

FIGHTING KAHANISM IN ISRAEL: RETROSPECT AND APPRAISAL *

By DR RAPHAEL COHEN-ALMAGOR

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A. Introduction

The aim of this essay is to review the efforts made to fight Kahanism in Israel. In the attempt to de-legitimize Kahane after his election to the Knesset in 1984, members of the Knesset led by the Speaker Shlomo Hillel resorted to different means so as to put obstacles on the functioning of Kach (Kahane's party), not all of which were justified. After each of these attempts Kahane appealed to the High Court of Justice, seeking its judicial assistance. The court repeatedly returned issues concerning Kahane and his party to the legislative body, suggesting that the decisions had to be made by the legislative body. The Judges insisted that restrictions on essential freedoms should be backed by laws, trying to divest their judgments of political references to the utmost.¹

The essay is opened by reflecting on the endeavour to restrict Kahane's freedom of expression and movement. I argue that the decision to restrict Kahane's freedom of movement was justified for no other way was present to stop Kahane from holding his

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1. It seems that Judges in countries which lack a written constitution are more careful than their colleagues in countries with a written constitution when facing political matters. More similarities exist between Israeli and British Judges than American Judges. The former try to leave political decisions in the hands of the legislator, whereas American Judges see law as a positive instrument of national policy and thus have less hesitation in dealing with political matters. On this issue see H. Street, *Freedom, the Individual and the Law* (Harmondsworth: Penguin, 1972), esp. pp.290-295.

provocative visits to Arab villages, where he intended to preach his Orwellian idea of "emigration for peace." However, I differentiate between restricting Kahane from holding rallies in Arab places, and withholding his freedom of demonstration *as such*. While the former act was required, the latter act abridged a fundamental right without a sufficient reason.

The essay also discusses Kahane's appeals to the Supreme Court, seeking its assistance in securing his rights. No less than five of these appeals were against the Speaker of the Knesset, who stood in the forefront of the campaign against Kahane. The court upheld not only Kahane's right to participate in the elections to the Knesset (the 1984 *Neiman* decision), but also his right to express his racist views over the airwaves; to raise in the Knesset motions of no-confidence, and to table racist bills. Reviewing those decisions, I argue that while the decision to allow him the submitting of racist bills was flawed, the other decisions were correct. Bearing the *Neiman* ruling in mind² the court was consistent in allowing Kahane to submit his bills. I see a difference between allowing the expression of racist diatribes and permitting a racist list to gain legitimacy through elections, and to further its aim of discriminating against others through legislation. It is neither morally obligatory, nor morally coherent, to expect democracy to place the means for its own destruction in the hands of those who either wish to bring about the physical annihilation of the State, or to undermine democracy.³ Nothing obliges democracy to provide those who hold values incompatible with democracy, with parliamentary means to curtail democracy.

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2. E.A. 2/1984. *Neiman and Avneri v. Chairperson of the Central Committee for the Elections to the 11th Knesset*. P.D. 39 (ii).
 3. Notice my emphasis on *physical* annihilation of the state. That is, in the Israeli context, no sufficient grounds exist to warrant disqualification of a party that wishes to change the character of the State from a Jewish State into, say, a Canaanite State, as distinguished from aiming to destroy the Israeli State as such.

B. Freedom of Movement

Two weeks after his election to the Knesset, Kahane started a series of provocative visits to Arab communities with the avowed aim of persuading the inhabitants to emigrate from Israel. The first visit, on August 30, 1984, was to the Arab town of Umm El Fahm. When Kahane and his supporters attempted to enter the town, the *a priori* position of the police was to allow them to carry out their intention. At some stage, however, the police realized that a situation of substantive danger to the public peace was being created.⁴ So, in fear of disturbances and bloodshed, the police forces did not allow Kahane to enter the town. They stopped the Kach group two miles from Umm El Fahm. In this incident, as in others, the police were there to intervene and to prevent bloodshed. However, the efforts to maintain public peace were not always successful. Time and again violent incidents arose between Kach supporters, who caused agitation by their visits to Arab villages, and Arabs and Jews who stood against them, blocking the way and shouting: "Racism Won't Pass!"

Kahane knew that the denial of entry to Umm El Fahm would serve as a precedent to stop him from going to any other Arab village. He sought the assistance of the court to overrule the police decision.⁵ However, this appeal was cancelled by Kahane himself on July 4, 1985 on the grounds that it was no longer relevant, as a result of measures taken by the Knesset to stop the visits. In December 1984 the Knesset House Committee voted in a 12 to 8 decision to restrict Kahane's parliamentary immunity. The provision in law secures members of the Knesset free access to any public place.⁶ The restriction was intended to enable the police to prevent Kahane from entering Arab communities in

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4. A testimony by Commander Karty. 100 *Divrei Haknesset* (Knesset Proceedings), 11 Knesset, 36th meeting (December 25, 1984) p.885.
 5. H.C. 587/1984. *Kahane v. Minister of Police and the Inspector General*. The case was not published.
 6. Knesset Members (Immunity, Rights, and Duties) Law, 5711-1951. Section 9(a) states: "A direction prohibiting or restricting access to any place within the State other than private property shall not apply to a member of the Knesset unless the prohibition or restriction is motivated by considerations of State security or military secrecy."

which his presence might invoke a breach of the peace.

At the time of the debate concerning this issue the Attorney General, Itzhak Zamir, justified the proposed restriction by saying that the Kahanist phenomenon fundamentally contradicted the values cherished by society. It distorted Judaism, exhibiting the Jewish tradition in a twisted way. Zamir asserted that Judaism was sensitive to the lives of human beings and respected people *qua* people, whoever they were, while Kahanism impugned these beliefs. The phenomenon was also incompatible with Zionism, for Zionism aimed to establish a just society in Israel, in which everyone enjoyed the same rights irrespective of their race, nationality, or religion. Zamir admitted that he was wrong when he refrained from acting against Kahane before the elections. He said that he had misjudged the force of Kahanism and what its resulting influence might be; that he had regarded Kahanism as a "sick phenomenon," but also as a peripheral, harmless one. Meanwhile the situation had changed. Kahane had *won legitimacy* since his election to the Knesset and Kahanism had become a danger to society, for it encouraged the violation of Knesset laws and, by so doing, it weakened the societal framework. Zamir postulated that for a member of the Knesset to act in the Knesset against the Knesset was inconceivable. He therefore urged the House Committee to act against Kahane immediately.⁷

Yossi Sarid MK (Civil Rights Movement), one of the two Knesset members who initiated this measure,⁸ explained the necessity of restricting Kahane's immunity by saying that Kahanism was a psycho-political phenomenon. Kahane incited Arabs and Jews to murder, and praised the Jewish terror organization. The serious thing was that his views had gradually received legitimization and public support. Sarid, Member of Knesset, warned, "today Kahane's views are accepted with less shock than before. More people are willing to listen to him. Kahane is already part of this place and, therefore, the Knesset

7. *Al-Hamishmar* (Israeli Daily). November 20, 1984. See also Yair Kotler, *Heil Kahane* (Tel-Aviv: Modan, 1985) pp.287-292 (Hebrew).

8. The other member of Knesset was Edna Soloder from Labour. Kahane called them S.S. (Sarid-Soloder).

has to stop him here and now."⁹ Haim Ramon MK (Labour) acknowledged the risks involved in taking this measure, but nevertheless gave his support to it, maintaining,

"the voting today is the beginning of Kahane's exclusion from this House and the law, outside of Israeli society. The Knesset decides today not only on a parliamentary act, but also on an educational act. The entire youth will know that this man symbolizes an illegitimate thing, an immoral thing ... [that] there is Kahane and another 119 MKs."¹⁰

The plenum of the Knesset approved the proposal with a simple majority (a 58 to 36 decision).

Kahane appealed to the High Court of Justice on preliminary, procedural grounds.¹¹ He claimed that his voice had not been heard during the debates of the Knesset House Committee. The House Committee, for its part, responded that Kahane had been invited to each and every session but had chosen not to come. Kahane was quoted as saying, "I would not degrade myself by appearing before the committee." On the day of the trial, Kahane had not appeared and the case was closed. Hence the court did not have to address itself to the essence of the case, whether the curtailment of Kahane's right, granted to every Member of Knesset to travel freely throughout the country without being prevented by the police, was justified.

Here, freedom of movement was interwoven with freedom of expression. Restricting Kahane's free movement was intended to prevent him from preaching his views in Arab villages. The visits to Arab villages constituted deliberate and wilful attempts to exacerbate the sensibilities of the Arab population. Kahane mapped specific target groups to whom he wanted to propagate

9. I have reservations regarding this statement. Kahane's ideas, rather than Kahane himself, were established in Israel. Kahane the person remained, until the last day of his life, quite an alien figure.

10. 100 *Divrei Haknesset* (Knesset Proceedings), 11 Knesset, 36th meeting (December 25, 1984) pp.885-905.

11. H.C. 43/1985. *Kahane v. Knesset House Committee* (from April 1, 1985). The case was not published.

his ideas of "separation" and "voluntary emigration for peace," and by going to their own places he forced them to be exposed to his racist statements and diatribes. The content as well as the manner of Kahane's speeches were intended to cause offence, in objective circumstances which were unavoidable from the unwilling witnesses' view. The intention was to inflict psychological offence, which was morally on a par with physical harm, upon the Arab communities. Kahane wanted to offend and stir up the Arab inhabitants, by expressing his avowedly anti-democratic views.¹² Knowing Kahane's motives, avoiding the demonstrations would have amounted - from the Arab residents' viewpoint - to saying that "Kahanism may pass." For them as Arabs, when the Kahanist phenomenon was at issue, no other way existed but to stand against it with all their power, especially when Kahane and his supporters decided to come to their villages with the intention of hurting them and awakening their fear. Any suggestion that Kahane would march in their front yard without them being present was inconceivable. Thus, the situation put the Arab citizens in such a position that either way they would be offended: if they attended the demonstrations, they would have to hear Kahane's preaching against them and his verbal insults; and if they did not, this would be interpreted as Kahane's victory. Therefore, no real choice was available for the Arabs but to attend the demonstrations and to suffer the pain caused by them. The only way of stopping Kahane from continuing his campaign of hatred was to resort to legal measures and restrict his immunity.¹³

12. In an interview made a few years later, Kahane was asked why he was engaged in activities such as visiting Taibe and Umm El-Fahm. He answered that his aim was to scare them and to make them realize that time was not on their side, that they must leave now. Cf. Raphael Mergui and Philippe Simonnot, *Israel's Ayatollahs* (London: Saqi Books, 1987), p.50. For further discussion on the ideology of Kahane and his political program see my "Vigilant Jewish Fundamentalism: From the JDL to Kach (or 'Shalom Jews, Shalom Dogs') 4 *Terrorism and Political Violence* (1992), No. 1, pp.44-66.

13. For further discussion see my "Harm Principle, Offence Principle, and the Skokie Affair," *XLI Political Studies* (1993), No.3, pp.453-470. See also Joel Feinberg's standards postulated in his *Offense to Others* (New York:

Moreover, given the fact that some of Kahane's men were armed, a possibility existed that one of them might decide to take the law into his hands and apply more persuasive methods to clarify the speech to the Arabs. The possibility existed of words being translated into physical harm. Thus, resorting to Scanlon's terminology, we may say that, in these incidents, the interests of the audiences were more significant than the interests of the participants.¹⁴

It was one thing to prevent Kahane from entering Arab communities, and quite another to refuse him access to any other places. While preventing the infliction of severe damage upon Arab citizens who could not avoid confronting Kahane in their villages was justified, to prevent him from preaching his ideas in predominantly Jewish places was not. On many occasions when Kahane wanted to hold rallies and assemblies in public places his requests were denied. On some of these, only after appealing to the courts Kahane was allowed to hold the rallies.¹⁵

Oxford University Press, 1985), esp. ch.9.

14. Cf. T.M. Scanlon, "Freedom of Expression and Categories of Expression." 40 *University of Pittsburgh Law Review* (1979), pp.519-550. Analogous considerations may guide us to think that a cross burning by the Ku Klux Klan is more easily tolerated in a field outside a southern town than in Harlem. Similarly, I would suggest that it is one thing to allow the publication of *The Satanic Verses* and quite another to grant Salman Rushdie permission, if he so wishes, to disseminate his ideas out of spite in a religious Pakistani neighbourhood in England. If Rushdie decided to hold a rally in promotion of his book outside the central mosque of Bradford, then the point of coming to that neighbourhood could only be to affront, insult, and lacerate the feelings of the Pakistani population. Even if Mr Rushdie himself were willing to take the risk and bear the consequences of his act, the offence involved in such an act to the relevant neighbourhood remains too great to be overridden by his right of free speech. Here too we have reason to believe that the speech is psychologically offensive to an extent that is equivalent to physical harm. A specific target group exists, and the circumstances are such as to make the offence unavoidable. Hence, we have strong justification against tolerance.
15. On September 24, 1984 Kahane appealed to the court against the Israeli police because it refused to give Kach a licence for holding an assembly in one of the parks in Jerusalem. Finally the licence was given and Kach withdrew its appeal. Kahane appealed again on the same ground in

I do not wish to consider all of these cases. Let me take one incident as an illustration.

On March 10, 1985 Kahane wished to enter Bar-Ilan University at the City of Ramat-Gan but was denied by the police. The official claim was that this measure was taken to prevent incitement toward Arab students.¹⁶ This claim strikes me as peculiar. In the first place, the police could not have known what Kahane intended to say. Going to an Arab village, Kahane was likely to address "the Arab issue." This was not necessarily the case when he went to address a Jewish orthodox university. Second, the probability of instigation, of translating words into harmful conduct was not great. Third, the Arab students could have avoided the meeting: a difference exists between preaching racism in an Arab neighbourhood, and preaching racism in universities. In my opinion, restricting Kahane's right to exercise his freedom of expression at Bar-Ilan is similar to restricting a person's right to speak at Hyde Park Corner in London. Lastly, the discrepancy between this incident and Kahane's appearance at the Hebrew University is glaring. I find it difficult to understand how the police allowed Kahane to speak in Jerusalem, where no less Arab students may be found than in Bar-Ilan, yet decided to deny his right to speak at Ramat-Gan.¹⁷

C. The Ban on Kahane by the Media

The media opened another front in the struggle against

November 1985, after his request to hold an assembly in a public place in the City of Beer-Sheba was denied. The appeal was withdrawn after the permission was granted.

16. Chapter 6 of the Police Ordinance permits the police to refuse a licence to hold a demonstration if, among other things, a reasonable basis exists to suspect that it will involve criminal offenses such as rioting (in contravention of s.152 of the Penal Law), incitement to rebellion (in contravention of s.133 of the same law), or incitement to any other offense (in contravention of s.34 of the same law).
17. Kahane wanted to speak to students at the Hebrew University of Jerusalem. The police granted him permission and on February 28, 1985, Kahane appeared before a mixed student population of Jews and Arabs.

Kahanism. Soon after the 1984 elections the media directors decided to introduce a ban on reviewing the activities of the movement. They spoke of an obligation to fight Kach's racist ideas. Kahane was not permitted to appear on programmes;¹⁸ his statements were not reported; newspapers turned down his requests to respond to the attacks made on him by writing his views; press conferences and events organized by Kach were not covered. The decision was made not to supply Kahane with the means to disseminate his views. The frustrated Kahane sought the assistance of the Supreme Court.

The broadcasting authority in Israel is a national body whose power and influence is unique. I do not know of any other body in a liberal democratic society which possesses similar authority. Until not long ago it supervised three of the main five radio networks and the sole television network.¹⁹ Immediately after the elections to the eleventh Knesset took place, the "News Forum" of the broadcasting authority decided that in matters which concerned Kach and Kahane, only items of "clear newslike character" were to be broadcast. This was in order to ensure that the national media did not serve as a platform for incitement against citizens and for statements which contradicted the Declaration of Independence. Kahane appealed to the court, arguing that the decision to ban him infringed his fundamental democratic rights, and that it was an act of "private censorship," contradictory to the principles of equal opportunity and fairness. The court, *per* Justice Aharon Barak (Justices Gabriel Bach and Shoshana Netanyahu concurring) accepted the appeal.²⁰

Justice Barak postulated that freedom of expression is the freedom of a citizen to express his or her views and to hear what others have to say. The rights derived from freedom of expression create a comprehensive system of inter-related

18. In Britain a similar ban is put on IRA members.

19. Not long ago "Channel 2" was also established under the supervision of the broadcasting authority. Nowadays, a cable system is run by private initiators.

20. H.C. 399/1985. *Kahane v. Board of Directors of the Broadcasting Authority*. P.D. 41(iii), 255. A summary of the case appears in 23 *Israel L. Rev.* (1989), pp.515-517.

regulations, which crystallize - through their operation - the tradition of freedom of speech. This tradition is integrated in the constitutional framework and it constitutes a cornerstone of the democratic essence of the regime (at 268). Justice Barak maintained that the right to disseminate views through the electronic media is part and parcel of the principle of free speech. He quoted Barron who said:²¹

"In the era of mass communication, the words of the solitary speaker or the lonely writer, however brave or imaginative, have little impact unless they are broadcast through the great engines of public opinion - radio, television, and the press" (at 269).

In the light of the unique nature of the electronic media, the duty of a broadcasting authority in a democratic society is to express the views of different sections of the population. Relying on a number of American decisions,²² Barak J argued that the public had the right to gain access to the media, as well as to receive information about unfamiliar ideas. An unlimited market-place of ideas should exist rather than a monopolized market. Three major reasons exist for this: the search for truth; the desire to allow individuals to express themselves; and the need to sustain the democratic regime, based on tolerance and social stability. Drawing on these reasons, freedom of expression was perceived to be a central right in Israeli constitutional law. Barak J asserted that this freedom also included the freedom to express dangerous, irritating and unconventional opinions, which the public hated and detested.²³ It also included racist decisions.

Justice Barak maintained that the way to deal with such ideas was not by silencing them but through explanation and

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21. J.A. Barron, *Freedom of the Press for Whom: The Right of Access to Mass Media* (Indiana: Indiana University Press, 1973), p.xiii.
 22. *Whitney v. California* 274 US 357 (1927); *Red Lion Broadcasting Co. v. FCC* 395 US 367 (1969); *Columbia Broadcasting v. Democratic Comm.* 412 US 84 (1973).
 23. Cf. Cr.A. 255/1968. *State of Israel v. Ben-Moshe*; H.C. 153/1983. *Levi and Amit v. Southern District Police Commander Police*; H.C. 14/1986. *Laor v. Censure Council of Films and Plays*.

education. The remedy for overcoming false views was not to put restrictions on speech but to increase their exposure. In this context, Justice Barak repeated Justice Holmes's renowned opinion in *Abrams* (as he did in *Neiman*) that the best test of truth is the power of the thought in question to win acceptance in the competition of the market.²⁴ Truth will win out through the contest of ideas.

However, Justice Barak conceded that the right for freedom of speech is relative.²⁵ A balance has to be struck between freedom of expression and other fundamental principles, such as the dignity of human beings or the public peace. The balancing process is done by the legislator; when silence occurs on its part, then the balancing becomes the work of the court. Justice Barak reiterated his reasoning in *Neiman*, saying that the appropriate test in deciding the balance between freedom of expression and other interests was the "probability" test rather than the "bad tendency" test. Accordingly, restrictions on speech may be introduced when it is probable that the expression in question will be followed by actions which substantially injure social order, the public peace, or the foundations of democracy. Justice Barak explained that the probability test came to answer the question: What was the causal connexion between the publication of speech and the harm to other values, which constituted justification for restricting speech? The test did not determine what values, besides freedom of expression, should be protected (at 290). Justice Barak specified that not every probable danger to the public peace justified restrictions on speech. Instead, the injury had to be material and real, and consideration had to be given to the magnitude of the danger and to its chance of coming about (at 294).

From the general to the particular, the broadcasting authority could decide its priorities regarding what should be broadcast, but it could not discriminate against specific views and opinions. Justice Barak argued that the broadcasting authority did not weigh the effect of Kahanist expressions on the public order - this

24. *Abrams v. US* 250 US 616 (1919), at 630.

25. Cf. Justice Shimon Agranat's reasoning in H.C. 73/1953; 87/1953. *Kol-Ha'am v. Minister of the Interior*. P.D. 7, 871.

was where it had acted wrongly. In each case it should consider the probability of substantial damage resulting from the airing of such opinions (at 308). Where no such probability arose, no justification occurred for allowing prior restraint on freedom of expression.

Justice Bach submitted a separate opinion in which he agreed with his colleague's conclusion but not with his reasoning. He asserted that racial or national-ethnic incitements were offensive to the feelings of the target group, and their publication constituted a breach of the public order. Such publications would probably produce such a result. Thus, Justice Bach disputed Justice Barak's assertion that even when a news item constituted a criminal offence because of its racist content, the electronic media had to broadcast it, unless public disorder was probable. In his view, the broadcasting authority had the right to refrain from airing racist incitements when it believed that their publication involved criminal offence, whether or not the publication was likely to cause disruptions of order (at 315). Nevertheless, Justice Bach concluded that the broadcasting authority could not ban Kahane altogether in the unprecedented manner to which it had resorted. It should weigh all relevant considerations honestly and reasonably, in good faith and without prejudice, when deciding on the allocation of time to different opinions. While it had no obligation to allocate equal time to each opinion, it must not single out any of them for censorship.

Justices Barak and Bach rightly concluded that the broadcasting authority had acted *ultra vires* in banning Kahane. Concurring with the two justices I argue that in a democracy we cannot allow the banning of ideas solely on the ground that they are associated with a certain party or a certain person. This is despite the fact that their very appearance on the state television may grant them some legitimacy.²⁶ We can hope that

26. Justice Bach said that when the state media broadcast racist ideas it did not affirm or support them, but it did help them gain legitimacy (at 316). Apparently he did not mean to say that any idea gains legitimacy just from the fact of being heard. There are many extraordinary, peculiar ideas; being given the chance to compete in the market-place of ideas

educational efforts to counter-effect the influence may prove to be successful. In a free democratic society there is room for any idea to be expressed, unless decisive reasons exist to abridge speech. However, decisive reasons do not mean the probability that the expression "will be followed by actions which substantially injure social order, the public peace, or the foundations of democracy." The "probability test" is too blurred to serve as a decisive criterion.²⁷

D. Kahane v. Speaker of the Knesset - Five Chapters

The next section reflects on the five appeals of Kahane against the Knesset Speaker, Shlomo Hillel. The court was asked to decide on Kahane's right to submit motions of no-confidence; on his right to submit bills; and on his right to qualify the Knesset oath.

I. The Right to Submit Motions of No-Confidence

In February 1985 the Knesset Speaker refused to accept a motion

does not in itself accord them legitimacy. It may then be argued that Bach J expressed this view because there was only one television network in Israel, controlled by the state; therefore any opinion that appeared on the air automatically received some sort of legitimation. This is a plausible argument. The fact that a person appears in the media several times does make him/her in a way "part of the place." Indeed, this consideration seems to have played some role in the decision of the broadcasting authority to ban Kahane. However, a clear-cut connexion does not necessarily exist between appearing on television and gaining legitimacy as a result of that exposure.

27. In "Harm Principle, Offence Principle and the Skokie Affair" (*Political Studies*, 1993), I propose the Harm Principle and the Offence Principle as qualifications to freedom of expression. Under the Harm Principle I argue that some types of speech which inflict considerable harm ought, like any other harmful action, to be subjected to restriction. And the Offence Principle supplies grounds for abridging expressions when the speech is intended to inflict psychological offence, which is morally on a par with physical harm, provided that the circumstances are such that the target group cannot avoid being exposed to it.

of no-confidence in the government submitted by Kach. The official excuse was that one member's political faction could not introduce such a motion. Clearly the claim was tailored against Kahane, who appealed to the court.²⁸

Speaking for a unanimous court (President Meir Shamgar and Justice Eliezer Goldberg concurred without explaining), Justice Aharon Barak considered two separate issues: the definition of the term "faction," and the issue of justiciability. He opened his judgment by reflecting on the term "faction" as used in s.36(a) of the Knesset Rules of Procedure which holds that "any faction is allowed to put on the agenda motions of non-confidence." Justice Barak found nothing to imply that factions of one member were not included within this term. However, the appellee based his case on two decisions of the Knesset House Committee which said that "one-person factions are not allowed to submit no-confidence motions."²⁹ Justice Barak responded that this argument could not stand because the Knesset Rules of Procedure could be only read to say that one-person factions were allowed to submit such motions, and the Knesset House Committee could not take contrary decisions (at 155). Justice Barak proceeded by analysing the delicate question of justiciability.

As ever, when confronted by such questions, Barak's inclination was to adopt the balancing approach. He drew attention to the fact that in H.C. 652/1981 the court (*per* Justice Barak) tried to determine "the golden path." The court advocated the need for striking a judicial balance based on a self-restraint on the part of the judiciary which nevertheless did not enforce an absolute restriction on itself.³⁰ There the decision was that the court would not interfere in the internal affairs of the Knesset as long as no danger appeared of offending the foundations of the constitutional framework. Applying this criterion to the case in question, the danger was considerable and the court could not abstain from interfering; for a faction which was denied the power to submit motions of no-confidence was parliamentarily

28. H.C. 73/1985. *Kach v. Speaker of the Knesset*. P.D. 39(iii), 141.

29. Resolutions from March 20, 1967, and from July 30, 1979.

30. H.C. 652/1981. *Yossi Sarid MK v. Menachem Savidor, Speaker of the Knesset*. P.D. 36(ii), 197.

crippled.

Moreover, the negation of this right endangered the entire framework of parliamentary life because one of the vital functions of the legislature was to supervise the actions of the executive; preventing one faction from submitting such motions reduced the parliamentary power of controlling the government. Justice Barak obviously recognized that the chance of a one-person faction succeeding in submitting no-confidence motions was quite slim. But, in his opinion, the question here was not tactical; it was a matter of *principle*. Judgments should be formulated on the realistic assumption that parliamentary life was in a continuous state of flux, and thus the possibility that the entire opposition could be comprised of one-person factions should be considered.

This clear analytical judgment seems immune to criticism.³¹ If the only grounds for the decree is the size of the list in the Knesset, then this decree might lead to the slippery-slope syndrome. It might open the way for major parties initiating further restrictions against political opponents. However, the way in which Justice Barak concluded his arguments is of interest. He said:

"My opinion is that the *order nisi* should be made absolute, in the sense that we declare that the Speaker of the Knesset is not entitled to prevent the petitioner from submitting to the Knesset's agenda a motion of no-confidence, *solely* on the ground that the petitioner is a one-person faction" (at 165, emphasis mine).

This conclusion implies that if other, more substantial grounds exist, then it is possible to prevent a list from submitting motions of no-confidence. I read Justice Barak's statement to imply that the court cannot be of assistance to the appellee in this case, in the form presented, but that if other reasons are presented, a basis for denying parties this right may exist.

31. For further discussion of this case, see Menachem Kanafi, "A Digest of Selected Judgments of the Supreme Court of Israel," 22 *Israel L.Rev.* (1987), No.2, pp.219-224.

II. The Right to Submit Bills - Three Appeals

(i) *The First Appeal*

The Knesset Speaker, Shlomo Hillel, and the Knesset Presidium, refused to introduce two of Kahane's proposed laws, asserting that "we will not lend our signatures to the contempt of the Knesset" through Nuremberg laws. The first bill (the "authority law") suggested that only Jews could be citizens in Israel. Non-Jews would have the status of alien residents. Consequently (among other things) they would not be allowed to vote, to serve in public office, or to reside in Jerusalem. Those who refused to accept this status would have to emigrate from the country voluntarily or non-voluntarily.

The second bill (the "separation law") called for the abolition of all governmental programmes involving meetings between Jews and non-Jews; separate beaches would be set up; a non-Jew would not be permitted to reside in a Jewish neighbourhood unless the majority of the Jews in that neighbourhood agreed; and intermarriage and sexual intercourse between Jews and non-Jews would be banned.

The presidium of the Knesset (the Speaker and the five deputy-speakers) said that "a black flag of disgrace rose over these bills in a conspicuous and unequivocal way."³² Relying on the Knesset Rules of Procedure³³ they argued that their authority empowered them to use their discretion in refusing the introduction of bills which degraded the Knesset. Kahane, for his part, contended that nothing in the Knesset Rules of Procedure empowered the presidium to refuse the submitting of bills because of their content.

The High Court of Justice had to decide on two separate issues: once again the question of justiciability arose as to whether the court could intervene in the workings of the Knesset.

32. H.C. 742/1984. *Kahane v. The Presidium of the Knesset*. P.D. 39(iv), 85, at 89.

33. Article 134(b) reads: "A member wishing to exercise his right to initiate a bill shall present it to the Speaker of the Knesset and the Speaker of the Knesset and the deputies, *after they certify the bill*, will lay it on the table of the Knesset" (emphasis mine).

And it had to consider the amount of discretion open to the Speaker of the Knesset and Deputy Speakers. Regarding the first question, a fair number of precedents rendered the petition justiciable.³⁴ Justice Barak (Justices Shlomo Levin and Mordechai Ben-Dror concurring) said that when a decision substantially offended the constitutional framework as that one did, the court had no other choice but to intervene (at 95). As for the question of the presidium's authority, Justice Barak argued that every Member of Knesset had the right to submit bills, and that the Speaker had to only supervise the technical aspects of the procedure. The authority of the presidium did not include the power not to confirm a bill on the grounds of objection to its political and social content. It did not have the right to refuse to register a bill even when that bill contained normative principles that violated the fundamental values of the State. Accordingly, although believing that the petitioner's two bills were an affront to basic principles of the Israeli constitutional system, arousing "horrifying memories" and serving "to damage the democratic character of the State of Israel," Justice Barak concluded that the first commitment of the court was to strict observance of the rule of law, even when this entailed giving expression to abhorrent opinions (at 96). Once the petitioner was elected on the basis of this platform, the presidium was not empowered to prevent the introduction of bills whose sole purpose, in terms of their content, was to put into effect the platform of the list.

This reasoning is in line with the *Neiman* decision which I have criticized elsewhere.³⁵ There I presented an ethical perspective explaining why we should withhold tolerance when movements such as Kach wished to be elected for parliament. On this issue my view differed significantly from that of John Rawls,³⁶

34. H.C. 652/1981. *Yossi Sarid MK v. Menachem Savidor, Speaker of the Knesset*; D.P. 166/1984. *Tomchey Tmimim Mercasit Yeshiva v. State of Israel*; H.C. 73/1985. *Kach v. Speaker of the Knesset*.

35. Cf. *The Boundaries of Liberty and Tolerance* (Gainesville, FL: Florida University Press, forthcoming), esp. ch.11.

36. John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), esp. pp.216-221.

Thomas Scanlon,³⁷ and Frederick Schauer,³⁸ among other philosophers. While they preferred to concentrate their discussions on the practical consideration of the magnitude of the threat, I addressed the ethical question of the constraints of tolerance. My view was that the fundamental question was ethical rather than practical. Thus, I argued that, as a matter of moral principle, parties which acted to destroy democracy or the state should not be allowed to run for parliament. Democracy should not place the means for its own destruction in the hands of those who either wish to bring about the physical annihilation of the State, or to undermine democracy. These two cases are the only cases in which democracy has to introduce self-defensive measures and to deny representation in parliament to violent lists which convey such ideas, and which act to realize them. Therefore, when a list such as Kach bases its political platform on discrimination and disrespect towards others, aiming to harm some people and to undermine democracy, it should be disqualified, as Kach indeed was in 1988.

That is to say that democracy has to find answers to the dangers emanating from the practice of its very principles, ie, tolerance and liberty.³⁹ Tolerance should prevail, but it also has to have its limits; otherwise democracy might supply its destroyers with the means to carry out their task more quickly and efficiently.⁴⁰ Notice that I am not arguing that members of the list should be denied freedom of expression altogether.

37. Cf. T.M. Scanlon, "A Theory of Freedom of Expression," in R.M. Dworkin, ed. *The Philosophy of Law* (Oxford: Oxford University Press, 1977), pp.153-171.

38. Frederick Schauer, *Free Speech: A Philosophical Inquiry* (New York: Cambridge University Press, 1982).

39. One of the problems of any political system is that the principles which underlie and characterize it might also, through their application, endanger it and bring about its destruction. Democracy, in its liberal form, is no exception. Moreover, because democracy is a relatively young phenomenon, it lacks experience in dealing with pitfalls involved in the working of the system. This is what I call the "catch" of democracy.

40. Arguments which convey similar notions have been employed in England by those seeking to restrict the activities of the National Front.

Democracy may endure any opinion, but this is not to say that each and every view has to be represented. Anti-democratic opinions deserve no institutional legitimization by democracy to help them prosper and attract more people. I reiterate that this is an argument of principle, not one that is contingent on circumstances and the degree of danger. The existence of the nation and of democracy is a constitutional requirement that all lists have to acknowledge. This principle is not to be weighed against any other consideration.

The court was erroneous in ignoring the licensing effect of the *Neiman* decision. Its view was that if Kach was allowed to run for elections, and was elected, then we might expect it to try to further its political aims through the democratic procedures which had brought it to the Knesset. Since racism and objections to democratic values were part of its political platform, then it was entitled to use democratic measures to realize them. Any other ruling would have been inconsistent with the previous ruling. The implications were that in the absence of a restrictive legislative statute, the court had to stay silent in the face of a party whose purpose was to practice discrimination and to destroy democracy. A racist list was entitled to carry its programme all the way, until it succeeded to implement it, unless a statute was introduced to put a stop to it;⁴¹ or, more likely, unless the court was convinced that there was a "reasonable possibility" of danger, or maybe "probability" or another such criterion to estimate the danger. No consideration was given by the court to what I have called (following Ronald Dworkin)⁴² "normative constitutional principles," that is, requirements of

41. Claude Klein (20 *Israel L. Rev.* No. 2-3, 1985, p.417), who questions the logic of this decision, asks whether it means that the presidium would be able to reject the same bills if they were tabled by a list which did not originally present a policy containing racist and anti-democratic principles and, thus, did not have any difficulty in being registered. He concludes: "Such a distinction would not make sense; nevertheless, it is the logical result of the [court's] reasoning."

42. Dworkin conceives principles of political morality as judicial norms, within what he calls "the full law." Cf. Ronald Dworkin, "Law's Ambitions for Itself," 71 *Virginia L. Rev.* (1985), No.2, pp.173-187. See also "The Model of Rules" 35 *Un. of Chicago L. Rev.* (1967), No. 14, pp.14-46.

Justice or fairness or similar measures of morality according to which the political structure may be interpreted. Thus, the court resorted to the formalistic view, preferring to throw the issue back to the legislature, rather than use its judicial discretion.

The reasons for which I argue that the *Neiman* decision is flawed suggest that this judgment is flawed as well. The role of the court is to set judicial standards in accordance with the normative principles on which the State is founded. Here the argument in favour of the anti-discrimination act, that the Arabs have equal rights, is an argument of principle that should be considered by the court. Hence, scope existed to decide that bills which contradicted the democratic foundations of Israel and its character as a Jewish State (as depicted in the Declaration of Independence), should not have been regarded in the same manner as other bills. These bills opposed the notion of equal respect and concern which were in the foci of both conceptions: the conception of Israel as a democracy, and the conception of Israel as a Jewish State. Why the court decided to give judicial assistance to a list which was explicitly anti-democratic, and which exploited a twisted conception of Judaism to discriminate against others, is difficult to understand.

The Knesset reacted to this decision by amending (on November 13, 1985) the Rules of Procedure of the Knesset, empowering the Speaker and his or her deputies to refuse to submit bills that were, in their opinion, of a racist nature or that negated the existence of the State of Israel as the State of the Jewish people.⁴³ The latter part of the amendment, based on s.7A of the basic law: the Knesset (to be discussed later on), was included to assure the political support required to pass the amendment. Kahane decided again to ask the assistance of the court.

(ii) The Right to Submit Bills - Second Appeal

The appeal was based on the argument that the court ruling took place before this amendment; therefore the refusal to submit these bills constituted contempt of the court (under s.6 of Court

43. Section 134 (C) of the House Rules.

Ordinance). A unanimous court rejected the appeal in a brief decision.⁴⁴ The justices (A. Barak, S. Levin and M. Ben-Dror) drew a distinction between operative order and normative order, asserting that in H.C. 742/1984 they did not *order* the presidium to present the bills. They merely declared what the existing law was and what powers might be derived from it. All that the court had said was that the appellees were not allowed to refuse to introduce the bills. Thus, by adhering to their refusal, the presidium could be said to have acted wrongly, but this act could not be seen as a contempt of the court (at 488).

After this ruling you might think that Kahane would have given up his attempts to submit bills. This, however, was not the case. He introduced five bills before the presidium: two of them were similar to the previous ones. The additional laws prohibited advocating religious conversion; forbade the selling of land to Arabs; and put a veto on meetings between Jewish and non-Jewish youth. The presidium, as expected, refused to place them on the floor for debate. Its decision was based on the recent amendment to the Rules of Procedure of the Knesset (s.134[C]). Kahane, for his part, stated that he had copied two of these laws, word for word, from the great Jewish law codifier, Maimonides, and the other from the Jewish National Fund.⁴⁵

(iii) The Right to Submit Bills - Third Appeal

Kahane's last appeal to the court on this issue was based on the grounds that an order which was designed to restrict the right of a Knesset member to submit bills should be founded in a specific law, and not in the Rules of Procedure of the Knesset.

Speaking for a unanimous court of five justices, President Shamgar argued that the Rules of Procedure themselves created the right of a Knesset member to initiate laws, and that they established the confines of this right. Only in exceptional circumstances of a substantial defect in an order of the Rules of

44. H.C. 306/1985. *Kahane v. The Presidium of the Knesset*. P.D. 39(iv), 485.

45. Those claims were rejected by distinguished scholars, who argued that these are partial quotations which do not truly reflect Maimonides' views, and which in any event are not applicable to current reality.

Procedure, was there scope for judicial scrutiny (at 399-400). This was not the case here, and in any event the court did not sit as an appeal instance regarding the decisions of the Knesset presidium. Therefore, Kahane's petition was denied.⁴⁶

Two of the opinions, those of justices Barak and Levin, deserve closer examination. The opinion of Justice Barak comprised two words: "I concur." In the other cases concerning Kahane's rights, Justice Barak formulated elaborate judgments. Here he preferred simply to express agreement with President Shamgar's reasoning. By taking this laconic decision Barak adopted a strict judicial view so as to say that all the data relevant to this case was similar to the data in H.C. 742/1984, with the exception that the legislator had decided to act, and now the court had to formulate its decisions on the basis of the amendment to the Rules of Procedure of the Knesset.

One of the criticisms that was voiced against Justice Barak held that a discrepancy arose between his opinions in the first case which considered Kahane's right to introduce laws, and this one. Thus, David Kretzmer asserted that in H.C. 742/1984 Justice Barak had said that the presidium could not refuse bills on the grounds of their contents, while here Barak based his decision on a Knesset amendment which made distinctions *precisely* on the basis of content.⁴⁷ However, this was only an apparent discrepancy, not a real one, because of the introduction of the amendment. Kretzmer, among others, had high expectations of the future President of the Supreme Court. I have to admit that I too expected Justice Barak to take a broader view of the issue, and not simply to concur with President Shamgar without commenting on the Knesset's initiative in blocking Kahane's attempt to submit his bills. Justice Barak could have said that the court had to follow the directives of the legislature while still expressing his reservations about this amendment, if he still had reservations.

The interesting decision in this case was that of Justice Dov

46. H.C. 669/1985; 24/1986; 131/1986. *Kahane v. The Presidium of the Knesset*. P.D. 40(iv), 393.

47. David Kretzmer, "Judicial Review of Knesset Decision," 8 *Tel-Aviv Studies in Law* (1988), p.137.

Levin. He concurred with the President's reasoning and added that it was right to deny the petition on different grounds. Justice Levin contended that even if the Knesset Rules of Procedure did not authorize the presidium to refuse the submitting of Kach bills, nevertheless the court should have rejected the appeal because it was based on proposals which negated the fundamental principles upon which the State of Israel as well as Judaism were founded (at 407-8). He postulated that the common denominator of these bills lay in their explicit discrimination against non-Jews, aiming to diminish their basic rights. It could not be that this court, whose role was to support justice, would aid those who wished to force the Knesset to present such racist proposals. The court should have declared Kach's petition *prima facie* void because Kahane wished to found his bills on the *Halacha*, while their *content* was invalid from a universal perspective as well as from the perspective of the principles which underlie Judaism. Moreover, Justice Levin criticized the court's decision in H.C. 742/1984, saying that if he had been among the justices in that decision, he would have rejected the appeal straight away. He said that because of the repugnant nature of the bills, there was no reason to discuss the case at all (at 406).

Thus, Justice Levin's reasoning was in essence similar to mine, and it was in line with Ronald Dworkin's concept of normative legal principles. Justice Levin implied that some matters have no place in a democratic society, and that democratic rights should not exist for the assistance of those who wanted to exploit them so as to infringe the rights of others. Justice Levin did not speak of the licensing role of the court, but his assertion that some ideas have no place in the court implies that among the duties of the court is to act against some noxious opinions, when the court reaches the conclusion that they should be excluded from the social framework.

Justice Levin's reasoning served as the basis for denying Kahane's last appeal against the Knesset Speaker, Shlomo Hillel.⁴⁸ At first glance the case seems peculiar: the adding of

48. H.C. 400/1987. *Kahane v. Speaker of the Knesset*, P.D. 41(II), 729.

a sentence when a member of Knesset makes the Knesset oath. A closer look at the dispute reveals that it was of great significance because it pitted two contradictory concepts one against the other: one democratic and the other theocratic. The main motivation was not the de-legitimization of Kahane, though the results of this dispute certainly contributed to that effect. Instead, Hillel seems to have thought that the Knesset should not allow anyone to make a mockery of its rules, that it should not stay silent when attempts were made to lower the status of Knesset in the constitutional framework and to introduce qualifications to the keeping of law and order.

III. The Right to Qualify the Knesset Oath

The crux of the case was the Knesset oath which every member of Knesset is required to declare when a new Knesset is convened. The oath reads: "I declare to be faithful to the State of Israel and to fulfil, in good faith, my mission in the Knesset."⁴⁹

When making his Knesset oath, Kahane added a sentence from the Book of Psalms (ch.119), saying: "I pledge to keep your [God's] laws always, forever and after." More than two years later, in January 1987, Kahane declared before a court in the United States, "I did not take the Knesset oath as prescribed." He explained that his reading from Psalms was intended to say that his first obligation was to the law of God, not to the laws of the State; that he would obey the laws of the Knesset as long as they did not disobey a higher law.⁵⁰

After the Speaker of the Knesset discovered Kahane's intention to stipulate his loyalty to the laws of the State only if they did not contradict the Laws of the *Torah*, he asked Kahane to declare his confidence once again, without any qualifications. Hillel warned Kahane that if he would not do that, all his rights as a

49. Section 14 of Basic Law: The Knesset.

50. As a matter of fact, Kahane had made the same statement already in August 1984, in a telephone interview to *The New York Times*.

member of the Knesset would be removed.⁵¹ The Speaker, we can assume, regarded Kahane's stipulation as an attempt to delegitimize law and order in Israel. Kahane appealed to the court, seeking its assistance to free him from fulfilling this demand.

The court unanimously rejected the appeal. Following the precedent set in H.C. 669/1985, Deputy President Miriam Ben-Porat referred to the concluding part of Kahane's declaration in the American court, where he said: "My intention in taking such oath was to modify the Knesset oath to reflect that my first responsibility is to God's law."

In line with Justice Levin's judgment, Deputy President Ben-Porat said that the court was designated to consider cases in which it found a need to observe that justice was done. She maintained that only clean-handed and honest people could enter through the gates of this court.⁵² In these circumstances, Kahane should not find any support in the court, for his conduct was not honest, and was not suitable for a public representative (at 735). Deputy President Ben-Porat quoted Justice Moshe Zilberg who said, "Israel is not a theocracy, for it is not religion which administers the life of the citizen, but the law."⁵³ Therefore, it was an insult to think a member of Knesset could put himself beyond the laws of the Knesset and still be considered loyal to his role in parliament, and to the State as such.

Justices Menachem Elon and Eliyahu Vinoguard presented their judgments in a similar fashion. Justice Elon referred to the first part of Kahane's confession, where he admitted that "I did not take the Knesset oath as prescribed." Since Kahane did not mention this comment in his appeal, then the appeal seriously lacked honesty. It had to be denied immediately, without even consideration of the claims that Kahane was making (at 741). For his part, Justice Vinoguard maintained that if the appellant

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51. In accordance with s.16 of Basic Law: The Knesset which provides that so long as the representative will not make the oath as required, he will not enjoy the rights of a Member of the Knesset.
 52. Cf. President Moshe Smoira in H.C. 29/1952. *St Vincent de Paul Monastery v. Tel-Aviv City Council*. P.D. 6, 670.
 53. H.C. 202/1957. *Seedis v. The President and Members of the Rabbinical High Court*. P.D. 12, 1528.

wanted to safeguard his rights as a Knesset member, he did not need to seek the assistance of that court. All he had to do was to make the Knesset oath again, as prescribed by the legislator, and s.16 of the Basic Law. The Knesset (1958) would not be activated against him (at 743). The court had no reason to intervene in the working of the Knesset in this case.

We may read the court's decision as saying that the taking of an oath provides a standard against which conduct can be measured and legitimate grounds for ousting if that standard is not met. The State does not have to permit a person to sit in parliament when that person has not, in good faith, taken the statutory oath, but has said that he or she does not feel obliged to be loyal to its laws.⁵⁴

E. Final Comments

I wish to round off this discussion by making an observation on the military involvement in the fight against Kahanism. The official army radio, "Galei Tzahal," decided to devote one day of broadcasting in October 1985 to refuting Kahanism and to fighting against racist trends. The commander of the radio station explained that although it should not be involved in political matters, an exception had to be made in this case. Given the scale of the problem and the fact that the army was the people's army,

54. Compare to *Albertson v. Millard*, 106 F. Supp 635 (1952), where an American court ruled that the State has no duty to permit Albertson to run for Congress on a Communist ticket when he may not, in good faith, take the statutory oath "to protect and defend the Constitution of the United States" (at 644). Accordingly, one may think that there was room for another application for judicial review, that of the Knesset Speaker against Kahane, who clearly sought ways to by-pass the rules of the Knesset. It seems that a complaint against Kahane for deception could have been made if legal grounds were to be found. However, the Basic Law: The Knesset (1958), does not include a section which provides grounds for contempt of the Knesset. This precedent shows that the Knesset should try to resolve this issue through legislation, as it did with regard to the issue of the submitting of bills.

it could not have ignored the racist ideas to which soldiers were exposed.⁵⁵ Colonel Shulamit Ligum, public relations officer for the manpower division of the Israeli Defence Force (IDF) wrote:

"We agree with the institutions of the state and with the vast majority of society that thinks Kahane's messages are racist and they hurt us first because they carry within them the destruction of Israeli society and threaten the existence of the State of Israel."⁵⁶

This statement followed the publication of a special instruction to all officers, issued by the Chief Education Officer in March 1985, concerning Kahane. It said, "it is commonly accepted that at least some of Kahane's activities undermine the stability of society, and thus endanger the entire population." The instruction maintained that Kahane's views contradicted the Zionist tradition and the "spirit of democracy." This was the first time that the Israeli Defence Force (IDF) decided to take a stand against a Knesset member and to warn against his activities.

That the military decided to join the struggle against Kahanism shows the extent of antagonism and concern felt by the commanders regarding the phenomenon. They witnessed the growing popularity of Kahane's discriminatory ideas amongst soldiers and decided to fight this trend. This fact also indicates the repugnance aroused by Kahane and his views. The consensus was that Kahanism had to be excluded from society altogether, and that the importance of this issue outweighed the interest of maintaining a clear distinction between politics and the military. But we have a matter for concern when the military becomes involved in politics and democracy. This step might have

55. One of the items brought into the broadcast was the result of research, showing that three per cent of the population wanted Kahane to become Prime Minister, and 26 per cent demanded that he would take part of the leadership in accordance with his power in the Knesset. Still, 51 per cent asserted that "the man and his movement should not take part in anything." Cf. *Ha'Aretz* (Israeli Daily), October 15, 1985.

56. Quoted by Kahane in complaint about the persecution he suffered. See *Uncomfortable Questions for Comfortable Jews* (Secaucus, New Jersey: Lyle Stuart, 1987), p.290.

significant effect on the relationship between the parliament and the army, though no decisive conclusion can be reached at this stage regarding the further implications of that involvement.