Rather, Rabbi Ginsberg was arrested out of fear that his pronouncements might prompt his students to harmful conduct. Moreover, Rabbi Ginsberg lectured frequently to hundreds of people and published his views on paper.

Justice Dorner mentioned that in one of his publications, Rabbi Ginsberg regarded Baruch Goldstein's massacre at the Cave of *Machpallah* as *Kiddush Ha'shem*. Unfortunately she refrained from voicing an opinion as to whether this writing contravened Israeli law. It was nevertheless obvious that Rabbi Ginsberg's lectures and publications exhibited no lack of clear evidence and material, so there was no need to resort to the exceptional measure of administrative detention.

I agree with Justice Dorner that there was no room to place Rabbi Ginsberg under administrative detention. I have strong reservations with regard to the employment of this measure in democratic societies. In another article I wrote that the procedure of administrative detention is manifestly unjust for it lacks proper hearing and due process of law. It is contrary to the democratic spirit and to liberal reason that proscribes arbitrary arrests. This procedure is commonplace in authoritarian regimes. It is the kind of instrument despots use to suppress opposition. They see no obligation to insist on rules of evidence and to disclose information to individuals under arrest. In contrast, democracies require that all legal procedures be exhausted before putting individuals behind bars. In a court of law, the prosecution has to prove that criminal offenses have been committed which justify penalties. Defendants have the right to be represented by lawyers, to summon witnesses and to cross-examine them. The administrative detention procedure eschews this and, therefore, is contrary to the notion of doing justice. Thus, my contention is the following: let the prosecution prosecute, the defendants defend themselves and the court of justice meet out justice in accordance with material evidence. And if there is not sufficient evidence to prosecute, or if the

prosecution is unable to produce relevant material, the defendants should retain their freedom. No procedure should exist to override the administration of justice.<sup>15</sup>

While agreeing that detention should not be considered just another preventive measure to be selected from the arsenal of preventive measures and that it should not serve as a tranquilizer or as a substitute for criminal proceedings, nevertheless there was room to file criminal charges against Rabbi Ginsberg for his inciting statements. It is reiterated that he should have stood trial for inciting to racism, for provoking acts of terror and for sedition.

One more observation regarding the Penal Law is in place. After Prime Minister Rabin's assassination, the Minister of Justice David Libai and Attorney General Ben-Yair recommended that the Penal Law dealing with seditious conduct be refined and defined more clearly. Professor Libai asked Professor Mordechai Kremnitzer of the Hebrew University Law Faculty to prepare a draft proposal for a specific incitement law.<sup>16</sup> However, at some later point this initiative was abandoned. I am sorry to say that for political reasons the Ministry of Justice never implemented its own recommendation.

#### D. *Pulsa Denurah*

The last example of incitement concerns a religious curse called *Pulsa Denurah*. In October 1995, on the eve of the most sacred day in the Jewish calendar, *Yom Kippur*, a person named Avigdor Askin, together with some other people, distributed this curse which was composed by three Cabbalists (*Mekubalim*) against Prime Minister Rabin. Mr. Askin was photographed during the recitation of the *Pulsa Denurah* prayer outside the Prime Minister's official residence in Jerusalem. The prayer called on Rabin to cease his wrongful deeds in this world; it was recited in the presence of media reporters who were invited to the scene to publicize the ceremony and to

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15 R. COHEN-ALMAGOR, "Administrative Detention in Israel and Its Employment as a Means of Combating Political Extremism", (1996) 9 *New York Int.L.Rev.* N° 2, 21-25.

16 I thank Mota Kremnitzer for providing me with the text of the draft proposal.

deliver an inciting message to the public. The message was that Prime Minister Rabin could not escape the death curse that was placed upon him because of his evil policies. In effect, Rabin's blood was allowed. This was a provocative measure calling for his death.

The legal authorities took no action against Mr. Askin. Only after the assassination, when Askin appeared on television and declared that "our prayer was fulfilled in full" did the authorities begin to look for him. Liberals may dismiss the entire story as ridiculous, saying *Pulsa Shmulsa*. But Liberals are not prone to believe in such curses. They will not be moved to help God in executing such wishes. This prayer constituted an incitement that fell on eager ears and helped to generate an atmosphere that was conducive to triggering Yigal Amir and encouraged him to carry out his heinous act.

In early March 1996 Palestinian terrorists launched a series of vicious attacks which caused the death of tens of civilians. Following those massacres, on March 6<sup>th</sup>, Mr. Askin approached the media and announced that it was his intention to perform the *Pulsa Denurah* ceremony once again, this time against Prime Minister Shimon Peres. After all, the curse proved very effective the first time, so why not give it a second shot. Once again, the media served as a good mobilizer of his intentions. On March 7<sup>th</sup> the two popular daily newspapers, *Yedioth Ahronoth* and *Maariv*, published Askin's contentions. In doing so they provided a platform for incitement.

Askin stood trial for (1) performing the *Pulsa Denurah* ceremony and for noting the connection between the ceremony and the death of Prime Minister Rabin the day after he was assassinated and also (2) for declaring that he intended to perform a similar ceremony calling for the death of Mr. Rabin's successor, Shimon Peres. The Court found Mr. Askin guilty on both accounts for violating Section 4 of the Prevention of Terrorism Ordinance, 1948. His verdict was imprisonment for a period of four months and an additional one year conditional sentence for a period of three years.<sup>17</sup> Askin appealed against the decision and as of November 1998, the appeal was still

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17 Criminal file 827/96. *State of Israel v. Avigdor Askin*, Jerusalem Magistrate's Court.



pending and Askin was still free, continuing to spread hatred and incitement against those conceived by him as "Israel's enemies." *Yedioth Ahronoth* informed that a survey conducted among Russian immigrants reveals that Mr. Askin was regarded by this large sector as the fourth most prominent political personality in Israel in 1997. There are speculations that Askin had also some connections with the SHABAC.<sup>18</sup>

## II. Further Thoughts

Prime Minister Rabin's assassination forced us to think harder than before about the limits of liberty and tolerance in our democracy. Israel is a young democracy. It is in process of development and undoubtedly it will face further challenges and tests. I hope these tests will not be of the nature and scope of the tragic murder of the 4<sup>th</sup> of November 1995. On the whole, Israeli democracy coped quite well with the challenge imposed by Prime Minister Rabin's assassination. Immediately after the assassination people feared that we might loose our brakes and that illiberal measures would be introduced that might hinder the Israeli nation-building tradition as a democratic state. I am happy to say that those fears were too pessimistic. Nevertheless, we must acknowledge that the assassination opened up new frontiers of political radicalism, and that ample safeguards should be installed to protect our vulnerable reality. We live in an era of political violence and extremism and we need to find answers to the radical forces that seem to go from strength to strength and to overcome them. We need to declare that incitement is well outside the boundaries of tolerance. We need to adopt legal measures to exclude it from the protection of the Free Speech Principle and not hesitate to prosecute people who call for murderous attacks on others. Unfortunately, nowadays we hear constant threats against high-ranking officials whose conduct runs counter to certain beliefs of extremists. It seems that, within the radical spheres, all boundaries are broken. The assassination of Prime Minister Rabin legitimized a new mode of conduct. The terms "political assassination" and "liquidation lists" became part of this place. I do not recall hearing those expressions prior to Prime Minister Rabin's assassination with

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18 Shosh MULAH, "Why Nobody Stops that Person?", *Yedioth Ahronoth* (November 7<sup>th</sup> 1997), pp. 12-15, 71 (7 Days Supplement).



the frequency and intensity that we hear them now. Even in the heyday of the quasifascist Meir Kahane, during the mid-1980s, people were much more careful in expressing themselves. It is our duty to curb this frightful tendency. We must take stringent action now if we do not want to face yet another assassination. The legislature, the police, the courts and the media should take measures to exclude certain modes of speech from our society. Furthermore, we need to fight down all forms of terrorism, whether directed against Jews or against Arabs. Terrorism and democracy cannot live together. One must make way and advance at the expense of the other. It is our common interest to work for the victory of democracy. We also need to build bridges and promote understanding between different factions of the population, especially between the secular and the religious factions. Terminology such as "we are enlightened liberals and they constitute the forces of darkness" which is often utilized by Israeli civil libertarians will not help the forces of democracy. There are enlightened individuals within the religious circles just as there are intolerant individuals within the secular circles. Israel, as a religious and democratic state, needs to work out ways to bring about the good of both traditions, and to enrich the citizens' understanding of both great forces that made Israel the state it now is.

