EA 2/84

EA 3/84

MOSHE NEIMAN ET AL.
v.
CHAIRMAN OF THE CENTRAL ELECTIONS COMMITTEE
FOR THE ELEVENTH KNESSET

The Supreme Court Sitting as a Court of Election Appeals
[May 15, 1985]
Before Shamgar P., Ben-Porat D.P., Elon J., Barak J. and Bejski J.

Editor's synopsis -

The Knesset Elections Law establishes a Central Elections Committee, to which are submitted the various proposed candidates lists that wish to participate in the Knesset elections. The Committee reviews the lists to ascertain that they conform to the requirements of the Law, approves such lists as comply and disqualifies any list that does not comply, supervises the conduct of the election campaign and the elections themselves, rules on various issues that arise during the campaign and during the elections and certifies the results of the voting. The Committee is comprised of representatives of the party lists that are represented in the outgoing Knesset. It is chaired by a Justice of the Supreme Court.

The Central Elections Committee for the election of the eleventh Knesset disqualified two party lists. One was the "Kach" list, which it disqualified for the reason that it advocates racist and anti-democratic principles, that it openly supports terrorist acts, that it seeks to foment enmity and hatred between different segments of the population and that its goals and objectives negate the fundamentals of the democratic regime that prevails in the country.

The Committee also disqualified the "Progressive List for Peace" from participating in the elections on the ground that it contained within it subversive elements and that certain key members of the list conducted themselves in a manner that identified with enemies of the State.

Sitting in a panel of five Justices, the Supreme Court allowed these appeals and reversed the Committee's decisions. The lead opinion was written by the President of the court, Justice Shamgar. He held:

1. There are no provisions in the statute concerning any limitations on the qualifications of a candidates list based on the list's beliefs and goals. Although the *Yeredor* case (see *infra*) established that the Committee could disqualify a list that sought to achieve the dissolution of the State, statutes and rulings that limit fundamental rights should be construed narrowly. One should not deduce from that precedent that there is room to expand the grounds for disqualifying a list to include less extreme circumstances.

2. Applying the standards set forth in *Yeredor* to the "Kach" list, one must ask whether this is a body that seeks to prejudice the very existence of the State, whether the party group was declared - before its disqualification - to be an illegal organization, according to statute, or whether it was proved before the Committee or before a court that its goals include the total negation of the State. The distortions in its opinions, the outrage that they arouse and the desire to disassociate oneself from any approval of these ideas, even indirectly, are not sufficient legal grounds to disqualify the list once it has satisfied the statute's formal requirements.

3. No evidence was presented to the Committee from which it might have concluded that the "Progressive List for Peace" meets the criteria of the *Yeredor* case. The Committee received a statement from the Defense Minister's spokesman to the effect that the Minister was convinced, on the evidence placed before him, that the list contained subversive elements. Although the information placed before a statutory authority need not meet the standards of evidence that apply in court, it is not sufficient that the Committee rely on information that is entirely in the hands of other parties. In this case, the Committee *de facto* delegated its authority to the Minister of Defense, and it had no right to do so. The classified nature of the information does not relieve a quasi-judicial body, such as the Committee, from its duty to examine the data itself and make up its own mind.

The Deputy president of the court, Justice Ben-Porat, concurred in the decision on the ground that, in her view, the Elections Law does not empower the Committee to consider the question whether a list is worthy of participating in the elections. All the Committee is empowered to do is to examine whether the proposed list meets the formal requirements set forth in the Law. Justice Ben-Porat expressed her agreement with the opinion of the dissenting Justice in the *Yeredor* case.

Justice Elon expressed the opinion that the Elections Law requires the Committee to approve a list once it determines that the list satisfies the requirements set forth in the statute. The Committee does not have any discretion to disqualify a list for other reasons. He supported the decision in the *Yeredor* case as based on a principle that stands above the ordinary canons of interpretation, namely, that the Law is given to live thereby, not to die thereby. Participation in the elections to the Knesset in order to destroy the State and the Knesset are self-contradictory. Society has a natural right to defend itself. But this is a onetime exception that cannot be applied to other grounds for disqualification of a list. He then surveyed the Jewish sources, in law and thought, that encourage intellectual freedom and the exchange of ideas. He rejected the "racist" ideas of

the "Kach" list as contrary to Jewish values and to the Biblical conception that all persons are created in the image of God.

Justice Barak was of the opinion that the Committee has discretion to disqualify a list if there is a danger that its approval might undermine the very existence of the State or its democratic character. The proper balance between values that conflict with each other is to be found in the degree of probability that the particular harm sought to be prevented will occur. Nothing in the platform of the "Progressive List for Peace" demonstrates that the list seeks to destroy the State or to injure its democratic character. The "Kach" list's ideas are contrary to the general ideals and to the Jewish values on which the State is founded. But, so long as it has not been proved that there is a reasonable possibility of injury to the State's existence or to its democratic character, the list must be approved.

Justice Bejski distinguished between negation of the very existence of the State and injury to its democratic character. The necessity for judicial legislation in the case of the former does not justify extending the *Yeredor* ruling to the latter situation as well, especially when one considers the basically political nature of the issue. The Committee is a partisan political body. If it were given the power to disqualify a list on the ground that it undermines the democratic character of the regime, without statutory definitions and restraints, some lists might be disqualified for reasons of narrow partisan interests, as they happen to appear at a particular moment to a majority of the Committee. Based on the "reasonable possibility" test advocated by Justice Barak, the "Kach" list endangers the democratic character of the State. The reason it is not to be disqualified is that there is no legal authority to do so.

Note - In the elections to the eleventh Knesset, the "Progressive List for Peace" and the "Kach" list each gained one seat in the Knesset. The eleventh Knesset amended Basic Law: The Knesset, empowering the Elections Committee to disqualify a list if its actions or goals negate the establishment of the State of Israel as the state of the Jewish people, negate the democratic character of the State or incite to racism (section 7A). Based on the third alternative, the Central Elections Committee for the elections to the twelfth Knesset disqualified the "Kach" list from participating in the elections. The Committee rejected a challenge to the "Progressive List for Peace" that was based on the first alternative. The Supreme Court turned down appeals from both decisions (EA 1/88, *Neiman et al. v. The Chairman of the Central Elections Committee for the Twelfth Knesset*, P.D. 42(4) 177; E.A. 2/88, *Ben Shalom et al. v. Central Elections Committee for the Twelfth Knesset*, P.D. 43(4) 221).

Israel cases referred to:

[1] E.A. 1/65, *Yeredor v.Chairman of the Central Elections Committee for the Sixth Knesset* 19P.D.(3)365.

[2] H.C. 253/64, *Gharis v. Haifa District Commissioner* 18P.D.(4)673.

[3] C.A. 723/74, *"Ha-aretz" Newspaper v. Israel Electric Corporation* 31P.D.(2)281.

[4] H.C. 75/76, *Hilron Ltd. V. Fruit Marketing Council* 24P.D.(3)645.

[5] H.C. 337/81, *Mitrani v. Minister of Transport* 37P.D.(3)337.

[6] H.C. 581/80, *Amsalem v. Prison Service Commissioner* 35P.D.(2)325.

[7] S.S.A. 1/66, *Pascal v. Attorney-General* 24P.D.(3)71.

[8] C.A. 292/66, *Axelrod v. Yitzhakian* and Counter-Appeal 24P.D.(4)387.

[9] H.C. 245/66, *Bustenai v. Inspector General of Polic*e 24P.D.(4)441.

[10] H.C. 1/49, *Bejerano v. Minister of Police* 2P.D.80; 3P.E.54.

[11] H.C. 74/51, *Contractors Association v. Minister of Commerce and industry* 5P.D. 1544.

[12] H.C. 517/72, *Snowcrest (Israel) Ltd. v. Mayor of Bene Berak* 27P.D.(1)632.

[13] H.C. 442/71, *Lansky v. Minister of the Interio*r 26P.D.(2)337.

[14] H.C. 56/76, *Berman v. Minister of Police* 31P.D.(2)687.

[15] H.C. 272/74, *Kefar Azar Moshav Ovdim Ltd. v. Minister of Labour* 29P.D.(2)667.

[16] H.C. 13/80, *"Noon" Preservatives Ltd. v. State of Israel - Ministry of Health* 34P.D. (2)693.

[17] H.C. 214/52, *Shohat v. Inspector General of Police* 7P.D.987; 17P.E.60.

[18] H.C. 288/51, 33/52 *Atzlean v. Commander and Governor of Galilee* 9P.D.689;19P.E.90.

[19] H.C. 554/81, *Baranse v. Commander of Central Command* 36P.D.(4)247.

[20] H.C. 297/82, *Berger v. Minister of the Interior* 37P.D.(3)29.

[21] F.H. 9/77, *Israel Electric Corporation v. "Ha'aretz" Newspaper Ltd.* 32P.D.(3)337.

[22] H.C. 141/82, *Rubinstein v. Chairman of the Knesset* 37P.D.(3)141; S.J. vol. VIII, *supra* p. 60.

[23] H.C. 246, 260/81, *Agudat Derekh Eretz v. Broadcast Authori*ty 35P.D.(4)1; S.J. vol. VIII, *supra* p. 21.

[24] H. C. 292/83, *"Neemanei Har Habayit" Society v. Jerusalem Regional Police Commander* 38P.D.(2)449.

[25] H.C. 153/83, *Levi v. Southern District Police Commander* 38P.D.(2)393; S.J.vol.VII,109.

[26] H.C. 73,83/57, *"Kol Ha'am" et al. v. Minister of the Interior* 7P.D.871; 13P.E.422; S.J.vol.I,90.

[27] H.C. 344/81, *Negbi v. Central Elections Committee for the Tenth Knesset* 35P.D.(4)837.

[28] C.A.2/77, *Azugi v. Azugi* 33P.D.(3)1.

[29] H.C. 188/63, *Betzul v. Minister of the Interior* 19P.D.(1)337. H.C. 188/63, *Betzul v. Minister of the Interior* 19P.D.(1)337.

[30] C.A. 32/81, *Tzonen v. Stahl* and Counter Appeal 37P.D.(2)761.

[31] H.C. 152/82, *Alon v. Government of Israel* 36P.D.(4)449.

[32] H.C. 234/84, *"Hadashot" Ltd. v. Minister of Defence* 35P.D.(2)477.

[33] F.H. 13/60, *Attorney-General v. Matana,* 16P.D.(1)430; S.J.vol.IV,122.

[34] Cr.A. 787,881/79, *Mizrachi v. State of Israel* and Counter-Appeal 35P.D.(4)421.

[35] Cr.A. 696/81, *Azulai v. State of Israel* 37P.D.(2)565.

[36] H.C. 163/57, *Lubin v. TeI-Aviv-Jaffaa Municipality* 12P.D.1043; 36P.E.227.

[37] H.C. 10/48, *Zive v. Acting Officer in Charge of TeI Aviv Municipal Area* 1P.D.85; 1P.E.33.

[38] H.C. 243/82, *Zichroni v. Broadcast Authority Management Committee* 37P.D.(1)757.

[39] Cr.A. 126/62, *Dissenchik v. Attorney-General* 17P.D.169; S.J.vol.V,152.

[40] H.C. 148/79, *Sa'ar v. Minister of Interior and Police* 34(2)P.D. (2)169.

[41] A.D.A. 1/80, *Kahana v. Minister of Defence* 35P.D.(2)253.

[42] C.A. 165/82, *Kibbutz Hatzor v. Rehovot Tax Assessment Officer* 39P.D.(2)70.

[43] H.C. 58/68, *Shalit v. Minister of the Interior* 23P.D.(2)477; S.J.Spec.Vol.(1962-1969)35.

[44] H.C. 29/62, *Cohen v. Minister of Defence* 16P.D.1023.

[45] H.C. 112/77, *Vogel v. Broadcast Authority* 31P.D.(3)657.

[46] H.C. 262/62, *Peretz v. Kefar Shemaryhau Local Council* 16P.D.2101.

[47] H.C. 241/60, *Kardosh v. Registrar of Companies* 15P.D.(3)1151; S.J. vol. IV, 7.

English case referred to:

[48] *Rex v. Secretary of State for Home Affairs, Ex parte O'Brien* (1923) 2 K.B.361 (C.A.).

American cases referred to:

[49] *Woodby v. Immigration Service* 385 U.S. 276 (1966).

[50] *Yick Wo. v. Hopkins* 118 U.S. 356 (1986).

[51] *Williams v. Rhodes* 393 U.S. 23 (1968).

[52] *Anderson v. Celebrezze* 103 S.Ct. 1564 (1983).

[53] *Cousins v. Wigoda* 419 U.S. 477 (1975).

[54] *Dennis v. United States* 341 U.S. 494; 71 S.Ct. 857; 95 L.Ed. 1137 (1951).

[55] *Communist Party v. Control Board* 367 U.S. 1 (1961).

[56] *Yates v. United States* 354 U.S. 298 (1957).

[57] *Communications Assn. v. Douds* 339 U.S. 382 (1950).

[58] *Whitney v. California* 274 U.S. 357; 47 S.Ct. 641 (1927).

[59] *Youngstown Co. v. Sawyer* 343 U.S. 579 (1952).

[60] *McCulloch v. Maryland* 17 U.S. 316 (1819).

[61] *Gompers v. United States* 233 U.S. 604 (1914).

[62] *Terminiello v. Chicago* 337 U.S. 1 (1949).

[63] *United States v. Dennis* 183 F. 2d 201 (1950).

[64] *Reynolds v. Sims* 377 U.S. 533 (1964).

[65] *Abrams v. United States* 250 U.S. 616 (1919).

[66] *Board of Education v. Barnette* 319 U.S. 624 (1943).

[67] *Brandenburg v. Ohio* 395 U.S. 444 (1969).

Jewish Law sources referred to:

These references are not listed here, since they are given their full citation in the body of the case. On the Jewish law sources in general, see note under **Abbreviations,** *supra*, p. viii.

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JUDGMENT

SHAMGAR P.: 1. On June 28, 1984 we decided to *allow* each of the two appeals, to *set aside* the decision of the Central Elections Committee for the Eleventh Knesset of June 17, 1984, with respect to the *Kach* list, and its decision of June 18, 1984, with respect to

the *Progressive List for Peace*, and to *confirm* the two mentioned lists for the purpose of section 63 of the Knesset Elections Law (Consolidated Version), 1969.

At the same time we added:

> Without derogating from the substantive reasoning called for in these two appeals, we have decided that the court finds it unnecessary at this stage to take a position on the question whether it should adopt the majority or the dissenting opinion in Elections Appeal 1/65 *(Yeredor v. Chairman of the Central Elections Committee for the Sixth Knesset* 19 P.D.(3) 365), since we have reached the conclusion, on the basis of the facts before us, that there was no room to refuse confirmation of the two appellant lists even according to the majority opinion in Elections Appeal 1/65 .

We turn now to the substantive reasoning itself.

2. There were two decisions of the Central Elections Committee as to which we convened to hear the appeals of the parties. The first was given, as aforesaid, on June 17, 1984 with reference to the *Kach* list, and this is the notice that was sent to the list following the decision:

> I hereby inform you that the Central Elections Committee for the Eleventh Knesset, at its meeting on June 17, 1984, refused to confirm your list, the *Kach* list, by majority opinion, on the ground that this list propounds racist and anti-democratic principles that contradict the Declaration of Independence of the State of Israel, openly supports acts of terror, endeavours to kindle hatred and hostility between different sections of the population in Israel, seeks to violate religious sentiments and values of a sector of the state's citizens, and rejects in its objectives the basic foundations of the democratic regime in Israel.

> Realisation of this list's principles would constitute a danger to the existence of the democratic regime in Israel and might also cause a breakdown of the public order.

With respect to the *Progressive List for Peace,* the decision was given on June 18, 1984, and notice was delivered as follows:

> I hereby inform you that the Central Elections Committee for the Eleventh Knesset, at its meeting on June 18, 1984, refused to confirm your list, the *Progressive List for Peace,* by majority opinion, on the ground that this list indeed harbours subversive elements and tendencies, and central persons in the list act in a manner identifying themselves with enemies of the state. The majority opinion rested on close scrutiny of all the verified information put before the Minister of Defence, and on the affidavit of General Avigdor Ben-Gal dated September 24, 1980. Likewise the opinion of the majority was reinforced by the statements made by representatives of the list to the Committee and to the Minister of Defence, as recorded in the minutes of June 8, 1984.
>
> A majority of the Committee members was persuaded that this list advocates principles that endanger the integrity and existence of the State of Israel and the preservation of its unique character as a Jewish state in accordance with the founding principles of the state as expressed in the Declaration of Independence and the Law of Return.

The notices were addressed to counsel for the respective lists and were signed by the Chairman of the Central Elections Committee, Justice Gavriel Bach .

3. The basic statutory definition of the right to submit one's candidacy for election to the Knesset is to be found in section 6 of Basic Law: The Knesset, which provides as follows:

> Every Israel national who on the day of the submission of a candidates list containing his name is twenty-one years of age or over, shall have the right to be elected to the Knesset unless a court has deprived him of that right by virtue of any Law or he has been sentenced to a penalty of actual imprisonment for a term of five years or more for an offence against the security of the State designated in that behalf by the Knesset Elections Law and five years have not yet passed since the day when he terminated his period of imprisonment.

Section 7 of the same Basic Law lists the state functionaries who are precluded from candidacy for the Knesset because of holding such office.

The procedure for approving lists of candidates is set forth in Chapter F of the Knesset Elections Law [Consolidated Version], section 56 of which deals with holders of office who may not be candidates, while section 56a lists the offences which may entail deprival of the right to be elected under section 6 of Basic Law: The Knesset. Section 57 prescribes the manner in which candidates lists are to be drawn up, signed and submitted. The other sections of the Chapter deal with representatives of the lists, a security deposit, designations and letters of candidates lists, and rectification of defects in drawing up a candidates list.

Section 63, titled "Approval of Candidates Lists", reads as follows:

> A candidates list duly submitted, or rectified in accordance with the previous section, shall be approved by the Central Committee, which shall notify the representative of the list and his deputy of the approval not later than the 20th day before election day.

Section 64 of the Law deals with appeals against a refusal to approve a candidates list, subsection (a) of which provides:

> Where the Central Committee refuses to approve a candidates list, either wholly or as to the name of one of the candidates or the

> designation or letter of the list, it shall, not later than 20 days before election day, notify its refusal to the representative of the list and his deputy, and they may, not later than 18 days before election day, appeal to the Supreme Court against such refusal.

Certain changes concerning these time periods, set forth in sections 62, 63 and 64, applied to the elections to the 11th Knesset, as a result of the Eleventh Knesset Elections (Temporary Provisions) Law, 5744-1984, but these are of no concern here.

So much for the text of the Law. It is clear that the statute says nothing about prohibiting or restricting candidates lists on the basis of the list's principles, its purposes and objectives, or the views of its members. In other words, the text of the pertinent legislation in effect on June 17 or 18, 1984 makes no express provision for the disqualification of a list on any of the grounds included in the notice of exclusion sent by the Central Elections Committee to each of the appellant lists.

4. (a) The authority of the Central Elections Committee to refuse to confirm a list of candidates for the Knesset on grounds of the list's political objectives and character was discussed in this court for the first time in E.A. 1/65 [1] (the *Yeredor* case). There this court, by a majority opinion, dismissed the appeal of a candidates list (named the *Socialists List)* which wished to take part in the elections to the Knesset, but had been refused confirmation by the Central Elections Committee. According to the Committee's decision, as cited in the above mentioned appeal, the list was disqualified

> for the reason that this candidates list is an illegal association since its promoters negate the integrity and very existence of the State of Israel.

(b) The underlying reasons for the decision of the Central Elections Committee to the Sixth Knesset came largely to the fore in the statement made by the Committee Chairman, Justice Moshe Landau, when summing up his opinion before the Committee members. He mentioned that the list was in fact identical, according to various tests, with the *EI-Ard* Group, an association that was declared illegal under regulation 84 of the Defence (Emergency) Regulations, 1945, after the Supreme Court had refused to intervene in the

District Commissioner's refusal to register it as an *amuta*[*] noting that its objectives absolutely and conclusively negated the existence of the State of Israel in general, and its existence within its present borders, in particular (H.C. 213/ 64, *Gharis v. Haifa District Commissioner* [2]). The society's illegality was not in itself the principal reason for its disqualification by the Elections Committee; rather, the fact was emphasized that the illegality found expression in an endeavour to undermine the existence or integrity of the state. In E.A. 1/65 [1] the Chairman of the Elections Committee was cited as saying, *inter alia* (at p. 372):

> I find a vast difference, as East is separate from West, between a group of people which seeks to undermine the very existence of the state or, in any event, its territorial integrity, and a party that acknowledges the political entity of the state but wishes to alter its internal regime.

He added that Basic Law: The Knesset, does not at all deal with the issue under consideration, but refers only to the personal disqualification of a candidate; however, he thought it permissible to read Basic Law: The Knesset and the Knesset Elections Law, 1959, together with the Cooperative Societies Law, and to read into the Knesset Elections Law an implied condition that an illegal organisation cannot be confirmed as a list. A list that is illegal in the sense that it is opposed to the very existence of the state cannot be confirmed, because the Knesset, which is the sovereign institution in the state and expresses the will of the people, cannot incorporate within it an element that negates the very existence of the state.

(c) This court's decision in *Yeredor* [1] represented a majority opinion. Cohn J., dissenting, held that there was no statutory provision from which one could deduce the authority of the Central Elections Committee to refuse to confirm a list that has met all the formal conditions specified in chapter F of the Law, whatever the nature of the list's platform or objectives. In his opinion, the legislator's silence and the absence of any statutory provision allowing the disqualification of a candidates list on grounds of its character and platform, deprived the Elections Committee's decision of all legal effect and

[*] A lawful non-profit society - Ed.

(it) contravened, in spirit, the principle of the rule of law. Therefore, the decision had to be set aside, and he so ruled.

(d) The President (Agranat) and Sussman J. (representing the majority opinion) took the contrary view that the character of the candidates list was in polar opposition to the very purpose of the elections, because in essence and objective the list negated the existence of the state, and it wished to bring about the annihilation of the State of Israel. Agranat P. said (at pp. 385-386):

> Indeed, there can be no doubt - and this is clearly deduced from the statements made in the Declaration of the Establishment of the State - that Israel is not only a sovereign, independent and freedom-seeking state, characterized by a regime of the people's government, but it was also established as "a Jewish State in the Land of Israel", for the act of its establishment was effected first and foremost by virtue of "the natural and historic right of the Jewish people to live like any independent nation in its own sovereign state, and that act was a realization of the aspirations of generations towards the redemption of Israel.
>
> At the present stage of the state's existence, I need hardly remark, these words express the nation's vision and credo and we are therefore obliged to bear them in mind "when we come to interpret and give meaning to the laws of the State" (H.C.73, 87/53 *Kol Ha'am v. Minister of interior* 7P.D. 871, 884). The import of that creed is that the matter of the continuity - or if you wish: "the perpetuity of the State of Israel is a fundamental constitutional fact", which no state authority, whether administrative, judicial or quasijudicial, may disclaim when exercising its power.

The statements of the President and of his concurring colleague, Sussman J., recognise that in the normal course of affairs the Central Elections Committee does not have authority to refuse the confirmation of lists that meet the formal statutory requirements.

But it happens - as in E.A. 1/65[1] - that extreme and exceptional constitutional factors converge to create a direct confrontation between the very grant of the right to compete in elections and the clear purpose of the elections, or - in more specific and precise terms - there arises a polar conflict between participation in the elections and the intention of the list to destroy the body, in the election of which it wishes to take part. In these circumstances, the committee is authorised to deny the right of participation in the elections, on the merits of the matter.

In the opinion of Agranat P., the basic constitutional premise that the court must take into account in interpreting the laws of the state is that the State of Israel is an existent state, and that its continuity and perpetuity cannot be questioned. This interpretative approach has direct bearing on the problem that arises when one wishes to reconcile a statutory provision that establishes the governmental institution for which the elections are being held, and the negation of its existence advocated by candidates of a list that wishes to take part in the elections. The answer is that this question - whether or not to act for the liquidation of the state and negation of its sovereignty-cannot arise at all on the agenda of the Knesset, for its very presentation contradicts what Agranat P. called the will of the people residing in Zion and its vision and *credo.* The effect of all this is that a candidates list which denies that doctrine does not have any right, as a list, to take part in the elections for the house of representatives. A group of persons whose unconcealed political objective is not merely "to alter the internal constitutional regime of the state" but "to undermine its very existence", as emphasised by the chairman of the Central Elections Committee, cannot *a priori* have any right to take part in the process of formulating the will of the people, and cannot, therefore, present its candidacy in the Knesset elections.

Sussman J. elaborated this point (at pp. 389-390):

> ..."An illegal purpose", *in the present context does not mean a purpose that aspires to change the internal order of government.* This order is not sacred, nor is its alteration a crime that entails punishment. Rather *an "illegal purpose" in this context is a purpose that aims to destroy the state, to bring disaster upon the majority of its inhabitants for whom it was established, and to join forces with its*

> *enemies*... Just as a man does not have to agree to be killed, *so too a state does not have to agree to be destroyed and erased from the map.* Its judges are not allowed to sit back idly in despair at the absence of a positive legal directive when a litigant asks them for assistance *in order to bring an end to the state.* Likewise no other state authority should serve as an instrument in the hands of those whose, perhaps sole, *purpose is the annihilation of the state.*

(Emphasis added - M.S.).

It transpires that even the judges of the majority opinion in the *Yeredor* case [1] did not consider themselves authorised to fill the gap in the law, in its simple sense, so as to add reservations related to the objectives and character of a candidates list, of the kind that can be found in the elections laws of some countries. All that was decided in *Yeredor* was that even where the existing law contains no provision allowing disqualification of a list, one must avoid the extreme, substantive and logical contradiction that would allow those who seek an end to the existence of the state and its authorities, to compete in the Knesset elections. One should not deduce from this that the court considered the Elections Committee or itself competent to add to the law and to assume the authority to deny a list its rights, even when no such extreme background conditions operate, and even when such polar conflict between participation in elections and the wish to uproot that elected body's existence, does not arise. Here, the interpretative leap does not entail the lesser power. On the contrary, only an extreme situation permits a kind of judicial legislation that goes beyond the written text so as to fill a gap, because existential necessity, and certainly also constitutional logic, require that it be filled.

The described limitation on the court's possible scope of action, which arises from the existing constitutional situation, therefore found expression also in the conclusion of Sussman J., that there was no identity between the legal situation in a different country - where an express constitutional provision allowing disqualification of a candidates list had been enacted - and our constitutional situation. He said (at p. 390):

> ...The German constitutional court, in discussing the question of the legality of a political party, spoke of a "fighting democracy" which

> does not open its doors to acts of subversion masquerading as legitimate parliamentary activity. As far as I am concerned, as regards Israel, I am satisfied with a "self-defending democracy", and we have the tools to protect the existence of the state even though we do not find them enumerated in the Elections Law.

5. (a) In summary, it appears to have been the opinion of the dissenting judge, Cohn J., that this court *does not, today,* have any authority to refuse to confirm a candidates list that meets the formal requirements, whereas the judges of the majority opinion held that the court does indeed have such authority, but *only* with respect to a candidates list that negates *the very existence of the state.* Because of the importance of this reasoning in application to the instant issue, it should be elaborated further.

(b) The remarks of Cohn J. as to the lack of authority to disqualify a list, regardless of its provocative character and nature, were clear-cut; in his view it was required and necessary that the legislature determine express provisions as to the disqualification of lists and that a particular body - be it the Central Elections Committee, or the Knesset itself, or the court - be vested with the authority to exclude from the Knesset "heretics of the kind who are traitors to the state and aid its enemies". However, the Central Elections Committee and the court may not assume such authority *ex nihilo* so as to add restrictions and limitations to the election laws. Thus (*ibid*. p. 379):

> In a state governed by the rule of law a person may not be deprived of any right, be he the most dangerous criminal and despicable traitor, except and only in accord with the law. Neither the Central Elections Committee nor this court legislate in this state; the Knesset is the legislative authority, and it empowers designated bodies, if it so wishes, to mete out treatment in accord with a man's conduct and the outcome of his actions. In the absence of such legislative authorization, neither common sense, necessity, love of country nor any other consideration whatever, justify taking the law into one's own hands and depriving another person of his right .

Any measure that is contrary to law or is taken without lawful authority and is calculated to deprive a person of his civil rights, is invalid, in his opinion, and an Israel judge will not uphold it. He added (*ibid.* p. 382):

> There are states in which the security of the state, or the sanctity of the religion, or the achievements of the revolution and the dangers of the counter-revolution, and similar kinds of values, pardon any crime and atone for any action performed without authority and contrary to the law. Some of these states have invented for themselves a *natural law* which is superior to any legal norm and annuls it when necessary, in the sense that necessity knows no law. These are not the way of the State of Israel; its ways are those of the law, and the law issues from the Knesset or under its express authorization.

(On this aspect, cf. S. Guberman, "Israel's Supra-Constitution", 2 *Israel L.R.* 445 (1967), at 460.)

Also the majority justices did not believe that the full range of the problem, in all its variations, potentially arising before the Central Elections Committee, could be solved comprehensively without recourse to express legislation. It is absolutely clear from their choice of language that the path they chose was dictated by the extreme nature of the case before them. One cannot deduce from their opinions that they found the constitutional state of affairs satisfactory or that the existing statutory arrangement might be left as it was, and that the solution of these problems - effected in some countries according to constitutional guidelines - be left to the Central Elections Committee, with the changing political coloration of its members, for them to contend with the issue from time to time, to the best of their understanding.

To sharpen the perspective and to indicate additional problems stemming from the fact that the current law deals only with the formal qualifications of the candidates lists, one might mention here, for example, that a right of appeal to the Supreme Court is granted to a disqualified list alone, and if the Elections Committee had chosen to *confirm* a list of the kind disqualified in E.A. 1/65, there would be no right of appeal available to any other party or body wishing to challenge that decision. The right of appeal under the

prevailing law exists only in case of refusal to confirm a list, and not in case of its confirmation.

The approach taken by the majority in E.A. 1/65 [1] pays regard to the essence of fundamental constitutional concepts, but beyond that, and in light of what has already been said, it must be considered in its proper context: a given answer to a constitutional issue might be good and correct for the solution of an extreme, complex problem that arises at a given time, but it should not necessarily be considered a guideline - and certainly not a cure-all - for every additional constitutional complication that public authorities encounter. The conclusion that ought to have been drawn at the time, also from the majority opinion, is that one who seeks to test the qualifications of lists according to their substance and objectives, beyond mere formal criteria, must find for that purpose a legal foundation expressed in a legislative act; the power of the Elections Committee to act without express statutory provision can be exercised only in very exceptional cases, namely: with respect to a list that seeks the annihilation of the state. This should have been clear to anyone interested in the conferment of further powers, such as those found in the constitution of the present German Republic. Yet from 1965 until now there has been no legislative initiative in this respect, neither on the part of the executive branch nor, more important, on the part of the legislature, which normally itself takes the initiative in relation to the enactment of electoral laws (but see the bill for the Knesset Elections (Amendment No. 9) Law, 1968, introduced by Y.H. Klinghoffer, M.K.). Naturally, this is doubly significant in light of the limited scope of E.A. 1/65 [1] (in terms of the circumstances of its application), upon which the Central Elections Committee again sought to rely when making the two decisions which form the subject of the present appeals. Moreover, in addition to the clearly restrictive language of the judgment in E.A. 1/65 [1], there is the restrictive interpretative approach that accompanies any limitation of a fundamental constitutional right.

Our frame of reference, as will be seen below, is that the right to take part in elections and to compete for the voter's ballot is a fundamental civil right, since it emanates from the doctrines of both civil equality and the freedom of expression. A statutory provision or judicial rule which seeks to limit a right is not given a broad sweeping interpretation; on the contrary, their proper interpretation is restrictive and strict *(Ha'aretz v. Electricity*

Corporation [3], at p. 295; *Hilron v. Council for Fruit Manufacture and Marketing* [4], at p. 653).

As stated in *Ha'aretz* [3]:

> Any statutory limitation on the scope and extent of such right shall be interpreted in a restrictive manner so as to give the said right maximum existence and not to limit it in any degree beyond the clear and express statutory language (H.C. 75/76, *Hilron*, at p. 653). The freedom of expression and a statutory provision that limits it are not of equal and identical status; to the extent that it is compatible with the written word, the existence of the right should at all times be preferred to a statutory provision designed to limit it. In summary, the standard which accords protection of the freedom of expression primary consideration when that right conflicts with another should find full expression not only when the legislature shapes the provisions of the statute but also in the interpretation of the statute and the application of its directives to circumstances in which its substance and operation are tested in practice .

This is the case when weighing a principle that determines a fundamental right as against a statutory provision that limits it; likewise, *a fortiori*, when balancing a statutory provision that confers a fundamental right against the intention or wish to restrict it without express statutory authority thereto (cf. H.C. 337/81 [5]).

Hence in accordance with our accepted practice in the interpretation of statutes, there is no room to widen the reach and form an expansive interpretation of the majority opinion in *Yeredor* [1] and attempt to derive therefrom what is not really there; that is, as if there were room for substantive extension of the inherent disqualificatory power vested in the Central Elections Committee, so that it applies also to cases in which the exceptional circumstances of *Yeredor* are not present.

It should be clarified that we related to this court's ruling in *Yeredor* as a primary standard in the present case because the minutes of the deliberations before the Committee reveal that it intended to act within the *framework* of this court's earlier decision, and thought that it was indeed doing so. Thus, from a strictly formal point of view, we could have disposed of the matter conclusively by merely examining this approach of the Committee. However, in order to complete the picture and encompass the oretical aspects of the matter, it will be dealt with on the merits and independently of our earlier ruling, so as to allay any doubt as to whether there is room for extending the scope of the ruling in *Yeredor,* that is, whether there is room in the present case to add grounds for disqualification by sole virtue of a new ruling by this court, unsupported by any Knesset enactment. We shall discuss this matter separately, below.

6. By adopting the criteria of the majority opinion in E.A. 1/65[1], we could immediately decide the matter before us. As appears from our decision of June 26, 1984, *no facts were brought* before the Central Elections Committee from which it could have concluded that either or both of the appellant lists were, as far as known and proven, of a character and identity found by the majority in *Yeredor* [1] to constitute grounds for disqualifying a list. The reasons for this conclusion differ for each of the lists.

7. In applying the criteria of the majority opinion in E.A. 1/65[1] to the issue of approval of the *Kach* list, one must pose and be guided by questions corresponding to the rules adopted in that case:

(a) Are we dealing with an entity that seeks to undermine the very existence of the state?

(b) Was this entity regarded, prior to the deliberations of the Elections Committee, as a prohibited association or an organisation declared illegal, under one of the enabling enactments in this regard (chapter 8, title 2 of the Penal Law, 5737-1977; regulation 84 of the Defence (Emergency) Regulations; section 8 of the Prevention of Terrorism Ordinance, 5708-1948)?

(c) Was it proven to the Committee, or to us, that the goals of the list utterly negate the existence of the State of Israel? In the words of Sussman J., an illegal purpose does not mean a purpose that aspires merely to change the order of government. We should add that the distortion in the views expressed by the list and its spokespersons, or the

opposition and even disgust which these arouse, and the desire to avoid any indirect affirmation of the list's very existence and the dissemination of its views - all of these are insufficient legal reason, in the present state of the law, for disqualifying the list. We shall later return to this aspect.

In order to give the answer, matters should be assessed as they stand, according to their plain meaning and substance. There is no room for a forced description that would bring the facts artificially within the parameters of the *Yeredor* ruling. It is not enough to seize upon the expressions used by the court in *Yeredor* [1] in order to describe correctly the facts pertaining to the nature and activities of the *Kach* list. The repugnance aroused by the views and opinions expressed by a list does not permit the confusion of dissimilar elements, nor provide an opening for an expansive subjective interpretation that is unsuited to substantive judicial examination in general and constitutional inquiry in particular.

Accordingly one cannot escape the conclusion that the answers to the three questions posed above, are in the *negative,* and it follows that by the criteria of the *Yeredor* ruling, there was no occasion to disqualify the *Kach* list.

8. (a) As regards the *Progressive List for Peace,* the gist of the argument against it was that its leader should be regarded as a kind of reviver or continuer of the *EI-Ard* Movement, so that everything said and decided in respect of the *Socialists List* in *Yeredor* [1] applies also to it.

(b) The composition of the *Socialists List* did not, in fact, coincide with the leadership of the *EI-Ard* movement, but it did reflect that movement, which was declared illegal and whose objects were defined as unlawful by this court, since some of those who headed it were also at the head of *EI-Ard.* The *Socialists List* comprised only *ten* candidates, and among them there were *five,* that is one half, who had been members of the illegal *EI-Ard,* which advocated the liquidation of the state. In the present case, on the other hand, we are dealing with a list of 120 candidates, only one of whom - the person at its head - belonged in the past to the *EI-Ard* movement. The head of the list, Advocate Miyaari, a past member of *EI-Ard,* contended that he did not regard the list as a continuation of that unlawful movement, and the mixed composition of the list of candidates appears, *prima facie,* to

support this thesis. He further explained in his appearance before the Elections Committee that he no longer represents the views of *EI-Ard* and dissociates himself from the P.L.O. Covenant.

Clearly, the mere denial of ideological association with a past entity cannot in itself amount to an irrebuttable presumption, *juris et de jure* that such is the case. Evidence could have been brought before the Committee in refutation of such denial and seeming to point to an opposite conclusion. In this regard two questions arise. First, what is the measure of proof, that is, what must be proven to the Central Elections Committee and upon whom lies the burden of proof? A second and separate question is, what is the decision-making process before the Committee, and to what extent can it avail itself of decisions of other authorities? The first matter concerns *substance and quantity;* the second concerns the *manner* of adducing evidence.

How does this apply?

The decision to disqualify a list lies with the Central Elections Committee, hence any ground for disqualification must be proved before it. That is to say, once a list has complied with the formal statutory requirements (a sufficient number of signatures in the required form, their submission to the Committee, etc.), it has fulfilled its obligation, and anyone attributing to the list a shortcoming, in its nature or objectives, bears the burden of proving so and convincing the Committee, which has the authority to decide the matter. It follows that if it was claimed that the *Progressive List for Peace* is a list seeking the liquidation of the state, like for example the *EI-Ard* movement, or the *Socialists List* which followed in its footsteps, and that it is nothing but the same old hostile and subversive movement in new garb, evidence to prove that thesis should have been brought before the Central Elections Committee.

Material required to be brought before a statutory authority does not necessarily have to be submitted in the form of evidence admissible in a court of law and proven in the manner in which evidence is presented in court. An authority exercising discretion vested in it by law is not bound by the laws of evidence applicable in a court of law unless otherwise provided by statute (which is not the case here), and it may base its decisions

on information that reaches it even if not given to proof in court proceedings where the law of evidence obtains (H.C. 581/80[6], at 328; S.S.A. 1/66[7], at 78). Thus a tribunal or other authority upon which a power of decision has been conferred by law, may base its decision on uncorroborated evidence when a court would require corroboration, or it may accept evidence not admissible in ordinary judicial proceedings (C.A. 292/66[8], at 391; H.C. 245/66[9], at 446; but cf. H.C. 1/49[10], at 84, where it was explained that mere rumour is not sufficient to found the authority's decision; and see also H.C. 74/51[11], at 1552, and H.C. 517/72[12], at 637). As we have said, the court will tend to set aside a decision grounded only on rumour or unsubstantiated surmise and conjecture, but if factual evidence is brought before the authority, upon which it can base its evaluation and decision - that is, material of such evidentiary value that reasonable people would find it a sufficient foundation for inferring the nature and activities of those concerned (see also H.C. 442/71[13]) - the court will not incline to interfere with the authority's conclusion. As was said in H.C. 442/71[13], not all hearsay testimony can have weight in the view of the authority, for example testimony which is nothing more than vague rumour. But the question of the weight and credibility of the testimony is a matter for the authority to decide, and no rules can be laid down in advance on how it must proceed, except that the testimony - having regard to the subject, the content and the witness - must be such that a reasonable person would regard it as possessing evidentiary value and rely upon it.

A statutory authority is not dependent in its decision on a previous finding by a judicial body (H.C. 56/76[14], at 692), and the power of decision is vested in its hands. Once vested with such decisory authority, it does not discharge its duty if it bases its decision on weak or unconvincing evidence. In this connection I would not construe literally the general *dicta* sometimes found in the case law that it is enough, as it were, for a statutory authority to have before it *some material* (H.C. 272/74[15], at 672; H.C. 13/80[16], at 696). According to my understanding, the expression *some material* does not refer to bits and pieces of material, but to such as a reasonable person might find a basis for forming an opinion, a belief or a suspicion, as the case may be.

H.C. 56/76[14] dealt with the question of denying existing rights, and there it was said that for the purpose of its decision the authority must have before it *persuasive and credible evidence that leaves no room for doubt.* I accept the implication of this *dictum* that

with regard to the denial of existing rights - *a fortiori* fundamental rights - equivocal evidence will not suffice. As is the accepted situation in the United States, I think that the evidence required to persuade a statutory authority of a justification for denying a fundamental right must be *clear, unequivocal and convincing* (see *Woodby v. Immigration Service* (1966) [49], which concerned evidence before the administrative authority prior to issuing a deportation order; see also C.T. McCormick, *On Evidence* (St. Paul, 3rd ed., by E.W. Cleary and others, 1984) 1023).

The more important the right, the greater the required weight and force of the evidence that is to serve as a basis for a decision in diminution of the right.

Incidentally, I am not dealing here with the interesting question of the demarcation of power between a statutory authority and a court, so far as concerns the upholding of evidence and the line between law and fact (B. Schwartz and H.W.R. *Wade, Legal Control of Government* (Oxford, 1972) 226, 235; C. Harlow and R. Rawlings, *Law and Administration* (London, 1984) 311). That is to say, I am not dealing here with the issue of when a court should intervene on a question of fact, since that is not necessary in the present context.

So much as regards the material that may serve as a basis for decision in the circumstances of this case. I now turn to the other question, the manner of reaching a decision.

9. (a) As was stated in H.C. 214/52[17], the evidence should have been brought before the decision-making authority, that is, in the present case, before the Central Elections Committee. However, with respect to the *Progressive List for Peace* no evidence was actually presented to the Elections Committee upon which it could have concluded that the list suffered a blemish of the kind that founded the majority decision in *Yeredor* [1].

(b) In the decision of the Elections Committee, the text of which was cited at the commencement of this judgment, it was maintained that this list -

> ...harbours subversive elements and tendencies, and central persons in the list act in a manner identifying themselves with enemies of the state.

That is the conclusion. Now as to the factual basis:

> . .The majority opinion rested on close scrutiny of all the verified information put before the Minister of Defence and on the affidavit of General Avigdor Ben-Gal dated September 24, 1980. Likewise the majority opinion was reinforced by the statements made by representatives of the list to the Committee and to the Minister of Defence...

The information placed before the Minister of Defence was not presented to the Elections Committee and did not come to its knowledge during the course of its deliberations. It received a notice from the spokesperson of the Minister of Defence, that -

> ...After a basic examination of all the verified information placed before him, including the oral declarations and arguments submitted by the list's representatives, the Minister of Defence is convinced that there are indeed subversive elements and tendencies among groups associated with the list and central persons on the list act by way of identification with the enemies of the State.

The nature and details of the verified information before the Minister of Defence remained entirely unknown, not one iota thereof was put before the Committee, and the language of the notice as a whole was vague and ambiguous. Such a notice, which contains no factual details, does not constitute any kind of evidence.

If "elements and tendencies" are present among the groups associated with the list, what is their weight in it? Does this refer to one out of the one hundred and twenty, or to ten of them? What are these "elements", that is, is the reference to groups of people or to programs or views? What is the practical meaning of the term "subversive"? And so on. After all, matters such as these lend themselves to varied evaluations and interpretations,

and it is the Committee itself that must draw the conclusion according to its own best discretion. Moreover, as already said, abstract descriptions and generalised conclusions formulated to follow verbatim the observations of this Court in *Yeredor* [1], are not sufficient if not duly founded on facts brought to the attention of the Committee and considered by it on their merits.

To summarize, since the material remained in the possession of the Minister of Defence or General Ben-Gal, as the case may be, the Committee did not have before it factual details upon which to ground its decision, but rested its decision on a discretion exercised by others on the basis of information brought before those others. We shall deal with this question more extensively later on.

(c) At this point we may pause briefly to consider the manner in which the Committee arrived at its decision, and the limits of judicial review thereof. So far as concerns this court, the accepted view is that in reviewing the action of a statutory authority we examine, in general, whether the modes of deliberation were lawful, and whether the authority had before it material on which it could base its decision (H.C. 288/51, 33/52[18]; H.C. 554/81[19], at 251).

This general observation may be broken down into elements. Lawful deliberation means, generally, that the principles of natural justice have not been violated; that the procedures prescribed by statute and applying to the authority, or set out in the regulations under which it functions, have been observed; that the decision was rendered by the competent person and that it was commensurate with the material jurisdiction of the decision-making authority; that the decision-making authority exercised its power in furtherance of its purpose; that no mistake of law occurred and that the decision was not tainted by fraud or influenced thereby; that the decision was made on the basis of supporting evidence, and, finally, that it was not contrary to law for some other reason. The exercise of a power in furtherance of that power's purpose means, in general, that no extraneous considerations were taken into account; that the authority did not overlook relevant information; that the power was exercised for the purpose for which it was granted; that the discretion was exercised by those empowered thereto, and that there is no room for concluding that the decision is marked by unreasonableness so extreme that no

reasonable authority could have made it, or that the exercise of the power was simply arbitrary. This list, long though it may be, clearly does not purport to be exhaustive, and it may well be set out in a different order if compared with the other elements mentioned above.

It was mentioned that the authority must act within the frame of the power vested in it. In the present case the limits of the power of the Committee were not defined by statute but by the precedents of this court, yet as far as the Committee is concerned, this cannot add to its powers. Once its powers have been lawfully defined, it is obliged to exercise them within its prescribed limits, and primarily according to objective standards (R.C. Austin, "Judicial Review of Subjective Discretion - At the Rubicon; Whither Now?" 28 *Current Legal Prob* (1975) 150, 152), just as it would do had its powers been delimited by statute. In the existing legal situation, the Committee has no power to spread its wings and lay down new limits to its powers, at its discretion and choice, nor may it now exercise its powers according to subjective tests.

The guidelines for judicial review are to a large extent a reflection of the mode of procedure that is binding upon the authority whose functioning is under review. Among other things, the manner of exercising discretion was emphasised, but here the stress must be laid on a single point, that when speaking of a lawful decision based on material upon which a reasonable person might rely in coming to a decision, we mean a decision which results from examination and consideration on the part of the person authorised to decide. In this context it should be emphasised that it is not sufficient to rely exclusively on information that was only in the possession of other persons, or on conclusions reached by others according to information before another who is not the party authorised to decide under the statute.

(d) The *authority* is the decision-making body, since in it alone did the legislature vest the power to decide the matter. The authority cannot delegate its decisory power to another unless expressly so authorised by the legislature, and in the absence of such authority it is obliged to reach its decision upon an independent examination of the facts. Applying the foregoing to the present case, our conclusion will be that the Elections Committee itself ought to have been satisfied on the facts before it that the candidates list was affected by a

disqualifying feature. That, however, did not happen here. The indirect reliance upon information that was presented only before another agency, all or some of the details of which were not at all known to the Committee, signifies that the Elections Committee did not consider the matter and that it was not the Committee that disqualified the list on an independent and considered decision, but that it sought to rely on information unknown to it and available, if at all, only to another agency. Incidentally, the other agency mentioned did not purport to decide the matter, since the Minister of Defence decided nothing, not even a matter within the scope of his authority. In fact, the Committee thereby vested in the Minister of Defence, unbeknown to him and with no foundation in law, the power to disqualify a list of candidates. For it rested content with the fact that the material, the nature and details of which it had no knowledge, had been brought before an executive agency and had convinced the latter to draw the attention of the Committee to the matter in a general way without specifying the grounds for so doing. Such *de facto* delegation of powers lacks any basis in the Knesset Elections Law [Consolidated Version] or any other statute, and goes beyond all accepted constitutional and legal concepts. It entails, on the one hand, making the Minister of Defence the actual decider with respect to disqualification of a list for purposes of the election laws, for which there is no legal foundation, and on the other hand it strips the powers of the Elections Committee of all content.

(e) Needless to add, the Committee could have regarded the submission of the material to the Minister of Defence as the initial ground for its own deliberation and inquiry, but at some stage the material should have come before it, since the Committee cannot discharge its function by having another, of whatever status, decide in its stead and thus in fact assume its power. Nor can the Committee unburden itself of the duty to exercise its discretion in the light of its own consideration of the material. A competent authority need not itself engage in gathering the facts, and it may pass this task on to others acting on its behalf, but at the final stage. before making its decision, the competent authority itself must consider the matter and draw its conclusions on the basis of the collected facts (H.C. 214/52[17], at 990; H.C. 297/82[20]).

When the chairman of the Committee, Justice Bach, opened the deliberations of the Committee, he informed it that the Minister of Defence did not see fit to disclose to the

Committee the factual details, but that it had been suggested to him to examine the material. The chairman rightly refused to do so, and explained that examination by him alone would still not resolve the legal problem, since in the absence of a statutory power to appoint someone (an individual or a subcommittee) to examine the material on its behalf, this suggestion would not provide the Committee itself with the information which is required to be before it for the purpose of its decision. I can only express my full agreement with these observations of Justice Bach.

To summarize this point, the classification and secrecy of the evidentiary material do not exempt a quasi-judicial authority (such as the Elections Committee in its capacity in the present matter - E.A. 1/65[1], at 337) from fulfilling its duty to apprise itself of the facts and to decide the matter on its own, on the strength of tested information.

The consideration whether or not to disclose material that is secret for reasons of state security, rests with the person so authorised by law, that is, in the present case, the Minister of Defence. This applies to proceedings before judicial instances (section 44 of the Evidence Ordinance [New Version], 1971), as well as quasi-judicial bodies empowered to take evidence (*ibid.* section 52) and any other authority. But if the Minister chooses not to disclose the material by reason of its secrecy - and as aforesaid, this power indeed rests with him - there remains before the Committee nothing but general statements in the nature of summary conclusions drawn by someone else, and that is not a sufficient discharge of its duty, as a quasi-judicial body, itself to consider and decide on the matter of disqualifying the list.

The question often arises, whether an authority may be persuaded by and adopt the opinion of an expert, and the answer is affirmative, provided there comes before the authority, for the purpose of its decision, not simply the expert's final conclusion but also substantive material upon which he founded his opinion. The duty of an authority vested with defined powers to arrive at an independent decision on a matter entrusted to it for resolution, does not terminate even when experts have examined the matter. The Committee could have looked into the information gathered by the Defence authorities and availed itself of an accompanying opinion, but it was not free to forgo independent knowledge and inquiry and thereby rid itself of the duty of lawfully deciding.

10. (a) The reference to the affidavit of General Ben-Gal of 1980 also does not alter the situation. In that affidavit General Ben-Gal explained his reasons for issuing administrative orders at the time, after having himself examined the material relating to Advocate Miyaari. But just as the Committee may not forgo a substantive decision based on information examined by itself and rely on information brought to the attention of the Minister of Defence alone, so too it could not rely merely on the fact that four years earlier General Ben-Gal had been convinced that there existed material concerning Advocate Miyaari which was sufficiently persuasive to require the latter's restriction for reasons of security, for one of the purposes enumerated in regulation 108 of the Defence (Emergency) Regulations.

…

[Ed. - After reviewing the contents of General Ben-Gal's affidavit, Shamgar P. discounted the tendency and sufficiency of this evidence as a ground for disqualification of the List by the Elections Committee, even were it legally permitted to base its decision solely on another's accepted general opinion. The learned President then continued:]

(d) The inquiry made by General Ben-Gal before giving his decision under regulation 110 of the Defence Regulations, well illustrates the proper course to be followed by a decision-making authority. The deponent was aware that he could not rest his decision on the evaluation of the police or the security service. Only after the particulars of the matter were brought before him and he examined them in detail did he decide, in 1980, to exercise his power under regulation 110 and to sign a restriction order.

To sum up, it is the duty of the decision-making authority to examine the facts; others may gather them, classify and organise them - provided that the integrity and accuracy of the picture is not affected - and may even add their advice, recommendations and opinions, but the decision must rest on an independent consideration of the matter and not on that of others.

(e) The affidavit of the person named "David", also presented to the High Court of Justice in 1980, does not add any detail which might have rendered the members the Committee aware of the factual ground and reason for their decision .

(f) The representations made on behalf of the List before the Minister of Defence and the Committee, however much they aroused the objection of the Minister or the members of the Committee, do not in themselves, by their substance and content, display the nature or measure of proof required here. They were no more than expressions of a political view, already voiced inside and outside the Knesset without being regarded as a ground for any legal action, and they did not contain the elements impliedly attributed to them in the decision of the Elections Committee. As already noted, there must be a factual connection between the conclusions and their underlying grounds. What is more, the Committee regarded those representations as supportive of its conclusion, as stated in its decision, but what is the force of such support when essentially there is nothing to support?

11. (a) If the security authorities possessed information, one wonders at its general concealment from the Committee, and why the Committee rested content with the laconic description in the notice of the Defence Minister's spokesperson.

There is no point in laying down guidelines concerning matters that are unknown to this court, but one may assume that the security authorities also considered the possibility of distinguishing between a concise description of a given event, which could be brought to the knowledge of the Committee, and disclosure of personal identifying particulars which might seriously impair security. In any event, apart from the notice of the Minister, nothing but the affidavit of General Ben-Gal was submitted to the Committee, and that dealt with agitation and the organisation of demonstrations and strikes rather than subversive actions to liquidate the state.

(b) It is possible that the inability or unwillingness of the security authorities to present material to the Committee pertaining to the security considerations that motivated their deliberations at the time of submission of the Knesset candidates lists, are a reflection of the fact that the Elections Committee - a broad body composed according to political criteria - is not the appropriate forum for dealing with such classified matters. That in itself

cannot be a reason or justification for the Committee to base its decision on information which it has not seen or heard, and which is within the knowledge of only a few members of the executive branch who cannot share it with others. The failure of a statutory body to make its independent decision is, in this case, tantamount to a failure to decide properly, and *ipso facto* devoids its act of legality and validity.

(c) Some of the Committee members relied for some reason on the fact that this court would examine the classified material that the Committee itself did not examine. As pointed out to them by the chairman, Justice Bach, this assumption had no legal foundation: this court examines the decision of the Committee, and it has no independent power to disqualify lists. It accordingly does not consider anything but the material that was before the Committee.

12. To remove all doubt I will add that the foregoing is not necessarily to be regarded as a definitive conclusion that the apprehensions voiced in connection with the orientation of certain candidates on the List are baseless, and for the present purpose no such conclusion is required. As explained, the Committee's considerations were required to be based on clear, unequivocal and persuasive material - which a reasonable person would regard as indicative of a tendency of the kind defined in the majority opinion in *Yeredor* [1]. If such material existed, however, it was *not brought before* the Central Elections Committee. It follows that the Committee could not have applied to the List the legally required yardstick, as enunciated by this court in the past.

This in itself would suffice for the appeal to be allowed, and we have indeed so decided.

13. (a) Thus far we have analysed the factual and legal data on the basis of the statutory law and the rulings of this court in effect at the time of the hearing of these two appeals. However, as already noted, this matter should be examined from a further perspective - that of the separate question whether the rules governing disqualification of a list allow for expansion beyond what was laid down in *Yeredor* [1], and whether a legal basis could be found for the decisions of the Central Elections Committee - not on its understanding of the substantive prevailing law, but by broadening the judicial rule.

(b) Any redefinition of the limits of the Elections Committee's authority and of the scope of the prohibitions against participation in the elections, has implications for the two lists concerned. That is so even though we have decided the case of the *Progressive List for Peace* not only upon analysis of the material demonstrating its objectives, tendencies and activities, but also, largely on ground of the process by which the decision was reached. Essentially the substantive problem is whether a list can be disqualified, in the case of *Kach*, on grounds of its non-adherence to principles of democracy, tolerance and morality accepted by a majority of the public, and on account of its hostility to a defined sector of the general population. In the case of the *Progressive List for Peace*, the question arises whether a list can be disqualified because of its members' attempt to establish political contacts for the purpose of talks with a hostile organisation or enemy states, while at the same time explicitly disavowing the objective of annihilating the State of Israel, which earlier was the ground for the decision regarding the participation of *EI-Ard* members in the elections. Also to be considered in this regard, is that the general prosecuting authorities did not regard those known contacts as a criminal offence and instituted no legal proceedings in that connection.

(c) The character of the issue also dictates the method of its examination. The following matters will accordingly be examined: first, the nature of the right under discussion; second, the manner in which its boundaries are defined; third, the principled reasons that induced the court in *Yeredor* to delineate the boundaries as detailed above; and fourth, the possibility of altering these bounds, as indicated in paragraph (a).

Before undertaking our detailed examination, there is need to further clarify the essential question before us, namely: *whether the Central Elections Committee is competent to impose additional restrictions on the right to participate in the Knesset elections,* beyond those expressly authorized in Basic Law: The Knesset, or in any other enactment.

14. The yardsticks for testing the answers to the above questions should properly be grounded in constitutional principles. Thus Professor Ronald Dworkin's words are apt,

when he writes: "Judicial decisions ..... even in hard cases ..... should be generated by principles not policy" ("Hard Cases", 88 *Harv. L. Rev.* (1974-75)1057,1060).

As far as I am concerned, judicial decisions in constitutional matters should be rested, even in hard cases, on grounds of principle and not on reasons and motives of policy formed in accord with what appears to meet the needs of the hour and the sentiments of the majority.

The adoption of a general guideline based on principles and not on occasional transient factors, wherever the need for judicial decision arises, as suggested by Professor Dworkin, is a separate matter that does not merit discussion here, and I, for one, do not consider myself bound by it. The reference here is to the standard to be adopted when discussing constitutional questions or legal problems that have constitutional implications. In such circumstances the choice of standard is not to be considered merely as a scholarly imperative or as a just and reasoned advice convincing on its own. Rather the choice dictated by adherence to legal principles inheres in the very nature of the subject. It stems from the need to formulate guiding principles for the functioning of a given political or social body adhering to the fundamental concepts that lend a special status to constitutional civil rights. One must bear in mind, *inter alit,* that when constitutional matters are under review, their import and implications have to be considered in the long term, and proper weight must be given to their impact on the political and social framework within which they operate. If these are subjugated to the needs of the hour and we adopt a casuistic approach in constitutional matters, particularly concerning the rights and freedom of the individual, we shall miss the mark and deal less than justly with the subject.

15. *What is the form and standing of a fundamental civil right in our law?* The protection of individual rights derives from fundamental constitutional principles forming a substantive and integral part of the law applying in Israel. The integration of fundamental constitutional rights in our law takes various forms: recognition of the fundamental freedoms does not express itself only in abstract doctrines that guide the actions of governmental bodies, but also entails the formal and concrete conclusion that these freedoms constitute part of the substantive law, in accord with their name and designation.

The legal status of a fundamental right within the abstract and theoretical system of rules was referred to in H.C. 337/81[5], at 355-356:

> Proper protection of the status of a given liberty is not achieved through mere declaration of its existence, although one should not fail to appreciate the didactic value of a declarative determination; such determination is an essential starting point in the process of moulding the right, in the course of which it gains concrete substance, and is likewise a starting point for introducing the legal principle that it embodies into extra-legal areas, such as the social or moral sphere. It should be added in this context that it is doubtful whether a given fundamental right can be viable without continuous, positive and reciprocal interaction between the legal and the socio-moral areas.

> To recognise the existence of a fundamental right is to accord it a place as part of our substantive law. In other words, it is not merely a declarative principle representing beliefs and opinions, but is one of the fundamental components of the law in effect in Israel. In this respect it has already been said (in C.A. 723/74, at 294-295) :

> > The absence in the State of Israel of any single legislative enactment enjoying supreme protected status and embodying the constitutional principles, does not mean that we do not have statutory provisions of constitutional substance or that our legal system does not contain constitutional legal principles defining the fundamental human and civil rights. Our conception and view of the law in effect in Israel is that it encompasses fundamental rules as regards the existence and protection of personal liberties, even if the bill of Basic Law: Human and Civil Rights has not yet become law.

> > The bill of the new Basic Law is intended to formulate principles and delineate their scope, and its central function is to

> root them in a written statute so as to protect them against risks of temporal crises. It is designed to serve as a vehicle for the expression of values which will serve to educate the citizen, and to restrain in advance those who seek to infringe the limits of his rights. Yet already now the fundamental liberties are rooted...in our basic legal perspectives and are a substantive part of the law in effect in Israel.

These legal principles influence the patterns of legal thought and interpretation, which are inspired by their force and direction (F.H. 9/77[21], at 359). Our legal rules relating to fundamental liberties thus serve as a connecting link between these liberties as mere abstract ideas and ordinary legal provisions, which are influenced in their content and language by recognition of the fundamental rights. For, together with the principled legal rules, some of the rights are also integrated in specific statutory provisions, which were influenced and have even been governed by them from the time of their formulation and throughout their existence and actual implementation (see, e.g., section 4 of Basic Law: The Knesset, and H.C. 141/82[22], at 156).

The delineation of the rights in terms of the wording of the Law is the basic and primary footing upon which their actual protection depends; the very existence of a statute lends tangible expression as well as stability to the political regime and its prevailing fundamental concepts. The stability stems from the existence of a statutory norm embodying the standard against which the legality of the acts of governmental agencies is measured. Therefore, it is of special significance and weight that the constitutional principles defining the fundamental rights be given explicit expression in a legislative act and not merely remain in the realm of the oral or unwritten law. In this way it is ensured that the substance and scope of the rights will be defined in clear language, upon which the individual citizen can rest his demands and claims. Therein, among other things, lies the importance and value of a written constitution, whose absence in our system is conspicuous each time a constitutional issue arises for legal deliberation.

The main expression of the rule of law is that it is not the rule of people - in accord with their unrestrained decisions, considerations and aspirations - but rests on the

provisions of stable norms that are applied and binding in equal fashion. The definition of a right and even its inclusion in a statute are not conclusive of its effective protection, for they do not exhaust the existence of the right. The actual realisation of the rights is expressed in honoring them in their actual implementation, in an equal manner and without unjust discrimination. The value and force of a statute that grants rights is that the rights determined therein are more than an abstract idea, proper in spirit and purpose; rather, the written word renders them concrete and positive, to be applied under standards of equality for equals that may not be departed from for invalid reasons *(Yick Wo v. Hopkins* 118 US 356 (1886)). Last to be mentioned, though not in order of importance, is the norm that when rights are violated, every person injured thereby will be shown equal consideration and given equal treatment (Tussman and Ten Broek, "The Equal Protection of the Laws", 37 *Calif. L.R.* (1948-49) 341).

16. The political rights are among the most important and decisive fundamental freedoms. Thus Professor Bernard Schwartz remarks:

> Among the most precious rights of citizenship are those denoted as political. Without such rights, indeed, it may be doubted that an individual can be said truly to attain the dignity of citizenship.

(A Commentary on the Constitution of the United States, Part III, Rights of the Person, p. 777.)

The main political rights are these four: the right to vote, the right to be elected, the right to assemble for a meeting or demonstration, and the right to address a petition (see also section 48 of the bill of Basic Law: Charter of Fundamental Human Rights).

As regards the right to be elected, the determination in section 6 of Basic Law: The Knesset that every Israeli citizen, who is 21 years old or over at the time of submission of a candidates list which includes his name, is entitled to be elected to the Knesset (unless the conditions specified in the concluding part of the section are found to exist) serves to define a right, ideologically based mainly on the principle of political equality, the duty to uphold which derives also from section 4 of Basic Law: The Knesset (H.C. 141/82[22], at 156; H.C. 246, 260/81[23], at 19). So far, the right to be elected has found expression in

our judicial decisions mainly in the context of equal opportunity, but the directive of the Basic Law reflects a broader and more general import of that right. Incidentally, in providing for the right to be elected in the Basic Law, the Israel legislator gave express and positive recognition to what is only indirectly derived from the U. S. constitutional provisions, without any explicit mention in the text of that Constitution ("Developments in the Law of Elections", 88 *Harv. L Rev.* (1974\75) 1111, at 1135).

Professor Schwartz says in this connection *(op. cit.,* 778-779):

> ...though there are no other express provisions in the matter, it may be stated today that there is a right to hold public office that inheres in the status of citizenship.... One may go further and say that the right of a citizen to hold office is the general rule - with ineligibility the exception. A citizen may not be deprived of this right without proof of some disqualification *specifically declared by law.* One court has gone so far as to assert that "the lexicon of democracy condemns all attempts to restrict one's right to run for office".

(Emphasis added - M.S.)

The legislature may restrict the right to be elected by determining eligibility qualifications, but the accepted practice in countries with similar systems of government to ours, is that there is no *lawful restriction* in this area except under express statutory directive.

In the U.S. a thesis was developed that even the right to elect becomes incomplete where the freedom to be elected is restricted. In other words, a restriction on the right of a party faction to contend not only limits the activities of the faction but also narrows the right of the individual to cast his vote in the manner he considers most effective. From this follows the view that the right to vote and the right to associate in promoting an elections list are but two sides of the same coin. Thus Justice Black regarded the two rights as -

> ...two different though overlapping kinds of rights- the right of the individuals to associate for the advancement of political beliefs and the

> right of qualified voters, regardless of their political persuasion, to cast their votes effectively.

(Williams v. Rhodes [51], at 30).

In other words, restriction of the right to be elected limits not only the rights of a person running for office, but also the rights of the voters to elect a candidate according to their preference by virtue of their right to enjoy equally with others everything accorded under the Elections Law to persons holding the right to vote. From the voter's point of view a restriction of the right to be elected indirectly narrows also his freedom of expression, since he is deprived thereby of his ability to associate with others in promoting his views and opinions as they would have been presented by his preferred candidate. Hence the court is required to exercise great caution in scrutinising the nature of such restrictions so as to ensure that they are reasonable and non-discriminatory. See *Anderson v. Celebrezze* [52]; *Cousins v. Wigoda* [53]; R.D. Rotunda, "Constitutional and Statutory Restrictions on Political Parties in the wake of *Cousins v. Wigoda"*, 53 *Tex. L.R.* (1975) 935; Nowak, Rotunda and Young, *Constitutional Law* (2nd ed., 1983), 777.

In summary, the right to participate in elections is a fundamental political right that gives expression to the idea of equality, freedom of expression and freedom of association, whence it follows that this right is one of the hallmarks of a democratic society.

Thus far as regards the nature of the right.

17. In *Mitrani v. Min. of Transport* [5], it was said, with respect to the conditions and limitations that may be imposed on a fundamental freedom, that the standing accorded any one of the fundamental personal rights in a given political or social framework reflects the notions and shapes the character of that framework. The oretical constitutional premise which holds that a fundamental right endures and subsists in its full scope so long as it has not been limited by the law, is more than a mere technical-formal indication of the ways in which the right may be limited. Likewise, that premise serves not only to underpin the principle of legality; rather its primary purpose is to express the superior legal status of a fundamental right, so that any restriction of the right must be founded on express statutory authority. The court there went on to say (*ibid.*, p. 355):

> Determination of defined and special procedures for changing a fundamental right is, to a large extent, the principal means of assuring that the matter will be properly examined in substantive terms. The right should not be limited except after careful study and deliberation, since curtailment of the scope of the right might bring in its train a distortion of the character of the social or political regime, to a greater or lesser degree. We have indeed said that the place of a fundamental right within a given legal system mirrors the extent of the substantive rule of law, and any change in the scope of the right necessarily affects also the continued existence of the rule of law. Hence the importance of defined legislative procedures, which offer the sole means of changing the application and scope of a fundamental right.

The exercise and practical implementation of a fundamental right are not absolute. In concrete given circumstances the use of a certain right by one person might conflict with another person's lawful right, as was indicated by my esteemed colleague, Barak J., in a different but related context *(Temple Mount Loyalists v. Police Commander of the Jerusalem Region* [24], at 455):

> The freedom of conscience, belief, religion and worship, to the extent that it is given concrete expression, is not an absolute freedom (see *Cantwell v. State of Connecticut* 310 U.S. 296 (1940). My right to pray does not allow me to trespass on my neighbour's property or to subject him to a nuisance. Freedom of conscience, belief, religion and worship is a relative freedom. It must be balanced against other rights and interests that similarly merit protection, such as private and public property and the freedom of movement. One of the interests to be considered is the public order and security. "The freedom of religion must be qualified: no society can accept the notion that its fundamental concepts as to public order may be frustrated for the sole reason that they are incompatible with the demands of a particular religion" (Rubinstein, *op. cit.*, at 135). The point was elucidated by Justices

Black and Douglas in *West Virginia State Board of Education v.* Barnette 319 U.S. 624 (1943), at 643-644:

> No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the state, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are... imperatively necessary to protect society as a whole from grave and pressing imminent dangers.

(See also H.C. 153/83[25]).

If there is a substantial probability that the exercise of a certain right will jeopardise the public order and security in a concrete case, the competent statutory body may limit the practical exercise of the right in those circumstances. But this generates no general right of a statutory body, not so authorised by law, to nullify or qualify the essential right regardless of concrete factual circumstances from which arises such substantial probability of the public security being endangered. This means, for example, that a distinction must be made between a prohibition imposed by a competent agency against holding a demonstration in a certain place at a certain time, and a blanket prior prohibition of the right to demonstrate, in any place at any time, imposed on a defined group of people. Obviously a general prohibition of that nature can be determined only under a legislative provision that authorizes the statutory body to impose it (H. C. 337/81[5]). I need hardly reiterate that the *a priori* application of general prohibitions against the exercise of the basic freedoms has a direct and negative implication as regards the character and nature of the regime under which they are imposed.

The subject can also be approached from a different angle, namely: the existence of a basic right does not grant immunity from legal proceedings to one who exercises it in contravention of the law. The right to demonstrate carries no permit to breach the public peace or to commit an assault, and a demonstrator who commits an act defined as a criminal offence will be prosecuted, when no general reliance upon the right of demonstration will save him. In other words, the general freedom offers no blanket license

to perpetrate criminal acts. The converse is true, too. The right to take legal measures following the commission of a crime and the authority to restrict the exercise of rights in concrete cases, constituting criminal action or giving rise to a substantial probability of danger to the public peace, do not transform the authority in such cases into a general authority to prohibit and restrict in advance the various liberties of citizens, or of classes of citizens, unless the legislature has expressly enacted such authority. The authority to restrict civil rights - including the right to participate as a candidate in the Knesset elections - is not generated *ex nihilo*, nor is it a natural extension, in character or scope, of the authority to prevent crime and bring criminals to justice. The question of an *a priori* general withdrawal of a right is on a different level of discussion and of a different legal character. One should distinguish between the formal and the normative elements, and discuss each separately: the legal authority to impose a restriction is one matter; the import of the restriction in terms of its impact on individual liberties, is another matter.

General prohibitions on enjoyment of the freedom of expression or the freedom of demonstration can only derive, in democratic states, from the exercise of an express constitutional power associated with special times of emergency. They are not in the category of a general and obvious inherent power which an authority may exercise without being so empowered by law. As aforesaid, no liberty may be denied in advance except in relation to a substantial and unavoidable probability of the commission of a criminal offence or an impairment of the public security or welfare (see H. C. 153/83[25]), and even then such power must derive from some statutory provision (for instance authorising the prohibition of a demonstration or the refusal of a licence to hold it, as may be provided in the statute concerned). Hence in *Yeredor* [1] the court, for the purpose of comparison, referred to a number of statutory provisions in English, American and German law which in one way or another imposed limitations on the right to be elected. In England and the United States, however, such general limitations are by and large related only to the candidate's criminal record, along the lines of what is laid down at the end of section 6 of Basic Law : The Knesset (presently we shall refer to special statutory provisions in the United States, as in the Smith Act).

The Constitution of the Federal German Republic, on the other hand, makes express provision for the prohibition of political parties, which also affects the right to campaign

for election (see P. Franz, "Unconstitutional and Outlawed Political Parties: A German-American Comparison", 5 *B. C. Int'l & Comp. L Rev* (1982) 51; H.W. Ruhrman, "KPD Verbotsurteil, Neue Juristische Wochenschrift" Dez. (1956) 1817). This provision is embodied in article 21(2) of the Basic Law of May 23, 1949 *(Grundgesetz* - BG B1 5.1) - the German Constitution. It prescribes that parties oriented by their purposes or the conduct of their supporters towards impairing the fundamental order of a free democracy or the removal or endangerment of the existence of the Republic, are unconstitutional, and entrusts the resolution of the unconstitutionality question to the Constitutional Court, leaving the particulars to be regulated by statute. To complete and supplement this constitutional provision the Law of Parties was enacted on July 24, 1967.

Since the establishment of the Federal Republic the Constitutional Court has outlawed the existence of two parties under the above provision of the German Constitution: the neo-Nazi *Sozialistische Reichspartei* (decision of October 23, 1952, 2 BVerf.GS. 1) and the Communist party *(KPD)* (decision of August 17, 1956, 5 BVerf. G. 85, rendered by the Constitutional Court after protracted hearings over a period of some *four* years; see Dr. T. Maunz, *Grundgesetz,* (Becksche Verlagsbuchhandlung, Muenchen), Vol. II, pars. 4-21).

Incidentally, the thesis that between the two World Wars the German Republic, based on the Weimar Constitution, lacked stability because it did not have the power and authority to ban political parties is unfounded. Under article 48(2) of the Weimar Constitution and the laws for the protection of the Republic (21.7.1922, I *Reichsgesetzblatt* (RGBI) 585; 2.6.1927, I RGBI 125; 25.3.1930, I RGBI 91), that obtained until the changes introduced by the Nazi regime, in Prussia alone some *thirty* parties and other political entities were banned between 1922 and 1929 (Maurer, "Das Verbot Politischer Parteien", 96 *Archiv des Oeffentlichen Rechts* (1971) 203, 206).

It was not the absence of statutory power that was decisive in this area but a variety of deeper-seated factors, which need not be analysed here but have been mentioned before in another context (F.H. 9/77[21], at 361).

18. (a) Article 21(2) of the Basic Law of the Federal Republic confers on the Constitutional Court the power to ban the existence of a political party. Under the pertinent

German case law such ban applies not only to the party banned, according to its actual name and identity at the time of the judicial-constitutional decision, but also to bodies and entities seeking to take its place *(ersatz Organisationen)* (Maunz, *op. cit.*, at 12). A vague and general intention to impair the fundamental order is not sufficient ground to permit the banning of a party. An aggressive, militant and active stance is required, but the orientation of a party may be deduced from its declared purposes or the conduct of its supporters (*ibid.*, at 38).

In a democratic regime the dilemma often arises of an apparent conflict between maintaining freedom of expression and the desire to uphold democratic principles even in the face of those who seek to do away with them yet, to that end and for their own convenience, avail themselves of the very democratic principles against which they conspire. In this connection commentators on the above Constitution pointed out that

> ...it is possible to reconcile the contradictory principles of the amenability of the political regime to historical changes (on the one hand), and preservation of the existing regime (on the other hand) only by way of practical-political reason, with cautious advancement and gradual changes ensuring the continuing existence of the whole.

(3 *Kommentar zum Grundgesetz* (1976) 32).

With regard to these problematics, the American legal scholar, L.H. Tribe, observed (see "Toward a Metatheory of Free Speech", 10 SW. *U. L.Rev.* (1978) 237, 239):

> It should be clear that no satisfactory theory of free speech can presuppose or guarantee the permanent existence of any particular social system. For example, a free speech theory must permit evolution from a society built on the ideals of liberal individualism to a society aspiring to more communitarian visions - just as it must permit evolution from communitarianism to individualism.

(b) The direction indicated by Tribe is clearly formulated, but its application to day-to-day political life is more difficult. That which is permitted ought also to imply that

which is forbidden, but drawing the line between the permitted and forbidden is not easy, and not infrequently the fear will arise that something of the freedom of expression or association has been sacrificed to create a wider security margin and to block in advance any trend from which the actual danger that arises may be far from a substantial probability. The German Constitution set down clear bounds, positive and negative, that are not necessarily tied to an *ex post facto* examination of the purposes and activities of the political party. From the power to ban the existence of a party, where the conditions laid down in Article 21(2) are fulfilled, the Constitutional Court has deduced also what the absence of a banning provision means. In other words, the Constitutional Court concluded from the permissible exercise of article 21(2) that it may not impose prohibitions on a political party. A party whose existence has *not* been banned under article 21(2) is free to act as a lawful body for all purposes (provided, of course, it is not a camouflaged substitue for a banned body).

As observed by Franz, *op cit.*, at 63:

> ... almost as a counterweight to its enormous party-prohibition power, the court has found that this clause provides a "privilege" to a party, under which both the party and its officials, when lawfully acting on behalf of the party, are to be free from government discrimination and governmental intervention as long as the Constitutional Court has not found the party to be unconstitutional. Through this interpretation, Article 21(2) retains a continuing vitality, despite the fact that the Constitutional Court last prohibited a party over twenty years ago.

The court based this "party-privilege" on the theory that a judgment of a party's unconstitutionality is *operative* not *declarative.* The court's judgment of a party's unconstitutionality is, in other words, a "performative utterance" that changes something in the world. A party *becomes* unconstitutional only when the court adjudges it so. The court does not "discover" unconstitutional parties and merely label them as such.

The declaration of a party ban under the above Constitution is constitutive and not declarative. So long as the prohibition has not been pronounced, the activity of the party is

deemed lawful, hence it is not possible to employ measures on grounds of past organisation, in the manner of the thesis posited in the American judgment in *Dennis v. United States* (1951) [54], with which we will deal below. It follows that a party may not be discriminated against or restricted in its activity so long as the Constitutional Court has not decided to exercise its power under Article 21(2). For this reason the German Constitutional Court invalidated the text of election laws that restricted in advance the prospects of parties which, in the view of the majority, constituted "a political danger to democracy" (decision of 9.3.76, 41 *BVerf*. G. 399) - with reference to a political organisation that had not been banned under Article 21(2).

19. (a) The Constitution of the United States has no provision that permits the banning of political organisations because of their views, but the American legislator has adopted several measures in ordinary legislation to ban the existence of the U.S. Communist Party and to restrict the activities of organisations that are generally subversive. These are the main enactments:

(1) The Smith Act of 1940 (18 U.S.C. (1946 ed), pars. 10, 11 - now 18 U.S.C.A. par. 2385, 54 Stat. 67D 671) defines a new criminal offence, i.e. -

> (2)(a) ... (1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government.

In the fifties and sixties this provision was applied to bring criminal charges against officers and activists of the American Communist Party.

(2) The Communist Control Act of 1954 (Pub. L. No. 83637; 68 Stat. 775 (1954)) rendered the existence of the Communist Party unlawful and prevented its participation in the Federal elections and in various state and local elections.

(3) The Subversive Activities Control Act of 1950 proceeded from the declared premise that the Communist Party constitutes a clear and present danger to the security of

the United States, and imposed a duty of registering bodies and organisations connected in any way with that party or its activities (on the interpretation of the provisions of this Act, see *Communist Party v. Control Board* (1961) [55]). It appears that this law has not been applied since the beginning of the fifties.

(b) In reliance upon the Smith Act, legal proceedings were initiated in the fifties and early sixties against certain activists of the American Communist Party *(Dennis v. United States* [54]; *Yates v. United States* (1957) [56]).

The outcome of these two cases differed as regards the final decision, but in both the court mapped out the guiding principles for construing the provisions dealing with the offence of organising for and advocating any purpose defined in section 2 of the Smith Act. The majority in the *Dennis* case [54] made it clear that a requirement for conviction, under the Act as phrased, is an unlawful intention to overthrow the government by force or violence. Freedom of expression gives no immunity from legal proceedings to those who support and advocate staging a revolution - in circumstances of a clear and present danger of commission of the forbidden act, that is, the overthrow of the government.

Freedom of expression indeed rests on the assumption that -

> ...speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies.

(Dennis [54], at 503, *per* Vinson C.J. , following *Communications Assn. v. Douds* [57], at 396.)

At times, however, the conclusion is required that the immediate danger outweighs the wish to preserve freedom of expression (*ibid,* at 509, *per* Vinson C.J.):

> Overthrow of the government by force and violence is certainly a substantial enough interest for the Government to limit speech.

As was held in that case, the government need not sit back and wait for a *putsch* to take place. If the authorities know that an entity aspiring to revolution is trying to educate

its members and organise them in such manner that they will carry out their leaders' decision to commit an illegal act, that will require the authorities to take action as well. The argument that there is no occasion for the governmental authorities to be overconcerned since they in any event command sufficient forces to overcome any uprising, if such occurs, is not weighty enough to call for a protracted inactivity, to wait-and-see.

(c) In the *Dennis* case [54], on the other hand, warnings were also voiced against excessive use of the "clear and present danger" test. Frankfurter J., who concurred in the majority opinion, referred to the comment of Prof. P.A. Freund *(Understanding the Supreme Court*, 27) that the test is not to be taken too simplistically, and that a number of factors must always be considered before exercise of the power, including, *inter alia:* the comparative gravity of the danger in relation to preservation of the values of freedom of expression and political activity; the possibility of employing more moderate means of control, and the need to examine in depth the specific intent accompanying the spoken words. Simplistic reliance on the above mentioned test is no substitute for the weighing of values.

Black J. dissented from the majority opinion and viewed the conviction as a far-reaching violation of the freedom of expression. An assembly for the purpose of disseminating ideas and viewpoints ought not to have led, according to Justice Black's thesis, to conviction for conspiracy to overthrow the government. He added, in a mixed tone of regret and optimism *(Dennis* [54], at 581):

> Public opinion being what it now is, few will protest the conviction of these Communist Petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

In other words, a decision to restrict the exercise of a given liberty should not be governed by momentary pressures or passions, and a more tolerant, long-term evaluation is required.

Douglas J., also in the minority, sought to qualify the restriction on freedom of expression that flowed from the conviction of the accused conspirators in the *Dennis* case [54]. To give foundation to his point of view he referred, *inter alia,* to the comments of Brandeis J. in *Whitney v. California* (1927) [58], noting as follows *(Dennis* [54], at 585-586):

> The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed. The classic statement of these conditions was made by Mr. Justice Brandeis in his concurring opinion in Whitney v. California 274 U.S. 357, 376-377:
>
> > Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it... But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immeidately acted on... In order to support a finding of clear and present danger it must be shown either that *immediate serious violence was to be expected or was advocated,* or that the past conduct furnished reason to believe that such advocacy was then contemplated.

> ...To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, *unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.*

(Emphasis added - M.S.)

(d) In the *Yates* case [56] the meaning of the term "advocacy" was somewhat narrowed, in relation to the expression of opinions about overthrowing the government. The court distinguished between support of abstract ideas and advocacy to carry out illegal *acts.* As explained there, the Smith Act was not designed to prohibit beliefs and opinions, but only advocacy and incitement to the commission of *acts.*

20. The above examination of some of the conclusions reached by the U.S. Supreme Court in *Dennis* [54] *and Yates* [56], is for comparative purposes alone, and is not exhaustive of the rules emerging from American case law in this area.

One may learn from the legislative as well as the interpretative approach in the United States, that the starting premise there differs somewhat from the practice under the German Constitution. The latter creates an express and exclusive constitutional basis for the prohibition of a political entity, and once a political body has been declared illegal it follows that no act may be done on its behalf in the area of organisation, dissemination of views, activities and the like. The banned entity is *ipso facto precluded* from participating in an election campaign. As explained above, the provision in the German Constitution that enables the banning of a political party, reinforces indirectly the conclusion as to the general lawfulness of the political activity undertaken by a body that has not been so banned. For the present purpose one may add that whatever be the views of the party, so long as its existence has not been prohibited by the Constitutional Court under the legal order prevailing there, its participation in elections may not be prevented.

The American approach, as expressed in the Smith Act, puts the emphasis on the character of the actions carried out from time to time. According to the nature of these it is determined whether or not an unlawful act has been committed, and in this respect a preliminary declaration as to the banning of the body is not a condition precedent for the institution of legal proceedings on account of the body's organisational activities.

21. The foregoing demonstrates the nature of our subject as regards its general legal classification. We are concerned here with one of the fundamental political rights. The pertinent provisions of the statutory law embody no authorisation for its restriction on grounds of the purposes and nature of the candidates list. In other words, the court cannot rest its decision upon a statutory provision that delineates in advance the scope of its power and expressly empowers the court to prohibit the participation in elections of a given list or of a type of list. Hence the need of the court to consider (both at the time of giving its judgment in the *Yeredor* case [1], and *now* when dealing with the two lists in the present case) to what extent an innate authority is vested in the Central Elections Committee to restrict freedoms and narrow fundamental rights *without* having been expressly empowered to do so by statute.

What are the powers of the Central Elections Committee and those of this court in the absence of statutory guidance? The principle of legality and the pursuit of the rule of law, which shrinks from restricting liberties without statutory sanction, as well as the special deference we must pay to the various freedoms - all these support the thesis that a fundamental right may not be restricted without statutory authority (H.C. 337/81[5], at 355). The proper and desirable fundamental aim is that rights should be maintained without limitation. Even when rights conflict one with the other, one must consider which of them prevails in the circumstances, or in what circumstances should the one prevail and in what circumstances should the other - and one has recourse to a value test that seeks to maintain the rights as far as possible side by side and not one at the expense of the other. This court cannot and ought not detach itself from the general legal context, and its interpretation is necessarily governed by the constitutional nature of the matter brought before it.

The path taken by the majority in *Yeredor* [1] represented an optimal exercise of the court's power, and in light of its reasoning we can only conclude that in any less extreme factual situation, the majority of the court in *Yeredor* [1] also, would have refrained from disqualifying the list.

In other words, the court faced a situation in which it had to fashion criteria *ex nihilo* for determining when the right to participate in elections was subject to restriction. In any event the court could only act on the premise that the existence of the state, its institutions and the elections thereto was a supreme necessity; and in so doing it had to be guided by the basic perspective that no liberty or right was to be prejudiced except in the most extreme cases. Only the far-reaching significance of the objective to liquidate the state engendered the court's readiness to assume a power amounting to the absolute denial of a right. It thus adopted a twofold test that integrates the supreme, basic constitutional concept of the existence of the state with the practical criterion of "substantial probability". That means that the court rested its decision on the (list's) illicit purpose that goes to the very root of (the state's) existence and on a test constructed in accord with the qualitative weight of the danger, its imminence and its clarity.

What we have said above serves to answer the fourth question we earlier posed, i.e., to what extent, if at all, may the decision of the Supreme Court in *Yeredor* [1] be supplemented. That is, can the *kinds of cases* in which a list may be banned from participation in elections be added to by virtue of judicial decision alone, without prior statutory sanction?

The clear answer to this question, which founded our decision of June 28, 1984, is in the negative. Only the polar conflict between the objective of eradicating the state, on the one hand, and the desire to participate in elections to state institutions, on the other, could have called forth a judicial determination resting on an ultimate principle and not requiring concrete legal substantiation founded on express statutory provision. Participation in fashioning the image of the state, through Knesset membership, on the part of those who contest its very existence, is a contradiction in terms, and it was this profound inner contradiction that freed the majority in *Yeredor* [1] from the limitation imposed by the absence of any written legislative endorsement. However, had it been

attempted to add variously to that, and had there developed an expansive case law with new circumstances added and elaborated in which the right to participate in elections might be denied *without* statutory ground, for reasons unconnected with the above substantive contradiction, the result might have been the clearest injury to the character of the political regime under which we live, and subversive of the fundamental notions by which it is nourished. The addition of further grounds for disqualifying a list would not be of mere quantitative import, but would entail transition to another dimension. Instead of reliance on the fundamental value of the existence of the state, which alone can bridge the legal gap engendered by the lack of statutory guidance, recourse would be had to substantive evaluation or to a value judgment concerning the party list based on its platform. So to do requires express and clear legislation, which demarcates limits and does not leave matters for resolution by way of unqualified discretion. A prominent feature of the democratic regime is not merely that it establishes checks and balances between the different branches of government, but also that it refrains as far as possible from entrusting unlimited discretion to any particular branch. The executive, the legislature and the judiciary must all act within their constitutional confines in such a manner that the fundamental values serve them as their foundations as well as *defined* tests for exercising discretion.

> The danger in choosing an alternative course is not to be discounted. If a committee composed entirely according to political party affiliation considered itself free to decide, by the ordinary majority required, that one list or another is disqualified from participating in the elections, notwithstanding the lack of any enabling statutory authority or normative standards delimiting the committee's discretion and prescribing the circumstances for its exercise of such power - the result might be to reduce substantially the general scope of the political right to participate in elections. In this regard it matters little that initially the committee exercises its power only with respect to entities which are obnoxious to a majority of the public. In the absence of any binding qualifying standard, it would be no surprise if the first selection for disqualification is a list of the kind that a majority of the public finds objectionable. We learn from the experience in other countries that the first examples do indeed relate to the extreme cases, but a less than strict observance of the rule of law and the fundamental freedoms gradually calls forth less extreme examples, as is well known.

Alongside the danger that democracy will be abused by those seeking its eradication or weakening, is the contrary danger that excessive anxiety to preserve democracy will render its principles purely theoretical and alienated from its practical significance, imposing multiple *a priori* limitations and prohibitions on liberties.

One should bear in mind in this connection that the dilemma of the limitation of liberties, that frequently assails governmental authorities, generally does not arise in relation to the rights of bodies whose existence and ideas are not controversial. It arises most acutely when views are voiced that arouse firm objection on the part of the majority, and even outrage the feelings of listeners. The true test for the existence of a right arises not in times when the current events express composure, tolerance and understanding, but at moments of pain and vexation, when there is little sympathy for the person claiming a certain right or for his views. The individual's right to personal liberty and the preservation of his rights against unlawful imprisonment or bodily torture, does not arise for debate only upon investigation of a respectable citizen's complaint that he was mistakenly taken into custody and mistreated by a police officer. The right is also truly tested when persons suspected of murder or rape are arrested, taken to prison and interrogated there. Protection of the freedom of speech or freedom of demonstration is important not only when words of wisdom are spoken, quietly and reflectively, for the existence of the right is not problematic where there is civilised and calm debate. But it is far more difficult to preserve freedom of expression and similar or associated fundamental rights, where beliefs, opinions and views are aired of a nature found outrageous and reprehensible.

We have seen that it is not sufficient to create a mere formal statutory basis for the authority of the Committee or this court. That is indeed an essential precondition for authority to restrict the right of candidacy in elections, but over and above that need, substantive normative definition of the nature of the discretion and its limits is also required. That is to say, the legislative act must consist of two components: one is satisfied by the formal act of vesting authority; the other - which must be treated with great care - is the definition of circumstances in which the authority may be exercised.

The central problem is the need to determine standards founded on democratic beliefs and viewpoints that must be applied also to persons who do not adhere to democracy and its values - quite the contrary! Professor John Rawls of Harvard named this challenge "The Toleration of the Intolerant" (Rawls, *A Theory of Justice* (Cambridge, 1971) p. 216).

This matter must be treated with great circumspection. The statutory restriction of the right of party lists to contend in elections when they seek to jeopardise the very existence of the state, creates no special problems. But as one widens the circle encompassing the classes of bodies whose candidacy is sought to be inhibited in advance, one also widens the possible impact of such legislation on the continuing existence and realisation of our fundamental democratic concepts. Thus, as in Britain and in other countries, we have found no room to prohibit the candidacy of lists that would establish a political regime of the kind that exists in some other countries and differs radically from our own. Are there grounds to depart therefrom? Of course, this court will not encroach upon the domain of the legislature, yet it is proper to stress again the caution that is required in this regard, lest any proposed new legislation bring about a change in an unintended direction. In any event, I am not persuaded that there is any reason to discard past truths or to determine new standards that might substantially restrict any of those clear manifestations of the democratic political regime that we have accepted so far.

The fundamental liberties - including freedom of expression, freedom of belief and equality in competing for public office, are all inherent in our governmental system and, therefore, in our legal system too. In every society one finds a variety of differing views and opinions; in a free society the diversity is manifest, in a totalitarian society the diversity is masked and concealed. Exchange of opinions, clarification of views, public debate, the urge to know, learn and convince - all these are essential tools in the service of every opinion, view and belief in a free society. The act of classifying citizens and distinguishing between them, some of whom are granted rights and others not, contradicts the truth that underlies the freedoms and, in its theoretical essence, manifests the same internal contradiction as does a person who decries democracy while utilising the rights it confers. Even with unpopular views and opinions must one contend and seek methods of persuasion. Prohibitions and restrictions are extreme devices of the last resort. The premise

is that freedom of speech finds prominent expression when accorded also to those whose opinions appear to be mistaken and even dangerous (*per* Scrutton J. in the *O'Brien* case [48], at 382, and see Agranat J. in *Kol Ha'am* [26], at 878). Adopting a similar approach in *Dennis v. U.S.* [54], Frankfurter J. quoted these words of Sir. W. Haley, Director-General of the British Broadcasting Authority (at pp. 553-554):

> ...there are powerful forces in the world today misusing the privilege of liberty in order to destroy her. ... [But] no debate is ever permanently won by shutting one's ears or by even the most Draconian policy of silencing opponents. The debate must be won. And it must be won with full information. Where there are lies, they must be shown for what they are. Where there are errors, they must be refuted. It would be a major defeat if the enemies of democracy forced us to abandon our faith in the power of informed discussion and so brought us down to their own level.

No person has a monopoly over truth, opinion and reason, and it has been said that what appears today to be simple and self-evident may seem uncertain tomorrow, or as it was put by Learned Hand: *(The Spirit of Liberty,* (New York, 2nd ed. 1953), p. 82):

> ...(the) certainties of today may become the superstitions of tomorrow. . we have no warrant of assurance save by everlasting readiness to test and test again...

True, liberty does not mean licentiousness, and there are circumstances that necessitate the imposition of restraints, just as it is necessary to take legal measures against the commission of various crimes *(Kol Ha'am* [26]; *Levi v. Southern District Police Commander* [25]). However, the restrictions must not only be based on express statutory provision but, more importantly, they must also be imposed only as an extreme measure of last resort in face of a substantial probability of danger. There must always be a rational connection between the degree of danger and the measures taken; and even if the advocacy of a certain view raises just indignation, that is not sufficient to cause the total denial of a

basic right. A democracy that acts to restrict freedoms when this is not an existential necessity, as indicated above, loses its spirit and force.

In summary, the practical maintenance of fundamental liberties should not be influenced by transient events or the prevailing sentiments, and where restraints on fundamental rights are necessary, these must not be improvised and moulded according to momentary needs. In a state that regards the rule of law as the principal means for protecting its citizens from diverse internal dangers and believes in the moral power of democracy, a person's liberty may not be restricted except by law and may not be denied him merely on grounds of objection, however forceful, to the content of his statements. Restraints on liberties to prevent dangers that are a substantial probability is sometimes a cruel necessity, but the introduction and implementation of restrictions and prohibitions - except as an extreme measure of last resort in face of a "substantial probability" of danger - could in the long term have the same effect on the fundamental liberties, and cause them the same harm, as is threatened by the advocacy of their restriction on the part of those who object to the very existence of such freedoms.

22. For the above reasons I decided at the time, together with my esteemed colleagues, to set aside the decisions of the Elections Committee.

BEN-PORAT D.P. My esteemed colleague, Shamgar P., has dealt extensively and impressively with all aspects of the problem at the core of the two appeals before us. Accordingly, I shall content myself with a brief exposition of the lines of thought which guided me to concur in the opinion of my colleagues that the appeals should be admitted.

After much thought I have reached the conclusion - which on the face of it might seem somewhat strange - that the Knesset Elections Law [Consolidated Version], 1969 (hereinafter - "the Elections Law") does not grant the Central Elections Committee (hereinafter - "the Committee") *any* authority to consider the worthiness of a given list to be a contestant in the elections by virtue of its platform or objectives. Its sole duty is to examine whether the list complies with the technical requirements enumerated in sections 6 and 7 of Basic Law: The Knesset (hereinafter - "the Basic Law") and in various sections of the Elections Law, *inter alia:* whether the candidate meets the conditions of age,

citizenship, etc.; whether the list has the required number of signatures, and so on. Once a list is submitted in compliance with all the conditions, and at the proper time, it has been "lawfully submitted" and must be confirmed; if not - it must be rejected.

I have said that on the surface my conclusion that the legislature entrusted the Committee with a purely technical-ministerial function, might seem somewhat "strange". For, on the one hand it may be urged that it is vital to prevent the infiltration of a dangerous list into the elected body, and it would be better therefore to recognize the power of the Committee to take this weighty consideration into account when asked to grant its approval to a list. On the other hand, however, it emerges from the case law to which I shall presently refer (and which, on the face of it, is unacceptable to me, with all due respect), that there is no judicial forum competent *to set aside the Committee's approval of a list*. On the contrary, if the Committee has *approved a* list, no matter how dangerous its purposes, that is the end of the matter and its decision cannot be questioned either by way of appeal or before the High Court of Justice. Recognition of a power in the Committee to grant a list *final* approval, to the exclusion of all judicial review, is an unacceptable result.

It appears that the *Kach* List, submitted to the Committee for the elections to the *Tenth* (i.e. prior) Knesset, was approved by a majority vote, contrary to the view of the Committee chairman (Justice Etzioni) who favoured its disqualification. His opposition was based on certain publications on behalf of *Kach*, which stated:

> ...In order to deter those who are intent on seducing Jewish girls to assimilate we propose mandatory imprisonment for a term of five years without mitigation of sentence or reduction of the term of incarceration for every non-Jew who has sexual relations with a Jewess...
>
> To prevent further deterioration we demand that an end be put to all plans of the Ministry of Education to encourage social relations between non-Jews and Jews and also to carry out schooling only in separate schools for Jews and Arabs... This is only by way of initial

> steps since it is clear that the true solution of the *Kach* program is to motivate the Arabs of *Eretz* Yisrael to migrate to their own countries.

As already mentioned, a Committee majority prevailed over the chairman and decided to approve the list. At a further meeting, when those present were informed of the Attorney-General's position that certain publications of this list amounted to a criminal offence, the Committee stood by its decision.

Four Israeli citizens, among them Mr. Moshe Negbi who pleaded on behalf of them all, felt impelled to counter what they considered an impending evil and petitioned the High Court of Justice (in H.C. 344/81[27], hereinafter - the *Negbi* case) for an *order nisi* against the Committee (and the *Kach* list) to show cause why it should not reverse its decision to approve the list, and disqualify it. Mr. Negbi was aware of section 137 of the Elections Law, which provides:

> Any complaint as to an act or omission under this Law shall be within the exclusive jurisdiction of the Central Committee, and, *save as otherwise provided in this Law,* no court shall entertain an application for relief relating to any such act or omission or to any decision or direction of the Central Committee, the chairman and vice-chairmen of the Committee, the chairman of the Committee, a District Committee or a Polling Committee.

(Emphasis added - M.B.P.)

To overcome the difficulty, Mr. Negbi submitted the argument, rightly called "sharp", that section 137 presented no obstacle because the Committee's approval was in no any way based on the Elections Law but on what have been called *supra-constitutional* principles. In other words, according to the Elections Law the Committee must only consider whether the requisite conditions have been met, materially and technically, in order to deem the list "duly submitted", and no more.

However, according to the rule of the majority opinion in the *Yeredor* case [1], it is also empowered, so it was argued, to consider *supra-constitutional* considerations (for

instance whether the list is in any way subversive of the existence of the state). Such a consideration, he submitted, goes beyond the strict confines of the Elections Law, hence it is also beyond the ambit of section 137 of the Elections Law and is amenable to judicial review by the High Court of Justice. On the other hand, if a *supra-consitutional* consideration is a matter within the scope of the Elections Law, then the Committee exceeded its power, which is confined entirely to a technical-ministerial examination, i.e. whether a list has been "duly submitted".

This argument was rejected, the court holding as follows (*ibid.*, at 839-840, *per* Barak J.):

> The decision of the Central Elections Committee to approve or refuse to approve a list is taken by the Committee by virtue of the power vested in it under the Elections Law, according to which the candidates lists are submitted to the Elections Committee (section 57(i)), and the *Committee either approves or refuses to approve them* (sections 63 and 64)... The constitutional-or if you wish the "supra-constitutional" - principles dealt with in *Yeredor* case, E.A. 1/65, do not sever the act of the Elections Committee from the Elections Law, and the *application of these principles* by the Committee in actual practice *is not excluded from the immunity prescribed in section 137 of the Elections Law.* The legal principles laid down in the *Yeredor* case, E.A. 1/65, comprise a complex of relevant considerations which the Central Elections Committee may or even must take into account when acting under the Elections Law, and in doing so it is immune from judicial review.

(Emphasis added - M.B.P.)

Further on it was stated that even if the Committee erred in exercising its discretion, this does not mean that the decision went beyond the scope of its power under the Elections Law. In the words of Barak J. (*ibid.* at 840):

> ...Just as a correct decision by the Committee is protected from judicial review, so too is an incorrect decision.

Accordingly, it was on the basis of the immunity covering the decisions and acts of the Committee under section 137 of the Elections Law, that it was decided to dismiss the petition, which meant that the Committee's approval of the *Kach* list was final and could not be challenged, whether the decision was correct or erroneous. That is to say, even assuming that judicial review were to reveal that the platform or purposes of the *Kach* list call for its disqualification, it remains legislatively decreed (in light of section 137 of the Elections Law) that the Committee's approval is final and binding.

I must confess that in reading the judgment I formed the impression that it does not distinguish between approval and non-approval by the Committee, as if in *both* cases its action is covered by the immunity of section 137 (see the passages cited above), but this is not so. To the contrary, the Elections Law does indeed "provide otherwise" (in the sense of section 137), regarding the Committee's refusal to approve a list in section 64(a), which reads:

> Where the Central Committee refuses to approve a candidates list, either wholly or as to the name of one of the candidates or the designation or letter of the list, it shall, not later than the 20th day before election day, notify its refusal to the representative of the list and his deputy, and they may, not later than the 18th day before election day, appeal to the Supreme Court against such refusal.

In other words, the symmetry that seemingly emerges from the *Negbi* case [27], does not exist at all: while the approval of a list is immune from judicial review, the legislature did grant a right of appeal to a list that considers itself prejudiced by the Committee's refusal to approve it. That is to say, the legislature saw no need for judicial review in case of approval of a list, but sought to prevent the injustice that might be caused to a list when the Committee refuses to approve it. If we construe this asymmetry in light of the ruling in *Negbi* [27], we must inevitably conclude that a decision of the Committee to *approve* a list is conclusive, regardless of any differences among its members as to the worthiness of the list to campaign in the elections to the Knesset because of its unacceptable platform and that there is no way to challenge such approval, whether by way of appeal or by petition to

the High Court of Justice. On the other hand, the Committee's decision *to refuse* to approve the list is subject to the list's right of appeal to the Supreme Court (section 64(a)).

If this asymmetry relates solely to ministerial examination of the conditions prescribed by the Elections Law (and the Basic Law), it seems reasonable and is even logically compelling. Where a list has been approved, there is no one at all to appeal the decision (unless a minority of the Committee members be permitted to appeal against the majority). It is possible also to understand it is better that a list be allowed (even erroneously) to participate in the elections, than be disqualified without just cause. In this way the principles of democracy are preserved, by the fact that a list barred from contesting benefits from a right of appeal and judicial review of the refusal. On the other hand, were the Committee empowered to take into account superior principles (for example, the fact that the list's platform undermines the existence of the state) and not merely to conduct a ministerial examination, then such asymmetry would be puzzling. The approval of a list subversive of the existence of the state and seeking its annihilation is far more dangerous than a refusal to approve it. It is clear that ensuring the existence of the state takes precedence even over the principles of democracy. Hence, had the legislature intended to embody also such a consideration in the frame of the Elections Law, logic would dictate that it should confer the right of judicial review precisely and primarily when the Committee's decision is to *approve* a list that endangers state security. If one maintained otherwise, an erroneous decision by the Committee to approve a list that aspires to destroy the state could well be disastrous. Moreover, the *natural* forum for judicial review of a decision to approve a given list is, to the best of my understanding, the High Court of Justice and *not* an appellate instance, since there is no one to appeal such approval. Another possible course (for example) is to vest in the Attorney-General a right of appeal against a list's approval. But, as aforesaid, the immunity extended to the approval of a list by the Elections Committee is absolute.

It should be noted that if we are dealing with superior principles, there is no reason to stop at the point where a list is in fact directly subversive, and there is good reason for also barring from the contest a list that aspires to a grave violation of basic democratic principles. Furthermore, without going into detail, it is at times difficult to establish a

clear-cut division between crass subversion of the foundations of democracy and an aspiration to destroy the state.

I am aware of the answer given by my esteemed colleague, Barak J., to this asymmetry. His view is that in case of the approval of a list which endangers the existence of the state, the Knesset will be impelled to act. I wonder why the refusal to approve such a list invokes judicial scrutiny, with all the haste necessitated by the impending elections, whereas its approval is a matter for the Knesset and not (for example) the High Court of Justice. In my opinion it is important to prevent such a list from entering the contest, and during the elections period it is difficult to expect the Knesset to find the time to resolve a matter of this kind. Moreover, if the *Kach* list had attained the "cut-off' percentage in the elections to the previous Knesset, when its participation was approved by the Committee, would the Central Elections Committee have been competent to refuse to approve its participation in the *next* elections? I wonder. Let us assume that a veteran Knesset faction submits a list to the Committee which is valid in all formal respects, but a majority of the Committee members think that by reason of its past conduct the list is subversive. Would the Committee be competent to refuse approval? The answer, to my mind, is that the Knesset - and it alone - has the power to outlaw an *existing* party faction. One should bear in mind that it was only by mere chance that the *Kach* list did not obtain the "cut-off" quota of votes in the previous elections to the Knesset and was not therefore a party-faction in the outgoing Knesset. This line of reasoning also supports my conclusion, that the function of the Committee is merely technical-ministerial. Incidentally, unlike my esteemed colleague, Barak J., I think that the platform of a party-faction would be sufficient ground for the competent body (if such existed) to disqualify it, and it would not be necessary to wait (if the platform is illegitimate) until that faction proves by its conduct that it indeed carries out the platform in practice.

I am conscious of the weighty considerations that moved the majority Justices in *Yeredor* to hold that the power to disqualify a subversive list was a practical necessity. Those proceedings concerned an appeal against the Committee's refusal to approve the *Socialist* list, the court holding that a party list whose aim is to destroy the state cannot be allowed to participate in elections to the Israel house of representatives. To so decide as an

appellate instance, it was obviously necessary for the court to recognise also (as it did) the Committee's power to disqualify such a list. The reason is simple: the function of an appellate instance, by its very nature, is to determine what decision should have been made by the body against which the appeal was brought. However, assuming that the list *(Socialists)* had been approved by the Committee (as was the *Kach* list in the elections to the Tenth Knesset), if only by a single decisive vote, it might be asked whether the immunity extending to such approval would have rendered that list any the less dangerous to the existence of the state? Yet such approval, as already indicated, has absolute immunity from judicial review.

Had it been decided in the *Negbi* matter [27], that for lack of an appeal (or an appellant) against *approval*, the doors of the High Court of Justice were open to anyone with *locus standi*, I might have been inclined to accept the majority judgment in *Yeredor* [1], if only for the reason that both approval and refusal by the Committee could be judicially reviewed (whether by the High Court of Justice or an appellate instance). I might have been so "inclined" since one of two solutions is possible: "*supra* - constitutional" considerations are either extraneous to the Elections Law or they fall within its scope. In other words, if the procedure to challenge a Committee refusal (on ground of subversion) is by way of appeal, then the same procedure should also be available to challenge a Committee approval (say at the instance of the Attorney-General, but no such provision is made in the Law). In any event, if the High Court of Justice cannot be approached in case of *approval* of a list, yet we find ourselves faced as we are here with an *appeal* against the Committee's *refusal*, the question of asymmetry in the existing interpretation arises most acutely.

In view of the rule laid down in *Negbi* [27], and so long as it remains unchanged, I cannot, with all due respect and modesty, see any way to adopt the solution according to which the danger posed by a particular list will be subject to judicial review when the Committee withholds its approval, but will *not* be reviewable precisely when the Committee *approves* the list, albeit mistakenly (that is, even when it is in fact dangerous and given to disqualification). I have read with interest the opinions of my esteemed colleagues but have not found in them any reference to the *Negbi* decision, nor a satisfactory answer to the question how any judicial instance (the High Court of Justice or

an appeal court) can remedy the situation if the Elections Committee (whether for political reasons or erroneously) *approves* a list that aspires to annihilate the state. Such is the consequence of perpetuating the asymmetry. Thus the duty to disqualify the list is held by my esteemed colleague, Elon J., in paragraph 13 of his judgment, to be entrusted to the Central Elections Committee; but if the Committee fails to discharge its duty - how shall *we* rectify the error? Clearly the statement of my esteemed colleague (*ibid.*), "in that case we are *obliged* to disqualify it", is not given to implementation in the existing situation. Likewise, the distinction made by my esteemed colleagues between annihilation of the state and prejudice to democracy is in my humble opinion very questionable. Not only does *grave* prejudice to democracy pose a danger also to the state's existence, but is itself among the "superior principles" that merit consideration. I nevertheless reiterate, that in case of conflict between principles of democracy and security considerations affecting the very existence of the state, clearly the existence of the state must be given first priority, however important the other principles may be.

In light of the situation I have described I hold to the opinion (as a lesser evil) - also expressed in the dissenting opinion of Cohn J. in *Yeredor* [1] - that the Elections Law charged the Committee with the sole function of examining compliance with the conditions prescribed by statute. That and no more. The legislature apparently believed - assuming it considered the matter at all - *that the supra-constitutional aspects would be dealt with by the Knesset itself, if the need ever arose in the future.* The danger that a problematic list would appear and also exceed the "cut-off" quotient of votes, apparently seemed slender or remote. Another possibility, that of petitioning the High Court of Justice in matters vitally affecting the State of Israel, was blocked by the above mentioned ruling in the *Negbi* case [27].

Support for the attribution of a limited function to the Committee can be found in section 63 of the Elections Law, which provides:

> A candidates list duly submitted ... *shall be approved* by the Central Committee, *which shall give notice of ... the approval ...*

(Emphasis added - M.B.P.)

Literally at least the text indicates a purely technical examination, as explained succinctly by Cohn J. in *Yeredor* ([1] at 376 ff.). In this manner the asymmetry loses its significance (as explained above).

This state of affairs, however, is undesirable and in the present reality even intolerable. It is time to enact a law protecting the state against the entry of subversive lists into its legislative body. A state that wishes to survive and remain committed to the principles of democracy, must take care that these are not overwhelmed by destructive elements from within, all in the frame of legitimate campaigning, as it were, for election to the Knesset.

On a previous occasion I agreed that even the majority in *Yeredor* [1], did not hold the Committee empowered to reject a list that sought to undermine the foundations of democracy, because the question never arose in that case. The fact that the discussion focused solely on the question of state subversion appears from Sussman J.'s description of the political purpose under discussion there (*ibid.,* at 389):

> ...a purpose that aspires to annihilate the state, to bring catastrophe upon most of its inhabitants for whose sake it was established, and to form alliance with its enemies.

As regards the *Progressive List for Peace,* the esteemed President has already explained in his opinion that privileged material is not "evidence". On the contrary, the meaning of the very privilege is that such evidence may not be proffered, disclosed or relied upon. Thus the preclusion of essential evidence in judicial proceedings because of privilege, will cause the litigant in need of that evidence to fail, for the reason that he is unable to bring evidence that is (so I assume) essential. In other words, privileged material lacks evidentiary force, and it is mistaken to think that the very privilege is in the nature of proof upon which the Committee or this court could rely to conclude that this list aims at annihilation of the state.

Finally, a marginal observation, that I must not be understood to agree with what my esteemed colleague, Shamgar P., said in relation to F.H. 9/77[21] and C.A. 723/74[3]. Vieing with the interest of freedom of expression is the legitimate interest of the

individual in his good reputation, and it seems to me that the majority judgment in that precedent expresses the correct balance between the two.

In summary of my opinion that the Central Elections Committee - hence also this court sitting on appeal - is not competent to disqualify a list because it seeks to undermine the existence of the state, I shall restate my main considerations:

A. The Elections Law grants a list a right of appeal to this court against the Committee's *refusal* to confirm its participation. On the other hand, it absolutely precludes any judicial review (whether by a court of appeal or the High Court of Justice) of a Committee decision approving a list's participation in the elections. In the precedents, too, no ground is found for such review of the Committee's approval (the *Negbi* case [27]).

B. The above policy reflects the legislature's fear that a list might be wrongly disqualified, and its lack of concern over the possibility of a list's wrong approval. This policy is consonant only with a technical-ministerial function, according to which the Committee must confirm all lists duly submitted in that (formal) sense. An erroneous approval is a "windfall" for the list (because of the lack of review). But the Committee's mistaken refusal to approve the list, provides the list with a right of appeal.

C. The concern that a list might be unlawfully excluded from the contest is consonant with a liberal approach and the desire to ensure wide participation in the electoral contest, as far as possible without hindrance or restriction.

D. Had the legislature assigned to the Committee the function of examining the substance of a list's platform (whether, for instance, it is subversive of the state's existence), it should have designated as a first requirement a judicial or other forum with the power of review, particularly of, the *approval* of a list by the Committee. If the Committee were to err in such examination, it would be imperative to provide for the possibility of correcting the error, otherwise the security of the state might be endangered and a subversive list allowed to become part of the house of representatives. To leave the solution of the problem, if and when it arises, to the Knesset itself (as Barak J. suggests), is

in my view, impractical, since in the midst of elections the Knesset cannot be expected to free itself for this task, and it is important, moreover, to prevent such a list's *very entry* into the contest.

E. It follows from the above that to invest the Committee with a conclusive power to approve a list, as regards the legitimacy of its platform, is so unwise and unreasonable as to be inconceivable.

F. If the Committee is competent to take into account not only technical but also substantive considerations and on that basis to disqualify a list (for instance) because of its subversive objectives, it is difficult to see how such power may be confined solely to the submission of a new list, as distinct from a list submitted by an outgoing and even longstanding Knesset party or faction. To the best of my understanding this matter is left to the Knesset itself.

I wish to emphasise the immediate and urgent need for appropriate legislation to prevent the infiltration of subversive lists into the house of representatives, perhaps by extending the existing framework so as to embrace, besides direct danger to the existence of the state, also crass violations of *basic* democratic principles.

ELON J. 1. When I agreed with my esteemed colleagues to allow the two appeals now before us, I did so in reliance upon the majority opinion in the *Yeredor* case [1]. The rule that emerges from that case is that the Elections Committee is competent to consider the election platform of a party list, and to disqualify that list from participating in elections to the Knesset, only when its platform negates the very existence of the State of Israel, or its integrity. In the present matter, that has not been proved to be the purpose of those promoting the *Progressive List for Peace,* as was well explained by the learned President. And as regards the *Kach* list, it falls entirely outside the reach of this ground for disqualification. I might have rested content with that explanation of my opinion - considering the particular circumstances accompanying this judgment, as well as the tradition that brevity is blessed: "And (Boaz) said unto the reapers*, the Lord be with you"

* A play on the Hebrew word *kotzer,* which means reaper but also means one who is brief - Ed..

(Ruth 2:4). But having regard to the opinions of my esteemed colleagues, I wish to add some further comments. In particular, I do not find their explanations of the *Yeredor* majority ruling fully exhaustive of its implications and I accordingly see need to elucidate it further. My esteemed colleague, Barak J., expands the *Yeredor* ruling to cover also a list that negates the democratic nature of the state. He further renders it a precondition to the disqualification of a list, for any reason whatever, that the realisation of that list's ideas is a reasonable possibility. I disagree with him on both scores. I also attach much importance to a Knesset enactment that will delimit the borders of the permitted and the forbidden respecting the matter in issue here - provided that enactment prescribes clear standards. I shall endeavour to explain briefly the reasons for my position in this matter.

2. The majority ruling in the *Yeredor* matter [1] was a great innovation, and it cannot be explained or even understood in terms of our accepted methods of interpretation. It is well known that the methods of interpretation vary with the interpreter, and this court has said (see C.A. 2/77[28], at 11) -

> ... which is only natural and comprehensible, considering that the rule of the Jewish scholars, "the judge has only what his eyes see", applies primarily to the modes of interpreting the law and the rules for its construction. The view of one judge differs from that of another. All depends on the eyes that penetrate the very heart of the law, its aim and purpose, and not merely the superficial meaning of the text. Some adopt an expansive method of interpretation... others advocate restrictive and strict interpretation... Still others proceed along various middle paths in order to find the proper balance.

From amongst these differing approaches that which commends itself to me holds (*ibid.*, at 12). -

> ...Let not the judge be likened to a mountain palm, and let him not abstain from the task of construction, so long as it is possible, even if strained, to reconcile the matter with the written text, if by doing so a

> result contrary to the declared purpose of the legislature can be avoided...

It has been said further (H.C. 188/63[29], at 350, *per* Berinson J.):

> We are interpreters and not simply linguists. A good interpreter of the law is one who carries out the legislature's will.

I also accept that the interpretation of a statutory provision must heed the spirit of the law and of the entire legal system. The judge should not rest content with the act of deciding alone, but must adopt a decisory policy. As we said elsewhere (C.A. 32/81[30], at 767):

> Such a process of decision-making pursuant to legal policy, which prevails over the legal rule since it itself is part of the law, is a common phenomenon in the decisions of the courts.

But there is a limit to all these methods of interpretation which the judge may not exceed or transgress: the will of the legislature, as it finds expression in its enactments. This prohibition against trespassing upon the domain of the legislature derives from the fundamental principles of the legal system concerning the boundaries of the three branches of government, and the judge may not enter the domain of the law-maker. Just as ascertainment of the legislature's will is one of the fundamental principles of legal policy, so too is it fundamental not to raise ourselves above the legislature but to accept its fiat.

3. The Knesset Elections Law (Consolidated Version) (hereinafter - the Elections Law) prescribes the fundamental right of every Israeli citizen to be elected to the Knesset, the circumstances in which this right may be denied, and the various requirements concerning the submission of candidates lists and similar provisions (section 56 and chapter six of the Law). The conclusion to be drawn from all these provisions is that the legislature directed and intended that *only* on the given grounds, and no other, may the Committee refuse to approve an election list. One may not infer in any manner from these grounds - which are technical and formal - the existence of additional grounds, such as

flow from examination of the *content* of a list's platform. There is good reason for the legislature's wish to limit the possibility of disqualifying a list to purely technical-formal grounds. On the one hand it wanted to safeguard the right to be elected, a fundamental right in the democratic regime; on the other, it lacked the confidence to entrust a power of disqualification - on grounds of a party list's substance and content, to a body mainly composed (except for its chairman) of party-political representatives, whose considerations might be ideological-political.

Furthermore, the Elections Law prescribes, mandatorily, that a list meeting the enumerated requirements "shall be approved by the Central Committee" (section 63). In that situation, the court may not assume, nor confer upon the Elections Committee, a discretionary power to disqualify a list for reasons not specified in the Law, when that discretion was withheld by the legislator. We are not concerned here with the application of rules of interpretation, but with acceptance of the rule of law, which is paramount in our legal system.

4. *Prima facie* this legal situation would lead to the conclusion reached by Cohn J. in the *Yeredor* case [1], and by my esteemed colleague, Ben Porat D.P., in the present matter, that there exists no competent power to disqualify a list whose platform embodies liquidation of the state and impairment of its territorial integrity. Indeed, had the majority in the *Yeredor* case reached its conclusion by applying the rules of interpretation as to the balancing of contradictory fundamental interests and the exercise of discretion in that process, I too would have thought that such power does not fall within the scope of the Committee's authority. But *that* was not the ground for the majority decision, which is clear from its reasoning. Thus Agranat P. said (*ibid.* p. 387):

> I agree that *ordinarily* it is not for the Central Elections Committee, when exercising its power to decide upon approval of one or other list of candidates, to examine the candidates in detail or *to question their political views. This rule, however, ceased to apply in the present matter* the moment the attention of the Elections Committee had been drawn to the fact that the appellant list was to be identified with a group of people held by the High Court of Justice to be an illegal association,

> because its purpose was to deny utterly and absolutely the existence of the State of Israel in general, and its existence within its present borders in particular, and that in consequence the same group had been declared an illegal organisation. In view of these facts, *the Central Committee was left no discretion or alternative but to decide against approving the appellant* list.

(Emphasis added - M.E.)

And Sussman J., concurring with the President, added (at p. 389):

> I also have no doubt that the Elections Law *did not empower* the Central Elections Committee to approve or refuse to approve a candidates list at its discretion. *The opposite of such discretion* is implied in section 23 of the said Law; nor is the grant of such discretion consistent with the composition of the Committee, which is a body composed entirely according to political criteria based on the representation in the outgoing Knesset - except for the chairman of the Committee, who is a justice of the Supreme Court. That was not, however, the question before us. The question as defined by the chairman of the Committee at its sitting on September 29, 1965 (p. 27 of the Committee's minutes), was whether the Committee may examine the legitimacy of the list according to a principle *that is not written in the statute book.*

(Emphasis added - M. E.)

The disqualification of the list in *Yeredor* was not, therefore, a consequence of the exercise of discretion, or of a balancing of interests, or the rules of interpretation. The Committee "was left no discretion or alternative" but to disqualify the list. For what reason? Sussman J. goes on to say (at p. 390):

> Just as a person does not have to agree to be killed, so also the state does not have to agree to be annihilated and wiped off the map. Judges may not sit with arms folded in despair at the absence of a positive law

> to invoke when a party asks them to assist in bringing an end to the state. Likewise no other state authority is required to serve as a tool in the hands of someone who has set the annihilation of the state as a goal, and perhaps has no other goal but that.

It is a contradiction in terms to participate in elections to the legislature in order to abolish the legislature, for the Knesset cannot exist together with those who seek to destroy it. That is an innate contradiction which cannot be reconciled, and the matter is not at all contingent - as my esteemed colleague, Barak J., maintains - upon the existence of a "reasonable possibility" that the members of such list will achieve their evil design. (I shall refer again later to the "reasonable possibility" criterion.) And by virtue of "natural law" and "the right of self-defence of organised society" (*per* Sussman J., *ibid.*) there is no alternative but to prevent the list from carrying out its scheme. This lack of choice does not stem from any of the ordinary rules of interpretation, but is founded on a supreme imperative in Judaism: "and man shall live thereby - and not die thereby" (Leviticus 18:5, B.T. *Yoma* 85b). As for the reservation expressed by my colleague, Barak J., I should make it clear that the legislature may be presumed to expect that the court and every other state authority will have recourse to and apply this supreme imperative, which exists by virtue of natural law. It is hardly necessary to say that this presumption is given to rebuttal where the legislature provides explicitly and unequivocally that the Elections Committee need not or shall not disqualify a list, even when it contests the very existence of the state or its territorial integrity.

5. As I said at the outset, the reasoning behind the *Yeredor* ruling marks a great innovation in our case law. It does not add a new rule to the ordinary modes of interpretation, but lays down a one-time principle *superimposed on* the ordinary modes of interpretation. This principle, by its very nature, is confined to the special case of an intent to put an end to the existence of the state or impair the integrity of its borders, and does not apply in any other case, no matter how reprehensible to us the list's political and cultural views. In every other situation the matter invokes the ordinary methods of interpretation, the principle of balancing interests and fundamental rights, the discretion of the body empowered to interpret and consider the matter. And since the legislature never conferred such discretion on any body whatever, the necessary conclusion is that except for the case

of a party list whose object is to annihilate the state and impair its integrity - there is no one empowered to prevent any list, whatever its platform, from participating in Knesset elections.

6. As we have seen, this material difference between a list that contests the very existence of the state and one that propounds any other kind of objectionable and questionable ideas, was central to the majority opinion in *Yeredor*. And just as their observations stress the necessity, as an "imperative of life", to disqualify a list intent on annihilating the state, so too they stress the enjoinder against disqualifying a list for other reasons relating to the content of its platform. Agranat P. dwelt on the point that in a democratic state it is not permissible to preclude the candidacy of any group of people seeking election to the Knesset in order to promote its own ends, except when the purpose is to annihilate the state, in which case it is imperative to disqualify the list (*ibid.*, pp. 387-388). Sussman J. reiterated the point (*ibid.* p. 389):

> An "unlawful purpose" in the present context does not mean *a purpose that aspires to change the governmental order. That order is not sacrosanct, and its change is not a punishable crime.* Rather an "unlawful purpose" is a purpose that aspires to annihilate the state, to bring catastrophe upon most of the inhabitants for whose sake it was established, and to form alliance with its enemies.

(Emphasis added - M.E.)

A clear and exhaustive analysis of this distinction was made by Justice Landau, then serving as chairman of the Knesset Elections Committee, whose views were cited by his colleagues in the *Yeredor* decision ([1], at 372):

> ...I do not find it at all difficult to draw a line between this list - whose purposes were defined in its rules of association and parts whereof were also mentioned in the judgment of the Supreme Court - and other political parties who aspire to change the internal constitutional regime of the state... I find a vast difference, as between East and West, between a group of people which seeks to undermine the very existence

> of the state, or in any event its territorial integrity, and a party that acknowledges the political entity of the state but wishes to alter its internal regime.
>
> The question raised here was what will the morrow bring if we apply the same statutory provision against other parties. I know of no other party in the state against which I could apply the same provision...

Hence (*ibid.*, at 374) -

> ...There is no dispute, and the learned chairman explained this to the Committee in unequivocal terms, that a list of candidates who oppose a certain statute and wish to repeal or amend it, or who oppose the composition of the existing government and wish to change it, and the like, is entirely legitimate, and no one would consider disqualifying it.

7. These observations on the rules of democracy made by three past Presidents of the Supreme Court were valid when they were uttered and are even more apposite today. After the *Yeredor* decision, our legal system underwent a change, and in 1980 the Knesset enacted the Foundations of Law, 5740-1980, which now constitutes one of the basic laws of the State of Israel that form its underpinnings. The fundamental principles enshrined in the Declaration of Independence, that "the State of Israel ... will be based on freedom, justice and peace as envisaged by the prophets of Israel" which served only as basic guidelines but lacked full legal efficacy, became with the enactment of the Foundations of Law, fundamental legal principles, underlying the entire legal system in the state, namely: "the principles of freedom, justice, equity and peace of Israel's heritage" (section 1 of the Law). It seems to me that there is no issue more amenable to examination in accordance with these principles of Israel's heritage than the one now before us.

My esteemed colleagues expanded upon the views of legal scholars and philosophers in various legal and political systems on the issue of freedom of expression and opinion, whose views are not always in alignment with and sometimes even contradict each other. Such an examination is most important, since it helps to broaden the horizons and deepen

the study of a subject common to all enlightened and progressive legal systems. And in this respect I may comment that in an examination of this kind one must always bear in mind the political background and the legal framework in which the statements are made, since these may vary from those in Israel. Since the different conceptions of scholars the world over have been well elaborated by my esteemed colleagues, I see no need to deal with them again. As I have indicated, we would do well to nourish the answer to our present problem on principles of the Jewish heritage. These we shall now seek to elucidate.

First a preliminary remark. It is common knowledge that abundant differences of opinion and conflicting approaches mark also Jewish thought throughout the ages - even the *halakhic* system itself, as will be shown later. No party to litigation will find it difficult to glean from its recesses some support for his arguments or views. Such is the case in relation to every matter, including freedom of expression and opinion and other questions which will be dealt with below. It goes without saying that all these views and approaches have contributed together to deepening and enriching Jewish thought at all times. But whoever embarks upon the quest for knowledge must distinguish between statements made for particular times and circumstances and statements made for all times, between a generally accepted view and an exceptional one, and the like distinctions and implications. From this vast and abundant treasure, it is possible to gather much that is significant for the requirements of one's own generation and age, so as to answer contemporary needs and at the same time replenish the treasure of Jewish thought and the heritage of Israel. This reality and the duty to make such distinctions are of the essence of Jewish thought - and of the *halakha* itself - as is the nature of every conceptual system. The subject is multi-faceted, but this is not the occasion to expand on it (see Rabbi A.I. Kook, *Eder HaYekar* (Jerusalem, 1967) 13-28; see also M.R. Konvitz, Preface to *Judaism and Human Rights* (M.R. Konvitz, ed., New York, 1972) 11.)

8. We shall have recourse to the heritage of Israel in relation to two questions: the principle of freedom of opinion and expression, and the legitimacy of the *Kach* list platform. I shall start with freedom of opinion and expression.

The prophets of Israel and their prophecies have long served as the paradigm of impassioned and uncompromising rebuke of governmental abuse of might and power, and

of a corrupt public or individual. They condemn oppression of the poor and exploitation of the widowed, the repression of individual and community rights, and deviation from the spirit and substance of the *Torah* and *halakha.* The firm stand and struggle of the prophets of Israel, even when the evoke severe and angry reactions, has been an inexhaustible source of inspiration in the struggle for freedom of expression and for contemporary enlightened democratic regimes. This is common knowledge, not in need of proof, and common currency for every student of political and democratic theory.

I believe there is no more penetrating and encompassing description of the freedom of expression and the importance of every individual opinion - even that of a single individual - than the Talmudic statement regarding the disputes between Bet Hillel and Bet Shammai: "both are the words of the living God" (B.T. *Eruvin* 13b; J.T. *Berakhot* 1:4; J.T. *Yevamot* 1:6). For practical purposes, as a binding form of conduct, the *halakha* is according to Bet Hillel "because they were kindly and modest" (see Rashi to *Eruvin* 13b), but the views of Bet Shammai remained legitimate and material in the world of the *halakha.* This approach became characteristic of the *halakha.*

The "rebellious elder", even after the *Sanhedrin* - the highest tribunal of the nation - had ruled contrary to his opinion, could continue to hold to his views and "teach as he had done before", provided he did not *actually* rule accordingly (Mishna, *Sanhedrin* 11:2; B.T. *Sanhedrin* 86b). Moreover, a minority view might in time become generally accepted and acted upon. Rabbi Judah said: "The opinion of a single person is recorded along with that of the many, in case time makes it necessary to rely upon it" (Tosefta (Zuckermandel) "Eduyot 1:4; see also Mishna, *Eduyot* 1:5). Also:

> Although the view of a single person is not accepted at first, and many disagree with him, at another time the majority may accept his reasoning and the law be decided accordingly, for the entire *Torah* was so given to Moses at times to forbid and at times to permit, and when he was asked: "until when shall we deliberate?" he answered: "follow the majority; because both are the living word of God".

(R. Samson of Sens, Talmudic scholar of France and Palestine at the turn of the 13th century, commentary to Mishna, *Eduyot* 1:5).

And still striking today are the words of Akavia ben Mahalalel, who differed from his fellow scholars:

> Akavia ben Mahalalel testified concerning four matters. They said to him: "Akavia, withdraw these four things which you say, and we will make you presiding judge of the court". He said to them: "better I be called a fool all my days than I become even for one hour a wicked man before the Almighty; and let not men say: he withdrew his opinions for the sake of holding office".

(Mishna *Eduyot 5:6;* and see further M. Elon, *Jewish Law, Its History, Sources and Principles* (2d ed., Jerusalem, 1978) 870-878).

This plurality of views is no negative phenomenon or defect, but is substantive to the world of the *halakha.* "There is no instability or shortcoming, such as to say that he causes more than one law to exist, Heaven forbid! On the contrary - such is the way of the *Torah,* and both are the words of the living God" (R. Hayyim ben Bezalel, introduction to *Vikuah Mayim Hayyim* (Prague, 16th century); and see in detail Elon, *op. cit.,* at 1145-149). Moreover, plurality of views and approaches has the power to create harmony and unity out of difference. As the last of the codifiers, R. Yehiel Michal Epstein, said at the beginning of this century *(Arukh Ha Shulhan, Hoshen Mishpat,* Introduction):

> All the disputes of the Tannaim and the Amoraim, of the Gaonim and the codifiers, are truly the words of the living God, and all are aspects of the halakha. Indeed that is the glory of our pure and holy Torah, the entire *Torah* is a song, and the glory of a song is when it is sung in different voices. And this is the essence of its pleasantness.

Indeed this basic conception that "both are the words of the living God" has at all times exerted a decisive influence on the mode and substance of *halakhic* codification as well as decision. I have dealt elsewhere with the subject and need not enlarge upon it here (Elon, *op. cit.,* at 870, and the references in note 94).

The plurality of views plays a material and fruitful role generally in the life of a just society. The rabbis even composed a special benediction to fit the secret encompassed in this notable phenomenon of a plurality of views in society: "If one sees a large crowd of people, one should say: Blessed is He who is wise in secrets; for neither their faces nor their thoughts are alike" (Tosefta (Zuckermandel), *Berakhot 7: 5;* and see B. T. *Berakhot* 58a). This is a blessing for wisdom and creativity: "Just as the nature of creation still renders the countenances of all people different, so also are we to believe that wisdom is still shared by men each differing from the other" *(Vikuah Mayyim Hayyim, supra).* Such a plurality of views should be respected by our leaders and government, as the following midrashic comments instructively indicate (Numbers Rabbah, *Pinhas,* 21:2; Tanhuma, *Pinhas* 10):

> Just as the countenances (of people) are not alike, so also their views, and each person has his own opinion ... Thus on the point of death Moses begged of God: "Master of the Universe, the views of every one are well known to you and your children's views are not all alike. When I depart from them, I pray, appoint them a leader who will be tolerant of each person's view".

That is the lesson of leadership and government in the heritage of Israel - tolerance for every individual and every group, according to their opinions and outlooks. And this is the great secret of tolerance and listening to the other, and the great potency of the right of every individual and every group to express their opinions, that they are not only essential to an orderly and enlightened regime but also vital to its creative power. For in the real world "two opposing elements converge and fructify; how much more so in the spiritual world" (Rabbi A.I. Kook, *HaNir* (Jerusalem, 1909) 47; *Eder HaYekar, 13 ff.)*

9. When in the plurality of opinions - itself welcome and vital - there is sounded a view that is injurious to society's spiritual and cultural foundation, that society must defend itself and its views. This end must be achieved first and foremost by persuasion and education. Education, as we all know, does not mean merely preaching to others, to those who have strayed from the desired path, but includes self-examination and reflection upon the spiritual and cultural image of that society in which thorns and thistles have sprung up.

And when the need arises, a cultured society will employ legislation to punish those who incite and agitate to challenge and threaten it. Those who so deserve, whose transgression has been adequately proved before the judicial authorities, will be punished accordingly. The legislature, needless to say, may employ even the most extreme measure of silencing such views by denying those who express them the right to be elected to its own house; which means also, as indicated by my learned colleague, Shamgar P., denial of the right of those adhering to such views to vote for and elect persons of their choice. This is the legal right of the Knesset, which represents the will of the people, and I shall later make some observations as to the extent to which it is proper, in my view, for the legislature to exercise this right and enact such an extreme and far-reaching measure as withdrawal of the right to elect and be elected.

As I said at the outset, in our democratic regime the denial of such a fundamental right does not lie with the judiciary in the absence of express authorization by the legislature - which represents the will of the people, and whence the judiciary draws its authority and power. If the court were to assume such power without legislative authorization, that itself would constitute an injury to an enlightened democracy, whose very foundation lies in the rule of the *law* - not of the *legislature*, the rule of *justice* - and not of the judge (see H.C. 152/82 [31], at 472-474; HC 234/84 [32], at 484). A further danger is threatened by the court's assumption of such power of disqualification, without express authority and guidance from the legislature, as to the scope and measure of such disqualification. The democratic character of the State of Israel found expression in the Declaration of Independence, which speaks of ensuring complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex, and guaranteeing freedom of religion, conscience, language, education and culture. These principles serve as our guiding light. The *Jewish* character of the State of Israel found expression in the Declaration of Independence in the very definition of the state as a *Jewish State*, and not merely as a state of *Jews*, in the opening of its gates to Jewish immigration for *Ingathering of Exiles* (as was expressed later in the Law of Return, 5710-1950), and so on. These principles likewise serve to guide us. This constellation of principles forms part of the Jewish state's special make-up. Prominent Zionist thinkers of all trends and streams, Jews of varying world outlook, citizens of the State of Israel of different ethnic and religious belonging, have all reflected upon and continue to debate the practical significance and

application of the principles of the Declaration of Independence in the Jewish state. How and by what standard will the court adjudge the content of a party platform that is not reconcilable with each and every one of the complex of principles set out in the Declaration of Independence?

My esteemed colleague, Barak J., says that disqualification of a list because its platform does not comport with the principles of democracy upon which the State of Israel is founded, may only be effected when there exists a *reasonable possibility* that the members of that list will indeed achieve their aims; and when the court examines the existence of such reasonable possibility it must "consider the entire social scene in all its various aspects. It should analyse social processes ... not only past events but also the probability of potential future happenings". Does the Court have the tools for this task, which rests entirely on social-sociological considerations and entails no judicial decision at all? According to what guidelines and rules will the court make its decision? Indeed, my esteemed colleague holds this examination to amount to "a prophecy in the guise of a legal decision", in the words of Jackson J. in the *Dennis* case. I would suggest that as judges we refrain from acting as prophets. The illustrious scholar, Maimonides, appositely remarks:

> The Holy One did not permit us to learn from the prophets [how to rule on the law - M. Elon] but from the scholars, the men of reasoning and opinion; and He did not say: "you shall come unto the *prophet* that shall be in those days" but "you shall come unto the priests and levites and *unto the judge* (that shall be in those days)".

(Deuteronomy 17:9) (Introduction to *Commentary on the Mishnah;* and see Elon, *op. cit.*, at 224-225).

If that is so in Jewish Law, which the Jewish scholars recognised as deriving from a *supra*-human source, all the more so in a legal system that is based entirely on wise men, men of reasoning and opinions, and applied by them. Moreover, as already indicated, the power to disqualify a list for social, ideological and sociological reasons is vested primarily in the Central Elections Committee, which - except for its chairman - is a political body *par excellence*, whose various members adhere each to his own long held

political opinions, and it is much to be apprehended that they will not easily be open to considered and impartial deliberation of so conspicuous a politico-social issue.

10. What I have said suffices to indicate the abundance of problems and difficulties that face us when we begin to consider disqualifying a list because of the content of its platform. From this viewpoint, the case of the *Kach* list hardly serves to illustrate the reality of these difficulties. For the content of its platform and the aspirations of its initiators and leaders are of such gravity, and so patently mischievous in terms of the cultural and democratic image of the State of Israel, that - had we been vested with the power of disqualification - we could conclude that it should not be allowed to participate with the other lists in campaigning for election to the Knesset. And as far as I am concerned, the most severe and serious aspect of the *Kach* platform - even more than its distorted outlook as to safeguarding the democratic foundations of the regime in the State of Israel - is that this list and its leaders seek support in the *Torah* and the *halakha.* Let us look at this aspect briefly.

A basic element in Judaism is the idea that man was created in the image of God (Genesis 1:27). The *Torah* so opens, and from this concept the *halakha* derives certain fundamental principles regarding the value of man - every human being as such - his equality and the love of him:

> He [R. Akiva] used to say, beloved is man in that he was created in the image of God, but it is a mark of a greater love that it was made known to him that he had been created in the image of God, as it is said (Genesis 9:6), "For in the image of God made He man".

(Mishna, *Avot* 3:18).

And it was by reason of this verse that the sons of Noah were prohibited from spilling blood, even before the *Torah* was given. Very instructive is the difference of opinion between two leading *Tannaim* as to the crowning value in human relations:

> "And you shall love your neighbor as yourself" [Leviticus 19:18], R. Akiva said, this is a major rule of the *Torah.* Ben Azai said, "This is the

> book of the generations of Adam" [on the day God created man He did so in the image of God-Genesis 5:1] – *this* is the greater rule.

(Sifra, *Kedoshim*, 4:10).

According to R. Akiva the supreme value in human relations is *love of* one's fellow man; and according to Ben Azai, the supreme and preferred value is the *equality* of man, since *every* man was created in the image of God. And these two values - equality and love of one's fellow - came together as one at the hands of the Jewish nation, together forming a cornerstone of Judaism throughout its generations and history. It is also stated in connection with this fundamental issue :

> Ben Azai said, "This is the book of the generations of Adam"-this is a major rule of the *Torah;* Rabbi Akiva said, "You shall love your neighbor as yourself"- that is a greater rule; so that people should not say, since I have been demeaned, my fellow man shall also be demeaned...Rabbi Tanhuma said: if you do so, then know whom you are demeaning - "in the image of God He created him".

(Genesis Rabbah, 24:7).

The great rule of loving your neighbor as yourself is not just a matter of the heart, or an abstract love without commitment, but refers to a practical way of life. And Hillel formulated the rule thus: "Do not do to others what is hateful to yourself". The commentators have dwelt on the fact that this negative formulation lent the principle a meaning that makes it compatible with human nature:

> For a man cannot in his heart love his neighbor as he loves his own self; and in any event R. Akiva has already taught us: your life comes before your neighbor's.

(Nachmanides, Leviticus 19:18).

R. Akiva, for whom the predominant rule was "Love your neighbor as yourself", himself taught that in times of danger - to the individual and to the community - it may be that "your life comes before your neighbor's" (B.T. *Bava Metzia* 62a).

The Jewish nation is enjoined to fight for its existence and to ward off those who conspire to harm and dispossess it of its sovereignty and its land. But the enemy too retains the value and dignity of a human being. When Jehoshaphat, king of Judea, was victorious over the Ammonites and Moabites, the people stood and sang "Praise the Lord for His mercy endures for ever" (2 Chronicles 20:21-22). On this the scholars commented (T.B. *Megilla* 10b):

> R. Johanan said: Why are the words "for He is good" omitted from this thanksgiving [in relation to the corresponding phrase in Psalms 107:1]? Because the Holy One does not rejoice in the downfall of the wicked. And R. Johanan further said: what is the meaning of the verse "and one came not near the other all the night" [Exodus 14:20; the reference is to the Israelites and the Egyptians at the crossing of the Red Sea]? The ministering angels wanted to chant their hymns, but the Holy One said: "the work of my hands is being drowned in the sea and shall you chant hymns?"

My esteemed colleague, Barak J. , referred to the instructive observations of Rabbi A.I. Kook on the love of mankind. Rabbi Kook indeed uttered profound words on this important theme in Judaism. In the chapter from which Barak J. quotes, he went on to say *(Middot Hare'ayah, Ahavah* 5):

> The love of mankind should be alive in the heart and soul, the love of the individual and the love of all peoples, the desire for their uplifting and their spiritual and material welfare... An internal love from the recesses of the heart and soul, to benefit all peoples, improve their possessions and render their lives blissful...

Also illuminating in this context and in Judaism generally, is R. Kook's teaching on the relationship between the "natural, customary morality" of every cultured person and the moral demands of Judaism:

> The love of mankind needs much fostering, to be expanded as befits it, against the apparent superficiality of its inadequate application in terms of the *Torah* and customary morality, as if there can be conflict or at least indifference regarding such love, which ought always to fill the chambers of the soul.

(Ibid., Ahavah 10; and cf. *Orot HaKodesh,* vol. III, p. 318.)

Thus the *Torah* and customary morality complement and reinforce one another as a dual requirement in nurturing and educating the Jew.

> It is forbidden that the fear of Heaven suppress the natural morality of mankind, for then the fear of Heaven is no longer pure. A sign of pure fear of Heaven is when natural morality, inherent in the very nature of man, proceeds to rise to even loftier heights than it might otherwise reach. But if fear of Heaven is portrayed in such fashion that life would have a greater tendency to do good and to benefit individuals and society without its influence, and the force of that active agent diminishes under its influence, such fear of Heaven is deficient.

(Orot HaKodesh, vol. III, Preface, paragraph 11, p. 27).

And further on (*ibid.*, paragraph 16, p. 32):

> The visible natural morality must be manifested before the substantive paths of the concealed superior morality can be revealed in the soul. Only in this manner, by establishing first the firm basic foundation, can we erect the upper structure, the summit of which is in heaven. The wider and deeper the roots of the tree spread, the fresher, stronger and more fruitful the branches, and its leaves will not wither.

The demand of morality in Judaism adds to and complements the moral conduct required of civilized and enlightened society, and whoever ignores the latter is deficient in the former.

11. These fundamental perceptions also determined the attitude of Jewish law to a national minority living under Jewish rule. A series of basic Jewish precepts are grounded in the *Torah* in the historical memory of the nation, in its suffering as a minority under the rule of others: "For you were strangers in the land of Egypt" (Exodus 23:9; Leviticus 19:30; 22:20; 29:9 and so on).

Furthermore, "You shall not abhor an Egyptian, because you were a stranger in his land" (Deut. 23:8). Racism, which has brought so much suffering to mankind, even to this very day, is alien to Judaism, and has been categorically rejected by it. A foreigner who joins the Jewish people becomes one of its members, with all rights and obligations: "You shall have one statute, both for the stranger and for him that is born in the land" (Numbers 9:14); "Neither let the alien that has joined himself to the Lord say - The Lord will surely separate me from His people ... For My house shall be called a house of prayer for all peoples" (Isaiah 56: 37). This applies not only to the future but even to the past. And thus wrote Maimonides in response to R. Ovadiah Ger Tzedek (a righteous convert) *(Responsa* (Freiman ed.) 369):

> Every one who converts, down to the end of days, and every one who professes the unity of the Holy One blessed be He as written in the *Torah,* is a disciple of our Patriarch Abraham ... and all are members of his family... No difference at all exists between us and them in any respect. And let not your pedigree be slight in your eyes; if our pedigree relates to Abraham, Isaac and Jacob, yours relates to Him who created the world by his word.

The Jewish people does not "gather souls" in order to draw members of other nations into its fold (Genesis 12:5; Maimonides, *Hilkhot Melakhi*m 8:10). This serves to express, among other things, the protection which Judaism gives to minorities to live by their own culture and heritage. The practice, common in ancient - and in less ancient times - of a minority's assimilation and absorbtion into the majority according to the principle of *cujus regio cujus religio* by virtue of which many minorities were persecuted until they adopted under duress the religion of the ruling majority, was categorically rejected in the world of the *halakha.* For this reason, when Israel was most powerful the *bet din* did not accept

converts throughout the times of David and Solomon. "In the time of David -in case they came out of fear, and in the time of Solomon-in case they came out of attraction to the greatness and goodness of the kingdom of Israel" *(Yad, Hilkhot lssurei Bi'ah* 3:15).

The *halakha* defined a member of a national minority as possessing the status of a "resident alien" *(ger toshav)* and the only condition that attached to that status was observance of the seven Noachide Laws, i.e., those elementary obligations of law and order which all civilised peoples are commanded to observe, and which the scholars regarded as a kind of universal natural justice (Maimonides, *Hilkhot Issurei Bi'ah* 14:7; B.T. Sanhedrin 56a; Nahmanides, Commentary to Genesis 34:13; and cf. Elon, *op. cit.*, 183 ff.). A national minority is entitled to all the civil and political rights enjoyed by other residents: "...A stranger and a sojourner shall live with you" (Leviticus 25:35); "Resident aliens are treated with courtesy and loving-kindness as an Israelite, since we are commanded to sustain their life ... and since you are commanded to sustain the life of a resident alien, he is healed gratuitously" *(Yad Hilkhot Melakhim* 10:12; *Hilkhot Avodah Zarah* 10:2). And the scholars also said (Deut. 23:17 and Tractate *Gerim 3*:4):

> A resident alien shall not be settled in border districts nor in poor habitation but in a good residence in the centre of the Land of Israel where he can pursue his skills, as it is written: he shall dwell with you, in the midst of you, in the place which he shall choose within one of your gates, where it pleases him best, and you shall not oppress him.

The fundamental guiding principles as regards the attitude of the Jewish State to its overall population, are the fundamental principles of the *halakha* in general, as pointed out by Maimonides *(Yad, Hilkhot Melakhim* 10:12):

> For it is stated: The Lord is good to all and His tender mercies extend to all His works, and further: Its [the Torah's] ways are ways of pleasantness and all its paths are peace.

I have cited just a small portion of the *halakhic* rules of government affecting minority rights in a Jewish state, and need not elaborate any further here.

I shall end these observations with the inspiring words of Maimonides on the aspiration of the generations for messianic times, which "differ from present times solely in servitude to earthly governmental power" *(Hilkhot Melakhim* 12:2, relying on Samuel's statements in B.T. *Sanhedrin* 91b, 99a and elsewhere). He writes:

> The scholars and the prophets did not yearn for messianic times that they might dominate the world or rule over the gentiles, nor to be exalted by the nations and to eat, drink and rejoice - but to be free for the study of *Torah* and its wisdom without oppression or disturbance - to gain everlasting life, as we explained in the laws relating to repentance. In those times there shall be neither famine nor war, neither jealousy nor strife - goodness will be abundant and all pleasant things profuse. The whole world will be preoccupied only to know the Lord. Hence Israelites will be wise and will know things that lie obscure and attain understanding of their Creator according to their human capacity, as it is written, "For the earth shall be full of knowledge of the Lord as the waters cover the sea". (Isaiah 11:9) (Maimonides, *Hilkhot Melakhim,* 12:45).

Israel's sovereignty and Jewish government - not in order to dominate the world or rule over the gentiles, but so that Israel no longer suffer oppression, and may engage in the study of *Torah* and its wisdom, and the earth may be filled with knowledge. These significant words of the greatest of Jewish thinkers embody the aim and image of the Jewish State.

12. The content of the *Kach* platform and the purpose of its promoters and leaders, as reflected in the material presented to us, stand in blatant contrast to the world of Judaism - its ways and perspectives, to the past of the Jewish nation and its future aspirations. They contradict absolutely the fundamental principles of human and national morality, the Declaration of Independence of the State of Israel, and the very foundations of present-day enlightened democracies. They come to transplant in the Jewish State notions and deeds of the most decadent of nations. This phenomenon should cause grave concern among the

people who dwell in Zion. This court is charged with the preservation of the law and its interpretation, and the duty of inculcating the values of Judaism and civilization, of the dignity of man and the equality of all who are created in the divine image, rests primarily upon those whom the legislature and the executive branch have chosen for the task. When, however, such a seriously dangerous phenomenon is brought to our attention, we may not refrain from sounding the alarm against the ruinous effects of its possible spread upon the character, image and future of the Jewish State. The remedy lies, in the first place, in a reassessment of the ways of educators and pupils alike, in all walks of our society.

13. It was not, therefore, for lack of sensitivity to the gravity of the *Kach* list phenomenon that we refrained from endorsing its disqualification, but because the legislature has not empowered us or the Central Elections Committee to disqualify a list from participating in elections to the Knesset on ground of the content of its platform. The only exception is a list that avowedly seeks to abolish the sovereignty of the state or impair the integrity of its borders, in which case we - and any other competent state body - are *bound* to disqualify it, by virtue of the *paramount principle* "thou shalt live by them", as we explained at the outset.

The consequence of not disqualifying the *Kach* list is difficult and saddening, considering the content of its platform, but it is right and proper not only in terms of our respect for the rule of law but also because it precludes the drawing of undesirable conclusions in such an important and complex matter. As I have already indicated, such a fateful and farreaching determination as denial of the right to be elected to the Knesset, on ideological grounds, should properly be made with the approval of a majority of the public, through the legislature, with clear limitations and definitions provided. A general legislative power that sanctions disqualification of a list because its promoters or its platform are opposed to the democratic principles on which the State of Israel rests or which are to be found in the Declaration of Independence, or any other like general and indeterminate formulation, would be so inherently uncertain and vague that this court could not exercise it in actual fact. This certainly applies to a body such as the Central Elections Committee, which is mainly composed (apart from its chairman) of members with defined political views and inclinations. Democratic principles, including those enumerated in the Declaration of Independence, are by their very nature subject to

interpretation in different ways, and incorporate different, sometimes contradictory, world views and fundamental perspectives. So it is in the enlightened democracies in general, and so it is in our society in particular, where social, religious, economic and constitutional problems are legitimate subjects of controversy.

Here it is appropriate to return to the *Yeredor* matter [1], and cite again the comments concerning the vast difference between an entity that undermines the very existence of the state, or in any event its territorial integrity, and a faction that acknowledges the existence of the state but desires to change its internal regime (at p. 372); or opposes a particular statute and seeks its repeal or amendment (at 374); or "aspires to change the governmental order, an order that is not sacrosanct, and its change not a punishable offence" (*per* Sussman P., at 389). These observations alone are enough to illustrate the objective as well as subjective difficulty of the court in circumscribing the permitted and the forbidden - the court having the function and authority to rule on the interpretation of a statutory enactment, its purpose and application, and not on an issue that turns entirely on world views, the recesses of the heart, and the social image of the regime. In the view of my esteemed colleague, Barak J., the existing situation is preferable to "unbalanced legislation". My view is otherwise, and in paraphrase of my esteemed colleague I would say that detailed legislation is preferable to adjudication that may well be unbalanced. Only the legislature may and can prescribe the criterion, from among the principles of democracy and the Declaration of Independence, which when disregarded justifies the disqualification of a list, and what shall be the degree of the violation and the likelihood of the danger from the violation of such principle that is required for the purpose of disqualification. Such clear determinations are the preserve of the legislature as well as its duty.

That is certainly no easy task, and perhaps its difficulty accounts for the legislature's silence so far. But this task is the legislature's entirely, from which it cannot be absolved. The grave and unwelcome phenomena apparent from the appeal before us, in terms of the image and character of our state, call for the legislature to accomplish this vital task without further delay.

14. In conclusion, for the reasons given above, I concur in the opinion of my esteemed colleagues that the two appeals should be allowed. The appeal of the *Progressive List for Peace* - because it was not proven that it seeks to liquidate the State of Israel or impair the integrity of its borders, thus leaving no occasion to apply the *Yeredor* ruling. And in the case of the *Kach* list - because it falls outside the ambit of the *Yeredor* ruling, since neither we nor the Central Elections Committee are empowered to disqualify it.

BARAK J. 1. I have read with great interest the comprehensive and important judgment of my colleague, Shamgar P. and I concur, not only in the result reached by him, which we have already announced, but also in the main points of his reasoning. Like him, I am of the opinion that the *ratio decidendi* of E.A. 1/65[1] (hereinafter "the *Yeredor* ruling") is confined to a refusal to confirm a list that contests the very existence of the State and wishes to annihilate it. The application of this test was not argued at all with respect to the *Kach* list, and it was argued but not proven with respect to the *Progressive List for Peace.* In this matter I believe that the burden of proof lies with the party arguing for the refusal of a list's confirmation, and that it must be discharged by competent "administrative evidence", that is, "such testimony as any reasonable person would consider to be of probative value and upon which he would rely to a greater or lesser degree" (*per* Agranat P. in H.C. 442/71[13], at 357; H.C. 297/ 82[20], at 37). If I nevertheless choose to add some reflections of my own, it is to elucidate my position on the question whether the *Yeredor* ruling should be extended and applied also to a case in which the election platform of the list rejects, not the very existence of the state, but its democratic character. Such elucidation would have been relatively simple had I been of the opinion, held by Cohn J. in *Yeredor* and by Ben-Porat D.P. in the present matter, that the Elections Committee does not have any authority to refuse to confirm a list on grounds of the content of its election platform. That is not my view. I am of the opinion, as was the majority view in the *Yeredor* case, that the Elections Committee is authorized to refuse confirmation of a list by reason of the content of its platform. Moreover, I am of the opinion that for our present purpose one should not distinguish between a platform that negates the existence of the state and a platform that recognises the existence of the state but disavows its democratic character. At the same time, however, my approach is that the Committee should exercise this authority - with respect to both a platform that rejects the existence of the state and one that rejects its democratic character - only where there is a

reasonable possibility that these ideas will be realized. Since such a possibility was by no means established in the present matter, I formed the opinion that there was no ground for refusing to confirm the participation of the *Kach* list in the elections. My approach thus differs from both the majority and the minority approaches in the *Yeredor* case. Unlike the majority, I do not believe that it is sufficient for the list to reject the existence of the state in order not to confirm its participation in the elections. Unlike the minority, I do not believe that the Elections Committee has no authority at all to refuse confirmation of a list whose platform rejects the existence of the state. As already indicated, my opinion is that the authority of non-confirmation exists with respect to both a platform that rejects the existence of the state and one that rejects its democratic character; but the exercise of such authority in both cases must be on ground of a reasonable possibility that the "threat"' will be translated into practise. It appears to me that my approach is very similar to that of my colleague, the President, who also stresses a number of times that the authority might inhere in special circumstances where there is a substantial probability that the exercise of a fundamental civil right will cause harm that is sought to be prevented. Yet my colleague is not prepared to follow my approach entirely, so that I find it necessary to set forth my reasoning. I shall begin with an analysis of the ruling in *Yeredor* [1], with an examination of the law as regards an election list that negates the existence of the state, and thereafter proceed to examine the issue before us of a list that negates the democratic character of the state.

The "Yeredor" Rule: Negating the Existence of the State

2. As we have seen, the question in *Yeredor* [1] was whether the Elections Committee may competently refuse to confirm a list for participation in the elections if it negates the very existence of the state. On this matter opinions were divided. The dissenting judge, Cohn J., was of the opinion that the Elections Committee is not vested with such authority. It appears that even those who question the correctness of this position do not deny the legitimacy of Cohn J.'s approach. It is well founded on accepted legal arguments in our "interpretative community". It relies, on the one hand, on the legislator's silence and, on the other hand, on a reluctance to read into the law a broad authority which would contradict fundamental principles of our system as regards the citizen's basic right to express himself and to vote. Arguments of this kind are often reflected in this court's rulings, they have

significant force and power (see, e.g. , H.C. 337/ 81[5]), and I myself have recourse to them and accept their validity. But the approach of Cohn J. is not the only possible one. That of the majority judges - Agranat P. and Sussman J. - and of Justice Landau when heading the Elections Committee, is likewise well-founded in accepted legal arguments in our "interpretative community". According to this approach, the Knesset Elections Law [Consolidated Version], 1969 (hereinafter - "the Elections Law") established the Elections Committee and granted it powers to refuse to confirm a list on certain grounds. These grounds can be supplemented, by way of interpretation, which addition is required by the basic principles of our system - principles which serve in the interpretation of statutes. Where the legislature provides that a list "shall be confirmed by the Central Committee" (section 63 of the Elections Law), the court, in applying the interpretative rules of its system, may determine that it is dealing with a directive which confers authority, and despite the mandatory language used, the Elections Committee must necessarily be conceded a discretionary power in order that the fundamental principles of our system be realized. It is true that the linguistic foundation for this interpretative result is weak, but it is decreed by the very fact that we are dealing with the interpretation of a basic constitutional provision. Such basic provisions should be construed according to a "spacious view" - in the words of Frankfurter J. in *Youngstown Sheet & Tube Co. v. Sawyer* [59], quoted by Agranat D.P. in F.H. 13/60[33] at 442 - and on the understanding that we are dealing with a provision that determines a way of life. The interpretation of an ordinary legislative provision is not the same as that of a fundamental constitutional provision. Familiar to us is the statement made by Justice Marshall, upon fashioning the American constitutional perspective, that when interpreting the constitution it should always be borne in mind that it is not an ordinary document - "it is a constitution we are expounding" (*M'Culloch v. Maryland* [60]). We are concerned with a human endeavour that must adapt itself to a changing reality. We have said that an ordinary statute is not a [linguistic] fortress to be conquered with the help of a dictionary but rather the cloak of a living legislative idea (Cr.A. 787/79[34], at 427); this approach should guide us *a fortiori* in interpreting provisions of a constitutional character. In the well-known words of Holmes J. *(Gompers v. U.S.* [61]):

> The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions...

> Their significance is vital not formal; it is to be gathered not simply by taking the words and dictionary, but by considering their origin and the line of their growth.

We may, therefore, construe the wording of a basic constitutional provision that determines a mandatory duty, in a manner that gives discretion to the authorized person - if such discretion is essential to realising the fundamental principles of the system. The American courts faced a similar problem in interpreting the First Amendment to the Constitution which states in unequivocal language that "Congress shall make no law...abridging the freedom of speech, or of the press." The Supreme Court did not hesitate to hold, in a long line of precedents, that despite the unequivocal language which denies Congress any discretion in the matter, it does have authority to limit freedom of speech and the press in certain cases. (See Lahav and Kretzmer, "The Charter of Civil Rights in Israel: Constitutional Gain or Illusion", 7 *Mishpatim* 154 (1976).) Indeed, our own Supreme Court has often taken this very approach that narrows or broadens the statutory language so as to realize the fundamental principles of our legal system (Cr. A. 696/81[35] at 574). For a legislative enactment in general, and a fundamental statutory provision in particular, is not a one-time act isolated from the general way of life. The statute gains substance within the framework of a given political and legal system. It constitutes one brick in a whole structure built on the given foundations of that regime and law, which constitute the "primary concepts of that society" (H.C. 163/57[36] at 1051). When a statute provides that a certain person shall decide every dispute, it is clear that he is not obliged to hear a dispute in which he has a personal interest. We interpret the general mandatory language against the background of our constitutional regime and the principles of equality, justice, fairness and morality in our system. Their application narrows the scope of the general language, or expands that of specific language, and this can transform discretionary authority into mandatory authority, and mandatory authority into discretionary authority. "The law of the people", said Agranat P. "must be deduced in the context of its national way of life" (H.C. 73/53[26] at 884). Therefore, every law must be interpreted in the light of the Declaration of Independence, which expresses "the vision and credo of the people" (Smoira P. in H.C. 10/48[37] at 89). Justice H. Cohn himself said in similar vein:

> When we talk of an enlightened democratic legislature, guided by good practices, lofty principles and concepts of justice, not only are we not allowed to assume that it has abolished them, but its enactments must be faithfully interpreted on the assumption that any law passed by it has been adapted to the framework of the existing "law', in all its multiple and varied components.

(Cohn, "Faithful Interpretation in Three Senses", 7 *Mishpatim* 5, 6).

According to this approach, the majority position in *Yeredor* [1] is founded on a firm interpretative base. The existence of the state, its "continuity and perpetuity" - in the words of Agranat P. in *Yeredor* - is certainly a fundamental principle of our legal system (cf. Pound, "A Survey of Social Interests", 57 Harv.L.Rev. 1). The Elections Law should be interpreted in light of this principle, by virtue of which the authority of the Elections Committee may be expanded so as to allow it not to confirm the participation in elections of a list that rejects the very existence of the state and aspires to its annihilation.

3. It appears, therefore, that both the majority and the minority opinions in *Yeredor* are possible from an interpretative point of view. Thus we face a real dilemma in which the judge must exercise the "sovereign prerogative of choice" (see Holmes, *Collected Legal Papers* (1952) 239). How is this choice to be made? It seems to me that the key lies in the fundamental principles of the system, which both the majority and the minority relied upon. The majority put its trust in the principle of the state's continuity and perpetuity; the minority in the principle of the citizen's freedom to vote and be elected. It appears to me that the correct course of interpretation must take into account all principles, those relied upon by the proponents of both views. Indeed, I believe that the interpreter-judge should not adopt a particular fundamental principle and neglect another. The judge should have recourse to all the fundamental principles and not choose only those that commend themselves to him as proper.

4. One might ask: how can one take into account all the fundamental principles when some of them lead to a narrow interpretation that denies the Committee's authority (as in the minority opinion) whereas others lead to a broad interpretation that extends authority to the Committee (as in the majority opinion)? What should a judge do when the fundamental

principles are contradictory and lead to different constructions in a given situation? This is not a new phenomenon, nor is it peculiar to the case before us. The judge often encounters fundamental values that contradict one another. It is not unusual to find one principle in conflict with another and a thesis opposed by its antithesis. Justice Cardozo commented:

> Again the task of judging is found to be a choice between antithetical extremes. We seem to see the working of an Hegelian philosophy of history whereby the tendency of every principle is to create its own antithesis or rival.

(Cardozo, *Paradoxes of Legal Science*, (1928) 62).

Indeed, the basic tenets of the system often march in pairs, each having its own direction. (See Dickinson, "The Law Behind the Law", 20 *Col.L.Rev.* 113,123.) The decisions of the Supreme Court bear testimony to this phenomenon. Thus, for instance, the principle of state security, public order and public security competes with those of freedom of expression (H.C. 73/53[26]), freedom of procession (H.C. 153/83[25]), freedom of religious worship (H.C. 292/83[24]) and freedom of information (H.C. 243/62[38]). The principles of judicial integrity (Cr.A. 696/81[35]) and a person's good reputation (F.H. 9/77[21]) conflict on occasion with the principle of freedom of expression.

5. When the judge encounters fundamental principles of his system that contradict each other - for instance, the preservation of the state and the freedom of expression and the vote - he must take them all into account. The judge must place the principles alongside each other and give each its proper weight and, having done so, he must strike a balance between the various principles. In the words of Justice Frankfurter:

> The core of the difficulty is that there is hardly a question of any real difficulty before the Court that does not entail more than one so-called principle... Judges cannot leave such contradiction between two conflicting "truths" as "part of the mystery of things". They have to adjudicate. If the conflict cannot be resolved, the task of the Court is to arrive at an accommodation of the contending claims. This is the core

> of the difficulties and misunderstandings about the judicial process. This, for any conscientious judge, is the agony of his duty.

(F. Frankfurter, *Of Law and Man* (New York, 1956) 31,43).

The judges of Israel also face this unavoidable task. This is a process in which "we weigh various competing interests in the balance and, after reflection, select those which, in the circumstances, predominate" (Agranat P. in H.C. 73/53[26], at 879), and which constitutes "the interpretative starting point" (Shamgar P. in F.H. 9/77[21], at 361). This was the approach of the Supreme Court in the *Kol Ha'am* case [26], where the court held that the authority of the Minister of the Interior must be exercised with a proper regard for the objectives of freedom of expression, on the one hand, and public security, on the other. In reaching that conclusion the court did not adopt the one principle and reject the other, but balanced the two. Taking a similar approach in the matter of a Police District Commander's authority as regards the holding of demonstrations, this court noted (H.C. 153/83[25], at 401) that such balancing requires -

> ... a judicial determination - in the absence of statutory guidance - as to the relative grading of the different interests, which will ensure resolution of the question whether these interests rank equally in importance or whether one takes preference over the other. Likewise, in the case of interests of equal standing, this balancing process calls for a judicial determination as to which interest shall defer to the other. Thus a judicial pronouncement has to be made with respect to the "limits of sufferance" of the various rights.

It follows that where fundamental values of the system incline in conflicting directions, the court must take them all into account. It must allow the different values to vie with each other, and balance them in accord with their weight and force at the point of friction. Holmes J. said in this respect *(op cit*., p. 181):

> Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and

> unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.

6. This same approach, requiring the balancing of competing values, should be adopted also where the platform of a list seeking to participate in the elections, negates the very existence of the state. It appears to me that a judge construing the Elections Law may not ignore the fundamental principles referred to by Cohn J. in the *Yeredor* case. He must take into account the citizen's fundamental right to elect and be elected. My colleague, Shamgar P., noted justly that "the right to participate in elections is a fundamental political right that gives expression to the idea of equality, to the freedom of expression and to the freedom of association" and, hence, "is one of the hallmarks of a democratic society". These principles must be considered in the interpretation of every legislative enactment, including the Elections Law. But, by the same token, it is impossible to ignore the fundamental principles referred to by Justice Landau (in the Elections Committee) and by Agranat P. and Sussman J. in the *Yeredor* case. It is inconceivable that we should interpret a statute without taking into account the principle that "the State of Israel is an existent state whose continuity and perpetuity is not to be questioned" *(Yeredor,* at 386). A constitution is not a prescription for suicide, and civil rights are not a stage for national extinction (cf. Jackson J. in *Terminiello v. Chicago* [62], at 37). The laws of a nation should be interpreted on the assumption that it wishes to continue existing. Civil rights are nourished by the existence of the state and ought not become a tool for its annihilation. Therefore, judicial interpretation has no alternative but to seek a proper balance between the competing values of the continued existence of the state, on the one hand, and freedom of expression and election, on the other. Frankfurter J. commented thus on the matter *(Dennis v. U.S.* [54], at 524):

> The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

7. How is the balancing of values, as they compete for primacy in the *Yeredor* case, to be accomplished? The interest in the state's existence and the interest in the right to vote are not equal. The first clearly precedes the second, since it is a condition for the existence of the second (cf. F.H. 9/77[21]). This court likewise held with respect to conflict between the principle of state security and the public peace, and that of freedom of expression (H.C. 73/53[26]), freedom of demonstration (H.C. 153/83[25]) and freedom of worship (H.C. 292/83[24]). Certainly the same approach should be taken where the very existence of the state is in the balance. It follows that we are concerned with achieving a balance that requires a judicial determination as to the probability that realization of the right to vote will prejudice the interest of the state's continued existence. What, then, is the criterion for weighing the probability of prejudice to the state's existence that would justify a denial of the right to vote? Of course, there is no answer to this question in the Elections Law, and the Supreme Court must provide it. The Supreme Court has faced such questions in related issues. Thus, for example, where the conflicting interests were state security and the freedom of expression, the Supreme Court adopted the test of "probable" danger, while rejecting the known American formula of a "clear and present danger" (H. C. 73/53[26]). The same "probability" test was applied with regard to a conflict between the principle of the public peace and that of the freedom of demonstration, worship and information (H.C. 243/82[38]). However, where the conflict was between the principle of free speech and that of judicial integrity, the court used the standard of a "reasonable possibility" (Cr.A. 696/81[35]), following Cr.A. 126/62[39]. Indeed, when adopting the standard of probability one should not follow a general, universal criterion, since it depends on the force of the different values that come into conflict within a given legal context (H.C. 153/83[25], at 403). The question always is whether the measure of harm, weighed against the possibility that it may not actually occur, justifies violation of a civil right so as to prevent the danger (see Hand J. in *U.S. v. Dennis* [63]). Professor Schauer remarks in this connection:

> Evaluation of the interest in national security requires a determination of the extent of the harm should the argued effect actually occur, the probability of that effect occurring and the immediacy of the effect. The

> more serious the effect, the less certain and less immediate that effect need be.

(Schauer, *Free Speech: A Philosophical Enquiry* (1982) 199).

According to this approach it is clear that when the interest is that of the state's existence, the damage that may occur is so great that there is no need to require the existence of a clear and present danger or a substantial probability of danger. Furthermore, these formulae are appropriate in cases of concrete, specific and special dangers related to defined events. It is not possible to apply them when dealing with social phenomena that are part of a continuing process. Indeed, the matter calls for wide margins of security, because no unnecessary risks can be taken, and once a list has been confirmed the Elections Committee cannot, at a later stage after the elections, retract its decision. Nonetheless, the principle of freedom of expression and the right to elect and to be elected are precious values, and we should not, therefore, accept a test of probability for which a mere remote danger suffices. It appears to me that the proper balance will be found in a test of "reasonable probability", to which this Court has had recourse in the past (cf. Cr.A. 696/81[35], following Cr.A. 126/62[39]). Certainly, this test "does not constitute a precise formula that can be easily or certainly adapted to every single case" (Agranat P. in *Kol-Ha'am* [26], at 888). On the contrary - this is a difficult formula that leaves broad margins of uncertainty, but in the absence of a legislative formula it commends itself to me as the most appropriate one.

8. It follows that I find myself taking a position that is not identical with either the majority or the minority opinion in *Yeredor*. Like the majority view, I too hold that the Elections Committee may refuse to confirm a list for participation in the elections, if its platform negates the existence of the state. However, I do not rest content with the list's "bad tendency" - in the words of Agranat P. in *Kol Ha'am* [36] - but would require a reasonable possibility that the list's platform will actually be realised. (For a similar approach, see Lahav, "On the Freedom of Expression in the Supreme Court Precedents", 7 "Mishaptim 375 (1976) at 416.) I regret that this requirement was not specified in the *Yeredor* case. Had the majority adopted that requirement, it might still have reached its same disqualificatory conclusion, since the case involved an organisation which the Minister of Defence had seen fit to declare illegal, which had acted as an arm of terrorist

organisations existing in neighbouring Arab states, and which posed a general threat to the state with perhaps a real possibility of endangering its very existence. It is interesting to note the reference made by the minority judge to this aspect *(Yeredor* [1], at 381):

> Moreover, even where the law expressly authorised the denial of a certain civil right - which right was a fundamental civil right, such as freedom of opinion and speech - this court refused to support the exercise of that legal power where the denial was not necessary to prevent a present, clear and substantial danger (H.C. 73/53 - *Kol Ha'am).* I fail to discern the substantial, clear or immediate danger to the State, its institutions or its rights, in the participation of this candidates list in the Knesset elections. And if one wishes to argue that this danger is concealed from the courts and known only to the security agencies of the Government, I would reply that the material before the Central Elections Committee, which was also submitted to us, does not justify and certainly does not compel a finding that such danger exists. Indeed, the attention of the Committee members was not drawn to any substantial danger supposedly imminent. In the absence of as a sanction for past conduct and opinions; and the Central Elections Committee is certainly not authorised to impose a sanction like that.

Can one assume that if a substantial danger had been proven, Cohn J. too, would have been prepared to take it into account? Should one not hold that the minority judge also would not have accepted the Elections Law as a prescription for national suicide? Still, it should be noted that the above remarks of Cohn J. were *obiter dicta,* and his main approach was that the Committee had no authority to deny a list's participation on grounds of its platform. I cannot agree with that approach, for if there is proved to be a reasonable possibility that the platform negating the state's existence might be realised, the Elections Committee certainly has the authority, even the duty, to disqualify the list from participating in the elections.

9. Thus far I have not discussed the fact that the authority of disqualification - according to my interpretation, upon a "reasonable possibility" test - is vested in the

Elections Committee, which is a body representing mainly political interests. It has occurred to me that this political composition may be indicative of the legislature's disinclination to rest the Committee's vested authority to decide upon a list's participation in the elections, on a party-platform test. Indeed, this is an important argument for, in principle, I believe that a body's authority can be inferred from its structure and composition (cf. J. Stone, *Social Dimensions of Law and Justice* (1966) 674). Nevertheless, it appears to me that this argument should be treated as part of a structural whole, and not as conclusive in itself. Thus, for example, in municipal elections the like authority is given to an elections officer who is an administrative functionary, and it cannot conceivably be argued that a different law applies there for that reason. Therefore one ought not deduce from the composition of the Elections Committee a decisive conclusion that, in the instant situation, would preclude application of the fundamental principles of our system and their internal balance. My colleague, Miriam Ben Porat D.P., has emphasized the fact that once the Elections Committee decides to confirm a list's participation in the elections, there is no appeal to the Supreme Court (H. C. 344/81[27]). According to her approach, this indicates that the Elections Committee is not authorized to weigh considerations affecting the state's existence, since she holds that it is inconceivable for the legislature to vest such power, without any possibility of an appeal or challenge, in the hands of a political committee. Although I share this approach in principle, I do not believe that it is decisive in the present matter for several reasons. *Firstly,* the Elections Committee is presumed to weigh material considerations with respect to both confirmation and non confirmation of a list. *Secondly,* it is necessary in every system to determine who shall have standing to apply to the court for a list's disqualification; in general, this power is given to political functionaries. From this point of view one can regard the Elections Committee as a preliminary obstacle to approaching the court. *Finally,* in the unusual event that the Elections Committee confirms a list which poses a reasonable possibility and, perhaps, even a certainty of danger to the very existence of the state, the Knesset always retains the power to prevent that disastrous consequence by legislative means.

Negation of the Democratic Character of the State

10. So far I have examined the Election Committee's authority to withhold the right of participation in elections from a list that negates the very existence of the state. What is the

Committee's authority as regards a list that acknowledges the state's existence but disavows its democratic character? In my opinion, here too we should adopt a like method of analysis. It appears to me that just as the existence of the state is a fundamental tenet in our legal system, so is its existence as a democratic state. The Declaration of Independence - in the light of which our legislation is construed - indicates that Israel rests "upon foundations of liberty, justice and peace as envisioned by the Prophets of Israel" and that it will ensure "complete equality of social and political rights for all its citizens, without distinction of creed, race and sex". All this presupposes not only the actual existence of the state but also its democratic essence, for it is impossible to ensure equality, liberty and justice without maintaining a democratic regime under which these principles will be realized. "The system of laws under which the political institutions in Israel have been established and function are witness to the fact that this is indeed a state founded on democracy" (Agranat P. in *Kol Ha'am* [26], at 884). Indeed, the distinction between questions pertaining to the state's existence and those touching upon its democratic nature, is at times difficult and complex. Can we not say, with a large measure of justice, that sometimes a danger to the existence of our democratic regime endangers also our existence, for our strength is in our regime? Can we not say that our democracy, our equality and our fundamental values are our strongest forces? Is it at all possible to distinguish questions about the state's existence from those about the essence of its democratic regime? Would the State of Israel without the Declaration of Independence be the same State of Israel? Is there any essential difference between denying the state's right of existence and recognising its continued existence under the flag of the Palestine Liberation Organisation?

11. It appears to me, therefore, that just as we must interpret the Elections Law on the basis of a proper balance between the principle of the state's existence and that of the freedom to elect and be elected, so too we must interpret the Elections Law on the basis of a proper balance between the principle of the state's democratic regime and that of the freedom of election. In its interpretation the court may not consider merely the principle of the state's democratic character, thereby ignoring the important fundamental principle of the freedom to elect and be elected. But, likewise, the court may not take into account only the principle of the freedom to elect and be elected, while ignoring the framework of the regime and the law under which that right is exercised, i.e our own democratic regime. As in the *Yeredor* case [1], so in the matter before us, there is no avoiding a proper balance

between the competing values. As with the threat to the very existence of the state, so with the threat to its democratic character, the balance finds expression in the formulation of a proper standard to determine the likelihood of realisation of the danger. As we have seen, that standard is shaped by the extent of the anticipated damage and the chance that it may not come about. It appears to me that in this connection too we should adopt the standard of reasonable possibility, and not probability, because of the supreme importance of the interest in the state's democratic character. Furthermore, as we have seen, the probability test is appropriate in the context of a concrete, defined event, and inappropriate in the context of an overall social framework (see O. Kirchheimer, *Political Justice* (Princeton, 1961) 140). As with the issue of the state's existence, so here we should maintain broad margins of safety. Still, to meet this standard of reasonable possibility, a "bad tendency" alone will not suffice, and it requires substantial proof of a reasonable possibility that the anticipated danger will actually come about. It follows from what we said above, that the same standard of "reasonable possibility" can be applied to the threat both to the state's existence and to its democratic character. It should not be inferred that these two values are thus seen to be on the same level. The difference between the two will find expression in the different balances that are called for when applying the "reasonable possibility" standard (see C.A. Auerbach, "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech" 23 *U. Chicago L.R.* 173 (1956)).

12. The import of the balancing process is no more than to convey that the right to vote, like the rights of expression, procession, information, assembly, and all other "political rights" are not absolute but relative rights (H.C. 148/79[40]). It was so noted by Justice Brandeis in *Whitney v. California* ([59], at 373):

> Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.

The same applies to the right to elect and be elected. This right too is one of the citizen's fundamental rights *(Reynolds v. Sims* [64]), but it is not an absolute right, only a

relative one. It can be restricted if there is a reasonable possibility that its exercise will deprive the state of its democratic character. Thus a delicate balance is attained between principles and values that mark democracy. On the one hand, the fundamental right to political expression is not to be denied merely because of the nature of the political view. Quite the contrary, the power of democracy lies in the freedom it allows to express opinions, however offensive to others. On the other hand, democracy is allowed to protect itself, and it need not commit suicide so as to prove its vitality.

Reasonable Possibility

13. What is a "reasonable possibility" of injury to the existence of the state or its democratic character? The answer to this question is not at all simple since it requires examination on the particulars required to be taken into account. It appears to me that one should not take into account only the possibility of a change by parliamentary means, through a majority vote in the Knesset. I believe the scope of the examination should be widened to take into account all the social possibilities. The parliamentary test frequently constitutes but a last formal stage in a social system, in which the legitimate activity of a list that rejects the very existence of the state or its democratic character, could injure the social fabric. It appears to me that all these should be taken into account. The danger of a vote in the Knesset is no greater than a danger that the lawful activity of a list which rejects the state, or democracy, might reinforce phenomena that impair the legitimacy of the state, or democracy itself, in the eyes of the public. The reasonable possibility test should encompass the entire social scene, in all its various aspects. It should analyse social processes in the course of which a marginal entity that disavows the state or democracy might gradually accumulate strength until reaching the stage where it constitutes a danger to the existence of the state or its democratic regime. Kirchheimer remarks in this connection *(op. cit.,* 137):

> He must consider past experience, future expectations, the ends pursued and the means applied by the revolutionary group, the doctrine it subscribes to, and the relation, if any, between doctrine and action patterns.

The test indeed imposes a difficult task on the Elections Committee and on the Supreme Court. They must examine not only past events, but also the probability of potential future events. This examination amounts to a "prophecy...in the guise of a legal decision" in the words of Jackson J. in the *Dennis* case ([54] at 570). But this is a task to which a political body is accustomed, and it is not alien even to a legal proceeding which often calls for a decision founded on the examination of social processes.

14. In determining the reasonableness of the possibility that explicit or implicit ideas of a list will be translated into practice, one must consider the various means that may be adopted so as to mitigate the risk, short of actual denial of the right of election. In fact, the drastic measure of withholding the right to participate in elections should not be taken unless the alternative means are insufficient adequately to reduce the danger to the state or its democratic regime. In this respect two important points should be made. *First,* one should consider whether methods of persuasion, explanation and education would not act to mitigate the danger. Often the soft face of education towards democracy and its values is preferable to the stiff hand of governmental intervention. These words of Justice Brandeis, quoted by my colleague, Shamgar P., are well-known *(Whitney v. California* [58], at 377):

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.

Second, there is room to consider other governmental measures that fall short of actually barring the list from participation in the elections. Thus, for example, activity against the state and its regime might constitute a criminal offence, and those associating together might constitute an illegal association under the Defence (Emergency) Regulations, 1945. Often the danger to the state and its democratic foundations can be reduced by punitive means - which might also entail the withdrawal of immunity from a Knesset member involved in criminal activity - before using the sharp measure of depriving the list of its right to participate in the elections.

From the general to the particular

15. In the instant matter we have examined the platform of the *Progressive List for Peace* but have not found in it any indication, explicit or implicit, of a desire to bring about the annihilation of the state or to impair its democratic character. That being the case, the appeal must be admitted without any need to apply the test of a *reasonable possibility.* Not so with respect to the *Kach* list. Here the Elections Committee studied the *Kach* list and its publications, concluding that this material showed the list "propounds racist and anti-democratic principles that contradict the Declaration of Independence of the State of Israel". On the basis of this finding the list was denied participation in the elections. In so doing the Committee erred, for the platform alone is not sufficient, and the Elections Committee must consider whether the list poses a reasonable possibility of harm to the democratic character of the state. Words, opinions and views are not sufficient. There must be evidence of the existence of a reasonable possibility of activities that endanger the democratic character of the state. For this purpose one may take into account the past conduct of the faction, its members and its leaders, and the future dangers they hold out. No evidence was brought in this respect, nor was any attempt made to do so. True, there was much evidence before the Committee that the platform of the *Kach* list impairs the democratic character of the State. There was even evidence that it seriously intends to realise its objectives and does not renounce them. Indeed, the evidence shows that it has engaged in several overt acts to realise its platform. Thus, for example, the head of the list and one of its members were taken into "administrative detention" under the Emergency Powers (Detention) Law, 1979, on the basis of information that they were planning attacks against Arabs. That detention was confirmed by the President of the District Court, and an appeal against his decision was dismissed by the Supreme Court which found that the activity of the two constituted a danger to national security (A.D.A. 1/80[41]). So too, a number of the list's activists were convicted in the Magistrate's Court of improper conduct in a public place (Cr. F. 135/82, not published). But all this is not enough. The question is not whether the list is serious in its designs, but whether there is a serious possibility that its purposes will be accomplished. The question does not, therefore, concern the list internally, rather the list in relation to the state. The question is whether the possibility that the platform of the list will be realised, is a reasonable one, or whether such a possibility is most remote. In my opinion there was no evidence before the Committee of any such reasonable possibility. On the contrary: the administrative detention and the criminal trial that were brought to the Committee's attention reinforce

the possibility that there are accepted means of defence at democracy's disposal, and there is no need, as yet, to adopt the drastic measure of denying the right to be elected. Indeed, neither the Committee nor this court was confronted with any factual data on which to base a finding that the list creates a possible danger to democracy in Israel. There was no fact from which to conclude that the Israeli democracy had lost, or that there was a reasonable possibility it would lose, its capacity to defend itself against this list - whether by educational or governmental measures. In the main, all that was proven was "bad tendency" - in the words of Agranat P. in the *Kol Ha'am* case [26] - and attempts to translate it into practice. That alone will not suffice. In these circumstances there was no justification for depriving the list of its right to take part in the elections. Note! I have no doubt that the ideas of *Kach* are racist and that its principles violate the fundamental doctrines on which the democratic regime of the state is founded. I am also convinced that they contradict the spirit and essence of Judaism, in all its various forms. In the words of Maimonides (Yad, *Hilkhot Sanhedrin* 12:3):

> For this reason, but a single man was created, to teach us that if any man destroys a single life in the world, Scripture imputes to him as though he had destroyed the whole world; and if any man preserves one life, Scripture ascribes it to him as though he had preserved the whole world. Furthermore, all human beings are fashioned after the pattern of the first man, yet no two faces are exactly alike. Therefore, every man may well say, "For my sake the world was created".

The same approach is echoed by Rabbi Avraham Yitzhak Kook:

> The most supreme value in the love of living creatures should be taken to be the love of man, which extends to all mankind. Despite differences of opinion among religions and faiths, and despite differences of race and geographic location, it is proper to understand the various nations and groups, to attempt to learn their nature and characteristics, in order to base love of humanity on foundations close to reality. For only on a soul rich in the love of living creatures and love of man can the love of the nation rise in its exalted nobility and

> its practical and spiritual greatness. And narrow mindedness, which sees only ugliness and impurity in all that is beyond the boundary of the particular nation, and beyond the border also of Israel, is one of the more terrible darknesses causing general destruction to all good spiritual edifices that guide by their light every gentle soul.

(See Z. Yaron, *Teachings of Rabbi Kook* (W.Z.O. Publications, 1973/4), 304.)

If we have decided to sanction the list's participation in the elections, it is not because we accept any particular item in its platform. On the contrary, we have held, and reiterate once more, that its approach contradicts our fundamental conception and the general and Jewish values upon which our national edifice is being constructed. But so long as it has not been proven to the satisfaction of the Elections Committee, and to this court, that the list creates a reasonable possibility of danger to the existence of the state or its democratic character, there is no alternative but to allow it to participate in the elections.

From the Particular to the General

16. I have accordingly reached the conclusion that under our existing law, the Elections Committee may refuse to confirm the participation in elections of lists that negate the existence of the state or its democratic character. However, that authority may not be exercised except where the Elections Committee is persuaded by the evidence before it that participation of the list in the elections raises a reasonable possibility of danger to the existence of the state or its democratic character. This approach stems entirely from the creative sources of the judicial process. This process is creative, but constrained within limits. The judge is not as free as the legislature. Therefore, I did not consider myself free to ignore the various principles, values and interests that compete for precedence, and I considered myself obliged to balance them in accord with a standard suited to the nature of the problem. It follows that my examination is interpretative. It seeks to exhaust the statutory language and has recourse to "supra-norms" with respect to the existence of the state, as an interpretative guideline. The same approach was taken by Justice Landau in the Central Elections Committee, in connection with the *Yeredor* matter. He said:

> As chairman of the forum of first instance, the Central Elections Committee, I focused my statements on an interpretation of the statute - albeit a broad interpretation, so as to prevent undermining of the constitutional foundations of our regime and of the very existence of the state itself. I believe that this is also the line of reasoning taken by Agranat P. I do not think that the criticism of this approach is justified. We never entertained any doubt as to the sovereignty of the legislature, from whose word the judge may not depart, and which can change any ruling of the court. In lofty matters such as these, it may be presumed that the legislature will address the issue despite its many other occupations. But it is also clear that the court may exercise its discretion in interpreting the legislative word and, with respect to legislation of constitutional significance, that interpretation must derive inspiration from the fundamental notions upon which our constitutional regime is founded.

(M. Landau, "Ruling and Discretion in the Administration of Law", 1 *Mishpasim* 292 (1969), at 306.)

That is my opinion as well. We are dealing with the interpretation of a legislative text through recourse to the ordinary rules of interpretation. One of those rules is that the statutory language should be interpreted in light of the accepted fundamental values of our legal system (Cr. A. 696/81[35], at 574; C.A. [42]), one of which - among the more important of them, but not the only one - is the principle of maintaining the state's existence. This interpretative approach exhausts the judicial process and lies at its core. It follows from the doctrine of the separation of powers and is consistent with our conception of the democratic state. My colleague, Elon J., is of the opinion that this interpretative approach entails a denial of the Elections Committee's authority. If that is the case, whence the judge's power to contradict the word of the legislature? Let us suppose an express statutory provision that the Elections Committee may refuse (to), or shall not, disqualify a list that negates the very existence of the state. Would Justice Elon still persist in holding that the Elections Committee must prohibit the list's participation in the elections? In my opinion, that result indeed follows from his approach. But how can it be reconciled with the approach of my colleagues - to which I too subscribe - that

the judge may not raise himself above the legislature, and that the rule of law, not the rule of the judge, governs our regime? Indeed the "extra-interpretative" approach is not new, and it has been referred to in the past. (See, e.g., Guberman, "Israel's Supra-Constitution", 2 *Israel L R* 455 (1967).) In this respect I need only adopt again the comment of Landau J. with reference to the *Yeredor* case, made in his above mentioned article (at p. 306):

> That decision has evoked criticism. It is said that the court exceeded its authority, thus violating the principle of the rule of law. In my opinion, that is too mechanistic a view of the court's role in interpreting the law. I agree with the statements of Dr. Rubinstein in his article "The Rule of Law: The Formal and the Substantive Perspective":
>
> > The rule of law is meaningless without basic premises that stand above the positive system of law...The role of the jurist, who has the knowledge and training for this purpose, is to apply the *meta-legal* principle and to effectuate it through the deductive methods offered him by the juridical technique.
>
> That is the role of judicial discretion in the interpretation of the law, so as to bring it into harmony with the foundations of the existing constitutional regime in the state. We know too that the boundaries between the interpretation of statutes and their supplementation where needed, are not defined, and that there are borderline areas. The leading decisions given in this spirit in the first twenty years of the state's existence - and their number is significant - have given our constitutional regime its special character, no less than the legislative enactments of the Knesset. This line of thought is the principal heritage to come down to us from the world of the Common Law, and it links our legal system to that world.

Indeed, my approach in the instant case is based not on "supernorms", raised above the law, but on "supreme principles" that pervade the law and emerge from it. My approach posits no "supra-constitutional" "natural law" that overrides the statutory law. It

is a positivist "intraconstitutional" approach, which examines the nature of the law and interprets it according to accepted interpretative criteria. The law, in the words of Sussman P. (H.C. 58/68[43], at 513) is "a creature that thrives in its environment", which environment includes not only the immediate legislative context but also broader circles of accepted principles, fundamental purposes and basic standards that comprise a kind of "normative umbrella" encompassing the entire field of the statutory law (C.A. 165/82[42]). In this manner the judge fulfills his proper role and does not trespass upon the domain of the legislature.

17. I would note, nevertheless, that even were I to resort to such "supra" principles, I would reach the same conclusion. The *supra-constitutional* rule relied upon by Sussman J. "is actually, so far as concerns the instant matter, no more than the right of self-defence of a society organised within a state" *(Yeredor* [1], 390.) But when, and in what circumstances, is this rule to be applied? Is a remote fear of a theoretical danger a sufficient ground for applying these principles? The answer appears to be that even with the application of a "supra" principle one must determine a ratio of probability between the danger and its avoidance. Indeed, even the *supra-constitutional* rule is a legal rule, and as such it too requires interpretation. It appears to me, therefore, that if I were to have recourse to it, I would hold that the *supra-constitutional* principle may be applied only in the case of a reasonable possibility that the danger will be realised. It follows that I would reach the very same conclusion as I did through interpretation of the Elections Law itself.

18. From the aspect of the general constitutional structure, it is desirable that this question of barring a list from participation in the elections, on grounds relating to the content of its platform, be regulated by legislation and not be left open to judicial interpretation. In this respect I am in agreement with my colleague, Deputy President Miriam Ben-Porat. But the main problem is the substance of that legislation. In my opinion the present situation is preferable to legislation lacking a proper balance, from which might result damage to democracy outweighing any benefit to the democratic process. It cannot be denied that a democracy wishing to withhold the electoral right from lists which reject democracy, is confronted with a philosophico-political difficulty. The difficulty lies in the dilemma - or, if you wish, the paradox: is the barring of antidemocratic lists from participation in the elections compatible with democracy itself, or is the democratic entity

not itself taking an anti-democratic measure? This is an old question, and Plato discerned it in asking whether complete freedom does not entail enslavement, and whether the freedom of choice granted by democracy does not lead to tyranny (see, in this respect, Popper, *The Open Society and Its Enemies*, vol. 1, 123, 265). Opinions on this issue are divided among philosophers and political scientists. Some maintain that the essence of democracy lies in full freedom of expression, extended under all circumstances and for all opinions, including those that might undermine the very democracy itself (see A. Meiklejohn, *Political Freedom; Constitutional Powers of the People* (N.Y. 1965)). Others - who constitute a majority - hold that a democracy has the right, under its own internal logic, to exclude election lists that disavow democracy itself from participation in the democratic process (see J.R. Pennock, *Democratic Political Theory* (1979), 377; Kirchheimer, *Political Justice* (1961), 119). But even those holding the latter view lack agreement as to the desirable solution. Some advocate the solution adopted in Germany, in both the Weimar and the post World War II periods, according to which a party that negated the democratic character of the state could not take part in the democratic process. In *Yeredor* ([1] at 384), Cohn J. noted that this legislative course might also serve our own legislature as an example. For all its merits, one cannot ignore its many deficiencies, since it denies a fundamental political right solely on grounds of content (of party platform), without any examination of the prospects of its realisation. Ought it not be said that the true test of the ideas of liberty, justice and equality, and the other fundamental principles that form the "credo" of our constitutional regime, is in their inner strength, their inherent truth, and not in their coercive power? Ought it not be maintained that the weakness of racism and incitement lies in their inherent falsehood which is exposed to all precisely in the free exchange of opinions and ideas that is unique to democracy. Justice Holmes explained the notion thus *(Abrams v. U.S.* [65], at 630):

> The ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Is there no danger that boundaries will be trespassed and that the stamp of racism and incitement will be imprinted on the views of a political opponent merely because they are

unpopular? Should we not say that the test of democracy, where there is no reasonable probability of danger that the controversial views will be realized, lies precisely in its toleration of opinions, however odious they may be? Freedom of expression is not the freedom to express an accepted opinion, but rather the freedom to express a deviant opinion. Bach J. elucidated the point in instructing the Elections Committee. He noted that the Elections Committee could extend the *Yeredor* ruling also to bar the participation of a list whose platform rejects the foundations of democracy, and he also believed that this extended principle should be applied in relation to the *Kach* list. Nevertheless, he wished it to be taken into consideration that

> ...above all, the right to elect and be elected to the Knesset is among every citizen's central and most hallowed civil rights in a democratic regime - the denial of this right is an exceptional measure which can be justified only in extraordinary cases... This rule is put to the test especially in relation to controversial lists. Ordinary, accepted lists present no challenge to it. But the rule is tested precisely where there is strong objection and aversion to the list on the part of certain or broad sections of the public. Precisely in such case must we generally take care to allow the expression of those opinions and leave the decision as to their weight and justification to the public in a free vote.

As Jackson J. said in *West Virginia State Board of Education v. Barnette* ([66] at 642):

> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

One might argue that these words are fit and proper for the great and powerful America, which can allow itself such a "liberal" approach, whereas we must act very cautiously since our state is small, its regime is young, and it is surrounded by enemies that pose a real threat to it. Indeed, that difference exists, but our own strength is in our moral force and our adherence to the principles of democracy notwithstanding the surrounding

danger. In this respect our strength is great, and we can say out loud that even if we do not agree with a certain opinion we would give our lives for the right to make it heard. The legislative question involved is truly weighty and hard. We should hope to find the proper balance, that takes into account the entire picture, in all its complexity.

For these reasons I joined my colleagues in admitting the appeals, setting aside the decision of the Elections Committee, and confirming the participation of the two lists - *Kach* and the *Progressive List for Peace* - in the Knesset elections.

BEJSKI J.: 1. Because of the proximity of the elections, we were pressed for time in deciding the two appeals brought before us. Despite the different considerations and reasons of the Elections Committee in refusing to confirm each of the two lists, we found a common denominator that required us to admit both appeals, since that result followed from adoption of the majority opinion in *Yeredor* [1], and even more so were we to adopt the minority opinion there. My esteemed colleagues have elaborated extensively and incisively upon the important constitutional issue in all its varied complexities, as regards both principles and consequences, and the absence of statutory guidance has brought to the fore differences of approach to the desirable solution of a conflict between basic fundamental rights. If one accepts the minority opinion in *Yeredor*, as does the esteemed Deputy President, the conclusion is unequivocal as regards each of the two lists concerned. According to this perspective, the Knesset Elections Law [Consolidated Version], 1969 does not grant the Central Elections Committee authority to deny any list the right to contend in the elections, irrespective of its objectives and declared platform.

If such list meets the formal, technical conditions determined in the Law, and none of its candidates are found to be disqualified under section 6 of Basic Law: The Knesset, the position is clear-the list must be confirmed as a lawfully submitted one. And if one adheres to the majority opinion in *Yeredor* - in its narrow, restrictive sense one might also reach the same result, since the majority opinion is limited in application to a list whose objectives negate the integrity of the State of Israel and its very existence. The reason for the refusal of the Central Elections Committee (hereinafter "the Committee") to confirm the *Progressive List for Peace* comes very close to attributing such objectives to it, and with regard to this list the decision turns on the evidence, that is, whether the objectives

attributed to it were proven sufficiently. In this connection I can already say at this point that I am in agreement with the reasoning in the esteemed President's instructive opinion, and this list's appeal should accordingly be upheld.

The reason for the refusal to confirm the *Kach* list attributes to it subversion of the foundations of the democratic regime in that it propounds racist principles, supports acts of terrorism, attempts to incite to hatred and hostility among different sectors of the population in Israel, and intends to violate the religious sentiments and values of a section of the state citizens. It is clear that this reason strays from the basis of the majority ruling in *Yeredor*. Hence, adherence to the majority ruling, as regards the narrow issue of negation of the state's very existence, provides no ground for disqualifying the *Kach* list, unless the ruling is expanded, by way of judicial legislation, to disqualify also a list which in essential nature propounds anti-democratic principles and seeks to undermine the foundations of the state's democratic regime. Obviously, this reasoning too would require the Committee to examine and be persuaded, in accepted probative manner, that the allegations against that list are substantial. In the case of *Kach* the Committee reached that conclusion.

2. Counsel for the state indeed invites us to expand the *Yeredor* ruling, and to hold that the Committee is authorised to disqualify not only a list that negates the very existence of the state but also one that disavows and undermines the principles of democracy as perceived by the free Western world. He contends that *Kach* is such a list, and therefore it was justly disqualified by the Committee.

It is possible to understand Mr. Yarak's argument that it is not necessary to regard this reasoning as an expansion of the majority opinion in *Yeredor,* because it was said in that case (following the *Kol Ha'am* decision [26] at 884) that any element posing a danger to *the perpetuity of the State of Israel* could not be countenanced; this was a constitutional foundation "which no state authority, whether administrative, judicial or quasi-judicial, may disclaim when exercising its power" *(Yeredor* [1] at 386). The existence of the state in its present form is tightly linked to the democratic foundations on which it is based and the state cannot be protected without protecting its democratic foundations. In other words, subversion of the principles of democracy is tantamount to subversion of the very

existence of the state, for the State of Israel inscribed in the Declaration of Independence, as a constitutional principle, that "it will rest upon foundations of liberty, justice and peace as envisioned by the prophets of Israel. It will maintain complete equality of social and political rights for all its citizens, without distinction of creed, race or sex; it will guarantee freedom of religion, conscience, language, education and culture...".

Mr. Yarak argues further that if the legislator has not seen fit to provide express statutory protection for the values of democracy, that is because these *supra-principles* have always been acknowledged in the case law as the basis of our regime, as regards both the recognition of rights and the creation of corresponding duties (H.C. 1/49[10] at 83; H.C. 73,87/53[26]; H.C. 148/79[40]), including rights and duties that are not written in the statute book but are recognised in law as stemming from the essential nature of our democratic regime (H.C. 29/62[44], at 1027; H.C. 112/77[45]; H.C. 262/62[46]; H.C. 337/81[5]; C.A. 723/74[3], at 295).

3. It is true that to undermine the foundations of democracy is largely the same as undermining the foundations of the state as presently constituted. A democracy may defend itself against such phenomena, and the difficult dilemma which faces most Western democracies relates to the permissible means of defence. That defence is not at all easy since subversive groups often, perhaps mostly, take advantage of the benefits of freedom of speech and assembly under a democratic regime, in order to achieve their goals. Extreme examples of this phenomenon are found in the events overtaking Italy in the 1920's, Germany in the 1930's and Czechoslovakia in the 1940's. The dilemma as to the methods of self-defence - and perhaps also of waging war against groups of a totalitarian nature, is compounded sevenfold because of the fundamental values of democracy which, by its nature, is open to a plurality of opinions and world views. In 1763 Voltaire is reputed to have said that even if he objected to all that his opponent said, he would defend the right to say it with his own life. Open discourse, the right to make unconventional statements, exertion of influence to change ways of thinking on controversial And in the aforementioned *Dennis* case, Frankfurter J. said ([54] at 551):

This difficult dilemma does not spare us either, and we have to contend with it from time to time. I choose to mention only one decision, the well-known *El-Ard* case (H.C.

253/64[2], at 679), from which reverberates the warning of Witkon J. concerning events of the kind seen in the recent past, when different totalitarian entities exploited the freedoms of speech, press and association granted them by the state, under the auspices of which to carry out their own destructive policies. It was said there (following H.C. 241/60[47], at 1170):

> "These freedoms are valuable possessions, the tradition of a democratic regime in a free country, but precisely for that reason they may not be used as a pretext or tool by those who seek to undermine that regime." Likewise in the present matter. And the encouragement given the *El-Ard* Movement from across the borders alerts us to its potential danger to the State of Israel. It would be blind folly to sanction it.

But at the same time the other side of the dilemma was expressed:

> The freedom of association is of the essence of a democratic regime and a fundamental civil right. Far be it from us to deny that right and disqualify an association for the sole reason that its goal, or one of its goals, is to strive towards changing the existing legal situation in the state. ... However, no free regime will lend support and recognition to a movement that undermines the regime itself.

If we maintain that the right to freedom of association and speech is of the essence of a democratic regime, and that "a regime that does not honor the freedom and right of a minority to express its views cannot claim to be a true democracy" (G. Leibholz, *Politics and Law* (Leyden, 1965) 44), that does not imply that one may deviate from the fundamental doctrines of that regime in the name of democracy and under its guise. One who claims rights in the name of democracy must himself act in accord with its rules. In the words of Schauer *(Free Speech, A Philosophical Enquiry*, Cambridge University Press, p. 190):

> Superficially, we might say that advocacy of legal change should be permitted, but that advocacy of violent or unlawful means of change

> should not be protected by the Free Speech Principle. After all, people should not be able to rely on freedom of speech derived, here, primarily from the argument from democracy, for the purpose of going outside the process of democracy. It is not that fairness or consistency requires that those who claim rights under a principle must themselves subscribe to that principle, although such an argument is quite plausible. Rather, speech that produces extra-legal change undermines the process of rational deliberation that is the a priori value of a democratic system.

And further on (at 194):

> That is, if freedom of speech is justified by its relationship to the legal system, and especially if it is justified by its ability to ensure the functioning of a system of laws, then speech directed at weakening or destroying that legal system would appear to have little claim to protection.

Pennock's comment is apposite *(Democratic Political Theory,* Princeton University Press, p. 377):

> ...It would seem strange to dub as undemocratic a provision designed to prevent democracy from committing suicide.

4. Measures of self-defence against acts subversive of the foundations of democracy are accordingly not considered prohibited, although in theory one can say that self-defence by the extreme method of suppressing or forbidding organisation entails an antidemocratic act. That is a price that must be paid, and it does not appear to be too heavy where a danger to national security or a state of emergency arises, which dangers are regarded as sufficient to deny freedom of speech or organisation. Against this background, the doctrine of a "clear and present danger" was evolved in the U. S. A. , as expressed in *Whitney v. People of State of California* [58] and modified in *Dennis v. U.S.[54] at 507),* and especially in *Brandenburg v. Ohio* (1969 [67]), 444). The doctrine's development and the considerations that guided the U.S. courts were discussed extensively in the opinion of the esteemed

President, and there is no need for repetition, except to note that when Douglas J. retreated from the "clear and present danger" test in the *Brandenburg* case, he said (at p. 456):

> The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation, is the line between ideas and overt acts.

Any test we adopt, be it the criterion of a clear and present danger, or that of an overt act, or the "reasonable possibility" test now suggested by my esteemed colleague Barak J., immediately poses a twofold dilemma: one relates to the proper time when the defensive reaction may and should come; the other concerns the dimension of the permissible measures, that is, whether radical elimination of the danger, in its infancy, or other lesser means. The tolerance that democracy espouses calls for forbearance also with respect to the timing, until the maturation of the selected test. Still, Leibholz warns *(op.cit.,* at 87):

> But usually the process of enlightening a misled public opinion in democracy is a very delicate undertaking. The slowness of its tempo may even have disastrous consequences: the warning voices may remain unheard and the reversal of public opinion may come too late.

After comprehensively analysing the lurking dangers, when a democracy fails to act in time and tolerantly seeks to reach compromise and understanding, the author adds (at 160):

> All these well-timed, tactical, so called understandings only confirm the old experience, that states, like men, are very slow to learn the lesson taught by history, even contemporary history, and to guide their policy and actions accordingly.

It is commonly agreed that governmental intervention against subversive bodies is justified and even necessary. Our historical memory also justifies timely, even prior intervention. That is necessary especially where the group does not stop at mere words but proceeds to act in destructive ways. However, the concrete dilemma concerns the permissible active modes of protection and their limits. Ought the conclusion be to bar the

group from participation in public life, to outlaw it, or does it suffice to impose some form of control over the group's activities. The answer involves many factors and considerations - political, educational, economic, military, and the like, and above all the virility of the democracy, the composition of the population and its capacity to withstand external onslaughts. This complex array suggests that the answer lies properly in the political domain. Thus Lippincott opines *(Democracy's Dilemma* (1965) 199-220) :

> It is a task of the highest statesmanship. In order to carry it out, at a minimum cost, democracy will need all the wisdom of which it is capable.

5. I have made these observations to explain why I believe we cannot admit the argument of counsel for the state, i.e. that it is supposedly self-evident that the *Yeredor* ruling [1] should be extended also to bodies which undermine the foundations of democracy, since that amounts to undermining the very existence of the state; likewise the argument that at in any event, and for the same reason, there is room to expand the *Yeredor* ruling beyond the narrow confines of the matter decided there. It is clear to me, and so it was unequivocally stated in the majority opinion, that only the vital need and the interest in the state's continued existence moved the court to take the extreme position of withholding the right to be elected, albeit by virtue of inherent authority, based on natural law, from someone whose avowed purpose is the destruction of the state. In the words of Sussman J. *(Yeredor* [1] at 390):

> Just as a man does not have to agree to be killed, so a state too does not have to agree to be destroyed and erased from the map. Its judges are not allowed to sit back idly in despair at the absence of a positive rule of law when a litigant asks them for assistance in order to bring an end to the state.

The majority judges were not prepared to go any further, as was explicitly stated by Agranat J. (ibid. p. 387):

> As already indicated, I agree that the Central Elections Committee, in exercising its power to decide upon the confirmation of a candidates list, is not ordinarily empowered to inquire into the candidates' worthiness or to reflect upon their political views.

Sussman J. spoke in a similar vein (ibid. p. 389). One might ask: since in the *Yeredor* case the court, without statutory sanction, assumed the power to deny a fundamental right, why shouldn't we extend that power to another cardinal matter that poses a danger to democracy, and is closely related to that dealt with in *Yeredor* - where the court saw fit to forestall the danger? The answer is that the two are not alike. Negating the very existence of the state is not the same as subverting the foundations of democracy. If in regard to the former question the court felt itself constrained to go beyond its ordinary bounds and to resort to natural law, that does not mean that the court will extend such judicial legislation beyond the call of necessity. Certainly not where it is concerned with an essentially political matter lying primarily in the domain of the legislature - upon which the court will not encroach except through the modes of interpretation. Even in the Federal Republic of Germany, where section 21(2) of its Basic Law of 1949 expressly authorises the Constitutional Court to decide whether the objectives or tendencies of a party are to impair the democratic foundations of the Republic, that court is enjoined to act with restraint when exercising powers of a political nature. Leibholz says *(op.cit.*, at 299):

> As custodian of the constitution, the constitutional judge has to watch out that the Supreme Court does not usurp political power and authority. He must respect the well-determined tendencies of the modern state. Out of this, it results that the constitutional judge, in the exercise of his powers, must wisely restrain himself.

And in the aforementioned *Dennis* case, Frankfurter J. said ([54] at 551):

> To make validity of legislation depend on judicial reading of events still in the womb of time - a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations - is to charge the judiciary with duties beyond its equipment.

The authors Nowak, Rotunda and Young comment in similar vein *(Constitutional Law* (2nd ed.) at 779):

> Although the Supreme Court has recognized that basic constitutional rights are intertwined in the electoral process, the Court also has noted that elections are largely political creatures and the Courts should refrain from getting too involved in basically political decisions.

(See also G. Marshall, *Constitutional Theory* (Oxford, 1971).)

If that is the situation in relation to the review and interpretation of the provisions of a written constitution, *a fortiori* in our case where there is no enacted provision and we are asked to usurp the legislator's function by way of expansive judicial legislation.

It bears reminder that it is the Committee's function to decide on disqualification and the court has only a power of review. The Committee is a clearly partisan political body, and it is constituted only for the purposes of, and with the powers granted by, the Knesset Elections Law [Consolidated Version], 1969 - and no more. If without defined and qualified legislative authority this Committee is extended the power to decide which lists undermine the foundations of the democratic regime, lists might be disqualified on grounds of narrow party interests, as deemed fit at the time by a chance or contrived majority in the Committee. Nor should one forget the fervour of elections, with all it entails.

It follows from everything I have said that I adopt the majority opinion in the *Yeredor* ruling, as it was limited and confined to the disqualification of a list that negates the very existence of the state or aspires to its destruction and the repudiation of its sovereignty.

That is the outer limit. Like my esteemed colleagues, I too am aware of and troubled by those occasional subversive forays, which from time to time might cause serious harm to the values of democracy if there is no planned, timely defence against them. However, I am not prepared to uphold the extreme sanction of disqualifying a list and denying the fundamental right to be elected, without legislative authority.

6. I have read attentively and with pleasure the interesting opinion of my esteemed colleague, Barak J., who, in his own way, finds it possible to expand the *Yeredor* ruling to apply also to a list whose platform negates the democratic character of the state, provided a reasonable possibility of the realization of its objectives has been shown. My colleague proceeds on the assumption that this authority stems from section 63 of the Knesset Elections Law, and, therefore, the court may apply its system's rules of interpretation to hold that this is an empowering provision; that despite the mandatory language, the Elections Committee must be vested with discretionary authority so as to realize the fundamental principles of the system.

My understanding is that the authority granted under section 63 is not merely limited to a "lawfully submitted" candidates list but, moreover, the power to refuse to confirm a list can only be based on section 6 of Basic Law: The Knesset (apart from technical-formal grounds that do not concern us here). That section grants the right to be elected to every national who is twenty-one years of age or over, and provides that a candidate may be disqualified only if a court has deprived him of that right by law or if he has been sentenced to five or more years imprisonment for certain offences against national security, as prescribed in that Law.

We are accordingly dealing with a very circumscribed and narrow authority, deviation from which is not a matter of interpretation or discretion, but one of legislation proper on a subject that has no connection whatever with the matter for which the authority was granted. Moreover, the judicial exception made related only to a danger to the very existence of the state, as was the opinion of Sussman J. in *Yeredor*, with which I find myself in agreement. It is one matter to refuse to confirm a list that was not lawfully submitted, with which alone section 63 deals, and an entirely different matter to disqualify a list because of its platform or the views of its members, which is nowhere mentioned in the statute. Where the legislature sought to obstruct the path to election of a person sentenced to five or more years of actual imprisonment for an offence against state security, it said as much; in that respect there is room for judicial interpretation, for example as to what constitutes an offence against national security, and so on.

In his instructive article on "Judicial Legislation", (13 *Mishpatim* (1983), 25 at 39) Justice Barak said:

> The judiciary is not omnipotent; it is not 'sovereign' in judicial legislation. It is not free to choose the content of a legal norm. Judicial legislation is subject to external limitations that define its formal legitimate sphere ... It is clear that the judge interpreter may not impart to the law a meaning that commends itself to him as interpreter, without it being rooted in minimal connections to the legislative enactment.

And in another article he said ("On the Judge as Interpreter", 12 *Mishpatim* (1982) 248, at 255):

> It is possible to give the language of the law a broad or narrow interpretation, an ordinary or exceptional interpretation, but generally one must find an Archimedean foothold for the purpose in the statutory text. There must be, generally, a minimal verbal connection between the language and the purpose. The interpreter may not achieve a purpose that has no hold, however weak, in the statutory language.

I am in full agreement with the above statements, and precisely for that reason I cannot find it possible to extend the *Yeredor* ruling beyond the issue decided according to the majority opinion, since the statute lacks that "Archimedean-foothold" upon which broad and expansive interpretation can be grounded and constructed. As far as I am concerned, we are not facing here any option of broad or narrow interpretation, but rather the total absence of any statutory provision on the matter concerning us in which we could find some foothold. We cannot forget that we are dealing with such a fundamental matter as the denial of the right to be elected; and if the majority opinion in the *Yeredor* case followed the unusual course that it did, the matter is explained by the disproportionate weight between the considerations, on the one hand, of negation of the existing integrity of the state and, on the other hand, the right to be elected. From this aspect of both the issue and the conclusion are indeed exceptional, and every other consideration must give way in face of the danger entailed in the negation of the very existence of the state. It is different

in the instant case, where the court has little justification for invading so deeply the preserve of the legislature merely on the ground that for nearly two decades that body has kept silent on such an important question of principle as that which arose so acutely in the *Yeredor* case.

Indeed, my esteemed colleague Barak J. also spoke of the desirability that this issue - the barring of a list from participation in the elections on grounds relating to the content of its platform - be regulated through legislation and not be left open for judicial interpretation. My difficulty is that I cannot find any basis and foothold upon which to construct such judicial interpretation, and for that reason I cannot adopt the solution proposed by my colleague. However, the very appeal to the legislature as regards the need for statutory regulation of the matter, to which I wholeheartedly subscribe, reinforces my view that in its absence we should not trespass upon the domain of the legislature in such a cardinal matter. Like my colleague Barak J., I too am apprehensive of an unbalanced legislative treatment of the subject, but one can assume that the broad considerations and difficult deliberations that accompanied each of us in deciding this case will not escape the attention of the legislature. And once it has spoken, the court will have a basis for interpretation for which there will undoubtedly yet be need.

7. I now come to the other question on which I disagree with my esteemed colleague, Barak J. If I had found it possible to agree with him on the principled question regarding the Committee's authority to disqualify a list on grounds of its platform, objectives and activity - if designed to endanger the foundations of democracy, I would have reached the conclusion that the *Kach* list had been lawfully disqualified and that we should not intervene.

My colleague says: "Words, opinions and views are not sufficient. There must be evidence that there exists a reasonable possibility of acts that endanger the democratic character of the state." For the sake of argument I am prepared to accompany him this far, though it should not be inferred that I accept the "reasonable possibility" test. However, even according to that test, if one accepts it as correct, I ask myself: what more evidence is required and could be offered in discharge of the burden of proof, than was actually proven with respect to the *Kach* list?

The Committee had before it scores of publications, booklets, pamphlets, posters, articles, all full of insufferable racist hatred. They speak of deporting the Arab population to other countries, while those remaining in Israel are to become alien residents without national rights. They advocate denying social security benefits to Arabs so as not to subsidize population growth in that sector.

At press conferences views are voiced, mainly by the head of the list, in support of terrorism against Arabs as a religious act in sanctification of God's name. In one public appearance Rabbi Kahana said that if he were appointed Minister of Defence, there would be no mosques and Arabs on the Temple Mount within half a year. In his platform he calls for enacting a law that would impose a sentence of 5 years mandatory imprisonment on a non Jew who engages in intercourse with a Jewish woman. There were also calls against the employment of Arabs, as well as justification for laying explosives on the Temple Mount.

Lest one say that these are only words and opinions which do not amount to a "reasonable possibility" of endangering the democratic character of the state, the Committee had information about members of the list who went to Arab settlements to convince them that they had no place in this country, and that if they did not leave voluntarily with compensation paid, other means would be found. Legal and illegal demonstrations were held to disseminate these views. The Committee had before it court judgments convicting members of the movement in respect of these activities (Cr.F.(Jerusalem)134/82; Cr.F.(Tel Aviv) 167/73). In A.D.A. 1/80[41], this court justified the administrative detention of the head of the list and his comrade, and it was said there:

> ...in the instant case the danger to national security, which the orders were intended to prevent, is of such gravity that it is proper to confirm the detention orders despite the violation of the detainees' right to defend themselves.

Lack of space prohibits the specification of all these activities and suffice it to say that they go beyond mere words and opinions, amounting to continuous and consistent action and deeds. And if indeed all these are not sufficient evidence of a danger to the democratic character of the state, then I do not know what more need or could be proven. And in appearing before the Committee, the head of the list gave a lengthy explanatory speech, in which he not only did not deny what was attributed to him and proven against the list, but actually repeated the racist "credo". The speech was long and there is no need to repeat it here, except for one or two extracts by way of illustration: "I now ask all the members of the Committee whether an Arab may live in a Jewish democratic state in peace, in quiet, in democracy, in procreation, to become a majority here and turn this state into one that is not Jewish but Arab?" (p.38). After explaining his conception of an "alien-resident" - that is, "he is not a citizen, does not cast a vote for the Knesset, he has cultural, religious, economic, social rights and no more" - he says: "If he is willing, then by all means, let him dwell here; if not, he shall leave. How? Whoever is prepared to leave quietly, nicely, peacefully, receives money for his property. If not so, the Government will send him out, as did the Poles, the Czechs, the Greeks, the Turks, and all those" (page 39 of the Committee minutes).

These tones reverberate so ominously from the not too distant past, that a democratic state like ours may justifiably defend itself against them despite all the patience and tolerance decreed by democracy for the another person's views. And, as was proven, the *Kach* list does not even try to disguise its platform, as is sometimes done so as not to arouse fear and suspicion regarding the true goals. Even the affidavit submitted to this court in support of the notice of appeal displays plentiful mention of these views, and without quoting them I shall refer particularly to pages 2-4 of the affidavit. Still I feel obliged to add that even if the platform of the *Kach* list were untainted with these blemishes, the platform alone does not present the full picture. A platform can be camouflaged. Therefore, the Committee is certainly allowed to base itself on material other than the platform, to the extent that it is indicative of the real objectives of the list and its activity, and so far as reliable. And here, as aforementioned, there was no denial-quite the contrary!

Like the Central Elections Committee, with all the material before it, I am persuaded that there was good reason to regard the *Kach* list as one that advocates racist and antidemocratic principles, as set forth in the letter of the Committee Chairman, Justice G. Bach, dated June 17th, 1984.

And if in our decision on June 28th, 1984, I concurred in the opinion of my colleagues on the bench that this list should not be disqualified - that was not due to lack of evidence as to its character and purposes constituting a danger to the foundations of democracy, by any standard. As I have explained, it was because I found no lawful authority to do so and did not consider it possible to extend the *Yeredor* ruling without having been granted such authority by the legislature.

Both appeals allowed.

Judgment given on May 15, 1985.