H.C.J 73/53

H.C.J 87/53

"KOL HA'AM" COMPANY LIMITED

v.

MINISTER OF THE INTERIOR

H.C.J 73/53

"AL-ITTIHAD" NEWSPAPER

v.

MINISTER OF THE INTERIOR

H.C.J 87/53

In the Supreme Court sitting as the High Court of Justice.
[October 16, 1953]
Before: Agranat J., Sussman J., and Landau J.

Newspaper - Press Ordinance, s. 19(2) (a) - *Suspension of newspaper by Minister of Interior - Probability that publication danger to public* peace - *Freedom of expression.*

Two communist newspapers, respectively owned by the petitioners, published articles containing material which, in the opinion of the Minister of the Interior, was likely to endanger the public peace, and acting under s. 19(2) (a) of the Press Ordinance[1)] the Minister suspended both the newspapers for periods of ten and fifteen days respectively. On the return to orders nisi calling upon the Minister to show cause why the orders of suspension should not be set aside,

Held : In exercising his power of suspension under s. 19(2) (a) of the Press Ordinance, the guiding principle is that the Minister must consider whether it is probable that as a consequence of the publication a danger to the public peace has been disclosed. A mere tendency to endanger the public peace will not suffice

1) For the text of this subsection see infra p. 91.

to fulfil that requirement Even if he is satisfied that the public peace is likely to be endangered by the publication, the Minister must nevertheless consider whether that danger is so grave as to justify the use of so drastic a power as suspension of a newspaper. Although the court will not interfere with the discretion of the Minister when properly exercised, the Minister in this case had not considered the probability of the public peace being endangered, but had acted in the belief that a mere tendency in this direction was sufficient.

In the circumstances the orders of suspension had been wrongly issued and should be set aside.

Israel cases referred to:

(1) *Cr. A.* 95, 99/51; *Podamski and Others v. Attorney-General;* (1952), 6 *P.D.* 341.

(2) *Cr. A.* 24/50; *Gorali v. Attorney-General;* (1951), 5 *P.D.* 1145 .

(3) *H.C.* 10/48; *Zeev v. Gubernik, District Commissioner, Urban District of Tell Aviv and Another;* (1948), 1 *P.D.* 85.

English cases referred to:

(4) *R. v. Secretary of State for Home Affairs, ex parte O'Brien* (1923) 2 K.B. 361.

(5) *R. v. Cuthell,* (1799), 27 *How. St. Tr.* 642.

(6) *Ronnfeldt v. Phillips,* (1918), 35 *T.L.R.* 46.

(7) *Attorney-General v. De Keyser's Royal Hotel, Limited* (1920) *A.C.* 508.

(8) *John Drakard's Trial* : (1811), 31 *How St. Tr.* 495.

(9) *Leigh Hunt's Trial :* (1811), 31 *How St. Tr.* 367.

(10) *R. v. Muir,* (1793) 23 *How. St. Tr.* 117.

(11) *Wilkes v. Wood,* (1763), 19 *How. St. Tr.* 1167.

American cases referred to:

(12) *Abrams et al. v. United States,* (1919), 40 *S. Ct. Rep.* 17.

(13) *United States v. Associated Press, 52 Federal Supplement* 362 *(S.D.N.Y.* 1943).

(14) *Whitney v. People of the State of California,* (1926) 47 *S.Ct. Rep.* 641.

(15) *Schenck v. United States, Baer v. Same;* (1918), 39 *S.Ct. Rep.* 247.

(16) *Schaefer v. United States, Vogel v. Same, Werner v. Same, Darkow v. Same, Lemke v. Same;* (1919), 40 *S.Ct. Rep.* 259.

(17) *Dennis et al. v. United States;* (1951), 71 *S. Ct. Rep.* 857.

(18) *Cantwell et al. v. State of Connecticut;* (1939) 60 *S.Ct. Rep.* 900.

(19) *Near v. State of Minnesota ex. rel. Olson Co. Atty.;* (1930) 51 *S. Ct. Rep*. 625.
(20) *Gitlow v. People of the State of New York;* (1924), 45 *S. Ct. Rep*. 625.

Weitzner for the petitioner Kol Ha'am Company Limited.
Nakkara for the petitioner Al-Ittihad.
H. H. Cohn, Attorney-General, for the respondent.

AGRANAT J., giving the judgment of the court.

Section 19(2) (a) of the Press Ordinance, as amended, provides as follows :-

> "(2) The High Commissioner either with or without having caused the proprietor or editor of a newspaper to be warned under subsection (1) hereof, may
>
> (a) if any matter appearing in a newspaper is, in the opinion of the High Commissioner in Council, likely to endanger the public peace,
>
> …….
>
> by order in council suspend the publication of the newspaper for such period as he may think fit and shall state in the said order the period of such suspension."

The Minister of the Interior now takes the place of the High Commissioner.

Relying on the provision I have cited the respondent, on May 22, 1953, ordered the suspension of the publication of the newspaper "Kol Ha'am" (which belongs to the petitioner in file No. H.C. 73/53) for a period of ten days, and, on April 14, 1953, ordered the suspension of the publication of the newspaper "Al-Ittihad" (the petitioner in file No. H.C. 87/53) for a period of 15 days. The immediate reason that led the Minister of Interior to make the orders for suspending the publication of the aforementioned newspapers was the printing in each one of them of a leading article, namely in "Kol Ha'am" on March 18, 1953, under the title "Let Abba Eban Go and Fight Alone..." and in "Al-Ittihad" on March 20, under the title "The People will not Permit Speculation in the Blood of its Sons". The ground for the criticism that was voiced in both of the articles was a news item published in the newspaper "Ha-aretz" on March 9, 1953, in these words :

"Mr. Henry Morgenthau stated that Georgei Malenkov was obviously worse than Stalin, and when the fatal hour came, Israel would place 200,000 soldiers at the side of the United States.

"Israel's Ambassador, Mr. Abba Eban, expressed his agreement with Mr. Henry Morgenthau's statement that Israel could place 200,000 soldiers at the side of the United States in the event of war, and added that Mr. Morgenthau did not sufficiently appreciate Israel's recruiting capacity".

The authors of the two articles regarded this news item as a typical sign of the "anti-Soviet policy" of the Government of Israel, as at present constituted, that is to say, of the policy of readiness "to fight at the side of the United States in the event of war against the Soviet Union"; and each of them warned against this policy in the manner described below. Copies of the full contents of the said articles are appended as a supplement to this judgment, and we shall therefore confine ourselves at this point to quoting certain passages in order to learn, on the one hand, in what form the authors voiced their protest against the matters contained in the news item published in Ha'aretz" and in order to ascertain, on the other hand, the attitude of the Minister of the Interior, who was of the opinion that each of the two articles contained material likely to endanger the public peace.

The article in "Kol Ha'am" concludes with these three paragraphs:

"Despite the anti-Soviet incitement, the masses in Israel know that the Soviet Union is faithful to the policy of the brotherhood of peoples and peace. The speeches of Comrades Malenkov, Beria and Molotov have once more confirmed that. If Abba Eban or anyone else wants to go and fight on the side of the American warmongers, let him go, but go alone. The masses want peace and national independence, and are not prepared to give up the Negev in return for joining the 'Middle East Command'.

"Let us increase our struggle against the anti-national policy of the Ben-Gurion Government, which is speculating in the blood of Israel youth.

"Let us increase our struggle for the peace and independence of Israel".

In the course of the evidence he gave on behalf of the respondent, Mr. Moyal (the Director General of the Ministry of the Interior) declared, that it was mainly the second paragraph that constituted the basis for the Minister of the Interior's decision concerning the suspension of the publication of the newspaper "Kol Ha'am". The article in the newspaper "Al-Ittihad" concluded (according to the translation from the Arabic original) with the following two paragraphs :

"And so all forms of surrender by the Ben Gurion Government, and all her demonstrations of faithfulness, will not avail her with her American masters; moreover, her economic, political and state bankruptcy, internal and external, are beginning to be revealed to the masses, who have started to understand whither this Government is dragging them - not only to unemployment, poverty and hunger, but even to death in the service of imperialism, feeding them as fodder to their war machine, whilst those masses do not want that fate and will demonstrate their refusal.

"If Ben-Gurion and Abba Eban want to fight and die in the service of their masters, let them go and fight by themselves. The masses want bread, work, independence and peace, will increase their struggle for those objectives, and will prove to Ben-Gurion and his henchmen that they will not allow them to speculate in the blood of their sons in order to satisfy the will of their masters."

In the body of the order that was issued for the suspension of that newspaper, the ground given - and repeated by Mr. Moyal in his evidence before us - was that, essentially,

it was the matter contained in the first paragraph that moved the Minister of the Interior to order the temporary suspension of the newspaper in the Arabic language.

For the sake of completeness, it should be noted that, on March 23, 1953, the Prime Minister announced in the Knesset, in reply to a question that had been put to him, that the news item published in the newspaper "Ha'aretz" was a "piece of journalistic imagination", and that all that the Israel Ambassador had declared on the occasion in question was:

> "The Governments of the free world are well aware of the declared purpose of Israel to defend its borders and its form of government against revolution and attack" ("Divrei Haknesset", Second Session, Issue No. 19, p. 1096).

From time to time, a case reaches this court which raises some fundamental problem, demanding the reconsideration of ancient and well-worn principles. The two cases in question here belong to that group, and we are called upon to define the relationship that exists between the right to freedom of the press on the one hand, and on the other, the power held by the authorities, by virtue of the said section 19 (2) (a), to place a limit on the use of that right. We regard the freedom of the press as one specific form of the freedom of expression, and we shall not hereafter, for the purpose of our judgment, distinguish between two concepts.

A. The principle of freedom of expression is closely bound up with the democratic process. In an autocratic regime, the ruler is looked upon as a superman and as one who knows, therefore, what is good and what is bad for his subjects. Accordingly, it is forbidden openly to criticise the political acts of the ruler, and whoever desires to draw his attention to some mistake he has made has to do so by way of direct application to him, always showing an attitude of respect towards him. Meanwhile, whether the ruler has erred or not, no one is permitted to voice any criticism of him in public, since that is liable to injure his right to demand obedience. The historian of the criminal law in England teaches us that, in the light of that approach until the end of the 18th century, every act of criticism in writing of persons performing public functions in England, concerning their conduct in such capacity, or of the laws and institutions of that State, was regarded as falling within the

scope of the offence of "sedition" (Stephen, Criminal Law, Volume II, p. 348). On the other hand, in a state with a democratic regime - that is, government by the "will of the people" - the "rulers" are looked upon as agents and representatives of the people who elected them, and the latter are entitled, therefore, at any time, to scrutinize their political acts, whether with the object of correcting those acts and making new arrangements in the state, or with the object of bringing about the immediate dismissal of the "rulers", or their replacement as a result of elections.

This simple understanding of the democratic regime inevitably leads, therefore, to the enforcement of the principle of freedom of expression in every state where such a form of government exists; that is to say, that it embraces a logical justification for the application of that principle. But anyone who confines himself to that notion alone and pursues it to its logical extreme must, whether he likes it or not, come to the conclusion, as Stephen notes (ibid., p. 300), that in accordance therewith, there remains in fact no possibility of imposing any prohibition on any criticism of the government in power, except perhaps to prohibit incitement calculated to result in the immediate injury to the life, limb or property of another. In other words, such a definition of the character of the democratic regime does not provide us with any serious contribution to the solution of the problem with which we are faced - a problem which is fundamentally one of placing proper limits - having regard to the general good and the interests of the state - on the wrongful exploitation by the individual citizen of the right of freedom of expression. So, in order to find such a solution, we must first of all consider the values involved in the exercise of that important right. It is important that we should previously acquaint ourselves with the interests that that right is designed to protect. But, for that purpose, we must necessarily arrive at a deeper understanding of the nature of the democratic regime than that which we described above.

Democracy consists, first and foremost, of government by consent, the opposite of government maintained by the power of the mailed fist; and the democratic process, therefore, is one of selection of the common aims of the people and the means of achieving them, through the public form of negotiation and discussion, that is to say, by open debate and the free exchange of ideas on matters of public interest (see *Reflections on Government,* by *E. Barker,* p. 36). "Public opinion" plays a vital part in that discussion, carried on through the political institutions of the state, such as parties, general elections

and debates in the legislature - and it plays that part not only when the citizen goes to the polls, but at all times and in all seasons. To the sensible statesman, it is evident - as that learned author, Lindsay, explains (see his book, The Modern Democratic State, Volume 1, p. 270) - that he must take public opinion into account from day to day, since it is the ordinary citizen who feels it when statutes are incompatible with his needs; he is the one who knows whether "the shoe pinches" too much, and where it pinches. "The public, it is true, is not acquainted with details", notes Prof. Roth, in Chapter I, "Government of the People by the People" (p. 19). "He only knows, for example, that war disturbs him or that the price of essential commodities is greater than his financial capacity. A very important part of the tasks of democracy is to make it possible for those feelings to come out into the open and be solved in a legal way fixed in advance, and the feelings are plain enough even to the ordinary man, even though he is not expert in the scientific analysis of the causes and their solution. 'A man's heart feels the bitterness of his own soul'; and if the ordinary man does not know how to put things right, he certainly knows what it is that needs putting right." There exists, in fact, not only the perpetual process of clarification of public opinion, but also its shaping. There is considerable educational value for the ordinary citizen in that system of public discussion and general negotiation. By following, to a greater or lesser extent, in the press the speeches and debates conducted in the legislature, for example, he learns what he needs and is thus assisted in determining his attitude (Roth, ibid., p. 39).

Basically, the whole of the aforementioned process is none other than a process of investigating the truth, in order that the state may learn how to reach the most satisfactory objective and know how to select the line of action most calculated to bring about the achievement of that objective in the most efficient manner. Now, the principle of freedom of expression serves as a means and an instrument for the purpose of investigating that truth, since only by considering 'all' points of view and a free exchange of 'all' opinions is that 'truth' likely to be arrived at. In his famous judgment in the case of *Abrams v. U.S.*, (12), Justice Holmes said:

> "But when men have realized that time has upset many fighting faiths, they may come to believe... that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of

> the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out."

Another American judge expressed a similar idea when he noted that freedom of expression is founded on the assumption that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection" (from the observations of Learned Hand J. in the case of *U.S. v. Associated Press*, (13)).

Even if that last view seems too extreme, it is at least true that the process of "free discussion" is more likely to serve as "a better ally of truth than of falsehood" (see article, "Freedom of Expression," in Harvard Law Review, Vol. 65, pp. 1, 2; and this approach is of importance and of great value not only for the purpose of investigating questions arising in the political sphere, to which the subject dealt with in both of the articles above mentioned belongs, but also of the problems calling for solution in every other sphere of life in which there exists a need for a free choice between different and opposing views.

Finally, we have hitherto considered the *social* interest which the principle of the freedom of expression is designed to protect, when we come to search for the truth. Whereas the importance of the principle also lies in the security that it gives to the most thoroughly private interest, namely, the interest of every man, as such, in giving expression to his personal characteristics and capabilities; to nurture and develop his ego to the fullest extent possible; to express his opinion on every subject that he regards as vital to him; in short, to state his mind, in order that life may appear to him to be worthwhile (see Barker, ibid., pp. 14-19; also, Laski, Grammar of Politics, pp. 102, 143, 144). In fact viewed from the object of maintaining this special interest, the right to freedom of expression serves not only as a means and instrument, but also as an aim in itself, seeing that the internal need that everyone feels to give open expression to his thoughts is one of the fundamental characteristics of man. Furthermore, although we have attached the epithet "private" to the latter interest, in point of fact, the state too has an interest in preserving it, since as Justice Brandeis once observed, in the case of *Whitney v. California* (14), "the final end, inter alia, of the state was to make men free to develop their faculties." Accordingly, even if someone

makes a remark of no direct value for society or the state, the specific observation may be important from the point of view of the aim of ensuring independent expression.

B. If we have dealt at some length on the values that are the object of the right to freedom of expression, we have done so only in order to emphasize the decisive importance of that superior right which, together with the similar right to freedom of conscience, constitutes the pre-requisite to the realisation of almost all the other freedoms. "Give me the liberty", wrote the poet Milton, in 1644, in his famous pamphlet in favour of freedom of expression, "to know, to utter, and to argue freely according to conscience, above all liberties."

Nearly two centuries later, the philosopher, J. S. Mill, also exclaimed: "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he if he had the power. would be justified in silencing man kind". ("On Liberty" Chapter 2). In our age, Scrutton L. J. held : "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous" *(Ex parte O'Brien*, (4)). Therefore, whatever may be the difference in the value of different statements people make, the supreme value contained in freedom of expression remains permanent and unalterable.

C. Nevertheless, the right to freedom of expression does not mean that a person is entitled to proclaim, by word of mouth or in writing, in the ears and eyes of others, whatever he feels like saying. There is a difference between freedom and licence. In *Podamski v. Attorney-General* (1), we explained that, side by side with the rights to freedom (and that, in effect, is their legal significance), there are restrictions imposed by the law, and we demonstrated this idea as follows: "Everyone has the right to freedom of speech and freedom of expression, but the use of that right is subject to the restriction of the law" (ibid., p. 355); and in *Gorali v. Attorney-General* (2), we stated: "The object of the local criminal law in making the uttering of slander and the publishing of libel offences is to restrict that fundamental right whenever a person abuses it" (p. 1160). That is to say, that just as the right to freedom of action in other fields does not extend to the use of a man's profession, business or property in a manner injurious to others, so also the right to freedom of speech and the press does not entail the abuse of the power of the tongue or the

pen. "The liberty of the press is dear to England", Lord Kenyon once said, in *R. v. Cuthell* (5), "The licentiousness of the press is odious to England". That is to say, that certain interests also require protection and for the sake of these it is essential to place clear limits on the right to freedom of expression. One interest of this kind was previously hinted at: the need for protecting the good name of the citizen (Criminal Code Ordinance, 1936, sections 201 and 202). Other kinds of interests requiring the raising of a barrier against the effect of statements by word of mouth and written publications are: the securing of a fair trial and the doing of justice to parties before the courts (ibid., sections 126 and 127), the prevention of outrage to religious feelings (*ibid.*, section 149) and the prohibition of obscene publications which offend against moral values (*ibid.*, section 179). We do not intend to exhaust the list of those interests, and we shall mention only the most important of them, namely, the interest included under the heading, "state security". Here we are concerned indeed with a composite and broad concept, but generally speaking, it may be said that it refers to all that is involved in avoiding the danger of invasion by the enemy from without; in suppressing any attempt at the forcible overthrow of the existing regime by hostile factors from within; in maintaining public order and securing the public peace. It is quite obvious that the object of reinforcing state security, too, requires some limit to the freedom of expression on certain terms, for were that not so, a situation might be created in which the state would be unable to achieve its aim or to conduct its affairs in a proper manner; everyone would be deprived of his freedom, including the freedom of speech and the press, and instead of freedom of liberty, anarchy and chaos would reign in the state.

D. The upshot of all this is that the right to freedom of expression is not an absolute and unlimited right, but a relative right, subject to restriction and control in the light of the object of maintaining important interests of the state and society, which are regarded, in certain conditions, as taking precedence over those secured by the principle of freedom of expression. In order to set limits on the use of the right to freedom of speech and the press, we weigh various competing interests in the balance and, after reflection, select those which, in the circumstances, predominate. We observed such a process in *Gorali v. Attorney-General* (2). We stressed there, that notwithstanding that the law imposes a prohibition on the publishing of statements of a defamatory nature against another person, it also recognises that "in certain circumstances and in certain conditions, the general good requires - in order that the fundamental right (of freedom of expression) ...shall not become

an empty phrase - that a person shall not be punished for uttering statements containing abuse, since the injury caused to the public from excessive restriction of the freedom of speech and the freedom of writing is graver in the eyes of the law than the causing of any private damage." In fact, the tests that the law lays down for preferring the social interest, one of the foundations of which is the principle of freedom of expression, to the private damage caused on account of the uttering of words of abuse about another are, relatively speaking, clear and defined; for those tests are the several defences set out in sections 205 and 207 of the Criminal Code Ordinance, 1936[1)]. But in speaking of the "balancing" of the interests involved in maintaining state security on the one hand, and preserving the principle of freedom of expression on the other, this process of weighing up competing interests becomes more complicated.

The complication arises in the main from the phenomenon that, here, there exist two competing kinds of interest, each one of which possesses a politico-social importance of the first order. While the vital importance of the aim of maintaining public security is self-apparent, it has also been demonstrated that the high value of the principle of ensuring free discussion and the investigation of truth constitutes a function of politico-social progress in every state which calls itself a democracy. It is true that today all are agreed that, in moments of supreme urgency - when, for example, the state is at war or is undergoing a grave national crisis - greater weight (according to the particular circumstances of each case) will be given to state security. Scrutton L. J. once more gave extreme but apt expression to this idea, when he stated, in the case of *Ronnfeldt v. Phillips* (6), that "A war could not be carried on according to the principles of Magna Carta." Justices Holmes and Brandeis, too, at the time when they were labouring to establish the standard principles underlying the rule of freedom of expression in the case-law of the United States, agreed that:

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right" (from the observations of Justice

1) These sections deal with the definition of unlawful publication and the cases in which publication of defamatory matter is conditionally privileged.

> Holmes, in the case of *Schenck v. U.S.,* (15)); "Only an emergency can justify repression (of the freedom of expression). Such must be the rule if authority is to be reconciled with freedom." (from the observations of *Justice Brandeis,* in the case of Whitney (14).)

Indeed, the concern for preserving the security of the state in time of emergency is so liable to becloud all other considerations, that the authorities will be inclined, by dint of that concern, to prohibit or punish the making of statements or their written publication even at a time when they constitute no danger to the peace of the state or the nation. "Experience... must have taught us all", said Lord Sumner, in the *De Keyser Case,* (7), "that many things are done in the name of the Executive in such times purporting to be for the common good, which Englishmen have been too patriotic to control." The author of the article on freedom of expression in the Encyclopaedia of Social Science (Volume 6-7, p. 455) touched on this question in a more specific manner, when he stated:

> "The problem lies in framing these limits as ultimate safeguards (for the freedom of expression) because of the tendency of legislators and judges, *especially in times of stress,* to regard ideas of which they disapprove as dangerous to the public welfare."

It was not without reason, therefore, that Justice Brandeis also warned, in the case of *Schaefer v. U.S.,* (16), of the necessity for judging "in calmness" the question of the danger comprised in the publications.

Finally, the same concern for preserving the security of the state is liable to have an injurious effect on the right to freedom of expression equally by reason of the mistaken approach that it protects only the individual interest of the citizen, wherefore that interest ought, as it were, to be disregarded whenever it comes into conflict with the social interest embodied in the security of the state. In this way, the authorities are liable unwittingly to overlook the great social value which the principle of freedom of expression adds to the efficacy of the democratic process, and they are liable to do so where the expected damage that the publication is likely to cause to the state is not so great as to justify doing away with the right. In his important book, Freedom of Speech in the U.S.A., Professor Chafee

severely criticises the Federal Courts in the United States for being led away into such error when interpreting the Espionage Act during the First World War (loc. cit., 1942 edition, p. 34). Even such an experienced expert as Sir William Haley, the director of the British Broadcasting Corporation, expostulated in 1950 against the danger involved in not paying proper attention to the value of the principle I have mentioned. On the assumption that "We have to face up to the fact that there are powerful forces in the world today misusing the privileges of liberty in order to destroy it", he warned that, nevertheless, "it would be a major defeat if the enemies of democracy forced us to abandon our faith in the power of informed discussion and so brought us down to their own level." (These observations are quoted in Justice Frankfurter's judgment in the case of *Dennis v. U.S.* (17).)

E. So far, we have dealt with the problem in a general way, and have established that the solution must come by weighing the interests of state security on the one hand against freedom of expression on the other; that the great social value of the principle which protects the latter interests is worthy of particular attention; and that preferring that former interest is justifiable only when the situation definitely calls for it. It is clear that this approach by itself does not amount to a mathematical formula which can be accurately adapted to every single occasion. The legislator does, in point of fact, sometimes do the work of weighing and balancing by himself, that is, he himself determines in advance the kind of material that is not to be published, or the terms on which its publication is to prohibited by considerations based on state security. This he did, for example, in the Official Secrets Ordinance. But sometimes the legislator leaves the discretion in this field in the hands of others, such as the Executive. In the last group of cases, the question must inevitably arise (particularly because that approach does embody a concise, narrow formula), as to what is the rational principle that ought to guide the Executive when engaged in the aforementioned process, in order to settle the question in favour of one or other of the two interests. If we consider this latest question in the light of section 19(2)(a) of the Press Ordinance, as we propose now to do, and if we bear in mind the interest of "public peace" instead of "state security", then it would be right to state the question in this form: what is the test which the Minister of the Interior should apply when he comes to decide whether the material that has been published is "likely to endanger the public peace" to the degree which justifies the suspension for a certain time of the newspaper in

which it has been published ? In fact, the moment we are successful in finding a definition suitable to the expression, "endangers the public peace", the question will become confined to the interpretation we ought to give to the term "likely".

So what do we mean by "endangers the public peace"? Once more we are dealing with a broad and complex notion. In the case of *Cantwell v. Connecticut* (18). Justice Roberts (of the Supreme Court of the United States), considered the offence of "breach of the peace", as understood in the common law, and after noting that it embodies "a concept of the most general and undefined nature", added: "The offence known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts and words *likely* to produce violence in others." It may well be that, in fact, the offence of "breach of the peace", as so understood, was what was in the mind of the legislator when he limited the use of the power mentioned in section 19(2) in the way he did. We do not propose to lay down any hard and fast rules in this respect, nor shall we try to mark the outer limits of the concept, "endangers the public peace", but for the purpose of the present discussion, it will be sufficient to hold that any publication leading to the use of violence by others, to the overthrow by force of the government in power or of the existing regime, to the breach of the law, to the causing of riots or fighting in public or to the disturbance of order, endangers the public peace.

But section 19(2)(a) says, "*likely* to endanger". What is the purport of the term "likely". The answer to that question depends on the choice of one of two possible approaches. According to one approach it is sufficient, in order to satisfy the condition stated in the section in question that the publication reveals only a tendency - even a slight or remote tendency - in the direction of one of the consequences that we included in the notion, "endangers the public peace"; while according to the other approach, the Minister of Interior must be convinced beforehand that there has been created, having regard to the circumstances in which it takes place, a link between the publication and the possibility of one of the said consequences occurring, which must lead to the inference that the occurrence of that consequence is probable. We think that the second approach represents the intention of the legislator in section 19(2)(a).

First, there is no doubt that the other approach - the one which takes the view that the suspension of a newspaper is justifiable, simply because it may disclose a tendency to endanger the public peace - originates in the way of thinking that created the offence of incitement to rebellion in the old common law. It will be recalled that, according to that definition, all criticism directed against the members of the Government concerning their conduct in that capacity, against the laws themselves and against the institutions established under those laws, was forbidden. The directions given by an English judge to the jury in 1811 in the case of *John Drakard's Trial* (8), who was convicted of the offence of incitement to rebellion only because he printed an article in which the writer roundly criticised the practice of flogging soldiers, in use at that time in the British Army for disciplinary purposes, testify to the complete identity between the mode of thought in which that definition is grounded and the view of "a mere tendency". In those directions Baron Wood stated thus :

> "... You will consider whether (the article) contains a fair discussion - whether it has not a manifest tendency to create disaffection in the country and prevent men enlisting into the army - whether it does not tend to induce the soldier to desert from the service of his country. And what considerations can be more awful than these...?
>
> "...The House of Parliament is the proper place for the discussion of subjects of this nature ...It is said that we have a right to discuss the acts of our legislature. That would be a large permission indeed. Is there, gentlemen, to be a power in the people to counteract the acts of the parliament, and is the libeller to come and make the people dissatisfied with the government under which he lives? This is not to be permitted to any man - it is unconstitutional and seditious."

In the trial that took place against the writer of that article. (Leigh Hunt's Trial (9) - who, as it so happens, was acquitted Lord Ellenborough directed the jury on the law in a similar vein:

> "Can you conceive that the exhibition of the words "One thousand Lashes", with strokes underneath to attract attention, could be for any other purpose than to excite disaffection? Could it have any tendency than that of preventing men from entering the army?"

(Those two passages are taken from the above mentioned book by Chafee (pp. 25 and 26), who quoted them from the collection of judgments known as Howell's State Trials, Vol. 31, pp. 367, 495).

In the Scottish case of *R. v. Muir* (10), in which in the year 1793 a man by the name of Muir was prosecuted, once again for incitement to rebellion, for advocating, in pamphlets and articles that he had disseminated, parliamentary reform which was designed to abolish the system of elections through "rotten boroughs" that was practised at that time in Britain, the following direction was given to the jury.

> "As Mr. Muir has brought many witnesses to prove his general good behaviour, and his recommending peaceable measures and petitions to parliament, it is your business to judge how far this should operate in his favour, in opposition to the evidence on the other side. Mr. Muir might have known that no attention could be paid to such a rabble. What right had they to representation?.. The *tendency* of such conduct was certainly to promote a spirit of revolt, and if what was demanded should be refused to take it by force."

(Quoted from Howell's State Trials, Vol. 23, p. 229, by Professor Sutherland, in his article published in the Cornell Law Quarterly, Vol. 34, pp. 303, 314).

It is easy to discern that this approach of "a bad tendency" means - as Stephen once commented in his analysis of the offence of incitement to rebellion in its original form - a refusal of the right of serious political discussion ("History of the Criminal Law in England", Volume II, p. 359). "And the most powerful weapon in their hands (i.e., of those who oppose freedom of the press)", Professor Chafee once stressed, "is this doctrine of indirect causation, under which words can be punished for a supposed bad tendency long

before there is any probability that they will break out into unlawful acts." (See the book above mentioned, p. 24).

To sum up: The approach of "a bad tendency" is perhaps suitable to a political system employed in a state based on an autocratic or totalitarian regime, but it obstructs, or at least renders inefficient, the use of that process which constitutes the very essence of any democratic regime, namely, the process of investigating the truth.

The system of laws under which the political institutions in Israel have been established and function are witness to the first that this is indeed a state founded on democracy. Moreover, the matters set forth in the Declaration of Independence, especially as regards the basing of the State "on the foundations of freedom" and the securing of freedom of conscience, mean that Israel is a freedom-loving State. It is true that the Declaration "does not consist of any constitutional law laying down in first any rule regarding the maintaining or repeal of any ordinances or laws" (*Zeev. v. Gubernik* (3)), but insofar as it "expresses the vision of the people and its faith" (ibid.), we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State, including the provisions of a law made in the time of the Mandate and adopted by the State after its establishment, through the channel of section 11 of the Law and Administration Ordinance, 1948;[1] for it is a well-known axiom that the law of a people must be studied in the light of its national way of life. Thus, here we have a first sign indicating that we must interpret the term "likely", when we read it together with the other matters stated in section 19(2)(a), in the sense of "probability" rather than in the spirit of the view which favours the doctrine of the "bad tendency" and "indirect causation".

As for the second sign, which goes hand-in-hand with the first: the procedural means available for suppressing or restricting the freedom of the press are of two kinds. One measure is to punish the objectionable publication after it has taken place. The other measure is preventive, that is, by way of taking steps directed to obstructing the publication of the improper material in advance or to prevent the continued appearance of the newspaper in which that material has been published. In the last instance, too, which is

1) See supra p. 47.

the present case, we are concerned with a preventive measure, which bears no criminal character in the regularly understood sense, seeing that its primary and immediate purpose is to secure the non-publication of the newspaper, because it is likely to contain similar improper: material in the future.

Indeed, it has long been recognised that that same "preventive" measure - which is, after all is said and done, nothing more than censorship, pure and simple - is the most powerful of the two measures that have been mentioned. "The censor", says Chafee, "is the most dangerous of all the enemies of the liberty of the press, and ought not to exist in this country unless *made necessary by extraordinary perils."* The history of many peoples, and of the people of Israel first and foremost, is full of examples without number, of men who have dared and ventured, without being deterred by the fear of punishment, to publish what their conscience dictated, notwithstanding its prohibition on the part of the ruling authorities. However, it is clear that such display of courage has never been, nor is it today, any sufficient guarantee against the effective stay, by preventive measures, of disseminating views or thoughts that are entirely novel. What endows the use of a measure of the preventive kind with its powerful and drastic character is the general acknowledgement, "that no official yet born on this earth is wise enough or generous enough to separate good ideas from bad ideas, good beliefs from bad beliefs" (ibid., p. 61). Accordingly, even during the period in which the rule of incitement to rebellion in its original form was still in force in England, the common law recognised the principle that the Executive ought to be slow in making use of measures preventing the publication of the forbidden material in advance, and that its sole alternative was the bringing of the offender to trial after the act for having disseminated the inflammatory remarks in public. Blackstone, at the end of the 18th century, put the rule in this way:

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must

take the consequence of his own temerity." (Commentaries, Volume 4, pp. 151, 152.)

Only in two periods, in which England was engaged in wars of world-wide range, has the English legislator departed - on security grounds alone - from that important principle, and even then the authorities made use of their "suspensive" power in very rare instances (see Chafee, pp. 105-106, and Ridge's Constitutional Law, p. 386).

The application of this limitation has been extended in the United States, in consequence of the guarantee of freedom of the press in the Federal Constitution, to the power to *make laws*, permitting staying or preventive measures. So, for example, the American Supreme Court, in the case of *Near v. Minnesota* (19), invalidated an Act enabling the authorities to obtain an injunction from the court, suspending a newspaper in which material insulting or defamatory of public officials in connection with the performance of their official duties has appeared. "The securing of the freedom of the press", said Chief Justice Hughes, "requires that it should be exempt not only from previous restraint by the Executive ...but from legislative restraint also" (loc. cit., p. 630), the reason being that putting such a power into the hands of the legislature means that "the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly", and then "it would be but a step to a complete system of censorship" (ibid., p. 633). Finally, the American judge, too, recognised the non-application of that limitation in extraordinary instances, such as in time of War, when there exists a need for preventing the obstruction of recruiting for military service, the publication of the sailing dates of transports or the disclosure of the number and location of troops; and also, at all times, when we must defend ourselves against the publication of matters inciting to acts of violence or the overthrow by force of the lawful regime (ibid., p. 631).

We have dealt at some length with this Anglo-American understanding of the use of preventive measures, because it vividly shows that, from the point of view of protecting the interest of freedom of expression, it is indeed the severest and most powerful means there is. If, for all that, the Israel legislator saw fit to leave the power defined in section 19(2)(a) unaltered, it means that it did so because of the state of emergency to which the

State has been subjected ever since its establishment. But, on the other hand, and especially having regard to the drastic character of that power, one should not attribute to the Israel legislator an intention to authorise the body in charge of exercising that power, to order the suspension of a newspaper only because the matters published seem to it to disclose a mere tendency to endanger the public peace, although in fact there is no direct incitement or even any advocating at all of a line of conduct which in the circumstances seriously increases the likelihood of such a result. To attribute such intention is quite out of the question since, on the one hand, Israel is a State which, as we have seen, is based on the fundamentals of democracy and freedom; and on the other hand, the establishing of an abstract and undefined standard of "bad tendency" alone must of necessity open the way to the introduction of the private opinions of the person in whose hands that power is invested, however exalted that person's aims may be, in estimating the danger allegedly anticipated to the public peace in consequence of the publication in question. What Jefferson wrote 170 years ago is no less true today, namely that:

> "To suffer the civil Magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy ...because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own." (Chafee, ibid., p. 29.)

It follows from what has been said, that there is in fact no choice but to interpret the term "likely" according to the notion of "probability", as distinct from a "bare tendency".

The third support for the interpretation which we favour, follows from the dictionary definition of the original term, "likely". The Shorter Oxford Dictionary (Third Edition, Volume II, p. 1143), explains the fact term as follows:

> "seeming as if it would happen ...*probable* ...giving promise of success ...come near to do or be..."

The expression "probable" is explained in the same dictionary (ibid., Volume II, p. 1689) as:

> "...that may reasonably be expected to happen..."

Are not those definitions to be regarded as clear evidence of the legislator's intention that the standard by which the Minister of Interior must exercise his discretion regarding the existence of the condition stated in section 19(2)(a) is once more the standard of "probability" : that be is bound to be satisfied, before ordering the suspension of any newspaper, that, having regard to the circumstances in which it is published, the publication of the material in question will logically create a likelihood of the occurrence of one of the consequences comprised in the notion, "danger to the public peace", in its aforementioned meaning. In other words: is it not to be understood from those definitions, that it is not absolute certainty with regard to the occurrence of the result that the legislator desired to prevent that constitutes the condition for applying the said power, but that, on the other hand, the disclosure of a bare tendency in that direction in the matter published is, in its turn, insufficient for that purpose; that, in fact, the standard in question is a kind of "golden mean" between the other two possibilities, namely, that it is *probable* that that is what will happen as a result of the improper publication?

F. It is desirable that we should further clarify the nature of the test of "probability" and the manner in which it should be employed.

(1) When we established that it is better to prefer this test to the test of the "bad tendency", we were not referring to any slender or hairsplitting distinction, but to a clear, rational principle, namely, the principle that, on the one hand, does not disown the objective of preventing danger to the public peace, at which the legislator is aiming, and on the other hand, also secures that proper attention is paid to the supreme value of the public interest which is protected by the freedom of the press. As we have already hinted, everyone agrees that even the men in power, being only flesh and blood, are not free from error; nevertheless, they are inevitably entitled to assume that their views are right, when they come to perform any actions within the scope of the exercise of their official duties. Such an approach on their part would only be logical and practical. But that does not mean

that it is right or proper that the people in power should make the same assumption only in order to suppress the opposing opinion of others. "There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation" (quoted from J. S. Mill in his book above referred to, Chapter 2; see also Chafee, ibid., p. 138).

According to a similar way of thinking, it ought to be agreed that the aforesaid assumption (that their opinions are correct) may very well serve to supply the men in power with a justification for suppressing the acts - even where they are only acts of publication that are in question - of those seeking to enforce their views on the state by way of incitement to a change of policy by physical force, instead of by vote in the legislature and in calm elections, or, as it is usually put, by "breaking heads instead of counting them". As the former President of Harvard University wrote :- "The power to carry out its will under such conditions must to some extent be inherent in every government" (see Public Opinion and Public Government, by A. L. Lowell, p. 11). Whereas the sine qua non for applying the drastic power of suppressing the views of others, in such circumstances, is once again the conviction of the men in power that the matters published disclose something more than the expression of an opposing opinion and even something more than creating a tendency that might "endanger the public peace" : in short, that the matters embody not *only* the idea that is likely to create, in consequence of its advocacy, a *remote* possibility that it might *indirectly* cause one of the unfortunate results referred to above. It is true that from a narrow point of view, "every idea is an incitement", since "it offers itself for belief and if believed it is acted on unless some other belief outweighs it" (Justice Holmes, in the case of *Gitlow v. N.Y.* (20)): Whereas, only when the publication has left the framework of the mere explanation of an idea and takes on the form of advocacy, which, having regard to the circumstances, creates at least a *proximate* possibility of the commission of acts endangering the public peace, will there be room for the intervention of the authorities in order to suppress the publication or to prevent its recurrence in the future.

If no exact definition is made of such a boundary between publications that merely consist of a disclosure of certain thoughts and publications that, in the circumstances

surrounding them, may be regarded as of inflammatory content in its aforesaid meaning; if we are not continually on guard against the blurring of that dividing line - the vital value of the interest involved in the freedom of expression is likely to be completely eliminated. Indeed, that concrete and rational principle of "probability" as distinct from the abstract and undefined notion of "bad tendency" is calculated to secure to a great extent (if it be properly understood and resorted to) that, on the one hand, the suppression of the views of others will not occur only by reason of their being opposed to those held by the people in authority, and on the other hand, that the objective of preventing danger to public peace, at which the legislator was aiming, will be achieved.

(2) It must indeed be admitted that even the test of "probability" does not constitute a precise formula that can be easily or certainly adapted to every single case. We mean by that, that when he makes his decision regarding the exercise of the power given him by section 19(2)(a), the Minister of Interior is not expected to forecast With absolute certainty that one of the consequences contained in the definition of "endangering the public peace" is bound to occur by reason of the act of publication in question, if he does nothing to prevent it. The most that is demanded of him is only an estimation that that is how things are likely to turn out, that is to say, an estimation that a proximate (and not necessarily a certain) result will follow if he does not make prompt use of his said powers. Now, the estimation means, as we have already suggested more than once in the course of our remarks, an estimation made *according to the circumstances surrounding the* act *of publication.* Just as the establishing of the real character of each act depends on the circumstances in which it is done, so the estimation of the nature of the matters published depends on the circumstances accompanying the publication. The standard by which the Minister of Interior must guide himself is, therefore, the standard of "the probable", according to what seems reasonable in the circumstances of the case That is, of course, in each case a question of degree. For example, if, at this time, a newspaper were to publish an article severely criticising the conduct of a certain battle in the War of Independence, it would not thereby create a ground justifying its suspension (assuming that it does not reveal any defence secrets); whereas, if it were to publish an article casting aspersions on the ability of a certain commanding officer, at a moment when the men under his command were about to go into battle, there would most certainly be room for making use of the power vested in the Minister.

Sometimes the matters that are published are, from the point of view of the possibility of endangering the public peace, "colourless", or "innocent", but what lends them their dangerous character are the circumstances that existed at the time of their publication, as in the previous example. By way of further example, there is nothing objectionable in the use of the word "fire" in an article published in a newspaper in the course of describing a case in which a certain house had, on some previous day, gone up in flames. But even those who favour the most pedantic safeguarding of freedom of expression would regard it as unthinkable to extend it to a person who, knowing that there is no truth in it, shouts "fire" in a theatre full to the gallery, and in so doing causes a panic among the spectators (see the case of *Schenck v. U.S.* (15), p. 244). On the other hand, it may happen that the inflammatory content of the words published in itself creates the probability of danger to the public peace - that is, without any particular or extra reference to the circumstances in which the publication took place, as in the case in which an article that appeared in a newspaper advocated the breach of a law imposing a certain tax by those on whom the tax fell, saying that they should resist its collection by force.

But even in the last example, the "circumstances" do also have some influence - for instance, that that newspaper has a wide circulation. So we perceive that the test to be applied always consists in some pre-estimation, according to the degree of logic, as to whether, as the result of the inter-action of publication and *circumstances*, a probability is created that the public peace will be adversely affected.

(3) It is important to stress that the circumstances which the Minister of Interior is entitled to take into account are liable to be varied and of different nuances. For instance, he must consider not only the *immediate* external facts, that is, that a direct connection has been created between the circumstances and the publication, but also the general background, such as the state of emergency existing in the country at the time of publication or the tension prevailing in international relations at the moment. It is indeed obvious that, since life is continually in a state of development, there is no point in our trying to exhaust or classify the circumstances referred to or in our making hard-and-fast rules concerning the possible effect of one or other of these circumstances. As stated, that effect is liable to alter from case to case, and what is always of importance is the

estimation of the combined effect of the circumstances in each individual instance. Nevertheless, it is worthwhile our adding - for the sake of guidance only, and without setting up any strict rules - the following observations:

First, generally speaking, there will be no need to consider the bad intention of those responsible for the publication in question. For you have your choice: either the contents of the matters published are true, in which case, it makes no difference what the author or publisher had in mind; or they are untrue, in which case only the possible effect of the published matters themselves on the public peace is of importance, and not the disclosed intention of those who have caused their dissemination. True, this will not apply in every case, since in certain conditions, the intention formed in the mind of the author or publisher may be of great assistance in estimating the danger that will probably result from the publication. For example, where the matters published may be understood in different ways, the discovery of that intention is likely to throw light on the real meaning to be given them, on their dangerous character and on the objectionable purport lying behind them.

Moreover, in certain circumstances and in certain conditions, it would not be out of place to take into consideration the strong tone, the offensive language and the emotional tinge in which the contents of the article or the piece of information published have been clothed. But we should not exaggerate this, since without being able to connect the form of the writing with other facts which might endanger the public peace, it would not be right to regard the form of language as a factor likely to affect the public peace; for if you hold otherwise, you are in fact disowning the principle which safeguards the freedom of expression and which recognises that discussion in the sphere of politics, at all events, cannot be restricted to polite criticism. As Chafee stated: "The greater the grievance the more likely men are to get excited about it, and the more urgent the need of hearing what they have to say" (loc. cit., p. 43).

Finally, it will not, *generally speaking*, be right for the Minister of Interior to take into account, among his considerations, the personality or character of those responsible for the improper publications. The observations of Lord Chatham when supporting the struggle of *John Wilkes* (11), a person of the most dubious past, for the freedom of the press in England, are most enlightening on this point: "In his person though the worst of men, I contend for the safety and security of the best". (Chafee, p. 242, et seq.)

(4) We must, in this connection, make one more point clear. The test of "probability" which we favour does not mean that the Minister of Interior must be satisfied in every case that the danger to the public peace is likely to occur shortly after the matters are published in the newspaper in question. A finding of "probability" does not necessarily mean a finding of proximity of the danger, in the sense of proximity in time. Indeed, the consideration that, as a consequence of the publication, an imminent danger has been created to the public peace strengthens the estimation that that danger is probable, just as the consideration that the publication is likely to show signs of its effect on the public peace only after a certain lapse of time reduces the likelihood of their being any such danger at all. But if the Minister of Interior becomes aware, in the light of circumstances, that the publication makes it possible, amounting almost to a certainty, that serious harm will be caused to the public peace, then there is nothing to prevent him from exercising the power given him by section 19(2)(a), even where he estimates that it is not a case where harm will be caused forthwith.

It should be noted that in the United States, when Justices Holmes and Brandeis were defining the guarantee to freedom of speech and the press that is to be found in the American Constitution, they held as an essential condition to the restriction of that freedom, that the publication in question must be liable to cause serious and immediate harm to the interests that the legislator was seeking to safeguard. "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree". (See *Schenck v. U.S.* (15), at p. 249; *Abrams v. U.S.* (12), at p. 22; *Whitney v. California* (14), at p. 649; see also the judgments collected on this point in the addendum to the judgment of Justice Frankfurter, in the case of *Dennis v. U.S.* (17), at p. 891; cf. the new approach of the majority opinion in the last-mentioned case). Now, it is very evident, in view of the approach we have indicated above, that we cannot go to the extreme of demanding that the Minister of the Interior be satisfied, before ordering the paper to be suspended, that the danger to the public peace created in consequence of the publication is also proximate in time. The dictionary definition, at the very least, of the term "likely" in section 19(2)(a), the meaning of which is, as stated, the presence of a probability that the effect on the

public peace must take place at some time in the future, and not necessarily the immediate future, prevents us from so doing. However, we take the view that, in weighing the interests involved in securing the public peace on the one hand, and the safeguarding of the freedom of the press on the other, the Minister of the Interior would do well to pay attention to the general directions that the aforementioned judges employed in shaping the rule of law and of some of which we have already made mention in an earlier part of our judgment. Those directions - which we quote here not, once again, as hard-and-fast rules, but as guiding principles only - are:

(a) As a general rule, there is a good chance that truth, in the end, will prevail; so that, if only there is enough time to spare, it is better to act through discussion, education and counter-explanation, in order to cancel out the effect of the false information published in the newspaper in question or in the article for which space was found. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence" (per Justice Brandeis, in the case of *Whitney* (14), at p. 649). Accordingly, it would be advisable to reflect, for example, whether instead of suspending the newspaper for publishing the incorrect information, it would not be preferable to oblige the editor, in accordance with section 17 of the Press Ordinance, to publish a denial.

(b) It often happens that the very act of oppression - the actual suspension of the newspaper in which the matters objected to have been published - endows them with an exaggerated value in the eyes of the public. Where "the enemies of liberty are met with a denial of liberty, many men of goodwill will come to suspect that there is something in the proscribed doctrine after all. Erroneous doctrines thrive on being expunged. They die if exposed". From the observations of Haley, quoted in the case of *Dennis v. U.S.* (17), sup., at p. 889; see also the observations of Justice Holmes in *Abrams v. U.S.* (12), at p. 22).

(c) Finally, in cases in which there exists no danger of causing *immediate*, or even *probable*, harm to the public peace, it would be best to weigh very carefully the gravity of the danger which the Minister of Interior sees in the offing as a result of the publication in question. The current view is that in any case any act of suppression of the appearance of a newspaper of itself occasions harm to the public interest, that is, to the important interest

connected with the freedom of expression. The point is that every such act of suppression of necessity fills, not only the owner of the newspaper that has been suspended and its editor, but others as well, with fear and apprehension; that that fear and apprehension in turn contribute to the imposition of a self-censorship on the part of the latter; and in that way, those very arguments that ought in particular to see the light of day for the purpose of investigating the truth and advancing the democratic process, are silenced (see Chafee, p. 561; Harvard Law Review, p. 6). On the other hand, since we are concerned only with the estimation of a potential danger, that is to say, one which is probable, but as regards which there is no assurance that it will necessarily occur - and at all events, there is no fear of its occuring in the near future - it is possible (even assuming that the possibility is a distant one) that the public peace will not suffer on account of the objectionable publication. In which case, it is important to consider whether the gravity of the danger that the Minister of Interior foresees as the result of the publication of the matters objected to, is indeed so great as to be comparable to the public harm to the other public interest, that is, the harm to the interest of freedom of expression, which the suspension of the newspaper is in any event likely to cause.

G. The rule to be applied in the present case may be, therefore, summed up as follows : -

The use of the power stated in the said section 19(2)(a) calls, on the part of the Minister of Interior, for the Weighing of the interests involved in the public peace on the one hand, and in the freedom of the press on the other, and preferring the former interest only after full weight has been given to the public need for freedom of expression. The guiding principle ought always to be: is it probable that as a consequence of the publication, a danger to the public peace has been disclosed; the bare tendency in that direction in the matter published will not suffice to fulfil that requirement. Moreover, the Minister of Interior is bound to estimate the effect of the matter published on the public peace only according to the standard of what is reasonable in the light of the surrounding circumstances: and in that estimation, the length of time likely to pass between the publication and the consequential event which constitutes the harm to the public peace is liable to be an important factor, though not necessarily a decisive one. Finally, even if the Minister is satisfied that the danger caused by the publication is "probable", he ought carefully to consider whether it is so grave as to justify the use of the drastic power of

suspending the newspaper or whether effective action is not available for the purpose of canceling out the undesirable effect consequent upon the publication. by less stringent means, such as discussion, denial and counter-explanation.

We would like to add to our summary of the rule a word about the phrase, "in the opinion of the Minister of Interior", in paragraph (a) of section 19(2). We must hold that the estimation of the effect of matters published on the public peace, in the light of the circumstances, is always within the sole jurisdiction of the Minister of Interior, so that the High Court of Justice will not interfere with the latter's discretion unless, in making that estimation, he has departed from the test of "probability", having regard to the meaning of the notion "endangering the public peace" ; unless he has paid no consideration or, at all events has paid mere cursory consideration - to the important interest connected with the freedom of the press; or unless he has erred in the exercise of his discretion in some other manner, having been misled by considerations that are devoid of any relevance, or are untenable or absurd.

In the light of that rule, our view is that each of the two orders issued by the respondent for the suspension of the two newspapers in question for a period of ten days and fifteen days respectively, are of somewhat dubious validity.

"Kol Ha'am" : In order to appreciate the considerations that weighed with the Minister of Interior when he estimated the effect of the article that was published in this newspaper on March 18, 1953, in the way he did, we shall quote here part of the evidence given by Mr. Moyal in cross-examination, which we regard as reflecting the respondent's approach also. Now, he testified as follows:-

> "...Had the first paragraph of the article in question appeared by itself, I would not have had the paper closed - nor on account of the second paragraph. Regarding the third paragraph, I should have drawn the attention of the Minister of Interior and asked whether it endangers the public peace - he has to decide ...In the fourth paragraph, I observe a charge that the Government maintains a policy of obsequiousness towards the United States - it is impossible to divide the article up, sentence by sentence, and to look at each sentence by itself for a

> statement that amounts to (endangering) the public peace - when reading the article as a whole - it does constitute a certain endangering of the public peace - I passed the article to the Minister of Interior - he read it all and came to the conclusion that it endangers the public peace - the fifth and sixth paragraphs by themselves do not endanger the public peace - but if it stated that the Government of Israel was giving way to the dictates of a foreign government against the interests of Israel - endangering the public peace - in the seventh paragraph also there is no endangering of the public peace - what is written in the eighth paragraph is a conclusion from what is stated beforehand and a slogan - that paragraph testifies to an intention to struggle against the Government of Israel for speculating in the blood of Israel, and I expressed the view to the Minister of Interior that that amounts to a very strong foundation - on the strength of that paragraph and on the strength of the article as a whole, the Minister of Interior recognised that there exist elements justifying the use of section 19."

If we recall that in the article in question, the author inferred from a certain pronouncement that the Israel Ambassador in Washington was alleged at the time to have made, that the Government of Israel had agreed to place 200,000 troops on the side of the United States in the event of war breaking out between her and the Soviet Union, and that he devoted the remainder of the article mainly to the criticism of this imaginary policy, it will be quite apparent that that estimation of the article made by the Minister - namely, that on account of its publication, sufficient foundation has been laid on which to exercise the power set out in section 19(2)(a) - is defective.

Can the publicly declared description of that policy as self-humiliation before a foreign state and surrender of the interests of Israel to the latter's will (however much that description may be mistaken) be regarded as creating at least a *proximate* possibility of "danger to the public peace", within the meaning I have given to that phrase? Would the article have such an effect, even if we consider the state of emergency in which our country finds itself at the moment when no permanent peace treaty has been signed with our neighbours, the Arab States? Would it be right to interpret the matters published as

incitement to the use of violent means in order to bring about a change in that supposed policy of the Government? Does there exist any sufficient foundation for inferring that they are advocating non-enlistment for service in the Israel Defence Forces within the framework of the Defence Service Law? It is quite obvious that we must give negative answers to each one of those questions.

If, for all that, the respondent arrived at a different conclusion, there can be no doubt that the reason therefore - as can be seen most clearly from the evidence of Mr. Moyal - is that he made the mistake of approaching the matter from the point of view of the "bare tendency" in the contents of the article, instead of examining whether the achievement of one of the aforementioned results, in consequence of its publication, is within the bounds of probability. Let us take as an example the paragraph which was selected by the learned Attorney-General:

> "If Abba Eban or anyone else wants to go and fight on the side of the American warmongers, let him go, but go alone. The masses want peace and national independence, and are not prepared to give up the Negev in return for joining the 'Middle East Command'."

It is very obvious to us that anyone, unwilling to enter into a pointless discussion whether the matters stated in that paragraph evince a "tendency" towards weakening the will of the citizen to carry out the duty imposed by the Defence Service Law should war break out between the two foreign States, will unhesitatingly agree that their proper construction is that the writer is opposed, in a strong and emotional form, to the "policy" of the present Government as therein described, and no more.

The same applies to the penultimate paragraph, on which Mr. Moyal laid particular stress in the evidence he gave before us, and the contents of which were quoted in the first part of our judgment. As the witness admitted, the statements in that paragraph constitute nothing more than a conclusion arising out of what the author had written in the previous paragraphs, namely, that the agreement to place a large number of troops at the disposal of the United States as aid in the war liable to break out in the future between her and the Soviet Union meant the sacrifice of Israel youth for the objectionable purpose, in return for

the chance of obtaining money from the United States, and that, in order to obtain the reversal of that policy, it must be fought. Now, whatever our view may be as to the correctness of the conclusion drawn, expressing opposition to that imaginary policy and advocating a fight for its reversal, can in no wise be regarded as likely in the future to endanger the public peace in any shape or form.

I admit that even in that paragraph the conclusion was expressed in pungent tones, and not only that, but was even accompanied by language (we are referring to the words, "speculating in the blood of Israel youth") bordering on what is truly defamatory. But, aside from the fact that there are provisions in the criminal code and in the law of civil wrongs for punishing or compensating for the publication of matter defamatory of or insulting to any persons, whether in their capacity as representatives of the public or as private individuals, the fact that the opinion expressed in that paragraph is clothed in strong, emotional and insulting language is not sufficient - without connecting that objectionable style to other circumstances endangering public peace - to invest the matters published with an influence so great as to create a proximate danger to the public peace, within the meaning defined in this judgment. Now, Mr. Moyal did not even so much as hint at any such special circumstances, either in the affidavit lodged in support of the respondent's reply, or in the evidence that he gave before us.

To sum up: if we do not wish to put obstacles in the way of discussion and free investigation in the political sphere and in that way divest ourselves of all interest involved in the freedom of the press, and if we do not also desire utterly to depart from the test which requires that the negative effect of published matter on the public peace be regarded in the circumstances as at least probable, then we shall have no alternative but to decide that, in making the order for the suspension of the newspaper "Kol Ha'am", for a period of ten days, for having published the article referred to, the respondent gravely exceeded his jurisdiction.

"Al-Ittihad": The same applies to the order made by the respondent for the suspension of the other newspaper for a period of fifteen days. In this connection, it ought to be noted that the article published on March 20, 1953, basically resembles the contents of the article that had appeared in "Kol Ha'am" two days before. It is true that the objection to what the author of the article (which was written in Arabic) regarded as the declared policy of the

Government of Israel was this time drafted in a stronger, more emotional and even more insulting style than the one in which the article that served as the occasion for suspending the other newspaper was written, and it may therefore be that it was this fact that moved Mr. Moyal to hold, in the evidence that he gave before as in the second case, that "the whole article endangers the public peace" : that is to say, that effect flows not only from what is written in the penultimate paragraph, which was stressed in particular in the affidavit that Mr. Moyal lodged in this case, but from the article as a whole. We are, however, of the opinion, for the reasons given above, that this feature (of the style of the article in such a form) is not of itself calculated to create a proximate possibility that the matters published in "Al-Ittihad" will result in the citizen refusing to carry out his duty of enlistment imposed by the Defence Service Law, or in any of the other consequences contained in the notion "endangering the public peace".

As for the matters in the penultimate paragraph - which Mr. Moyal, according to the evidence that he gave in the second case, regarded as "incitement against the Government of Israel, based on the falsehood that the Government of Israel is speculating in the blood of its sons", and "incitement of the masses to act against the State and its Government" - we are once more concerned with the expression of a conclusion by the author of the article, similar in spirit to that which was arrived at in the article published in "Kol Ha'am".

That conclusion is, as will be recalled, that that "policy", which the author regarded as the declared policy of the Government of Israel, meant that the lives of Israel citizens were to be sacrificed for the objectionable purpose, in return for the receipt of money for the country from the United States, in that that "policy" is dragging them "not only to unemployment, poverty and hunger, but even to death in the service of imperialism, feeding them as fodder to their war machine". To this, was added the "makeweight", that "those masses do not want that fate and will demonstrate their refusal."

As was suggested, if we disallow, for one moment, the addition of the "makeweight", then we are once more obliged to hold - for reasons we gave when we denied the possibility of the publication of a similar conclusion in the *Hebrew* newspaper being likely to harm the public peace - that the parallel estimation regarding the "dangerous effect" made by the respondent in relation to the conclusion expressed in the *Hebrew* newspaper

is, too, devoid of any logical foundation. Can the addition of the words, "and will demonstrate their refusal", alter the situation?

The Attorney-General argues that, at all events, in the last words, and in the similar remarks with which the article concludes ("and will prove to Ben-Gurion and his henchmen that they will not allow them to speculate in the blood of their sons", etc.), there is apparent an obvious call to the use of violent means for the purpose of bringing about a change in what the author regards as the Government's policy, or at least, that the words in each of the two said paragraphs are like incitement to disobedience to the law by refusing to carry out the duty of enlistment for military service. On the other hand, counsel for the petitioner contended that the intention behind those remarks was that the citizens of the State express their disagreement with that "policy" in a lawful and quiet manner - for example, by voting in a certain direction in the general elections shortly to take place.

We have no doubt, having regard to the pungent and emotional manner in which the article as a whole is composed, that the words at the end of each of the two paragraphs in question bear a double meaning; that is, they may be interpreted in each of the ways stated. For that reason, and seeing that the decision as to the possible effect of those remarks is first and foremost a matter for the discretion of the respondent, we feel ourselves bound by his recognition that the interpretation indicated by the Attorney-General is the one likely to be accepted by the readers of that article. However, our employing that approach does not necessarily mean that the fate of this case has been completely settled, since the question still remains whether, in the light of all the circumstances in existence at the time of the publication, there was in fact created a logical basis which would enable one to conclude that, in view of the said meaning of those words, one of the "dangerous" consequences that the Attorney-General suggested was likely to ensue.

As for this last question, the circumstances rather point in the opposite direction. For what do we observe? First of all, it turns out that that article was based wholly on the assumption that the news item published in "Ha'aretz" on March 9, 1953. concerning the content of the declaration alleged to have been made by Mr. Abba Eban in Washington regarding the official policy of the State of Israel, was true; that is to say, that that is in fact the policy that the author of the article was protesting against and which led him to

advocate what he did. Secondly, it appears that five days after the publication of the article, the Prime Minister announced in the Knesset that the news item was none other than "a piece of journalistic imagination", and that, moreover, the official policy of Israel was "to defend its borders and its form of government against revolution and attack"

In those circumstances - when, on the one hand, the very essence of the view advocated in the two passages cited is dependent on that news item of March 9, 1953, being an accurate reflection of the official policy of the present Government of Israel and, on the other hand, it became clear, only a few days after the publication of the article, that that news item was incorrect and without any foundation in fact, so that the condition above-mentioned does not exist at all - in those circumstances, can it logically be estimated that that appeal would have the effect of endangering the public peace? Could anyone really imagine that, after reading what was written in the article in question, "the masses" might at some time arise and employ violent means or refuse to carry out their lawful duty of enlisting for military service, just in order to bring about the reversal of the policy which, as it appears, was not in any wise declared by those qualified to do so to be the official policy of the Government of Israel at this time? Thus, we can give a negative answer - and a negative one alone - to those questions. And if it be said that the day may come when Israel's policy will turn into the policy against which the author of the stated article was agitating, that the readers will then recall the matters written therein and that, as a result thereof, they will act in the manner they were called upon to act by the author, so that the public peace will be seriously endangered, we would reply that that approach is none other than the approach of the "bad tendency" and "indirect causation" that we disapproved of as a standard proper to be employed by the Minister of Interior when deciding whether to exercise the power stated in the said section 19(2)(a).

It follows that in making the order for the suspension of the newspaper "Al-Ittihad", too, for a period of fifteen days, the respondent exceeded his jurisdiction.

For these reasons, we have decided to make absolute the orders nisi given in each of these two cases.

Orders nisi made absolute.

Judgment given on October 16, 1953.

APPENDICES

The Article in "Kol Ha'am" - Appendix A

"Topic of the Day

Let Abba Eban Go and fight Alone...

The Ben-Gurion-Bernstein Government has not reacted in any way to Abba Eban's announcement concerning his readiness to provide 200,000 Israel troops in the war against the Soviet Union. The official silence can only be interpreted as complete agreement with the remarks of A. Eban. More than that. The Ambassador of the Ben-Gurion-Bernstein Government cannot be assumed to have made his pronouncement in his own name and not in the name of the Government **as a** whole.

A. Eban's pronouncement is exceptional, even in the Atlantic camp, since every government, within the aggressor Atlantic bloc is endeavouring, with all its might, to place as few troops as possible at the disposal of the American generals. The confirmation of the war pacts of Bonn and Paris has so far met with great difficulties. Many countries in Asia and Europe, Britain and India among them, are seriously criticising the policy of Eisenhower-Dulles.

It seems, therefore, that the Ben-Gurion Government is pushing its way into the front ranks of the warmongers' camp; it is prompter than any other government, even within the aggressor Atlantic bloc.

The finance bosses of America do not feel obliged to take into account the "war effort" of Ben-Gurion, Sharett and Abba Eban. The Lebanese newspaper, "Az-Zaman", has quoted American officials as stating that john Foster Dulles, the American Foreign Minister, and Anthony Eden have reached agreement on a common policv which calls for the consent of Israel 'to the annexation of the Negev to jordan, in order that the British army stationed in the Suez Canal Zone can transfer to the Negev' and their consent to other concessions, such as the transfer of Haifa port to the Atlantic command, etc.

The White House is trying very hard indeed to increase the arms race in the Middle East, and the dispatch of American weapons to the value of 11 million dollars leaves no doubt as to that. And that is not all. The State Department has delivered an ultimatum to the Ben-Gurion Government regarding the evacuation of the grounds of the Arab College in Jerusalem. The Ben-Gurion Government has obeyed the ultimatum without a murmur.

The anti-Soviet policy of the Ben-Gurion-Bernstein Government resembles the policy of the Polish reactionaries, Beck and Ridz-Smigly, who out of blindness and anti-Communist hatred brought national disaster on their country.

Despite the anti-Soviet provocation, the masses in Israel know that the Soviet Union is faithful to the policy of the brotherhood of peoples and peace. The speeches of Comrades Malenkov, Beria and Molotov have once more confirmed that. If Abba Eban or anyone else wants to go and fight on the side of the American warmongers, let him go, but go alone. The masses want peace and national independence, and are not prepared to give up the Negev in return for joining the Middle East Command.

Let us increase our struggle against the anti-national policy of the Ben-Gurion Government, which is speculating in the blood of Israel youth.

Let us increase our struggle for the peace and independence of Israel."

The Article in "AI-Ittihad" - Appendix B

"The People Will not Permit Speculation in the Blood of its Sons.

At the opening of the *'Independence' Bonds* Conference last week in New York. Abba Eban. Ben-Gurion's Ambassador in the *United* States, declared that the Government of Israel was prepared to supply two hundred thousand Israel troops to fight on the side of the United States in the event of war against the Soviet Union.

To this day, no reply has appeared on behalf of the Ben-Gurion-Bernstein Government to this grave pronouncement by its Ambassador and representative in New York. If that

silence means anything at all. it means that the Government expresses full agreement with that pronouncement. that that pronouncement was not made save at its behest, that no official representative of anv Government can express in his speeches and declarations other than the opinions and policy of his government.

This self-humiliation before the gates of American imperialists is not new on tile part of the Ben-Gurion Government, its diplomats and representatives. This Government has become accustomed to running as fast as it can before the chariot of American imperialism, in its endeavours to overtake all of its satellites and to express its faithfulness to its masters and warmongering supporters, and to prove to them by every form of compliance that it is the faithful servant whose services cannot be dispensed with, that it hopes to win a glance of satisfaction from it. At a time when American imperialism is meeting with many difficulties in carrying out its programmes in each of these satellite states, and at a time when those governments are trying to squirm and manoeuvre and even dare at times to criticise the Eisenhower-Dulles policy, and at a time when a government like that of Naguib in Egypt and Shishakli in Syria are still afraid of binding themselves to any Kind of guarantee to join the Mediterranean bloc, we see that the Ben-Gurion Government is crawling on all fours and asking and begging to be received into that bloc, and promising to hand over bases, ports, airfields and cannon-fodder to the American war machine. But it seems that the lords of Wall Street and their representatives in the White House do not yet appreciate this Ben-Gurionic service given with such 'generosity' and do not see any need for giving a friendly glance at their Israeli lackeys for being in their 'pocket', after breaking off relations with the Soviet Union, and after becoming completely dependent, from the political and economic point of view, on the "kindness" of American imperialism. Thus we see that rulers of America are trying to make up to Naguib, Shishakli and lbn-Saud, and are no longer interested in Ben-Gurion and his offers. This week, the Lebanese newspaper, 'Az-Zaman', wrote that Foster Dulles, at present on a visit to the Mfiddle East, is carrying in his pocket a programme for peace between Israel and tile Arab countries, which includes stripping Israel of the Negev and annexing it to Transjordan, in order that the British troops evacuating the Suez Canal can be transferred there.

And so all forms of surrender by the Ben-Gurion Government, and all her demonstrations of faithfulness, will not avail her with her American masters; moreover,

her economic, political and state bankruptcy, internal and external, are beginning to be revealed to the masses, who have started to understand whither this Government is dragging them - not only to unemployment, poverty and hunger, but even to death in the service of imperialism, feeding them as fodder to their war machine, whilst those masses do not want that fate and will demonstrate their refusal.

If Ben-Gurion and Abba Jeban want to fight and die in the service of their masters, let them go and fight by themselves. The masses want bread, work, independence and peace, will increase their struggle for those objectives, and will prove to Ben-Gurion and his henchmen that they will not allow them to speculate in the blood of their sons in order to satisfy the will of their masters."