Amendment 66 to the Penal Law (2002), Article 144D2 – Incitement to Violence or Terror: Legislation Based on Political Considerations

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In 2002, the Israeli legislature added Article 144D2, entitled "Incitement to Violence or Terror", to the Penal Law, 1977.[1] According to this article:

> If a person publishes a call to commit an act of violence or terror, or praise, or words of approval of, encouragement for, support for or identification with an act of violence or terror (in this section: inciting publication) and if – because of the inciting publication's contents and the circumstances under which it was made public there is a real possibility that it will result in acts of violence or terror, then he is liable to five years' imprisonment.

This law is the legislature's response to the Supreme Court's call to revamp the sedition chapter of the Penal Law, Articles 136-139, and Article 4(A) of the Prevention of Terrorism Ordinance – 1948, as well as to explicitly define in the Penal Law the limits of the phenomenon of incitement to violence. This call arose, explicitly and implicitly, through disagreements in the decisions of the Supreme Court regarding the definition of the value that the criminalization of the act of sedition in the Penal Law should safeguard; the limits of the crime of sedition;[2] and the limits of terrorism-related crimes according to Article 4(A) of the Prevention of Terrorism Ordinance.[3]

The Background to the Legislative Reform

Sedition is defined in Article 136 of the Penal Law, inter alia, as follows: [...]

> 3. The creation of discontent or resentment among Israeli residents;
> 4. The promotion of conflict and enmity between different parts of the population.

The chapter on sedition in the Penal Law is based on British law from several centuries ago.[4] The historical background to the law indicates a desire within the political system, in particular the royal family, government and parliament at the time, to combat the press, which began to develop during that period, and to stifle all criticism of itself. The Mandatory British regime in Palestine incorporated the British law on sedition into the Criminal Code Ordinance – 1936. The Israeli legislature subsequently retained it in the Penal Law, though aware that it was a Mandate-era law and clearly contradictory to the fundamental principles of constitutional and criminal law, such as the principle of freedom of expression, the principle of legality, and the principles of legal clarity and certainty derived from it.[5]

Over the years, and principally during the period preceding the murder of Prime Minister Yitzhak Rabin, the chapter on sedition was used selectively in a small number of cases. There are two guiding Supreme Court rulings addressing the chapter on sedition.

The first case is *Anabtawi v. The State of Israel*,[6] which involved an Arab resident of Haifa, an alcoholic, who, while intoxicated during an early morning argument with neighbors, said to one neighbor: "Kill the Jews," "I'm going to bring Saddam Hussein to kill you," and "I'll launch an Intifada against you!"

For these statements, the Haifa District Court convicted Anabtawi of sedition and sentenced him to two years of prison time plus a suspended term of an equal duration. The court also imposed a cumulative sentence of

eighteen months and a concurrent suspended sentence of eight months. Thus the defendant was sentenced to an active prison term of three and a half years. Anabtawi submitted an appeal to the Supreme Court. At the outset of the hearing, his attorney and the prosecutor submitted a plea bargain according to which the sentences would run concurrently. In addition, the defense attorney noted that Anabtawi planned to leave Haifa (a mixed, Jewish-Arab city) and relocate to Nazareth (an Arab city) with the intention of rehabilitating himself, apparently in order to encourage the prosecutor and the Supreme Court to accept the plea bargain. The Supreme Court noted this fact and accepted the plea bargain.

I will argue that the aforementioned statements do not constitute a basis for the crime of sedition. Firstly, the statements were not made publicly, and therefore no harm was done to public safety. Secondly, the statements were made by an intoxicated alcoholic and within the context of an argument between neighbors. Thus under these circumstances, no danger was posed by the statements, even if they are perhaps immoral. Thirdly, the statements, from a criminal law perspective and in the context of protecting social values, fall within the realm of absurd actions, since the speaker concerned had no control over Saddam Hussein or over the other residents in the neighborhood (to compel them to launch an Intifada with him). Absurd actions are not prohibited by the criminal law and a person performing absurd actions is viewed as someone who is detached from reality, similar to someone who is mentally ill – an insane person.[7]

The second case is *Aliya v. The Attorney General*,[8] which involved a resident of the West Bank who photocopied flyers calling for a strike, including a threat against anyone who violated it. According to the circumstances of the incident, the flyers were not distributed, or at least it was not possible to prove that they were. The District Court convicted the accused of sedition and sentenced him to five years in prison (half of which was an active term and half a suspended sentence). The Supreme Court rejected an appeal filed against the sedition conviction, ruling that, "Preparation of the flyer is part of an overall attempt at rebellion aimed at harming the state." The Supreme Court did, however, accept a further appeal filed against the severe length of the sentence, and imposed a reduced prison sentence of three years (half an active term and half a suspended sentence).

This case, I argue, also fails to constitute the crime of sedition. Firstly, it was not proven that the publication was made public. Secondly, the conviction is based on the danger of harm posed to the state, and not on the fact that the defendant called for harming strike-breakers. The flyer's call to violence, however, was not directed against the state. A strike that has no violent basis against the state cannot constitute the crime of sedition. Such a strike falls within the realm of protected freedom of expression. Thirdly, the criminal offense of sedition is intended to (also) protect the structure of the state's regime;[9] it is very doubtful that the criminalization of the act of sedition can help to maintain a state's military hold over a specific territory.

Following the murder of Yitzhak Rabin, the practice of using of the sedition chapter of the Penal Law sporadically ended, and it came to be used in an extensive and unfocused manner against members of the (extremist, mainly settler) right-wing.[10]

As stated above, the sedition chapter of the Israeli Penal Law is legislation from the British mandatory-era and was thus enacted by a non-

democratic lawmaker. As such, it violates fundamental democratic values, including freedom of expression in all of its aspects. The use of the sedition chapter over the years was unfocused and even arbitrary. Severe criticism of it and a call to amend it were made in two fundamental court rulings. The first was a criminal appeal involving Kahane, the facts of which were as follows: Benjamin Kahane of the 'Kahane Chai' movement, prior to the latter's disqualification from participating in elections to the Knesset, published an article during the election campaign of 1992 calling for the bombing of the Arab town of Umm al-Fahem.[11] In this case, a majority of Supreme Court justices ruled that criminal offenses relating to sedition were intended to protect the structure and stability of the regime alone, and not public safety, in the sense of preventing incitement to violence in general.[12] In support of this interpretation, the majority relied upon the legislative history of the sedition chapter of the Criminal Code Ordinance – 1936, entitled "Treason and Other Offences Against the Authority of the Government." The Court also relied on the English common law, based in modern British law,[13] Canadian law,[14] and Australian law,[15] according to which the sedition chapter is intended to protect the regime (in terms of its structure and stability) and not public safety, in the sense of preventing incitement to violence. However, the majority ruled in Further Criminal Hearing Kahane that paragraphs 3 and 4 of Article 136 of the Penal Law are also intended to protect social cohesion – that is, also public safety – and therefore prohibit incitement to violence.[16] The majority relied on the wording used by the legislature in enacting the criminal offense of the "publication of racist incitement" (Article 144B) in the Penal Law,[17] as well as on a previous ruling that addressed the phenomenon of incitement to racism,[18] according to which Article 136(3) and (4) prohibit both incitement to racism and incitement to violence. Due to these differences in opinion over the social interest protected by the sedition chapter, and its anti-democratic nature, the Supreme Court called for its revision and for a clear definition of the phenomenon of incitement to violence.

Article 4(A) of the Prevention of Terrorism Ordinance, entitled "Supporting a terrorist organization," states that:

> A person who publishes, in writing or orally, words of 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 offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one thousand pounds or to both such penalties.

Article 4(A) of the Prevention of Terrorism Ordinance is discussed at length in the Jabareen Criminal Appeal and Further Criminal Hearing, which also elicited a call for legislative reform in this area. In this case, the defendant wrote a newspaper article in Arabic that praised the throwing of stones by children at Israeli soldiers during the first Intifada. According to the majority opinion in Criminal Appeal Jabareen,[19] Article 4(A) prohibits the support and publication of words of praise or sympathy for a crime that has a terrorist nature; that is, criminal acts characteristic of a terrorist organization. It does not require that the criminal act be perpetrated by a terrorist organization (as opposed to an individual).[20] In contrast to this opinion, the majority justices in Further Criminal Hearing Jabareen[21] stated that the Prevention of Terrorism Ordinance only addresses terror organizations and not individuals, and thus

only criminal acts perpetrated by terror organizations fall within the purview of Article 4(A). To strengthen their conclusion, the majority referred to the ordinance's stated purpose of fighting terrorist organizations, as well as to its historical background. Therefore, according to the majority opinion in the Jabareen ruling, the publication of words of praise and identification with a crime perpetrated by an individual is not criminally prohibited by Article 4(A) of the Prevention of Terrorism Ordinance. In addition, and as indicated in the ruling in the Kahane case, there is a contradiction in the rulings pertaining to the parameters of the criminal offense of sedition under Articles 133-136 of the Penal Law. This ambiguity led the legislature to enact an amendment and add Article 144D2 to the Penal Law; at the same time, Article 4(A) of the Prevention of Terrorism Ordinance was annulled.

Phenomena that Fall within the Category of Incitement under Article 144D2

Article 144D2 of the Penal Law defines two forms of incitement: direct incitement in the sense of an explicit or implicit call to commit acts of violence or terrorism, and indirect incitement in the sense of publishing words of support and encouragement for perpetrating an act of violence or terrorism in the future, or publishing words of praise for and identification with an act of violence that was committed in the past. Therefore, acts of violence or terror – that is, actions that entail the exercise of physical force against a person's life or limb – constitute the object of incitement.

My contention is that the addition of the term "acts of terror" is superfluous and derives from political motives. "Terrorism" is a political term;[22] terror is a Latin concept that means instilling fear through violence or a threat to use violence. From an historical perspective, "terrorism" does not have a negative or political connotation.

The use of the term "terrorism" in the political-state context reached a peak in the 19th century, when any action detrimental to the regime's image or that challenged its legitimacy was perceived as an act of terrorism. The term "terrorism" was an instrument employed by the regime to attack movements and organizations that did not identify with it. For example, immediately after the Nazi regime's rise to power, the term "terrorism" was used against rival political entities in order to persecute them. Hence, for example, the Communist Party (KPD) and the Social Democratic Party (SPD)[23] were declared terrorist organizations, on February 28, and June 22, 1933 respectively.[24]

Declaring a party, movement or organization a terrorist organization makes it illegal and provides legal authorization to exercise all means, including criminal law, to fight it. The phenomenon of terrorism is viewed as undermining the regime's stability and public safety. Therefore, from the public perspective, the fight against such organizations is justified. As Professor Gad Barzilai notes, "If obedience to the law is seen as necessary for national security, it is advisable not to criticize the law. If national security is a collective need, then it justifies laws that violate human and civil rights. The laws of 'preventing terror' are a salient example of state law that violates human and civil rights, while employing arguments of national security."[25]

The phenomenon of using law as a means of tackling a political rival is not foreign to the State of Israel. The Prevention of Terrorism Ordinance – 1948 was approved by the

People's Council, a non-elected parliament controlled by former Prime Minister David Ben-Gurion and those close to him, in order to "take care of" the Etzel and Lehi underground organizations that were his political rivals. There are two historical explanations for the legislation of the Prevention of Terrorism Ordinance. The first was the murder of the United Nations emissary, Count Bernadotte, and his aide, the French Colonel Andre Serot, in Jerusalem on September 17, 1948. The provisional government and People's Council passed the Prevention of Terrorism Ordinance at lightning speed on September 23, 1948; that is, five days after the murders. This act was intended to send a message to the UN General Assembly regarding Israel's determination to fight the phenomenon of the politically-motivated use of force, including murder. The second reason was to provide the provisional government with an additional means of "taking care of" rival political organizations. The provisional government (composed of Ben-Gurion and his associates) feared that such organizations, such as Etzel and Lehi, would not accept the authority of the new government, would fight against it and try to alter the nature of the Israeli regime.[26] The provisional government therefore wanted to concentrate all military power in the hands of the state's army, which was under the authority of the government, and therefore enacted the ordinance. Thus, as can be seen from its formative background, the Prevention of Terrorism Ordinance was originally intended to be used for political ends.

The foregoing indicates that it is best to refrain from inserting the political term "terrorism" in the law, or at least to reduce its use in the legal system as far as possible. Moreover, as stated, the term "terrorism" means the use of violence, including intimidation and the threat of violence in order to achieve a goal, primarily a political one, and therefore entails the element of violence. For this reason, the addition of the term "terrorism" to the criminal offense of incitement is redundant and surprising.[27]

The Phenomenon of Incitement to Violence: A Conduct Offense of Causing Fear and Danger

As noted, incitement can be both direct and indirect. Direct incitement constitutes an explicit or implicit call to commit acts of violence. We have already addressed the nature of direct incitement and the danger it entails.[28] The anti-social nature of direct incitement represents a challenge to the rule of law and the legal order, as well as a violation of public safety, in the sense of living in peace and security without fear or anxiety. This is the main value protected by the offense. It should be noted that the wrongdoing (anti-social act) of direct incitement is less than the wrongdoing entailed by inciting individuals or a specific, small group of individuals. The public inciter does not have the same influence as the person who incites at a personal level; the public inciter lacks a direct, personal influence on those who are incited. Public figures, the media and other entities can publish denunciations of incitement and reduce the severity of its 'anti-sociality'. Nonetheless, direct incitement is a serious phenomenon and there is clear justification for its criminalization. Indeed, direct incitement can be considered to be 'Janus-faced,' both as regards instigation, which is addressed by the general part of the Penal Law, and the phenomenon of harming public safety, which is addressed by the specific part of the Penal Law. If instigating someone to perpetrate a crime is a serious, anti-social

phenomenon the punishment for which, at least from a normative perspective, is the same as that for a direct perpetrator, then direct incitement is close to instigation and its criminalization is justified. The fact that the wrongdoing of direct incitement is to a certain extent less than that of instigation is expressed in the fact that the punishment for direct incitement is less than that for instigation. In addition, legal systems and the approach of Professor Gur-Aryeh , view direct incitement as a type of instigation;[29] that is, a serious phenomenon the prohibition of which has a clear justification.

On the other hand, indirect incitement – publishing words of encouragement and sympathy for future acts of violence, or publishing words of praise for and identification with acts of violence committed in the past – is less, even far less, anti-social in nature. The main 'anti-sociality' entails the cumulative effect of acts of indirect incitement, which could create a more conducive climate or atmosphere in which to commit similar acts.[30] The impact on internal public safety of explicit or implicit incitement, in the sense of living in peace and tranquility, including the public's sense of living in peace and tranquility, as well as on the rule of law, is more severe and effective than the impact of words of support, sympathy, encouragement and praise. Indirect incitement is a criminal offense that causes fear and danger that acts of violence might be committed.

A connecting line cannot be drawn between the publication of indirect incitement and the commission of an act of violence against the object of incitement. The phenomenon of indirect incitement is on the fringe of criminal law, at the border between the serious phenomena that justify criminalization and the less serious phenomena that do not. Therefore, designating indirect incitement as a criminal offense is permissible as an emergency measure in situations of crisis.

Furthermore, in order to prevent a situation in which the offense of indirect incitement becomes tantamount to punishing thoughts alone, the potential for committing acts of violence is required. The requirement for the potential of harm underlines the objective 'anti-sociality' inherent in indirect incitement. The cumulative test for indirect incitement is, therefore, a necessary condition for its criminality. In addition, in the absence of an objective characterization of the act of indirect incitement statements protected under freedom of expression in a democratic regime are liable to be included within the prohibition.[31] An example is the remark made by former Prime Minister Ehud Barak that he would have joined the rejectionist organizations – Hamas or Islamic Jihad – if he had been born a Palestinian in the Occupied Territories. Finally, having an objective should be required as a 'special state of mind'[32] in order to make the 'anti-sociality' of the offense more severe and to enable its criminalization.

The criminal offense of incitement to violence according to Article 144D2 of the Israeli Penal Code includes two tests: a test of content and a test of consequence. It thus requires that the acts of violence, from an abstract and objective perspective, with real potential to cause harm to life and limb, and that the inciting publication in the concrete case creates a real possibility of the commission of acts of violence liable to harm life and limb. The combined content and consequence test takes into account all the considerations and circumstances that affect the possibility of creating a danger and its realization, such as time, place, target audience, and the standing and influence of the publisher. In the words

of former Israeli Supreme Court Justice Theodor Or, proving "this potential in one specific case or another depends on the particular circumstances of each case … the court will draw its conclusions in this matter from the entirety of existing circumstances … this entails an assessment of the possible impact of the concrete publication at the time it was made. First and foremost, the court will study the content of the publication, both in terms of its meaning and its style. The court will also study the circumstances surrounding the case – which medium was used, who the target audience was, where the publication was made, and when it was done."[33]

As stated above, an objective should be required as a special state of mind in order to increase the severity of the objective 'anti-sociality' of indirect incitement, which is otherwise insufficient for applying criminal law and criminalizing the action. However, in Israeli law the prohibition suffices in practice with the defendant's awareness of committing a crime. Thus the prohibition violates freedom of expression and makes it difficult to draw a clear line between the dangerous and criminal phenomenon of incitement and publication that is protected by freedom of expression. This criticism was also leveled by the Supreme Court when it ruled that, "Such a prohibition [the publication of words of praise for acts of violence, even if committed in the past] constitutes a significant violation of freedom of expression; it is possible to accept this [however] in a democratic society when dealing with terrorist organizations, and the great and special danger they present."[34]

It seems that the legislature wanted, by sufficing with the defendant's awareness only, to greatly expand the criminal prohibition and to prevent unjustified criticism of it from both legal rulings and from the legal literature, in order to encourage the state prosecution to utilize this prohibition in a selective way, similar to the selective use of the broad and unjustified prohibition on sedition.[35] Proof of the politicization of the prohibition on incitement to violence can be found in the Knesset debates, when fractions raised arguments against the legislation and the scope of the prohibition, fearing that it would be detrimental to their supporters.[36]

This broad definition of the prohibition, which generates selective use, is flawed and violates the rule of law. The criminal prohibition is general, its application is not restricted to a specific target group, and its use is selective; it is also motivated, perhaps primarily, by political considerations, which renders it invalid. A prohibition should be clear, justified, and directed toward the general public.

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End Notes

1 Book of Laws 226.

2 Criminal Appeal 6696/96, *Kahane v. The State of Israel*, P.D. 52(1) 535; Further Criminal Hearing 1789/98, *The State of Israel v. Kahane*, P.D. 55(5) 145.

3 Criminal Appeal 4147/95, *Jabareen v. The State of Israel*, P.D. 50(4) 38; Further Criminal Hearing, 8613/96, *Jabareen v. The State of Israel*, P.D. 54(5) 193.

4 See Criminal Appeal Kahane, supra note 2, at 585; Further Criminal Hearing Kahane, supra note 2, 158. Mordechai Kremnitzer and Khalid Ghanayim, *Incitement, Not Sedition* (Israel Democracy Institute, 1997) at 7; Moshe Negbi, *Freedom of Press in Israel – Values in the Legal Mirror*, (Jerusalem, 1995) at 62; Mordechai Kremnitzer and Liat Levanon-Morag, "Restricting the Freedom of Expression Due to Fear of Violence – On the Protected Value and Probability Tests in Crimes of Incitement to Sedition and Incitement to Violence in the Wake of the Kahane Case," 7 *Mishpat U'Memshal* (2004) 308-309. See also the criticism of the definition of sedition in English law and Canadian law, which is identical to the definition in Israeli law: James Fitzjames Stephen, *A History of the Criminal Law of England*, Vol. II (London, 1883) at 298; *Law Reform Commission of Canada Working Paper 49, Crimes against the State* (Ottawa, 1986) at 35.

5 See also Kremnitzer and Ghanayim, supra note 4, at 7, 9-10; Further Criminal Hearing *Kahane,* supra note 2, at 159-160.

6 Criminal Appeal 1448/91, *Anabtawi v. The State of Israel*, Takdin Elyon, 2396 (3)91.

7 See Kremnitzer and Ghanayim, supra note 4, at 28.

8 Criminal Appeal 294/89, *Aalia v. The Attorney General*, P.D. 43(4) 627.

9 Regarding the protected value in the criminal offense of sedition, see supra note 2.

10 See also Kremnitzer and Ghanayim, supra note 4, at 10; Mordechai Kremnitzer, "What is Prohibited Incitement," in Michael Konfino (ed.), *The Power of Words and the Weakness of Knowledge: Propaganda, Incitement and Freedom of Expression* 100 (Tel Aviv: Am Oved, 2002) 104; Meriam Aryeh, "Criminal Restrictions on Expressions that Contribute to Creating a Violent Climate," in *Sefer Shemgar*, Vol. B 115 (Tel Aviv, 2003) 116-117.

11 The prosecutor's decision to indict on charges of sedition is strange, because the relevant criminal offense is incitement to racism. See Kremnitzer and Levanon-Morag, supra note 4, at 311, 317; see also Magistrates' Court Judge Z. Zilbertal in Criminal Appeal *Kahane,* supra note 2, at 546-547.

12 Criminal Appeal *Kahane,* supra note 2, at 552 and following – ruling by Justice Goldberg, at 582-583 – ruling by Justice Barak; this is also the minority opinion in Further Criminal Hearing *Kahane,* supra note 2, at 181 – ruling by Justice Barak, at 192 – ruling by Justice Turkel.

13 See *R. v. Burnes*, 16 Cox C.C. 355 (1886); *R. v. Aldred,* 22 Cox CC 1 (1909); *R. v. Chief of Metropolitan Stipendiary Magistrate, ex parte Choudhury*, 1 All E.R. 306 (1991); Lobban, "From Seditious Libel to Unlawful Assembly: Peteloo and the Changing Face of Political Crime c770-1820," 10 *Oxford Journal of Legal Studies* 307 (1990); James E. Boasberg, "Seditious Libel v. Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson," 10 *Oxford Journal of Legal Studies* 106 (1990).

14 See *Boucher v. The King* [1951] S.C.R. 265; L.R.C. of Canada, supra note 4.

15 See *Burns v. Ransley*, 79 CLR 101 (1949); Laurence W. Maher, "The Use and Abuse of Sedition," 14 *Sydney Law. Review* 287 (1982); *Review of Commonwealth Criminal Law, Fifth Interim Report, June 1991, Part V - Offences Relating to the Security and Defence of the Commonwealth*, para 32.15.

16 See Further Criminal Hearing *Kahane,* supra note 2, at 154 and following – ruling by Justice Mazza, at 183 – ruling by Justice S. Levine, at 183 – ruling by Justice Kedmi, at 185 and following – ruling by Justice Dorner. This is also the minority position of Justice Mazza in Further Criminal Hearing *Kahane,* supra note 2, at 572.

17 See the Penal Code Bill (Amendment 24) 5745-1985, at 195-196.

18 See Criminal Appeal 2831/95 *Alba v. The State of Israel*, P.D. 50(5) 221, at 244-254; HCJ 399/85, *Kahane et al. v. Executive Council of the Israel Broadcasting Authority et al.*, P.D. 41(3) 255, at 313; see also the view of Justice Mazza in Criminal Appeal *Kahane,* supra note 2, at 573, as well as Justice Or in Further Criminal Hearing Kahane, supra note 2, at 155. See also Kremnitzer and Ghanayim, supra note 4, at 7.

19 Criminal Appeal *Jabareen,* supra note 3, at 38. This view was unanimously expressed in Criminal Appeal *Alba,* supra note 18, at 295.

20 Justice Mazza in Criminal Appeal *Alba,* supra note

18, at 285; Further Criminal Hearing *Jabareen,* supra note 3, at 217; Justice Kedmi joined this view, id. at 212-215; and Justice S. Levine, id. at 214-217. See also Criminal Case (Kfar Sava) 149/96, *The State of Israel v. Axelrod*, (not yet published) November 2, 1997; Criminal Case (Jerusalem) 1035/97, *The State of Israel v. Bar Yosef*, (not yet published) November 19, 1998, page 12.

21 Further Criminal Hearing *Jabareen,* supra note 3.

22 Gad Barzilai, "Center versus Periphery: 'Anti-Terror' Laws as Politics," *Plilim* 229, 234 (2000) (Hebrew).

23 This party formed the government and the president was a party member prior to the rise of Hitler; after the fall of the Nazi regime following the end of World War II, the Social Democratic Party returned to the political arena and formed the government during various periods. The Communist Party also returned to political life, but the reasons for banning it in 1956 were, in the view of many, primarily political. See Martin Kutscha, *Hochverrat und Staatsgefaehrdung in der Rechtsprechung des Bundesgerichtshofs* (Bonn, 1962) at 69-84.

24 See Friedrich-Christian Schroeder Schroeder, *Der Schutz von Staat und Verfassung* (Muenchen 1970) at 155.

25 Barzilai, supra note 22, at 233.

26 Id. at 229; Further Criminal Hearing *Jabareen,* supra note 3, at 203-204.

27 Perhaps the term "terrorism" would be useful for a state in late stages of legislation, but it is clear that the use of term terror in the criminal offense of incitement to violence is superfluous.

28 See Kremnitzer and Ghanayim, supra note 4, at 17 and following.

29 See Gur-Aryeh, supra note 10, at 143-152; English law, see Glanville L. Williams, *Criminal Law – The General Part*, 2nd ed. (London, 1961) at 612.

30 See Kremnitzer and Ghanayim, supra note 4, at 26-27, 32-34; Gur-Aryeh, supra note 10, at 122; and Justice Or in Further Criminal Hearing *Kahane,* supra note 2, at 167.

31 See also Criminal Appeal *Kahane,* supra note 2, at 558; and the remarks of Justice Barak, id. at 589.

32 See Kremnitzer and Ghanayim, supra note 4, at 27; Kremnitzer and Levanon-Morag, supra note 4, at 350; Justice Dorner in Further Criminal Hearing *Kahane,* supra note 2, at 191.

33 Further Criminal Hearing *Kahane,* supra note 2, at 172-173.

34 Justice Or in Further Criminal Hearing *Jabareen,* supra note 3, at 205; also, in Further Criminal Hearing *Kahane,* supra note 2, at 180.

35 Regarding the selective application of criminal directives and the claim of discrimination, see also Criminal Case 2212/02, *The State of Israel v. Amara*, a ruling by the Nazareth Magistrate's Court on November 14, 2002 (not yet published). On the claim of discrimination and the selective use of the law, see also Shlomo Avineri, "How Democracies Defend Themselves," in Michael Konfino (ed.), *The Power of Words and the Weakness of Knowledge: Propaganda, Incitement and Freedom of Expression* 169 (Tel Aviv: Am Oved, 2002) 172-173. On the selective and politically motivated use of the sedition crime in Australian law, see Maher, supra note 15.

36 See also Michael Konfino, "Rhetoric as a Battlefield," in Michael Konfino (ed.), *The Power of Words and the Weakness of Knowledge: Propaganda, Incitement and Freedom of Expression* 7 (Tel Aviv: Am Oved, 2002) at 30-31.