The Boundaries of Liberty and Tolerance

The Struggle Against Kahanism in Israel

Raphael Cohen-Almagor

With a Foreword by Geoffrey Marshall

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Chapter 12

Curtuiling Kahane's Freedom of Movement und Expression

Freedom of Movement

Two weeks after his election to the Knesset, Kahane initiated a series of provocative visits to Arab communities with the avowed aim of persuading the inhabitants to emigrate from Israel. The first visit, on 30 August 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.[1] So, fearing disturbances and bloodshed, the police did not allow Kahane to enter the town. They stopped the Kach group two miles from Umm El Fahm. In this incident and in others, the police were there to intervene and to prevent bloodshed; however, their 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's decision: However, Kahane himself canceled this appeal on 4 July 1985 on the grounds that it was no longer relevant. The issue ceased to be relevant because of measures taken by the Knesset to stop the visits. In December 1984 the

Knesset House Committee voted in a twelve-to-eight decision to restrict Kahane's parliamentary immunity. The provision in law secures members of the Knesset free access to any public place.[3] The restriction was intended to enable the police to prevent Kahane from entering Arab communities in 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 had been 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.4

Yossi Sarid, member of Knesset (Civil Rights Movement), one of the two Knesset members who initiated this measure,[5] explained the necessity of restricting Kahane's immunity by saying that Kahanism was a psychopolitical 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 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 has to stop him here and now."[6] Haim Ramon, member of the Knesset (Labor), 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 the other **119** Members of Knesset."[7]

The plenum of the Knesset approved the proposal with a simple majority (a fifty-eight-to-thirty-six decision).

Kahane appealed to the High Court of Justice on preliminary, procedural grounds.* 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 that he would not degrade himself 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. Under the Offense Principle (cf. part **1,** chapters *7* and **S),** this measure was justified. It was designed to abridge the expression of opinions, of which the content as well as the manner were intended to cause offense in objective circumstances that were unavoidable from the unwilling witnesses' view. Such visits to Arab villages constituted deliberate and willful attempts to exacerbate the sensibilities of the Arab population. Kahane targeted specific groups among whom he wanted to propagate his ideas of "separation" and "voluntary emigration for peace"; and by going to their places he forced them to be exposed to his racist statements and diatribes. A reflection on Joel Feinberg's three standards may prove that reason existed for introducing the restriction (see chapter 7). The seriousness of the offense standard was satisfied: Kahane intended to inflict psychological offense, which was morally on a par with physical harm, upon the Arab communities. He wanted maliciously to offend and stir up the Arab inhabitants by expressing his avowedly antidemocratic views.[9] The *Volenti* standard was certainly satisfied, because the Arab inhabitants did not feel an obligation to attend the rallies simply out of curiosity. Finally, given Kahane's motives, avoiding the demonstrations would have amounted — from the Arab resi-

dents' viewpoint—to saying that Kahanism may pass. Thus, the Arab citizens were put 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 to 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.

We also can argue that grounds existed for restricting Kahane's freedom of movement and expression under the Harm Principle. 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 own hands and apply more persuasive methods to clarify the speech to the Arabs. The possibility existed of words being translated into physical harm.[10]

It was one thing to prevent Kahane from entering Arab communities but quite another to refuse him access to any other places. Although 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. In some of these cases, Kahane was allowed to hold the rallies only after appealing to the courts.[11] I do not wish to consider all of these cases, so let me take one incident as an illustration.

On 10 March 1985 Kahane wished to enter Bar-Ilan University at the city of Ramat-Gan but was denied entry by the police. The official claim was that the measure was taken to prevent incitement against Arab students. This claim strikes me as peculiar. In the first place, the police could not have known what Kahane intended to say. Visiting an Arab village, Kahane was likely to address the Arab issue, which would not necessarily be 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 neighborhood 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 (cf. chapter 7). Lastly, the discrepancy between this incident and Kahane's appearance at the Hebrew University on 28 February 1985 is glaring. I find it difficult to understand how the police allowed Kahane to speak in Jerusalem, where no fewer Arab students may be found than at Bar-Ilan, yet decided to deny his right to speak at Ramat-Gan.

The media opened another front in the struggle against 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 programs;[13] his statements were not reported; newspapers turned down his requests to respond to the attacks made on him; press conferences and events organized by Kach were not covered. The decision was not to supply Kahane with any means to disseminate his views. The frustrated Kahane sought the assistance of the supreme court.

The Media's Ban on Kahane

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 that possesses similar authority. Until not long ago it supervised three of the main five radio networks and the sole television network.[14] Immediately after the elections to the Eleventh Knesset took place, the News Forum of the Broadcasting Authority decided that in matters that 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 that contradicted the Declaration of Independence. Kahane appealed to the court, arguing that the decision to ban him infringed on 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.[15]

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 interrelated regulations, which crystallize—through their operation—the tradition of freedom of speech. This tradition is integrated into 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, "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).[16]

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,[17] Justice Barak argued that the public had the right to gain access to the media as well as to receive information about unfamiliar ideas. An unlimited marketplace 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. These, among other arguments, were discussed in part 1, chapter 5. Drawing on these three major reasons, freedom of expression was perceived to be a central right under Israeli constitutional law. Justice Barak asserted that this freedom also included the freedom to express dangerous, irritating, and unconventional opinions, which the public hated and detested.[18] It also included racist expressions.

Justice Barak maintained that the way to deal with such ideas was not by silencing them but through explanation and 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 (as he did in *Neiman*) Justice Holmes's renowned opinion in *Abrams* that the best test of truth is the power of the thought in question to win acceptance in the competition of the market.[19] Truth would win out through the contest of ideas.

However, agreeing with Justice Shimon Agranat's reasoning in *Kol Ha'am,* Justice Barak conceded that the right to free speech is relative. 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 legislature; 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 that 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 connection 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 chances 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 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-ethnical 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 offense 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 offense, 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. In a free democratic society we have 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 that substantially injure social order, the public peace, or the foundations of democracy. The probability test is too blurred to serve as a decisive criterion. Instead, the Harm Principle and the Offense Principle are offered as the only qualifications on freedom of expression. To recall, under the Harm Principle I argued that some types of speech that inflict considerable harm ought, like any other harmful action, to be subject to restriction. And the Offense Principle supplies grounds for abridging expressions when they are intended to inflict psychological offense, 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.

At this point I must dedicate some space to a specific point made by Justice Bach in his judgment. He said that when the state media broadcasted racist ideas they did not affirm or support them but did help them gain legitimacy (at 316). The question of granting legitimacy to a list has been one of the main considerations here to argue that violent political lists that strive to bring about the annihilation of the state and violent lists with explicit antidemocratic platforms have no place in a democratic parliament. Now, you may argue that the same reasoning should persuade us to outlaw racist expressions altogether.

In my discussion on Skokie I expressed reservations regarding the view that makes racist speech a special case, distinguishing it from other forms of speech, thereby enabling it to be excluded from the entrenched protection usually granted to speech. Instead, I have formulated the Offense and the Harm Principles. I still think that in a free democratic society we have room for every opinion to be heard, racist opinions included. If we reflect on Bach's argument, we see that he did not mean an idea gains legitimacy just from the fact of its being heard. Many extraordinary, peculiar ideas exist; being given the chance to compete in the marketplace of ideas does not in itself accord them legitimacy.

You may argue that Justice Bach expressed this view because only one television network existed in Israel, controlled by the state; therefore, any opinion that appeared on the air automatically received some sort of legitimization. This is a plausible argument. The fact that a person appears in the media several times does make him or her part of the place. Indeed, this consideration played some role in the decision of the Broadcasting Authority to ban Kahane. However, a clear-cut connection does not exist between appearing on television and gaining legitimacy as a result of that exposure. Justice Bach's reasoning does not provide grounds to infer from the legitimacy argument — with regard to restricting representation in parliament — the denial of freedom of expression. For a great difference exists between appearances on television and appearances in parliament. I agree with Justices Barak and Bach that in a democracy we cannot allow the banning of ideas solely on the basis that they are associated with a certain party or a certain person. This is in spite of the fact that their very appearance on state television may grant them some legitimacy. We can hope that educational efforts to counteract the influence will prove successful. But what democracy can afford in terms of freedom of expression is not necessarily what it can allow in terms of freedom of election. Television is not a democratic instrument. In many democratic countries television networks are controlled by wealthy people who decide what their viewers will see according to diverse interests, public as well as selfish. In other democracies, such as Israel, the government exerts a strong influence on what is broadcast. In either case, the decision about what should be shown on the screen is not made in a democratic fashion. On the other hand, parliament is a democratic institution, an essential procedure without which democracy becomes an empty word. It is too much to expect democracy to allow those who aim at its destruction to enter parliament so as to further their aim by democratic means. I would hesitate to say the same about expressing antidemocratic ideas in the media. In the media we are dealing with competition in the market of ideas, while in the parliament we are dealing with the legal possibilities of translating ideas into deeds.

In addition, so far as the legitimacy factor is concerned, a difference occurs between the legitimacy that may be accorded a person or a body of persons through appearance on television and the legitimacy accorded a party through representation in parliament. In the case of a state-controlled television network, we can say that both types of legitimacy are institutionalized. The first may be called *media legitimacy*, while the second may be called *governmental legitimacy*. They are not one and the same, although one may affect the other. Those who gain media legitimacy may become celebrities, but they do not necessarily gain legitimacy

as decision makers. Some of them, surely, have no claim but to be known. They may base their status in society—through the legitimacy accorded to them by the media—on merely sensational material. On the other hand, those who enjoy governmental legitimacy or wish to gain it through election to the parliament have a different claim and a different position in society. They want to dictate the future of their society. *They have authoritative claims.* They do not only shape what we will eat for breakfast or how we will dress next summer; they can determine whether we say what we think, and to what extent coercion will prevail in society.

The final section of this chapter reflects on Kahane's five appeals against the speaker of the Knesset, Shlomo Hillel. But first an observation on the military involvement in the fight against Kahanism should be recorded. 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, it could not have ignored the racist ideas to which soldiers were exposed.[20] Colonel Shulamit Ligum, public relations officer for the manpower division of the IDF, wrote, "We agree with the institutions of the state and with the vast majority of society that thinks that 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."[21]

This statement followed the publication of a special instruction sheet concerning Kahane to all officers, issued by the chief education officer in March 1985. It declared, "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 IDF decided to take a stand against a Knesset member and to warn against his activities.[22]

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

Kahane v. Speaker of the Knesset—Five Chapters

THE RIGHT TO SUBMIT MOTIONS OF NO CONFIDENCE

In February 1985 the Speaker of the Knesset refused to accept a motion of no confidence in the government submitted by Kach. The official excuse was that one member's political factions could not introduce such a motion. Clearly the claim was tailored against Kahane, who appealed to the court.[23]

Speaking for a unanimous court (President Meir Shamgar and Justice Eliezer Goldberg concurred without explanation), 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 Section 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 determined that "one-person factions are not allowed to submit no-confidence motions."[24] Justice Barak responded that this argument could not stand because the Knesset's Rules of Procedure could be read only 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 analyzing 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.[25] 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 that was denied the power to submit motions of no confidence was parliamentarily 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's 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.[26] If the only ground 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 grounds 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 interpret 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.

THE RIGHT TO SUBMIT BILLS — THREE APPEALS

The First Appeal

The speaker of the Knesset, Shlomo Hillel, and the Knesset Presidium refused to introduce two of Kahane's proposed laws, asserting that they

would not lend their 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 nonvoluntarily.

The second bill (the Separation Law) called for the abolition of all governmental programs 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 neighborhood unless the majority of the Jews in that neighborhood agreed to it; 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."[27] Relying on the Knesset Rules of Procedure,[28] they argued that their authority empowered them to use their discretion in refusing the introduction of bills that 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, 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 amount of precedents rendered the petition justiciable.[29] 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 the Knesset had the right to submit bills, and that the speaker had only to 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 (H.C. 742/1984, 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. 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 that 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 program all the way until it succeeds in implementing it, unless a statute was introduced to put a stop to it;[30] or, more likely, unless the court was convinced of 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 Dworkin) *normative constitutional principles*, that is, requirements of 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 argued that the *Neiman* decision was flawed suggest that this judgment was 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 favor of the anti-discrimination act, that the Arab citizens have equal rights, is an argument of principle that should be considered by the court. Hence, scope existed to decide that bills that 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 concern and respect that were the focus of both conceptions: the conception of Israel as a liberal democracy and the conception of Israel as a Jewish state. Why the court decided to give judicial assistance to a list that was explicitly anti-democratic and that exploited a twisted conception of Judaism to discriminate against others is difficult to understand.

The Knesset reacted to this decision by amending (on 13 November 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.[31] The latter part of the amendment, based on section 7A of the Basic Law: The Knesset (to be discussed shortly), was included to ensure the political support required to pass the amendment. Kahane decided again to ask for the assistance of the court.

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 Section 6 of Contempt of Court Ordinance). A unanimous court rejected the appeal in a brief decision.[32] The justices (Barak, S. Levin, and 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 being in a contempt of the court (at 488).

After this ruling one might have thought 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 placed a veto on meetings between Jewish and non-Jewish youths. The Presidium, as expected, refused to bring them to the floor for debate. Its decision was based on the recent amendment to the Rules of Procedure of the Knesset (Section 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.[33]

The Right to Submit Bills—Third Appeal

Kahane's last appeal to the court on this issue was based on the ground that an order that 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 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's Presidium. Therefore, Kahane's petition was denied.[34]

Two of the opinions, those of Justices Barak and Levin, deserve closer examination. Two words comprised the opinion of Justice Barak: "I concur." In the other cases concerning Kahane's rights, Justice Barak had 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 as if 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 legislature had decided to act, and now the court had to formulate 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 that made distinctions *precisely* on the basis of content.[35] However, this was only an apparent discrepancy, not a real one, because of the introduction of the amendment. Kretzmer, among others, had high expectations for 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 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 that 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 that 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 straightaway. 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 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 in order 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 speaker of the Knesset, Shlomo Hillel.[36] At first glance the case seems peculiar: the adding of a sentence when a member of Knesset takes the Knesset oath. A closer look at the dispute reveals that it was of great significance because it pitted two contradictory conceptions one against the other: one democratic and the other theocratic. The main

motivation of Hillel's action was not the delegitimization of Kahane, although 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 rules, that it should not stay silent when attempts were made to lower the status of the Knesset in the constitutional framework and to introduce qualifications to the keeping of law and order.

THE RIGHT TO QUALIFY THE KNESSET OATH

The crux of the case was the Knesset oath that every member of Knesset is required to declare upon his or her election to the Knesset. The oath reads, "I declare to be faithful to the State of Israel and to fulfill, in good faith, my mission in the Knesset."[37]

When taking his Knesset oath, Kahane added a sentence from the Book of Psalms (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.[38]

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 member of the Knesset would be removed.[39] 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 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" (at 734–35).

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 honest people

with clean hands could enter through the gates of this court.[40] Under these circumstances, Kahane would not have found 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."[41] Therefore, it was an insult to think a member of the 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 he 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 wanted to safeguard his rights as a member of the Knesset, 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 legislature, and section 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 stating that taking an oath provides a standard against which conduct can be measured and legitimate grounds for being ousted 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 laws.[42]

Chapter 12: Curtailing Kahane's Freedom of Movement and Expression

1. Testimony by Commander Karty. 100 *Divrei Haknesset* (Knesset Proceedings), 11 Knesset. 36th meeting. (25 December 1984), p. 885.

2. H.C. 587/1984. *Kahane v. Minister of Police and the Inspector General.* The case was never published. I was able to trace it thanks to Commander Hana Hirsch of the Israeli police.

3. 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."

4. *Al-Hamishmar,* 20 November 1984. See also Yair Kotler, *Heil Kahane,* pp. 287–92 (Hebrew).

5. The other member of Knesset was Edna Soloder from the Labor Party. Kahane called them S.S. (Sarid-Soloder).

6. 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 alienated figure.

7. 100 *Divrei Haknesset,* 11 Knesset. 36th meeting. (25 Decem er 1984), pp. 885–905.

8. H.C. 43/1985. *Kahane v. Knesset House Committee* (from 1 April 1985). The case was not published. Here I acknowledge gratitude to Mr. Zvi Inbari, the Knesset.

9. In an interview done 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 the inhabitants and to make them realize that time was not on their side, that they had to leave immediately. See Mergui and Simonnot, *Israel's Ayatollahs,* p. 50.

10. Under the Harm Principle *(argument number one)* any speech that incites the causing of physical harm to ,designated individuals or groups ought to be curtailed (cf. chap. 7, "The Millian Arguments").

11. On 24 September 1984 Kahane appealed to the court against the Israeli police because they refused to give Kach a license for holding an assembly in one of the parks in Jerusalem. Finally the license was granted, and Kach withdrew its appeal. Kahane appealed again on the same grounds in 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.

12. Section 6 of the Police Ordinance permits the police to refuse a license 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 sect. 152 of the Penal Law), incitement to rebellion (in contravention of sect. 133 of the same law), or incitement to any other offense (in contravention of sect. 34 of the same law).

13. In Britain a similar ban is placed on members of the IRA.

14. Not long ago Channel 2 was also established under the supervision of the Broadcasting Authority. Nowadays, a cable system is run by private initiators.

15. H.C. 399/1985. *Kahane v. Board of Directors of the Broadcasting Authority.* A summary of the case appears in *Israel Law Review* 23 (1989), pp. 515–17.

16. J. A. Barron, *Freedom of the Press For Whom?* p. xiii.

17. *Whitney v. California* 274 U.S. 357 (1927); *Red Lion Broadcasting Co. v. FCC* 395 U.S. 367 (1969); *Columbia Broadcasting v. Democratic Comm.* 412 U.S. 84 (1973).

18. Cf. Cr.A. 255/1968. *State of Israel v. Ben-Moshe;* H.C. 153/1983. *Levi and Amit v. Southern District Police Commander;* H.C. 14/1986. *Laor v. Censure Council of Films and Plays.*

19. *Abrams v. United States* 250 U.S. 616 (1919), at 630.

20. One of the items presented in the broadcast was the result of research showing that 3 percent of the population wanted Kahane to become prime minister and 26 percent demanded that he should take part in the leadership in accordance with his power in the Knesset. Still, 51 percent asserted that "the man and his movement should not take part in anything" (cf. *Ha'aretz,* 15 October 1985).

21. Quoted by Kahane in complaint about the persecution he suffered. See *Uncomfortable Questions for Comfortable Jews,* p. 290.

22. Cf. Reuven Pedhatzur, "It Is Agreed Upon that Some of Rabbi Kahane's Activities Endanger the Citizens of the State," *Ha'aretz,* 5 March 1985.

23. H.C. 73/1985. *Kach v. Speaker of the Knesset.*

24. Resolutions from 20 March 1967 and from 30 July 1979.

25. H.C. 652/1981. *Yossi Sarid v. Speaker of the Knesset, Savidor,* at 203.

26. For further discussion of this case, see Menachem Kanafi, "A Digest of Selected Judgments of the Supreme Court of Israel," pp. 219–24.

27. H.C. 742/1984. *Kahane v. the Presidium of the Knesset* (at 89).

28. 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" (italics mine).

29. H.C. 652/1981. *Yossi Sarid Member of Knesset v. Speaker of the Knesset, Savidor;* Application for Leave to Appeal (A.L.A.) 166/1984. *Tomchey Tmimim Mercasit Yeshiva v. State of Israel;* H.C. 73/1985. *Kach v. Speaker of the Knesset.*

30. Klein, in "The Defence of the State of Israel and the Democratic Regime in the Supreme Court," p. 417, questions the logic of this decision and asks whether it means that the Presidium would be able to reject the same bills if they were tabled by a list that did not originally present a policy containing racist and antidemocratic 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."

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

32. H.C. 306/1985. *Kahane v. the Presidium of the Knesset.*

33. Those claims were rejected by distinguished scholars who argued that the laws included partial quotations that did not truly reflect Maimonides' views and that, in any event, were not applicable to current reality.

34. H.C. 669/1985; 2411986; 131/1986. *Kahane v. the Presidium of the Knesset.*

35. David Kretzmer, "Judicial Review of Knesset Decisions," p. 137.

36. H.C. 400/1987. *Kahane v. Speaker of the Knesset.*

37. Section 14 of Basic Law: The Knesset.

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

39. In accordance with section 16 of Basic Law: The Knesset, which provides that so long as the representative will not make the oath as required, the representative will not enjoy the rights of member of the Knesset.

40. Cf. President Moshe Smoira in H.C. 29/1952. *St. Vincent de Paul Monastery v. Tel-Aviv City Council.*

41. H.C. 202/1957. *Seedis v. the President and Members of the Rabbinical High Court.*

42. Compare to *Albertson v. Millard,* 106 F. Supp. 635 (1952), where an American court ruled that the state had no duty to permit Albertson to run for Congress on a communist ticket when he could not, in good faith, take the statutory oath "to protect and defend the Constitution of the United States" (at 644). Accordingly, we may think that room existed for another application for judicial review, that of the Speaker of the Knesset against Kahane, who clearly sought ways of bypassing the rules of the Knesset. A complaint against Kahane for deception could have been made if legal grounds were to be found. However, Basic Law: The Knesset (1958) does not include a section that 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.