THE BOUNDARIES OF LIBERTY AND TOLERANCE: LIBERAL THEORY AND THE STRUGGLE AGAINST KAHANISM IN ISRAEL.

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ABSTRACT

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

The primary aims of this research are **(1)** to formulate percepts and mechanisms designed to prescribe boundaries to liberty and tolerance conducive to safeguard democracy; and **(2)** in the light of the theory to analyze a case of a democratic self-defence. Hence, I employ the formulated philosophical principles to the study of the Israeli democracy, evaluating the political and legal measures to which it resorted in its struggle against Kahanism.

In the first part of the thesis I examine two of the main arguments which are commonly offered as answers to the question: 'why tolerate?' The first is the 'Respect for Others Argument', and the second is the 'Argument from Truth'. I introduce some qualifications to these arguments, asserting that our primary obligation should be given to the first, and that in case of conflict between the two principles, this former principle should have preference over the latter.

Through the review of the Millian theory and some more recent theories I try to prescribe confines to liberty. With regard to freedom of expression, I state two arguments: the first under the Harm Principle, and the second under the Offence Principle. Under the Harm Principle I argue that restrictions on liberty may be prescribed when there are sheer threats of immediate violence against some individuals or groups. Under the Offence Principle I explicate that expressions which intend to inflict psychological offence are morally on a par with physical harm and therefore there

are grounds for abridging them. In this connection, I review the Illinois Supreme Court decision, which permitted the Nazis to hold a demonstration in Skokie.

Moving from theory to practice, in the second part I apply the theory and the conclusions reached to the Israeli democracy, observing its struggle against the Kahanist phenomenon as it has been developed through the last two decades, and increasingly following the election of Meir Kahane to the Knesset in 1984. I examine the mechanisms applied in this anti-'Kach' (Kahane's party) campaign, the justifications given for the limitations that were set, and how justified they were, according to the formulated philosophical and legal guidelines.

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Table of Contents

PART I: THEORY

BOUNDARIES OF TOLERANCE AND LIBERTY

"What is toleration? It is a necessary consequence of our being human. We all are products of frailty: fallible, and prone to error. This is the first principle of the law of nature, the first principle of all human rights".

Voltaire.

"To be truly free is to have power to do. When I can do what I want to do, there is my liberty for me".

Voltaire.

INTRODUCTION

In August 1985 I participated in a demonstration against Rabbi Kahane, a religious, quasi-Fascist propagandist who was elected to the Israeli Knesset in the preceding year. Kahane came to advocate his ideas to the citizens of the city of Givatayim, and in the gathering place he was met by thousands of people, led by the Mayor of the city. The small public square was crowded with people who stood against Kahane, screaming, shouting and whistling in order to prevent him from speaking. I had just returned from a summer school in the United States, and this was not what I expected. I had no idea that the confrontation would take this form, and thus I stood there with an increasing unease. I came to protest, but in a different way. The demonstrators were using the same means against Kahane that the man himself would use - if he would have had the power - against any opposition. This person, who raised his voice against democracy was now demanding in the name of democracy the right to be heard; while advocates of democracy were standing against him, determined to prevent him this same right. The paradox, so brightly illuminated in this incident, of denying in the name of democracy one of its basic tenets - freedom of speech - was the preliminary force which drove me to concentrate my research on this subject, and to focus on the tensions that evolve from the very foundations of democracy.

The problem of any political system is that the ideas and principles which underlie and characterize it might also, when applying them, endanger it and bring its destruction. Democracy is no exception. Moreover, because democracy is a relatively young phenomenon it lacks experience in dealing with pitfalls involved in the working of the system. This is what I call the "catch" of democracy.

The study concentrates on two of the concepts which underlie liberal democracies: tolerance and liberty. Its primary aims are **(1)** to outline boundaries of tolerance and liberty through the formulation of principles conducive to safeguarding democracy, and **(2)** in the light of the theory to analyze a case of a democratic self-defence. Thus the research combines theory with application, viewing how a democracy dealt with a specific problem which was conceived as a danger to, at least, some of its basic principles as a democratic state. I shall employ the formulated philosophical principles to the study of the Israeli democracy in its struggle against Kahanism.

The thesis is primarily a conceptual analysis and essentially not a historical study of how democracy as a system of ruling has evolved in the course of years, nor an investigation of how it accommodated itself to changing circumstances. Its plan is the following: the theoretical part will be opened by a discussion on the general concepts of tolerance and liberty. These two concepts will be dealt with simultaneously. When reading the literature I noticed that many appear to think that there is a theory (or theories) of tolerance and a theory (or theories) of freedom. However, there is an overlap between tolerance and liberty. In fact, a theory of tolerance <u>is</u> a theory of liberty. Any instance of tolerance is an instance of extending liberty.[1] By prescribing the confines of tolerance we set the constraints on liberty. By arguing that we cannot tolerate everything we hold that some limitations on freedom have to be introduced: everything and anything cannot be allowed in the name of freedom. By tolerating one restricts one's own freedom in not exercising one's own disapproval and consequently one does not restrict the liberties of the other, whose conduct one disapproves of.

Chapter 2 explores the scope of tolerance. I shall first consider "the paradox of tolerance" and then proceed by offering some useful distinctions regarding tolerance and compromise. I will provide a perspective which distinguishes between two forms of tolerance: manifest and latent and make a further distinction concerning the concept of

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1. Cf Raphael. "Toleration, Choice and Liberty". 6 <u>Government and Opposition</u>. 1971. p 234.

compromise. Thus I shall distinguish between principled and tactical compromise. The former is said to be compromise that is motivated by respect for the other party; while the latter is made out of partisan interests, without a real intention of respecting the agreement.

Chapter 3 analyzes the deontological argument which is commonly suggested as one of the answers to the question: why tolerate? In this context I will analyze the 'Respect for Others Argument' and consider the ideas of neutrality and impartiality, forwarded by liberal thinkers to explain why we should tolerate different conceptions of the good. Then, in chapter 4, I will examine the importance of cultural norms and what part they play in requiring us to tolerate others out of respect. I will insist that an important qualification has to be made, namely that we have to speak of mutual respect for others.

By inserting this qualification the Respect for Others Argument both gives grounds and sets limits to tolerance and liberty. With regard to liberty I will lay emphasis on the distinction between liberty of action and of expression. Following Mill and Emerson I will assert that although this distinction between "expression" and "action" is problematic, it is crucial for we should allow expression a greater latitude than that which we allow to action. In borderline cases the determination of whether the conduct is to be treated as expression or action rests upon whether the harm is immediate, whether it is irremediable, and whether regulation of the conduct is administratively consistent with maintaining a system of freedom of expression.[2]

The following three chapters will address the subject of freedom of expression. While chapters 5 and 6 postulate the arguments for freedom of expression, chapter 7 provides necessary restrictions to expression. The discussion starts by considering the grounds which provide special status for freedom of expression. These arguments will be sub-divided under the headings of autonomy, democracy, infallibility, and truth. I will proceed by a detailed examination of the Millian Truth Principle. Here it has to be

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2. Thomas. I. Emerson. Toward a General Theory of the First Amendment. 1966. p 61.

noted that while the Respect for Others Argument refers both to action and expression, this Millian, utilitarian argument gives grounds for toleration of speech alone. Thus I will specifically reflect on Mill's essay On Liberty and also on his earlier article "Law, Libel and Liberty of the Press", an article which did not receive adequate attention by scholars. I will try to show that it is difficult to reconcile between what Mill had to say in this article to what he said later on in On Liberty. I will go on to argue that in a case of conflict between the 'Respect for Others Argument' and the 'Argument from Truth' our first obligation should be given to the first, which should have preference over the latter principle. For viewing truth as superior to all other social values might endanger the very grounds which the 'Argument from Truth' is intended to safeguard, i.e., tolerance: the holding of truth as the most important value might result in harming individuals, and in generating an atmosphere of intolerance.

In chapter 7 I will elaborate on the ethical question of the constraints on speech. In this context I will state two arguments: the first under the 'Harm Principle', and the second under the 'Offence Principle'. Under the 'Harm Principle' I shall argue that restrictions on liberty may be prescribed when there are sheer threats of immediate violence against some individuals or groups. Under the 'Offence Principle' I will explicate that expressions which intend to inflict psychological offence are morally on a par with physical harm and therefore there are grounds for abridging them. Thus I will suggest that certain speech-acts that either directly harm individuals, or offend unwilling listeners who cannot avoid being exposed to them, can properly be considered as actions because the harm they cause to these individuals is direct and irremediable by attempts of regulation.

Moving from theory to practice, in chapter 8 I will go on to apply the formulated principles to a legal case which arouses much controversy, evaluating the court decision in their light. Thus I shall review the ruling of the Illinois Supreme Court which permitted the Nazis to hold a demonstration in Skokie, arguing that it was wrong.

The discussion on Skokie will take us to the second part of the thesis in which I will apply the theory and the conclusions reached to the Israeli democracy, analyzing its reaction to political parties which were conceived to be a threat to its system of ruling. I will examine how this democracy tried to cope with internal dangers and what safeguards it developed as an answer to the threats which it had to encounter. Here the cases of 'Kach' (Kahane's List) and the Progressive List for Peace (PLP) in the 1984 elections, and of 'Kach' in the 1988 elections will be considered. More specifically I shall observe the reaction of the Israeli political system to the Kahane racist phenomenon as it has been developed through the last two decades, and increasingly following the election of Meir Kahane to the Knesset in 1984.

In evaluating the Israeli reaction to the Kahanist phenomenon, I shall take two different though complementary roots of analysis. The first will reflect on the reaction of the Israeli society - its political system, voluntary groups, the media, the educational and cultural systems - to Kahane, while the second will canvass the juristic aspects which are interwoven in this matter. I will begin by reflecting on the Kahanist phenomenon. Thus in chapter 9 consideration will be given to Kahane the man, his ideology and political programme. In this context I shall also examine the mechanisms employed in the anti-'Kach' (Kahane's party) campaign.

Chapter 10 will supply us with the necessary legal background for evaluating the legal restrictions that were enacted against Kahane. I will examine the major legal criteria that were applied, such as the probable danger test, bad tendency, clear and present danger test, and the balancing approach. Then, upon the legal guidelines I shall review the factors which were put forward in legislation and court decisions when requests to withhold Kahane's fundamental freedoms were submitted. Hence, in chapter 11 I will discuss the *Neiman* decision of 1984 which allowed Kahane to participate in the elections which brought him to the Knesset, attempting to show that that decision was wrong. In turn, chapter 12 will consider the attempts to restrict Kahane's freedom of expression and of movement. Here I shall review the justifications given for the limitations that were set and how justified they were, according to the formulated philosophical and legal guidelines.

Finally, in chapter 13 I will discuss the *Neiman II* decision and some of the implications of the Kahanist phenomenon on the Israeli society. I shall argue that although Kahane was killed twice, first politically and two years later physically, Kahanism is still very much alive in Israel. It would take a long educational process, as well as a political solution regarding the Palestinians, to uproot the deep feelings of hostility towards Arabs which prevail in Israel today.

Before starting the analysis, there are three notes on terminology that I wish to make: first, the terms 'toleration' and 'tolerance' are employed interchangeably throughout the thesis.[3] The same policy is adopted with regard to the terms 'liberty' and 'freedom'. They too are used interchangeably, as synonyms. Lastly, in this essay I have tried to use the neutral term 'one' whenever possible. However, when I speak of a person, my reference is made in the masculine term 'he'. I hope that the reader will not interpret it as a sign of sexism or of any other form of this notorious attitude.

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3. P. King (Toleration. 1976. p 12) and D.D. Raphael (op.cit. pp 229-234) are exceptional in arguing that the term "toleration" has a broader purpose than the term 'tolerance'.

Chapter 1

TOLERANCE AND LIBERTY: GENERAL INSIGHT

A. The Duty To Be Tolerant, the Right To Be Tolerated

The root of the terms 'tolerance' and 'toleration' is found in the latin word *Tolerabilis* meaning that which can be endured. In the earlier history of the expression it implied the general notion of enduring certain kinds of beliefs (say religious beliefs) as well as certain forms of behaviour. Tolerance arose, to a great extent, because it was viewed as the suitable alternative to endless religious rivalry. The notion was not enunciated as an ideal one, but more as a necessary evil. It became a necessity in Europe once it became apparent that neither side in the religious controversy was going to gain the upper hand decisively. The notion was that law ought to be obeyed because it is right, hence a common moral authority which would determine what is right had to be established. In general, tolerance has to prevail to make living together possible.

Many in the liberal tradition have argued that there is no right to be intolerant but that there is a right to be tolerated. According to these views we have to be tolerant not because we cannot really avoid it, but because we think it is right and desirable. Rather than being driven to toleration, it is a claim of our conscience, a part of our conception of justice, a virtue that is acknowledged to be the distinction of the best people and the best societies. Tolerance has been conceived as a good in itself, and not as a mere pragmatic device or prudential expedient.[1] This view has made every discussion on the confines of tolerance problematic.

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1. See, for instance, S. Mendus. Toleration and the Limits of Liberalism. 1989. p 3. Mendus writes in her introduction to On Toleration (1987. p 3) that three justifications are given for toleration: that it is a requirement of prudence; that it is a requirement of rationality, and that it is a requirement of morality.

At first glance, toleration involves self-restraint. The tolerator, by definition, is free to put into effect his disapproval of some group, idea, or conduct, and when he decides not to exercise his power against the unfavourable object he relinquishes the freedom he enjoyed. However, by suppressing his intended behaviour he may have increased his autonomy, his self-rule. The notion of autonomy involves the ability to reflect upon beliefs and actions, and to be able to form an idea regarding them, so as to decide the way in which to lead a life.[2] For by deciding between his own conflicting trends the agent consolidates his opinions more fully and reviews the ranking of values for himself with a clear frame of mind. The emphasis of the moral ideal of toleration is that it is rational that an individual should freely consent to being tolerant, that tolerance should be something he actively wishes to exercise even though it curtails his freedom.

Thus, imposing restrictions on oneself is a necessary part of being tolerant and, therefore, a constituent part of one's freedom. By restricting his own liberty the agent grants liberty to another. By tolerating, he introduces some overriding principles which bring him to interfere with his own liberty. By being tolerated one gains the freedom from interference by the agent. Exercising liberty so as to restrict another's liberty means that the agent does not find overriding considerations to justify the restriction of his own liberty. In this connection it is important to note that there can be liberty without any corresponding toleration but there cannot be toleration without a corresponding liberty.[3] One can exercise one's liberty without being said to be tolerated or acting as a tolerator.

People want to be free to decide their own priorities and to achieve what they conceive to be desirable; hence objects of freedom are to be defined in terms of wishes or wants of the agent involved. However, the necessity behind the value of freedom is

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2. I will discuss the notion of autonomy in the following section and explore it further in ch. 3, when analyzing the notion of neutrality.

3. Cf D.D. Raphael. op.cit. 1971. p 234.

that to be free of something is to be that much less impeded in the attempt to achieve a good life. Thus Isaiah Berlin writes: "I am normally said to be free to the degree to which no human being interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others".[4] Berlin further argues that to be free is to be able to make an unforced choice, and that there are degrees of freedom constituted by the absence of obstacles to the exercise of choice: the more avenues people can enter, the broader those avenues, the more avenues that each opens into, the freer they are; the better persons know what avenues lie before them and how open they are, the freer they will know themselves to be.[5] In this context it needs to be said that Berlin's assertions could be interpreted to mean that the given alternatives should be significantly distinct from one another and entail different consequences. At least some of them should be regarded by the actor as valuable.[6] The alternatives that are open to an individual must not be coercive ones, and the situation of choice itself must be one that facilitates our volition and ability to choose.

Furthermore, a person must be capable of understanding how various choices may affect his life and to what an extent, in order to choose. Consideration is given not only to one's rationality, but also to one's awareness regarding the options open for one. Essentially one must be able to recognize an alternative for it to be considered as an option.[7] The underlying presupposition of the concept of freedom is that the doer is

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4. Isaiah Berlin. "Two Concepts of Liberty", in A. Quinton. Political Philosophy. 1967. p 141. Berlin maintains this by elaborating on quite an old idea of the distinction between negative and positive liberty. The former is said to be the absence of external restraints on the individual's liberty, while the latter is said to be the individual's ability to develop his potentialities as a human being. For critical discussion on the two concepts of liberty see C.B. Macpherson. Democratic Theory. 1973, ch. 3; and G.C. MacCallum. "Negative and Positive Freedom", in A. de Crespigny et al.(eds.) Contemporary Political Theory. 1970. pp 106-126.

5. Berlin. Concepts and Categories. 1980. pp 190-192. For an opposing view see P. Jones and R. Sudgen. "Evaluating Choice". II International Rev. of Law and Economics. 1982. pp 47-65.

6. If one is to choose a certain option from a set of similar options, or worse, is confronted by a "your money or your life" dilemma, then these sorts of choices can hardly be said to make one freer.

7. A person, for example, may have the physical strength, hight and coordination to

autonomous to assert himself, to make critical reflections and to lead his own life independently. A person whose autonomy is absent is said to be unfree. Thus, it has been argued that whatever we think ought to be included in what passes for a liberal view, the affirmation of a certain picture of individual political autonomy, and institutionalized tolerance for that autonomy, cannot be left out.[8] Here I wish to expand on the relationships between liberty and autonomy.

B. Liberty and Autonomy

Liberty is a necessary condition for individuals to exercise their capacities independently. It is required in order to enable people to discover, from the open confrontation of the ideas that are cherished in their society, their own stand, their beliefs and their future plans of life. As previously said, the central idea of autonomy is of self-rule, or self-direction. Accordingly, the view is that the individual should be left to govern his own business without being overwhelmingly subject to external forces. One is said to be free when one's acts are not dominated by external impediments; thus enabling one to form judgment, to decide between alternatives and to act in accordance with the action-commitments implied by one's beliefs.

In this context three notes are relevant. First, one may decide not to do a thing, and as long one reaches that decision freely, without any constraints, one exercises one's autonomy. To decide not to act is also a decision. Indeed, it is also an action. In other words, autonomy implies the making of decisions. It does not necessarily imply the taking of an active action. Moreover, it has to be said that not all external forces are

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become Michael Jordan, and the talent scout of the Boston Celtics arrives to his college. However, our potential player never saw his future in sport, and therefore he is indifferent to the scout's visit. That visit cannot be said to constitute an option for him. Choice has any positive bearing on the doer's freedom if at least one of the alternatives is valuable, or desirable, for him.

8. Steven L. Ross. "A Real Defense of Tolerance". 22 J. of Value Inquiry. 1988. p 127.

regarded by the individual as impediments. Some are taken to be facts of reality, as part of our existence. Otherwise the entire notion of impediments would become absurd.[9]

The third note is concerned with the notions of self-realization and autonomy. Raz asserts that these are distinct, though related notions. He makes two hypotheses: the first holds that self-realization consists in the development **to their full extent** of **all** the valuable capacities a person possesses. He contemplates that one may exercise one's autonomy so as to decide to abstain from developing one's capacities. The second hypothesis maintains that one can stumble into a life of self-realization or be manipulated into it or reach it in some other way which is inconsistent with autonomy.[10]

It seems that reservations are required in the consideration of both accounts. As to the first, it is not clear why Raz insists that self-realization necessarily consists in **full** development of **all** valuable capacities. It is true that one may have certain capacities which one may not wish to develop (say for self-sacrifice). Yet a person may decide not to cultivate that capacity precisely because he wishes to cultivate another inherent capacity of his (say, showing love and affection to his dear ones) through which he realizes himself. One may decide to choose one path, which one regards as valuable to the extent that it outweighs other capacities with which one is blessed. He may think that he could achieve self-realization by preferring one option to the others and pursuing that path alone. Can we say that because he decided to concentrate his efforts in developing one capacity rather than another, precisely in order to realize himself, that he really did not realize himself because he neglected one (or more) of his other valuable capacities? In this example, the individual deliberately made this decision, thinking that if he would simultaneously try to develop both capacities, then he might not be able to realize himself through any of them, since each necessitates considerable effort. Thus he acknowledges that he could best realize himself through the cultivation of one capacity, which he appreciates most. Alternatively, he may decide to cultivate various valuable

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9. Walls, for example, would be viewed as a hostile barrier not only in the case of jail, but also when free citizens recognize their necessity for their own need for shelter.

10. Joseph Raz. The Morality of Freedom. 1986. p 375; "Autonomy, Toleration, and the Harm Principle", in Susan Mendus (ed.) Justifying Toleration. 1988. pp 155-175.

capacities, but not to the fullest extent. Either way, if he satisfies his aims in life, he may feel that he has realized himself.

As for the second hypothesis, Raz explains that the capacity to choose one's own life can be developed by stimulation and deceit, by misleading the person to believe that he controls his own destiny. This may be true. Yet it is not clear how a person can "stumble" into a life of self-realization. Does he realize that he has stumbled? For if he does not, then in what sense can we speak of self-realization? And if he does, can we assume that he did nothing to realize himself and just "stumbled"? In any case, we may postulate that the notion of self-realization is intelligible only if one independently makes a decision for oneself, i.e., if one exercises one's autonomy. There must be prior recognition by the doer of how he wants to live his life for the notion of self-realization to be meaningful.

Raz maintains that autonomy is exercised only if there is an adequate range of choices. To be autonomous there is a need for a variety of options to choose from, some of which might be of significance to the agent, and some which he might find meaningful to decline. Having options enables the doer to sustain activities which he regards as worth pursuing, and the reaching of such a conclusion - what is worthwhile and what is not, is often arrived at by reflecting on various, often conflicting, alternatives. A person is autonomous if he has a variety of acceptable options available to him to choose from, and his life is as it is through his choice of some of these options. As Raz notes, a person who has never had any significant choice, or was not aware of it, or never exercised choice in significant matters but simply drifted through life, is not an autonomous person.[11]

An autonomous choice does not have to be the best one available. It presupposes that the agent exercises some extent of rationality, but not perfect rationality. A person may not choose the best decision and still be considered autonomous. Moreover, there are objective limitations that stand in our way for making the best decision. We hardly ever

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11. Raz. op.cit. 1986. p 204.

make a fully informed choice, having all the existing data about a given case. So we put limits on our efforts and instead of looking for all the existing information, we speak of the required data; then it is our decision to decide what is relevant and what is not, and when to stop searching for more information. In addition, there are, of course, the questions of the availability of data and of access to centres of information.

The distinguishing feature of autonomy is, therefore, the forming of one's own discretion in a way that is supported by one's own reason, though one's rationality might be limited. One may disregard some relevant data required for making a decision, either because one does not acknowledge its relevance, or because one is unable to comprehend its meaning. Sometimes one may prefer to ignore some facts because they conflict with certain beliefs which one is not willing to yield. Nevertheless, the agent is still said to be autonomous.[12] He is not coerced to choose one alternative over another. His own ability (or lack of it) might restrain him from taking the best alternative open to him. Yet from his point of view, he is taking the best one that he can possibly conceive of, given his inherent deficiencies. Choosing the best option or thinking correctly, is not a requirement for autonomy so long as the doer exercises deliberation in assessing the alternatives. The emphasis is not on deciding the "best" options, or on holding the "true" opinions. Rather, the emphasis is put on the way in which one comes to make one's decisions, and to hold one's opinions.

Some words of explanation are in order regarding the term 'deliberation'. Deliberation presupposes a process of examining alternatives in an effort to determine which course of conduct to pursue. This process may include habitual actions. In such instances the reasons for action enter automatically into the process of deliberation. The agent has done his calculations before, considered the alternatives and has reached the decision as to which option is preferable to others. He intentionally reduces the number of options so as to avoid spending time again and again deciding which data are relevant for

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12. Marxists will probably have some reservations regarding this assertion.

assessing different courses of conduct in familiar circumstances.[13] If, in the agent's opinion, new factors emerge that deserve consideration, which - on balance - seem important enough, he may then decide to re-evaluate his former decision and reshape his behaviour. Thus, as Hollis asserts, habit is quite consistent with deliberation, provided the agent is also in the habit of monitoring his own habits to check for internal, as well as external changes, which may convince him to modify or to break his habit.[14]

Moreover, I have said that deliberation assumes some degree of rationality on the part of the actor. To deliberate may involve considerations which spectators may conceive to be irrational but which, from the actor's point of view, may be perfectly rational. That is, an agent may act in a certain way which would make others conceive of him as an "irrational" person, while "irrationality" may precisely be the notion which the agent wishes to convey to further his position. Sometimes a certain course of action which others see as irrational can award the agent more gains than he could possibly have achieved had he played his cards in an "expected", "rational" way. In international relations, brinkmanship has often proved to be a sensible policy, often bringing more gains than would have been the case had a "conventional", "rational" policy been pursued instead. Some leaders have, indeed, decided to cultivate an irrational image precisely in order to improve their position. Furthermore, we may note that deliberation does not necessarily involve only rational considerations. A person who deliberates autonomously will not necessarily choose in a rational manner. Emotions may have a bearing on the course of conduct which the doer decides to take. Autonomous people may act impulsively or emotionally and, therefore, we may distinguish between autonomous people and autonomous actions. Not every self-propelled act of an autonomous person may be regarded as autonomous. As Scanlon postulates, a person is

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13. In a similar vein, persons often categorize actions, people, facts, objects etc., so as to save time when encountering familiar data. We put labels on things, e.g. library, bedroom, theatre, spring, liberalism, ethnicity. These categories contain information that facilitate discussion and save the need for tedious explanations.

14. Martin Hollis. Models of Man. 1977. p 125.

autonomous when he sees himself as sovereign in deciding what to believe in and in weighing competing reasons for action, which may not necessarily be rational reasons.[15]

The requirements of autonomy are weak in Scanlon's view because, for him, one is autonomous if one independently applies one's canons of rationality when considering the judgment of others as to what one should believe or do. It does not matter to him that these canons of rationality may be substantially lacking. Consequently, it does not matter that a person may make decisions in an uncreative or weak-minded manner, revealing his ignorance, emotions, lack of self-reflection or any combination thereof. Thus, for instance, John may decide that his love and affection for Jane outweigh the fact, which he recognizes to be relevant, that they share nothing in common but their love. We may say that John is not rational, and John himself may agree, but still for him it is more important to live (in spite of quarrels) with the woman he loves than act rationally and give up his relationship with her. Although we may say that John's emotions prevented him from having maximum control over the situation in making his decision, we cannot say that John did not act autonomously, for no external limitations were involved. As a rational person, John is still able to reconsider his decision in the future, to criticize and evaluate it in the light of their experience as a couple.[16]

Hence, when speaking of autonomous conduct, the emphasis is put on the way in which a decision is made, rather than on the result. One chooses autonomously when one identifies and evaluates the factors that are relevant for one's decision by oneself, not all of which may be reconciled in a rational manner. This is not to say that autonomy does not require taking advice from others. On the contrary: it is for the agent's benefit to hear different opinions and to consult others, who may have more experience or information about the matter in hand, as long as these advisers do not resort to manipulation, that is, to illuminate their views by any possible means, while

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15. T. Scanlon. "A Theory of Freedom of Expression", in R.M. Dworkin (ed.) The Philosophy of Law. 1977. p 162.

16. The example assumes a certain degree of independence and rationality on the part of John. However, if a person is completely emotionally dependent on another, to the extent that he entirely lacks self-respect, independence, and self-confidence, then we may say that that person is not autonomous and, therefore, unfree.

blocking the agent's exposure to opposing views. The agent may rely on another's judgment but he must be able to hear contrary opinions and exercise his own discretion. Exploring another's opinion is a step to help him to form his reasoning through critical thinking. Autonomy requires that the final judgment be of the doer, after gathering that which he regarded as relevant and then assessing it.

The upshot of this argumentation suggests that inherent restrictions do not make a person less autonomous. An autonomous person is one who has the ability to deliberate and to make decisions on the basis of reasons (rational and emotional) and without external limitations. Internal limitations inhibit rationality, make a person less comprehending, less capable of choosing the best alternative available, but it does not follow that he is less autonomous. Only external limitations make a person less autonomous and, therefore, less free. Now we face the task of explaining the meaning of external limitations. Do they include all societal limitations, or only a part of them? Do they include, for example, norms, cultural beliefs, rules, traditional codes and the like?

From the earlier discussion of habit we may infer that norms and tradition are not to be included among these limitations. We cannot divorce individual judgments from the social and cultural context in which they are made, and more specifically from the individual's social background. For internalization of socially received concepts, beliefs and norms is a necessary precondition for critical reflection on any specific project or practice. There have to be certain points which we accept, according to which we are able to make judgments, to review opinions, and to form our views. As Connolly explains, we must always accept some concepts and beliefs in order to isolate others for critical examination; we must therefore follow some practices unreflectively now so that the source and rationale of others can be considered reflectively.[17] Thus, external constraints, when they are conceived by a person not as alien or in some way threatening to him, but rather as necessary, even as conducive to his individuality,

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17. William E. Connolly. The Terms of Political Discourse. 1974. p 155.

become self-imposed and cannot be seen to be contradictory to his autonomy. An individual internalizes norms which help him to define his convictions, to understand himself and others, as well as his surroundings. One accepts norms because they help one to perceive the world in which one lives, to define one's place in one's society. Accordingly, e.g., one adopts the norm of commitment as part of one's concept of friendship and one's concept of family, which places some restrictions on one's autonomy. But these restrictions are not viewed as impediments on one's freedom or one's autonomy. One willingly accepts such norms as ways of expressing oneself, one's sense of giving, of sharing, of love and any other affective notion that is important for defining one's world as an autonomous creature living among others. One may have an interest in giving to others because the act of giving, and the recognition that one makes others happy, contribute to one's own satisfaction, making one feel that one is a more humane person, whose personality has been "bettered". Restricting oneself in such cases does not go against one's own interests. Rather, it is conducive to promoting one's own position through the effort of contributing to others. We all have an interest in promoting egoistic motives, but for similar reasons we also have an interest in furthering altruistic notions. Thus we are willing to take on sacrifices and restraints.

Moreover, although norms prescribe ways of conduct and consequently limit our autonomy to a certain extent, they, nevertheless, do not ultimately coerce us. There is still room for non-conformism, still the possibility of rebellion, of changing the norm. A notable example in the context of democracy is the well-accepted norm of "one person, one vote". This idea, which was considered ridiculous or even dangerous only a century ago, is fully established today. Societies and circumstances change and bring people to adjust to the new developments. People recognize the need for moulding or replacing old norms with more acceptable ones. They accept a norm when it provides sufficient reasons for them to adhere to it, and to act accordingly. Thus, the prevailing view is that citizens can, upon reflection, criticize norms and try to change them when they believe, for example, that new circumstances and new times require some form of accommodation. Norms may be changed because - assuming that people are autonomous and capable of forming judgments upon evidence - there is continuous feed-back

between the people and those who maintain the norms, who ascribe to norms their institutional backing. As Connolly contends, it is not that the autonomous person takes nothing for granted, but rather that he is able and willing to question any particular project or practice and to adjust his conduct on the basis of such reconsideration. He might, indeed, accept upon examination most of the prevailing practices within his culture, but to the extent that he does so autonomously, reflective judgment and self-understanding enter significantly into his acceptance of these patterns.[18]

To conclude: the internalization of socially received concepts, beliefs, and norms is a necessary precondition for critical reflection on any particular project or practice: the initial system of concepts and beliefs that helps us to define ourselves provides the materials out of which we define and comprehend our setting.[19] An autonomous personality develops against a background of social limitations, some of which exist as a part of life, and which citizens do not regard as constraints at all. Others are regarded as limitations on liberty which citizens nevertheless accept willingly, recognizing their importance for making living together possible. Therefore, it may be more suitable to treat impediments as limiting freedom only if they restrict options that might otherwise, under the given conditions and norms, be available and eligible. The major problem is to determine the restrictions which reconcile individual liberties, and societal common interests. Indeed, this is our prime concern: what should these restrictions be and what are the grounds for introducing them? This is another way of asking: what are the scope and confines of tolerance?

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18. Ibid.

19. The issue of the free will problem concerning the possibility of transcending all hereditary and environmental influences is not considered here. Rather, the notion of autonomy that is conveyed assumes feed-backs between self and society. For discussion on the assumption that each of us, when we act, is a prime mover unmoved see Roderick M. Chisholm. "Human Freedom and the Self", in Gary Watson (ed.) Free Will. 1982, pp 24-35. See also C.A. Campbell In Defence of Free Will. 1967. pp 35-55. Criticism of this view is presented by Harry G. Frankfurt. "Freedom of the Will and the Concept of A Person", in Free Will. 1982. pp 81-95, and by Galen Strawson in his comprehensive study Freedom and Belief. 1986, esp. pp. 25-60.

In the next chapter I shall begin the task of exploring the scope of tolerance by examining the motivation for tolerance. I will proceed by analyzing two of the distinctions that were made regarding this issue. The first is that of Marcuse between passive and active tolerance. The second is Warnock's distinction between the weak and the strong sense of tolerance. Then I will make two distinctions of my own: between latent and manifest forms of tolerance, and between principled and tactical compromise.

Chapter 2

THE SCOPE OF TOLERANCE

A. Reasons for Tolerance

In coming to evaluate tolerance we have to examine the reasoning for the act of tolerance. Tolerance is conceived of as a policy which is adopted when consideration of others as bearers of rights is of significant importance in conducting one's affairs. The ability to tolerate seems to rely upon the recognition that all people share some basic features. One tolerates the other because one believes in the latter's right to hold his own beliefs and to exercise his choices freely (at least so long as he does not harm others). This qualification of "not harming others" is of crucial importance. I will explain its meaning later on, when discussing the Harm and the Offence principles.[1] Here, however, I am intrigued with the issue of the motivation for tolerance. It is commonly assumed that the motivation for tolerance is respect for people as human beings. That is: respecting the people's right to live as individuals who are capable to reason and to decide their own course of life.[2] But this might not always be the motivation for tolerance. Some might wrongly view tolerance to include any act of toleration, regardless of its motivation. In so doing they ignore the possibility that one may tolerate a certain conduct or group for expedient reasons, because it may be to one's advantage to do so. One may tolerate a certain minority because one needs their voices to be elected, or because it could be of benefit to one's business. Tolerance that is exercised for purely instrumental reasons, motivated not out of concern for others but rather directed at advancing some selfish interests, is not tolerance in the genuine sense

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1. Cf ch. 7.

2. Ch. 3 considers in detail the notion of respecting others.

of the word. Therefore it is not considered to be the subject of this essay. In other circumstances the current tolerator might adopt the opposite policy, were this to serve his interests better. Tolerance that is carried out for egotistic reasons does not respect the other's interests but, rather, the tolerator's interests. It is only a tactic, and the grounds for tolerance today may supply grounds for intolerance tomorrow.

Yet a policy of tolerance may be embraced not because of concern for the others as people but to ensure stability and order. Again, it is difficult to affirm that a certain disliked group is being tolerated in the genuine sense, according to how the concept is viewed here, for the motivation is not the belief that each should be granted equal respect and consideration, but rather keeping the peace. Those who decide to tolerate that group simply assume that not tolerating it might result in disorder which could be perilous for society. In different circumstances, the opposite conviction might be adopted using the same reasoning, so as to avoid disorder. It is, therefore, worth reiterating that tolerance in its authentic sense is taken to be a policy whose motivation is primarily the concern and respect for others: it is not suggested that we tolerate in order to ensure stability, but rather that we tolerate because we respect others as human beings who should enjoy the ability to exercise choice and lead their lives as free, autonomous beings, so long as they do not harm others. The consequences may as well be peace and order in society, but the emphasis and reasoning are totally different.

Having established what should not be counted as grounds of tolerance, the next step I wish to take is to canvass some of the notions involved in the study of the scope of tolerance. For tolerance is not a well-defined, static concept but rather a conceptual framework within which different notions and degrees of the term may be discerned. Thus, for example, Marcuse seeks to draw a distinction between the passive and active sense of tolerance. Passive toleration is said to be of entrenched and established attitudes and ideas, even if their deleterious effect on people and nature is evident; whereas active tolerance is an official tolerance toward political parties, which increases with the level

of dislike the government feels toward the political ideas and acts of the party in question.[3]

That distinction is not clear-cut and presents several problems. To begin with, it is not clear who holds and promulgates those "entrenched and established attitudes and ideas". Tolerance of ideas and of parties are often connected, for parties are propagators of ideas. Ideas are obviously the ideas of someone and, if they continue to prevail in society, then they must be supported by some group of people. In any event, whether or not to allow the "passive" toleration of ideas is a dilemma which often confronts officials: should entrenched attitudes be allowed to prevail or should they have no place in society? Uprooting these ideas may require educational and propagandistic measures. Sometimes this endeavour may necessitate the taking of a legal form, through legislation aimed at disposing of those undesired ideas. On the other hand, advocates of tolerating undesired ideas may equally adopt the same measures to protect them from intolerant groups seeking to curb those ideas and ensure their being heard. The question, then, is to what extent the harmfulness of the ideas plays a role in characterizing toleration as passive or active.

A stronger argument can be raised against Marcuse's implied supposition that tolerance is, in the main, a conduct of governments. He says that "the society seemed to practice general tolerance", but this within "the effective background limitations imposed by its class structure".[4] There is silence regarding the actual part that citizens play in the practice of tolerance. Marcuse does not specify in the first instance of passive tolerance who actually tolerates, but it may be inferred from the active sense that he means passivity on the part of the establishment: the government tolerates the disliked views, which bear no relation to any established body, and allows them to keep floating around and have their damaging effect on people. It is implied that the tolerance is passive because the ideas are not affiliated to any party. If they were, then tolerance

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3. H. Marcuse. "Repressive Tolerance", in R.P. Wolff. A Critique of Pure Tolerance. 1969. p 99.

4. Ibid. p 100.

would become active, probably because then the government would tolerate not only ideas, but also parties. The questions remain how ideas, in the first instance, come to prevail in society, and what role (if any) the citizens have in exercising tolerance.

Another distinction that has been made is that between the weak and strong senses of tolerance. Warnock suggests the following:

> "In the weak sense, I am tolerant if I put up with, do not forbid, things which it is within my power to forbid, although I **dislike them or feel that they are distasteful**. In the strong sense I am tolerant only if I put up with things which it is within my power to prevent, even though I hold them to be **immoral**".[5]

By weak tolerance, it seems, Warnock reflects on our attitude toward things or actions which we find to be merely annoying. If we simply dislike something, then this something cannot be considered by us as harmful in any significant way. In turn, strong tolerance is applied when we forbear things or actions which we find deeply disturbing, which we disapprove of. Warnock recognizes that here she is confronted with the central issue of On Liberty, which is (as she puts it) "whether the law can put up with that which is morally wrong".[6] This is another way of postulating the question: should we tolerate disapproved harmful actions? Warnock does not say whether we should allow disapproved things only so long as they do not harm others. Instead she concludes the discussion by saying that the issue of defining the limits of toleration is not one of theory only, and its solution cannot be deduced from any text, "neither the Bible, the Koran, nor On Liberty. For the limits of toleration must be defined piecemeal, each difficult case a matter of judgment and good sense".[7]

In making the distinction between weak sense and strong sense of toleration Warnock recognizes that, to some extent, a person's attitudes are influenced by the

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5. Mary Warnock. "The Limits of Toleration", in S. Mendus et al (eds.) On Toleration. 1987. pp 126-127. (Bold mine).

6. Ibid. p 127.

7. Ibid. p 139.

moral codes which prevail in his society, and that his own personality may determine the extent to which he internalizes the norms, or decides to act in a non-conformist manner. In turn, he may develop preferences and tastes which will make him tolerate non-conformism. Warnock illustrates the distinction by discussing tolerance of the torture of a child, and tolerating the wearing of sandals with a suit. The latter is an example of weak tolerance, whereas tolerating a torturer necessarily requires strong overriding reasoning. Thus, Warnock would probably agree with the assertions that cultural and societal norms determine, to a great extent, our attitudes and priorities, and that they are significant in crystallizing sets of beliefs as well as in ordaining certain types of behaviour in different circumstances.[8] Indeed, she acknowledges that cultural norms prescribe our sense of dislike. However, Warnock is careful to refrain from saying that there are unified notions, based on norms, which could enable us to say that some acts are immoral, while others are distasteful. She implicitly recognizes that one may consider a certain action to be immoral, while another may not see it as wrong in any sensible way. Warnock understands that the examples of torturing of a child and wearing of sandals with a suit are clear-cut examples, and that there may be other issues on which no sharp line can be drawn between what one dislikes and what one disapproves of. The edges between the two senses can be quite blurred. Therefore, since it is difficult to find the criteria according to which we can apply the distinction, then we would probably have to resort to her suggestion that "the limits of toleration must be defined piecemeal, each difficult case a matter of judgment and good sense".

Warnock examines the issue of homosexual (or lesbian) conduct between consenting adults. This is an illustration of a conduct upon which it is difficult, maybe impossible, to reach a universal agreement regarding what people morally disapprove of and what people merely dislike. This is, of course, a practice which is liked by some (whether or not they take an active part in it), and leave others indifferent to it. That same practice is disliked by many other people, and may bring some others to counteract, demonstrating their strong disapproval. The latter group of people conceive this conduct

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8. I shall discuss these issues in ch. 4 *infra*.

to be immoral though it does not harm others.[9] In this context considerations of culture are certainly of great relevance. Culture may conceive a certain conduct at a certain point of time as morally wrong, and thus would consider it to be illegitimate. That same culture may react to changes within society, trends, fashions, or "pressures of the time" in a way which would legitimize certain modes of behaviour by modifying its moral codes. Thus, that which may be considered today as "objectively" morally wrong may be regarded tomorrow as a subjective feeling. Cultures may adopt different moral codes in different times, as some have indeed with regard to homosexual conduct.[10]

Moreover, there may be only a few moral codes that claim universality, purporting to represent the view of any rational agent (not to murder, for instance). Most of them, however, are culturally bound. I shall elaborate on this issue later on. Here I wish to proceed by pondering "the paradox of tolerance".

B. Popper's Paradox of Tolerance and Its Modification

In relation to the distinction between the weak and strong sense of tolerance, Mendus in a recent book modifies what Popper calls "The Paradox of Tolerance". Popper explains that because of the strong belief in toleration, on the one hand, and the fear of being intolerant, on the other, people are inclined to extend toleration to those who spread intolerant ideologies, whose aim is to destroy the very foundations of toleration. Many

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9. Of course this conduct may harm the individuals involved in this practice, but a liberal-democratic society assumes that people, as rational human beings, should weigh up for themselves risks when they decide to do certain things which do not harm others, e.g. smoking, drinking and making love. Government can, and should, promote awareness and warn against self-regarding activities which are harmful, but it must not outlaw them altogether. If it did, then either we would find it difficult to call such a society a liberal-democratic society, or the laws would not be worthy of the paper on which they were written. The ban on alcoholism in the U.S. early in this century reminds us that, on such matters, law enforcement might prove to be a two-edged sword.

10. Cf the Hart-Devlin debate. P. Devlin. The Enforcement of Morals. 1965; and H.L.A. Hart. Law, Liberty, and Morality. 1963. I may add that in the 1980s, the age of AIDS, there appears to be a draw-back in the status of the homosexual community in society.

see themselves committed to treating every individual as a moral agent, and to allowing any person the opportunity to practice his freedom - even if this attitude might prove to be conducive to promoting intolerance. Afraid of being intolerant, people tend to tolerate even those who clearly oppose the very idea of toleration. However, the moral ideal of toleration does not require that we put up with anything and everything regardless. Popper asserts that it is paradoxical to allow freedom of speech to those who would use it to eliminate the very principle upon which they rely. He does not imply that we should always suppress utterances of intolerant philosophies; as long as we counter them by rational argument and keep them in check by public opinion, "suppression would certainly be most unwise". But "we should claim the **right** to suppress them if necessary even by force"; for it may easily turn out that the intolerant people are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; "they may forbid their followers to listen to rational argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols."[11]

Mendus supplements this line of argument with the distinction originally made by Warnock between strong tolerance and weak tolerance. She argues that, in the first instance, tolerance is based on moral disapproval, implying that the thing tolerated can objectively be conceived to be wrong and therefore ought not to exist. The question that then arises is why, given the claim to objectivity incorporated in the strong sense of toleration, it should be thought good to tolerate. Mendus maintains that by contrast, weak tolerance involves cases in which toleration is based merely on dislike, which do not raise the same claim to objectivity. She explains that weak tolerance does not claim objectivity for my dislike of something is distinct from my belief that that thing is morally wrong in just this sense, that there is not necessarily a commitment to the idea that the world would be a better place if the thing did not exist.[12] Mendus believes that the debate over whether the scope of toleration is such as to cover both things which

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11. K.R. Popper. The Open Society and Its Enemies. 1962. Vol. I. p 265. See also his "Toleration and Intellectual Responsibility", in S. Mendus et al (eds.) On Toleration. 1987. pp 17-34.

12. Susan Mendus. Toleration and the Limits of Liberalism. 1989. p 19.

we dislike and things of which we disapprove, is not merely a verbal dispute. Rather it is part of a general philosophical debate about the very status of moral judgments and the nature of the distinction between such judgments and judgments of taste or preference. She contends that only in cases where toleration involves more than mere dislike, and has a moral force, does a paradox arise, which involves explaining how the tolerator might think it good to tolerate that which is morally wrong. In other words, Mendus explains, we need to show how we can consistently claim **both** that toleration is a virtue, and that strong toleration necessarily and conceptually involves reference to things believed to be morally disreputable, or evil.[13] The problem, however, lies in the very distinction between the terms 'dislike', and 'morally disreputable' and 'evil': is there any common definition which distinguishes immoral things or conduct from disliked ones? And secondly, can moral judgments claim objectivity? In the last section it was argued that different cultures and different individuals may have different outlooks regarding the same phenomenon. Here I wish to claim that sometimes it is not the phenomenon as such that determines one's attitude towards it, but rather it is the combination of circumstances and conduct, as Mill noted when explaining what should be the constraints on liberty of expression.[14]

If we contemplate for a moment the example of the homosexual conduct, we may argue that some people would not regard it as an immoral act *per se* but would still see it as repugnant. Therefore they would wish that such conduct would take place only in private. They would assert that homosexual relations should not be allowed in public places, where it might corrupt "innocent souls of young people who may be passing by". Then we may press the issue and ask: what if the same conduct were to take place in a private bedroom, with the curtains open? One may argue that then it might corrupt innocent neighbours. Homosexual scenes may cause one such disgust that one may feel this conduct must not be tolerated as long as there is the slightest chance that someone might be offended by it. In such a situation it seems that the persons concerned are

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13. Ibid. p 20.

14. Cf chapter 7 *infra*.

themselves unsure about their own attitude regarding the situation they encounter. The same thing may appear to be legitimate and tolerable if done in private, where no outsider can share in the intimacy, but if there is a chance of being observed by others, then it could be considered immoral. People may come to think about a specific action when they actually encounter it; before then they might not have established their point of view, among other reasons, because with regard to some conduct it is not easy to form an opinion, as in Warnock's examples of torturing a child, and wearing sandals with a suit.

Furthermore, people who may be indifferent or tolerant of homosexual intercourse when it is done between consenting adults might not tolerate it if one of the couple were an adult and the other, say, a fourteen-years-old, even if the latter were willingly taking part in the activity. Different considerations are involved, and we can stretch the example into absurdity, discussing the extent to which curtains are open or the exact age of the consenting participants. The boundaries between what we morally disapprove of and what we merely dislike are not easily defined. That is to say, when moral issues of this kind are concerned they necessarily involve subjective judgments. It is not that moral judgments claim objectivity, while non-moral judgments express purely subjective preferences, as Mendus suggests. Moral judgments also involve subjectivity. One person may be inclined to agree with those who say that a certain conduct is objectively wrong, that no value will be lost if it is prohibited and, therefore, it ought not to exist. The same person at another stage of his life (together with other persons) may only wish that the same conduct did not exist. Moral judgments are a matter of preference.

In the following section, an alternative to both Marcuse's distinction between passive and active tolerance, and to Warnock/Mendus's distinction between a weak and strong sense of tolerance, is offered. This is the distinction between latent and manifest tolerance. With regard to the use of the term 'latent' one preliminary note is in order. In the field of sociology this term, as coined and employed by Merton, implies neither intended nor recognized notions.[15] Here the term 'latent' is used to convey only the

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15. Cf R.K. Merton. "Manifest and Latent Functions", in Social Theory and Social

notion of something hidden, as opposed to open and expressed. Both forms of tolerance, the manifest as well as the latent, are understood to be intentionally exercised by conscious agents. It will be argued that degrees of manifest tolerance can be distinguished, and that the latent form of tolerance is significant, although it is not expressed freely in the open. It is significant to the tolerator, and it is important to the overall notion of toleration that is upheld in society, whether it is expressed openly or prevalent under the surface.

C. Latent and Manifest Tolerance

We have contended that tolerance is composed of a disapproving attitude and one or more principles which override that disapproval. The disapproval may be latent or manifest. If it is manifest, it can take various forms, ranging from a lenient attitude which urges that every idea should be heard as long as it does not coerce others, and hence that every manifest form of disapproval should not abridge that right to free speech in any way, to manifest strong disapproval, which although it shows objections to a certain opinion, nevertheless believes in its right to be heard. A very lenient view argues that respect for others requires respect for everyone, whoever one may be, as well as respect for any opinion a person may wish to hold, however distasteful it may be. Every opinion has the right to compete in a free market of ideas, alongside our disapproval.[16] A less lenient attitude might convey counter-arguments and/or deeds designed to fight the disapproved and persuade the public to take sides against the disliked views. Disapproval may also take the form of manifest protest against these views, usually after losing hope in trying to influence the agent to change or moderate his conduct. Yet the overriding principles restrict the freedom of the tolerator to exercise

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Structure. 1967. pp 19-84. For its criticism C. Campbell. "A Dubious Distinction? An Inquiry Into the Value and Use of Merton's Concepts of Manifest and Latent Functions". 47 American Sociology Review. 1982. pp 29-44.

16. I will consider this argument in detail in ch. 6 *infra*.

his disapproval, with the result that the tolerated are allowed to continue carrying out their actions or conveying their beliefs. Let us examine this range of attitudes in more detail.

In the first instance, during a debate one may think that there is a point in trying to change the other's mind, to communicate and exchange views. The tolerator is willing to face the other person, whose ideas or behaviour he strongly resents; nevertheless, he respects the other's right to hold and preach them. A person may even come to a debate determined to convince the other and simultaneously not be averse to changing his own views. Attitudes of this sort afford tolerance of the opponent in the belief that he is free to speak out his opinions, and that he may be right. In such instances it is not condescension at work, nor opportunism or indifference. This sort of tolerance is distinguished from indifference because the person does care about the other's conduct and preferences. Indeed, this is the real essence and meaning of the idea of tolerance and it may be entitled "strong manifest tolerance".

There is a less strong manifest tolerance, when one is willing to confront the other but comes with a different purpose in mind. Sometimes one may be willing to take part in a public debate not so much to influence the other participant/s (the gap between the views might be too wide and unbridgeable) as to influence the spectators, those attending the debate or are in some way exposed to it, in the hope of scoring more points than one's opponent.

A still weaker form of manifest tolerance is when one tolerates the other's conduct, but is not willing to negotiate with him or do anything which might help the other convey his views. Thus, on some occasions, one may tolerate a certain opinion but not be willing to share the same platform with the other, or put oneself in any other way in what may be regarded as an equal position to him, for fear that so doing might legitimize the other's views. Another means of seeking to withhold another's views of legitimization is by walking out of the room whenever unpopular views are being expressed.

It may be reasonable to question whether these forms of action can still be considered as acts of tolerance. Skillen implies that they may not, arguing that although

such actions do not heckle, or chant, or threaten to beat up the speaker, and although the agent does not deny the other freedom of speech or prevent anyone else from hearing, it is clear that such a practice is incompatible with the activity of rational debate or discussion, and that a way of life in which people normally refuse to listen to views opposed to their own could not be considered as an open society or one in which freedom of speech could flourish.[17] However, Skillen ignores the concomitant effect of legitimization when an opinion is allowed a free hearing. Walking out on opposed views rather than rebutting them does not necessarily demonstrate little feeling for freedom of speech, as Skillen suggests. It may imply that "we don't want any part of what is said", that the gap between the views cannot be narrowed, and that there is no point in intellectual discussion because the entire fabric of presuppositions and values is different, or even contradictory. Therefore, anything which might imply legitimization should be rejected. Moreover, such a policy may be employed because democracy seems to be in danger, and thus it may be adopted as an appropriate measure of self-defence.

In addition, Skillen asserts that it appears that freedom of speech requires a culture in which minds are critically open. But when we speak of a democratic culture we speak also of trade-offs between basic liberal principles and particular principles which may require ample consideration, and which sometimes limit the extent to which we can apply the liberal principles. If we take the Israeli political culture as an example, this culture was shaped, and to a significant extent it is still shaped, under the impression of the holocaust. When the quasi-fascist Kahane was elected to the Knesset and continued to preach his ideas about the expulsion of the Arabs, most members of the Knesset adopted the habit of walking out of the plenum whenever Kahane rose to speak.[18] This action was designed to show that nothing which might imply legitimization of his views should be allowed. The implication was that the gap between Kahane's views and theirs was too wide to be bridged, so that there was no point in exchanging views and

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17. Anthony Skillen. "Freedom of Speech", in Graham (ed.) Contemporary Political Philosophy. 1982. p 154.

18. On the different measures which the Israeli democracy employed in its defence against Kahanism, see part II.

debating. They respected the voters' decision to elect Kahane, and therefore respected his right to speak and to represent their views, but they did not want to be in any way associated with them. Some of these MKs thought that Kahane was entitled to advocate his views; nevertheless they thought that such views simply had no place in Israeli society. The message that they wished to convey was that "Kahanism won't pass!".

Therefore, one may fight for the other's right to be heard, and at the same time fight to curtail the influence of the disliked views, in order not to do anything which could be interpreted as giving those views equal status. It is plausible that a tolerator may respect the other's right to voice his opinions, and may still think that some defensive measures should be taken to diminish their influence. These measures can include warnings, on the one hand, and preventing legitimization, on the other.

Finally, an even weaker type of manifest tolerance is one in which a person tolerates speech and argues for the right of distasteful views to be heard, but opposes the right of the propagators of these views to stand for elections. The argument that may be advocated here is that a liberal society should enable every concept and value to be pursued, whatever they may be (provided that they do not inflict harm upon others), but there is no requirement that every view be allowed to gain institutional legitimization. That is, we have to distinguish between freedom of expression and freedom to compete in elections. Society can endure any opinion but there is no obligation that the parliament should represent each and every view. Harmful and discriminatory opinions could be allowed to be pronounced (with certain qualifications),[19] but they may have no place in the house of representatives; they deserve no sort of legitimization by democracy to help them develop and attract more people. The underlying assumption of this argument is that when certain opinions are denied institutional mechanisms of legitimization, the propagators of these opinions will not be able to transform them into an endangering power. This attitude shows a qualified tolerance, for it denies the right to equal respect: some paths to exercise freedom and autonomy are denied because the overriding principle includes considerations of safety, either of the entire democratic

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19. The qualifications will be considered in chs. 7 and 8 *infra*.

framework, or of some parts of the community. It still allows for the exercise of a wide range of freedoms, other than standing for elections.

Thus far I have considered manifest ways of expressing disapproval. But there is a different sort of disapproval that is latent, that is not expressed publicly. It has been said that tolerance takes place when one disapproves of certain conduct and still decides to adopt some overriding principles. Accordingly, the clash between the negative attitude towards certain conduct and an overriding principle of, say, the belief in mutual respect, does not necessarily have to be manifested. One does not necessarily have to act out one's disapproval while safeguarding the other's right to exercise his basic liberties of free expression, free association, free speech, etc. One may disapprove of a certain view and do nothing to show this disapproval. It is still a form of tolerance for it contains the capacity to understand those who differ from oneself, or at least of respecting their rights and liberties despite the fact that their opinions or conduct rouse the tolerator against them. The tolerator still thinks that the others are entitled to speak or act according to their own beliefs, and to exercise free choice in leading their own lives. One may feel contempt towards a certain opinion, yet still decide that out of respect for the person who expresses it, and whom one appreciates, one had better remain silent. One may even assist that person in spreading his views. Alternatively, one may feel that a certain disliked view should be tolerated, but one does not have enough reason to express one's own views; perhaps because there is no incentive actually to show one's attitude, or one may feel reluctant to let one's opinion be known because of the risk of raising extreme opponents of the disliked view in question against oneself. One may feel that this view is marginal and not worth disputing, or that it is expressed in a remote place, and thus one's voice could not influence another's life in any way. Furthermore, in a similar vein to those who would not wish to converse with the other so as not to help him gain legitimacy, one could think that any comment that is made regarding the disliked view might give it resonance and help spread it among the public. One may think that the other has the right to exercise his liberties, but one is not willing to help him in any conceivable way. One tolerates the other's conduct, but one is not willing to

do anything that might assist him to gain support for carrying out the disliked conduct. This latent form of tolerance is a matter of conscience, like the manifest tolerance, but unlike the latter it does not become public knowledge.

It is important to emphasise that this position is a form of tolerance because there is a definite attitude against a certain conduct, and some overriding principles are held which make one refrain from exercising liberty to restrain that conduct. The only difference between this and manifest tolerance is that, for various reasons, a person decides to keep his position to himself. It should be further noted that latent tolerance does not differ from the manifest variety in the sense that the latter safeguards or extends the liberties of the tolerated, while the former does not. Being tolerated in any form - latent or manifest - does not necessarily entail the extension of political or other rights. One, or more, may tolerate a discreditable minority, and this still would not have any positive effect on the minority's position in society.

In this context of latent tolerance, we also may speak of different senses of tolerance, though it is somewhat more difficult to speak of stronger and weaker forms of latent tolerance. We may argue that when one disapproves of a certain group or a certain conduct, but still assists this group in conveying its disapproved views (say by providing the group with public forums), or helps a group or an individual in carrying out a distasteful deed (say a mother who helps her daughter to do a punk haircut), one exhibits a strong sense of latent tolerance. With regard to weaker forms of latent tolerance, we may note the difference between situations in which, for example, one holds this form of tolerance either because one is afraid of risking one's position in society, or because one is remote from the distasteful phenomenon, or because one thinks that the phenomenon in question is marginal, and/or insignificant. Notice the difference in motivation between this latter view and the view that any reference to the disliked or disapproved phenomenon might contribute to its legitimization.

A question arises whether or not the latent form of tolerance can be counted as significant. It would appear that the argument can be subjected to the same criticism of practicability which previously was directed against Mendus's distinction between that which is disapproved and that which is disliked. What is the meaning of this tolerance

when the tolerator resents a certain conduct but does nothing to manifest his resentment? Moreover, while we recognize that latent tolerance cannot be regarded as indifference, it could still be argued that when tolerance is latent then silence prevails, and consequently we cannot distinguish it from indifference. However, when citizens adopt a tolerant attitude, the latent form included, then they do have an opinion; the issue at hand does matter to them, and this attitude does have an impact on society, on the people's norms and general attitude towards a disliked group. A tolerated group still gains something from the lack of interference on the part of the tolerator. Ethnic minorities, for example, which are out of favour with the government, may still live in a tolerant atmosphere.[20] This point takes us to the further argument which explains why latent tolerance is significant. It postulates that this is a meaningful form of tolerance because latent tolerance does not necessarily stay latent. There may be a trigger which will transform it into a manifest form of tolerance. And even if such a transformation does not take place, latent tolerance is still important because it is significant to the tolerator. It indicates to the tolerator the relationship of his priorities to those of the society in which he lives. It is vital to any conception of self, society, or value. Any form of tolerance is valuable not only for the tolerated, but also for the tolerator. Latent tolerance, therefore, counts because of its contribution in shaping a frame of mind, a conception of the good and the right, and the establishment of priorities:[21] which principles are important enough to override disapproval? When disapproval should be manifested? And at which point does the disgust, or revulsion, override the principles appreciated so as to limit the extent of toleration of the disapproved action? This contribution, I wish to suggest, cannot easily be ignored.

Another important distinction that deserves mention concerns the principles which may lead a person to take a certain position, whether tolerant or intolerant. The

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20. Polls may detect the prevalent notions under the surface and give an indication of future policies regarding the tolerated, sometimes with regard to related concerns as well.

21. The next chapter is concerned with the issue of conceptions of the good.

conflicting principles may reflect a tension between the citizen and his society. One may override cultural norms and hold tolerant views which are scarce in society. One can be said to be tolerant when one overrides one's own disapproval, and also when one overrides certain disapproving norms of society, say when showing consideration for others whose culture, nationality or religion is disapproved of by vast sectors of one's society. The focus here is put on prevailing norms which one acknowledges, and may even assume to have a firm basis. Still, the agent himself adopts a more tolerant attitude than society, and thus is willing to override his negative feelings toward the phenomenon in question. Although it can be argued that the norms a person internalises are also the norms of society, the overriding norms internalised are not necessarily the norms that prevail in society. Someone may, for example, live a considerable period of his life in a different culture, internalise its norms, and then return to his home country and try to apply the internalised standards at least to his immediate, close surrounding. Then he may feel that his society should tolerate some norms and/or groups which currently it does not, and *vice versa*. Thus, in a democracy where there is no separation between state and religion, and all weddings are required to be religious ceremonies, it may be felt that people should be able to get married in a secular ceremony. In such cases, when one adopts principles which clash with norms prevalent in society, one may prefer the latent type of tolerance so as not to arouse antagonism. Certainly, one would confront enormous difficulties in openly manifesting one's overriding principles in favour of certain groups or forms of conduct which are unpopular in one's society. To take another example, being "pro choice" in a society whose prevalent norm is "pro life" might portray the tolerator of abortions as one who is an enemy to life, an enemy of those who are yet to be born. He may prefer to keep his opinion to himself.[22]

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22. Again, it should be emphasised that in neither case - when one overrides one's own disapproval, or when one overrides a societal disapproving norm - does it directly follow that the rights of the tolerated have been extended or even safeguarded. However, when tolerant views are shared by many there is a cumulative influence on society, which makes it more open and pluralistic in its character. In such a case, the resultant contribution is of non-interference, so that those tolerated are granted freedom from interference on the part of the tolerator. Still in order to safeguard and extend the rights of a disliked group, it should enjoy some form of public support.

In this connection one final comment has to be made. Earlier it was argued that tolerance may evolve from two main sources: expediency, in terms of self-interest, and respect for others as human beings. I have excluded the first from being considered as a tolerant act, arguing that tolerance is concerned mainly with consideration for others. Now it seems that one qualification has to be introduced. If one adopts overriding principles which support certain positions, or which are in favour of granting equal rights to certain groups which are discriminated against in society, one may adopt latent tolerance and try to make marginal improvements on behalf of that discriminated group, rather than trying to rebel against society. There is not much point in risking one's own position in society by rising to fight for the rights of that group. Although it is, in a way, a case of self-interest, this motivation for tolerance differs from the "pure" cases of self-interest because the main motivation in tolerating the other, or in tolerating a certain conduct, is still respect for the other's rights. There is not much point in taking an overt stand against society, knowing that the forces of intolerance are powerful enough to exclude the tolerator, in some way or another, from the society. Nothing comes of fighting windmills.

A notable yardstick to measure the extent of tolerance that prevails is the amount of freedom enjoyed by minorities in a given society. There is a great need for tolerance when there is a multitude of deep cleavages within society. These cleavages may be created by, *inter alia*, differences in religion, ethnicity, race, culture, ideology, or language. A society which accepts the pluralistic idea is likely to acknowledge the need for the expression of every group interest within a society and be willing to grant a certain extent of autonomy to minority groups.[23] The motto of such a society can be phrased in the language of English civil law: "So use your own that you do not harm another". It may be true that amidst the roots of acceptance there may be a tacit tension

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23. Wiggins lucidly expresses this liberal outlook by saying that human interests and concerns are as indefinitely various and heterogeneous as are human predicaments. Even moral interests and concerns are indefinitely various and heterogeneous. Therefore, there is no general reason to expect that a common moral consciousness will issue in some rational disposition to single out just one from among all the moral/practical alternatives apparently available in any situation. Cf D. Wiggins. Needs, Values, Truth. 1987. p 174.

between different groups and organizations who possess some power, but nevertheless, the guiding principle is that every group recognizes the demands of the others, and even if it does not accept the other's ideas, it does accept the other's right to express and to pursue them. The aim then is seen not as to secure complete agreement on every question, though democracy certainly welcomes crystallization of consensus, but rather to administer an exchange of views between different groups with different interests. This process involves free debate and open, mutual criticism; for when discussion is engaged in between the majority and minorities, or among the minorities themselves, the range of opinions is further broadened by the inclusion of new elements, or by the modification of old ones. Free discussion is essential for reaching some form of understanding. The commonly accepted method in this process is compromise - a principle whereby that which divides is rejected in favour of that which unites the people.

D. Principled and Tactical Compromise

According to the Oxford English Dictionary 'compromise' is a "settlement of a dispute by which each side gives up something it has asked for and neither side gets all it has asked for".[24] The settlement may be achieved by consent reached by mutual concessions. It can be reached without any external interference or assistance, or by arbitration. In other words, we may distinguish between two types of compromise: the directly negotiated one and the third party compromise. In any event, when compromise takes place between two or more parties, the emphasis is on reciprocity, i.e., the concessions are mutual. Compromise is made possible when each side values more the things that can be achieved than the things they are required to give up.

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24. Oxford Advanced Learner's Dictionary of Current English, ed. A.S. Hornby. 1974.

There are preconditions to compromise. The discussion presupposes that some forms of communication and cooperation take place between the involved parties,[25] and that they speak the same language, in the sense that they share some basic norms which form the grounds for potential understanding. As was said earlier, when divergences become so fundamental that can no longer be compounded, then no compromise can be reached. There is simply nothing to talk about. Thus, to reach an agreement or at least some form of understanding, an appeal to some common norms has to be made. Sometimes the appeal must also include norms which are known to be of particular importance to only one of the sides (say **A**). This can be done if these norms are not repugnant to the other side (**B**). **B** may regard certain norms as inconvenient, but still may view them as practical and acceptable, necessary to make communal life possible.[26] Then **B** may recognize the force or sincerity of the opponent's view and - while not agreeing with **A**'s position - still accept **A**'s right to hold it.

Another favourable condition for compromise is mutual respect. In compromise, interests are accommodated rather than regulated, and this accommodation should be inspired by the respect one feels for the autonomy of the other. When one is sensitive to the rights of the other, then one will prefer settlement to coercion, and be more willing to acknowledge the need for concessions in order to reach an agreement. I shall consider this principle of mutual respect more closely in the next chapter. Here, however, two further contentions are pertinent:

1) Compromise is not only a matter of two or more parties dealing with a common subject of concern or resources. Sometimes a compromise is made by one side with regard to its aims, in deciding how to allocate the available means and in determining priorities. Compromise then often comes to be the requirement: to compromise between the different demands, needs and ideas which are to be pursued and satisfied; between

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25. Notice that compromise requires some kind of cooperation, but not all forms of cooperation require compromise.

26. For example, norms which demand that secular people not drive on Sabbath in religious neighbourhoods.

what is believed in, and the circumstances. In short, people often compromise between the "ought" and the "is", between that which is aspired to, and that which is given in reality. In this connection the given circumstances, conflicting goals, scarcity of resources, uncertainty, complexity of the subject involved, availability of means, time pressure - all these reasons among others may induce a party to compromise in making a decision.

A relevant distinction that can be suggested is that between principled compromise, and tactical compromise. A principled compromise is a mutual recognition by each side of the rights of the other, which leads them to make concessions so as to enable them to meet on a middle ground. However, since political disputes frequently involve conflicts of personality, character, and of distinct sectional interests, settlements might turn out to be no more than a temporary arrangement, reached as a result of time constraints. This type of compromise is not made out of an effort to bridge the gap between rival groups. Rather it is a compromise which at least one side is forced to accept under given circumstances. That side would have no qualms about violating the common understanding and trying to gain a further advantage at the expense of the other should a proper opportunity occur. This is what I call tactical compromise, to which agents resort without giving up any of their aims. It is made only because one party realizes that the end could not be achieved by one decisive move, and thus it should be realistically reached in stages. There is no genuine willingness to give up part of the interests involved but only to postpone the deadlines for their achievement. If there is any compromise here, then it is within one party, and not between different parties. The essential component of compromise, namely mutuality, is lacking. This, of course, is not the sort of compromise being examined here, nor the one which is encouraged by democracy.

2) Compromise is not an end in itself. It should be plainly said that compromise should not be made for its own sake, just because there is a need to take into account the preferences of others, no matter what these preferences might be. To extol the

virtues of compromise simply because it resolves conflicts peacefully and satisfies the interests of some is to exalt means over ends and to judge the merits of the method used in settling a problem, rather than its core. Nothing in the arguments for compromise suggests that compromise is a self-sufficient principle that can be divorced from moral, or other considerations. There are claims that are not permissible either to press or to accommodate, as there are limits to what may be decided democratically. Here we may specifically speak of instances where compromise is being achieved between two (or more) parties regarding their common stance towards a third party. Situations can be envisaged in which two parties come to sit together and out of respect for each other make concessions that are reached at the expense of a third party. There is a fundamental question of moral legitimacy which precedes the act of compromise. The issue is whether compromise is compatible or incompatible with integrity and with some sense of justice. Compromise should be considered and reached according to the content of the demands, with regard to their substance and meaning. If the values at stake contradict human rights, inflicting harm on society or part of it, then tolerance prescribes a need to refrain from making concessions just to satisfy the wills of the exploitative party/ies.[27] The fact that a combined power - joined through the making of compromises with the intent of exploiting a certain minority - is literally stronger than that minority, does not imply that might makes right. A majority can hold destructive views and the mere fact that a considerable number of people are involved does not make beliefs just; it only makes the situation more terrible.

At this stage I wish to begin the task of prescribing boundaries to liberty and tolerance according to the two basic principles which are conceived to be fundamental in a liberal society. These are: to grant others equal consideration and respect, and not to harm others. The analysis starts by considering in detail the Respect for Others Argument and the related anti-perfectionist argument, which professes neutrality on the part of the government, or the state. This argument is advanced in order to maintain

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27. Here I refer to acts of appeasement, when one party may be willing to cooperate with another to exploit a third party.

pluralism, with the result of enabling each citizen to pursue his or her conception of the good. I shall argue that this argument both gives grounds and sets limits to tolerance. Then, in the subsequent chapters, I will explore the Millian theory and specifically the Harm Principle. The main question which will be addressed is: what is to count as a justified restriction on choice, which amounts to the restriction of one's liberty? In another phrasing the question is: what constraints should be introduced to tolerance?

Chapter 3

WHY TOLERATE? THE RESPECT FOR OTHERS ARGUMENT

A. Preliminaries

The aims of this and of the following chapters are **(1)** to analyze the grounds for toleration and **(2)** prescribe restrictions for liberty. The arguments which will be postulated are derived from the liberalisms of Kant and Mill, which are among the more celebrated creeds that are prominent in the literature:

A) The Respect for Others Argument - this is based on the Kantian, deontological argument. The defence of personal liberties which advocates tolerance is founded on the assertions that we ought to respect others as autonomous human beings who exercise self-determination to live according to their own life plans; we respect people as self-developing beings who are able to develop their inherent faculties as they choose (i.e., to develop the capacity they wish to develop, not every capacity that they are blessed with).[1]

In turn we respect them so as to enable them to realize what they want to be. Each individual is conceived as a source of claims against another person, just because the latter's resolution is his own, made by him as a free agent. If we pursue the idea of tolerance to its logical extreme, then to regard the other with respect is to respect his decisions, because they are his, regardless of our opinions of them. We simply assume that each of us holds that his own course of life has intrinsic importance, at least for him, and we respect his reasoning.

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1. For instance, one may have the capacity to be Florence Nightingale, but it is against one's interest to develop that capacity.

A related argument advocates tolerance on the part of citizens and government, to enable citizens to live their lives according to their own moral tenets and the values which they hold most dear. It urges that **(a)** every person should be able to pursue his own conception of the good, and **(b)** that the government should take a neutral stand regarding these conceptions.[2] The first part of the argument needs to be qualified, otherwise it does not make sense, for it might bring about the negation of respecting others. I shall express my reservations in a minute. The additional advocacy of neutrality on the part of the government, or the state, is part of the more general doctrine of anti-perfectionism. This doctrine conceives state perfectionism as a policy which would serve to distort free consideration of different ways of life, to harden the dominant ones, whatever their intrinsic values may be, and to exclude unfairly the values and aspirations of marginalized and disadvantaged groups within the community. It further argues that state perfectionism raises the prospects of a dictatorship of the articulate and would unavoidably penalize those who are inarticulate.[3]

In formulating the Respect for Others Argument I will insist on the need for presenting some qualifications which would have constraining effects on toleration, without defeating its very idea. I shall argue that if we refrain from introducing qualifications, then we face the danger of transforming tolerance into a self-defeating concept and, in turn, we might undermine democracy (the "democratic catch"). Thus, one should give equal consideration to the interests of others and should grant equal respect to the others' life projects only so long as these do not deliberately undermine the interests of others by interfering with those of others in a harmful manner. The focus here is placed on the rationale of mutuality, on keeping the roles and principles of the game by all participants.

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2. Cf B.A. Ackerman. Social Justice in the Liberal State. 1980. pp 11, 43, 346-348.

3. Cf Will Kymlicka. "Liberal Individualism and Liberal Neutrality". 99 Ethics. July 1989. p 900.

B) The Harm Principle - through the review of the Millian theory I shall try to formulate some relevant criteria that should be taken into account when dealing with boundaries of liberty.[4] I will briefly consider what restrictions were introduced by Mill on liberty of action, and then go on to discuss the constraints on liberty of expression.

Mill argued that as human beings should be free to form opinions and to voice them without reserve, so freedom of action is a precondition for the development of individuality. Without liberty of action one is not able to choose between different paths of action, nor can one experiment different plans of life: "As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living".[5]

However, these arguments are not tantamount to an assertion that acts should be as free as opinions. Mill contended that "[N]o one pretends that actions should be as free as opinions".[6] He saw freedom of speech as a special case of other-regarding acts which should enjoy almost complete immunity from state interference or control. Mill warned against human inclination toward intolerance and suppression, asserting that human propensity is to curb unwanted criticism, and to impose opinions as a rule of conduct on others.[7] He, however, did not deny that expressions may cause harm. In what he regarded as extreme circumstances Mill explicitly admitted the importance of restricting them. I shall discuss Mill's theory after the analysis of the Respect for Others Argument. Following his reasoning two principles will be formulated: the Harm

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4. The subject of freedom and its limitations is discussed by Mill in the article "Law, Libel and Liberty of the Press" (1825); in his chapter on the methodology of social science in Bk 6 of the System of Logic (1842); throughout his book Principles of Political Economy (1848); in Dissertations and Discussions (1859); in chapter 26, on the freedom of the will, of An Examination of Sir William Hamilton's Philosophy (1865); to some extent in his essay "The Subjection of Women" (1869), and in the most extensive way in On Liberty (1859).

5. On Liberty. pp 114-115 (all references are to Utilitarianism, Liberty and Representative Government. 1948. Everyman's edition).

6. Ibid. p 114.

7. Ibid. p 77.

Principle and the Offence Principle, asserting that these render speech liable to restriction when it is, or is most likely to be, harmful. It will be maintained that consideration has to be given not only to physical harm, but also to psychological offence which is morally on a par with harm. If not, then freedom of expression might be abused in a way which contradicts, to use Dworkin's phraseology, fundamental background rights to human dignity and to equality of concern and respect, which underlie a free democratic society.[8] Let me first discuss the Respect for Others Argument.

B. The Respect for Others Argument

Toleration has been viewed in positively charged terms: as a right, as a virtue, and also as an ideal.[9] As a result, the idea of tolerance is closely associated with the idea of being humane and, more specifically, with the notion of respect for people as human beings. Thus, for example, Dewey suggests that an anti-humanist attitude is the essence of every form of intolerance. Movements that begin by stirring up hostility against a group of people end by denying them all human qualities.[10] Similarly, Marcuse points out that tolerance is an end in itself by explaining that the elimination of violence and the reduction of suppression to the extent required for protecting people and animals from cruelty and aggression are preconditions for the creation of a human society.[11] He goes on to concede, and thus qualifies his initial assertion, that tolerance is an end in

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8. R.M. Dworkin. Taking Rights Seriously. 1977. pp 266-278; "Liberalism", in A Matter of Principle. 1985. pp 181-204.

9. See, for instance, Peter Nicholson. "Toleration as a Moral Ideal", in J. Horton and S. Mendus (eds.) Aspects of Toleration. 1985. pp 158-173.

10. John Dewey. Freedom and Culture. 1939. p 127.

11. It has to be noted that Marcuse includes the capitalist system as such within his conception of violence.

itself only when it is truly universal.[12] In turn Rawls asserts that "the public culture of a democratic society" is committed to seeking forms of social co-operation which can be pursued on a basis of mutual respect between free and equal persons,[13] and we may recall that Dworkin regards not only tolerance, but the entire political morality as resting on the single fundamental background right of everyone to human dignity and to equal concern and respect.[14] By speaking of background rights Dworkin means rights that provide a justification for political decisions by society in the abstract, without connecting them to any specific political institution. Let us consider this argument for a moment.

Dworkin implies that his aim is to claim that some rights are better viewed as universal, as applicable to every political framework, because they are essentially derived from the conception of people as human beings. Such is the right for equal concern and respect.[15] This right may be morally applicable to any society, whatever this may be, but Dworkin would agree that this right may not necessarily be morally convincing. That is, it may not necessarily be one that every society would wish to adopt. Indeed, the Respect for Others Argument can be said to underlie a liberal-democratic society and not just any society.[16] In a society of sadists, people may not see any contradiction in conceiving fellow people as human beings, and doing their best to harm them. In such a

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12. Marcuse. "Repressive Tolerance". op.cit. 1969. pp 96-98.

13. Rawls. "Liberty, Equality, and Law". Tanner Lectures on Human Values. 1987, sec. III; "Justice as Fairness: Political not Metaphysical". 14 Philosophy & Public Affairs. 1985. pp 223-251.

14. R.M. Dworkin. op.cit. 1977. pp 266-278; "Liberalism", op.cit. 1985. pp 181-204.

15. See Dworkin. "Hard Cases". 88 Harvard L. Rev. 1975. pp 1069-1071.

16. I am not suggesting that currently there is widespread agreement in constitutional democracies that all people should be accorded the same rights and opportunities. Unfortunately this is not the case. I think, however, that this is one of the major ideas of liberalism and that liberal-democracies should strive to apply it. Furthermore, I may add, sharing Hampton's view, that we have an obligation as philosophers committed to arguing with, and thus respecting, our fellow human beings to persuade opponents of this idea and thus to change their minds. Cf Jean Hampton. "Should Political Philosophy Be Done without Metaphysics?". 99 Ethics. 1989. p 813.

society one (**A**) who sees a fellow person (**B**) drowning in the river may not be indifferent to the scene. But instead of giving **B** a hand, **A** may smile and cheer on the drowning man to depart from the world as slowly as possible. **A** does not consider the possibility of saving **B** for what we regard to be humanistic reasons. Rather, **A** may save **B**'s life if he may think that he could inflict on **B** further pain for his own enjoyment. Only then may **A** bother to calculate the risks involved in such a deed. **A** knows that if the situation were different, and he were in **B**'s position, then he would have received the same treatment from **B**. In this sense, people in this society are accorded what we understand to be equal (dis)respect and (ill)concern. Furthermore, they may encourage the happenings of such "happy" occasions. In a society of sadists no one has a moral obligation to give a hand to one's fellows; no one has a moral right to be rescued by fellow members of the community. And if a member of the community is happened to be a humanist, then he either will have to find a way to leave his community or to accommodate his views. Furthermore, if he would ask liberals from outside communities to help him in changing the set of values of his sadist community, then some would argue that it would be wrong for them to impose their values on that community.[17] Thus, for practical purposes, instead of speaking of universal background rights, I shall speak of the Respect for Others Argument in the context of a liberal society. We may note that sometimes Dworkin speaks of the right of each person to respect and concern as an individual only in the context of liberal democracies.[18]

The notion of treating people with concern means to treat them as human beings who may be furious and frustrated, who are capable of smiling and crying, and to treat them with respect is to treat them as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.[19] That is, respect for human

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17. The case would be different if the sadist community were to exist as a sub-culture within a liberal democracy. I will expand on this issue in chapter 4 *infra*.

18. Dworkin. "Liberalism". op.cit. 1985. pp 196, 198; Taking Rights Seriously. 1977. pp 272-273.

19. Dworkin's terms 'concern' and 'respect' signal the values of well-being and

beings involves the presupposition that others should be allowed to make their own decisions, based on their own conception of what is good and just. Respecting a person is the result when one gives credit to the other's capacity for self-direction, acknowledging the other's competence to exercise discretion when deciding between available options. Accordingly, each person is viewed as speaking from his own particular point of view, having perceived his interests in his own way. We, of course, may be asked to give our opinion, or decide to express our view anyway; nevertheless, we recognize the other's right to make his own choices. We recognize that the final decision rests with the agent himself.[20] We accept the idea that every person should be respected and treated as a moral agent whose views can be discussed and disputed, as a person who is capable of changing his opinions if rational grounds are provided.[21] Respect for a person means conceiving the other as an end, rather than as a means to something.

Thus, tolerance is concerned primarily with the consideration of others. To invade another's way of making a decision for himself by enforcing certain directions is to fail to recognize something which is private, which is valuable and important to him. Respecting others is, of course, a matter of degree. We do not assume that every person grants every other person exactly the same respect. Some people are more to our liking than others, as some opinions are more appealing to us than others. There are many factors that influence one's decision as to how one should treat another and in what ways one should show one's respect toward one's fellows. Here, however, I refer to the

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autonomy, respectively: we ought to show equal concern for each individual's good and equal respect for his autonomy. Cf Allen E. Buchanan. "Assessing the Communitarian Critique of Liberalism". 99 Ethics. 1989. p 879.

20. This so long as one operates within the area of tolerance, i.e., so long as one does not harm others.

21. We should note that there are certain groups of people (e.g. retarded, autistic) who lack the basic characteristics of rationality and/or the ability to communicate with others, to identify alternatives, etc. These groups are accorded different kinds of respect and concern.

most fundamental level of respecting the other's right to hold beliefs, and to put his own interpretation on his own life, i.e., to exercise his discretion and to deliberate as an autonomous human being. The underlying motivation is, to use Hillel's famous dictum, "[W]hat is hateful to you do not do unto your fellows".[22] As you expect others to appreciate the fact that your beliefs are of significance to you, so you must accept that others' beliefs do matter for them.

The Respect for Others Argument as constructed in this thesis is grounded on Kantian ethics, which is based upon reflexive self-consciousness. The notion that is prescribed is that of obligation which tells us how to behave. According to Kant an action has moral worth only if it is performed from a sense of duty.[23] Duty rather than purpose is the fundamental concept of ethics. It commands us to accept moral codes because they are just, regardless of the other's attitude towards them. This deontological ethics proscribes a certain set of actions, with the effect of constraining our range of options, not because the results will be useful, but because this set of actions is incompatible with the concept of justice. Following this reasoning, the Respect for Others Argument urges us to give equal consideration to the interests of others, and to grant equal respect (within limits) to the way of life of others. This kind of egalitarianism, however, does not require that we perceive all interests of others in a similar fashion, nor does it command us to sacrifice our own interests in the course of respecting others. The pursuit of the Kantian directive does not demand to grant toleration to another out of respect when he might take advantage of it to curtail our liberties. Doing that may resemble a boxing match where one boxer anxiously seeks to shake his opponent's hand at the beginning of the fight and refuses to open the fight before doing so (that is, as far as he is concerned), while his opponent ignores the referee and takes advantage of every such attempt (in which our fair fighter opens his

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22. Babylonian Talmud. Sabbath 31a.

23. For discussion on the use of the terms 'obligation' and 'duty' see R.B. Brandt. "The Concepts of Obligation and Duty". LXXIII Mind. 1964. pp 374-393.

defence) to punch him as hard as he can and finish the fight before the other has started it. In such a case, respecting the other's autonomy, the other's interests, clearly and necessarily might be self-defeating.

Consider the further example of someone's decision to become a Stalinist. Then we respect a minority's decision to follow Stalinist ideas. Of course we democrats grant the minority respect as regards the democratic right to become a majority. We end up violating interests of various sections of the population, or with no respect for human beings at all. Should we, then, tolerate the other whose ideas respect neither us, nor the rules of the game (assuming that the idea of the dictatorship of the proletariate cannot be reconciled with liberal democratic norms)? In such a case, whatever policy we adopt, we are bound to violate someone's interests: either our own, or someone else's.

It is important, therefore, to qualify the Respect for Others Argument by saying that every person should be able to pursue his own conception of the good, as long as he does not harm others.[24] Ackerman, however, does not acknowledge the importance of this qualification. We may recall that according to his view every person should be able to pursue his own conception of the good, whatever this conception may be.[25] Ackerman asserts that any form of social life that makes sense to any significant group will find a place in the liberal state. He implies that people lead their lives in accordance with their ideals, or conceptions of the good.[26] Ackerman maintains that any form of social life will survive so long as it continues to convince a fragment of the next generation that the ideal it puts forward deserves the respect of a free and autonomous person.[27]

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24. Cf Dworkin. "What Liberalism Isn't". XXIX N.Y. Review of Books. 1983. p 47. We may respect our fellow man **A**, respect **A**'s decision to steal from **B**, think that it is wrong, and with all due respect punish **A**. This is perfectly consistent with the Respect for Others Argument.

25. Cf fn 2 *supra*.

26. Ackerman. Social Justice in the Liberal State. 1980. pp 43, 54, 348.

27. ibid. p 348 (underline mine).

However, this argument would allow a Stalinist movement to go from strength to strength in the way that I have just described. This argument has to be rephrased with reservations, otherwise it might bring the negation of liberalism and the values which Ackerman so vigorously cherishes, namely individuality and neutrality.

A counter-argument that Ackerman may formulate in response is that he spoke of "any form of social life", while I took an extreme example of an all-encompassing ideology, which re-shapes society. But then one has to explain the meaning of "any form of social life". In any event, sadism or bigamy or an association in certain cults (like worshipping Satan) are surely forms of social life, so it might be better for Ackerman not to speak of <u>any</u> form of social life. Moreover, the issue is not whether we speak of ideology, isms, forms of life, or certain activities. Not only ideology or "any form of social life", might change the character of society, but even certain conduct might bring the same result. Thus the necessity of adding the qualification of not harming others. Let us consider the following scenario to clarify my assertion.

A significant group in the liberal state of Nemgal decides to start doing experiments on, say, short people. For the sake of argument let us assume that there is no snowballing effect to other spheres of life, and that in all other respects Nemgal is similar to any liberal state. The group sincerely believes that this is the best way to derive medical conclusions which would benefit humanity. It convinces the next generation of the importance of this conduct, and it also may "convince" other people, who believe that the doing of experiments on people (whoever they are, i.e., short, blond, old, twins, etc.) is an appalling policy, to adopt this conduct. Ackerman does not explain which forms of "convincing" others are legitimate, and whether some forms should be excluded from a liberal state. The result might be that all will be convinced (with or without a quotation mark) to adopt the making of experiments on short people as the best way for improving their living. The question is, however, whether or not we can call such a state a liberal state.

Therefore, it seems unavoidably necessary to qualify the deontological argument. The Respect for Others Argument may serve as a guiding principle so long as the

interference is not harmful, and does not deliberately violate the interests of others.[28] The focus is also on the rationale of mutuality, on all participants abiding by the rules of the game, otherwise they exclude themselves from the status of participants. That is, **M** regards **N** as a bearer of rights and would expect **N** to respect him in the same manner when reaching decisions. This requirement of mutuality applies to individuals, as well as to institutions. Thus individuals will respect others when they accept the Respect for Others principle. And similarly, the government has to allow pluralism to prevail, and respect each and every group in society, as long as these groups respect the institutions and accept the rules of the game, i.e., the rules which enable the existence of a liberal-democratic society.

Until now I did not say much about neutrality and the idea of "the conception of the good". Their meaning will be clarified in the next section. Before taking this endeavour, however, two notes are in order. It has been said that tolerance should prevail to enable each and every person to pursue his own conception of the good. The first note is concerned with the term 'pursue'; the other with the limits of state interference in the ways people decide to lead their lives.

In my discussion I am using different terms regarding what one may do with ideas. Thus the terms 'pursue', 'promote', 'preach', 'advocate', 'further', and 'advance' are frequently mentioned. All of them convey a similar notion: the notion of making an effort to convince others about the "rightness", "truthfulness", or "goodness" of one's conception of the good. These terms convey the notion that a person tries to gain support, vindicate, or recommend a certain set of values which he holds dear, a certain conception of the good which he sees to be meaningful. These terms do not necessarily involve the taking of action, besides verbal reasoning. The reasoning may, at some point, lead to the taking of action. But the saying that one 'advocates' or 'advances' a certain conception of the good does not imply that words are directly linked with action.

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28. One may further suggest, following Mill, that under the Respect for Others Argument people should not neglect their societal obligation of helping the needy in life and death situations. That is, a person who sees his fellow person drowning has the obligation to jump into the water and save him, if he has the ability to do so.

It is important to note this because I see a difference between presenting a view and the convincing of others to take steps to bring something about; between an abstract preaching and urging others to take an action. It seems that the government can give much more latitude to the 'furthering' of a conception of the good than to the actual taking of measures to implement it and to bring it about. As the United States Supreme Court held, there is a difference between advocating a mere abstract doctrine of forcible overthrow of government, and an action to that end "by the use of language reasonably and ordinarily calculated to incite persons to such action".[29] I shall elaborate on this issue in **chapter 7**, when specifically addressing the question: what should be the confines of freedom of expression?

As for the second issue concerning the limits of state interference, I have said that enabling each and every person to pursue his own conception of the good does not entail that the role of government is to secure equal opportunity for individuals to promote any conception of the good they may decide to hold, whatever that might be. Someone may adopt a conception which he sees as a conception of good, but which we regard as a conception of evil. If its consequences are harm to others then we should not tolerate that conception. However, the question that is now open is: what should be the limits of interference? In other words, we may think of sub-cultures within a liberal society which would like to have an autonomy to exercise their values according to their traditions. Some of these values may not be compatible with liberalism. Should we interfere or should we tolerate them? Here we may press the further question of whether there are shared ideas and values that characterize a liberal society, which constitute a basic conception of the good. That is, whether there is a general conception of the good that provides the basis for a liberal society. Let us now consider these questions.

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29. *Yates v. U.S.* 354 U.S. 298 (1957), at 1075. See also *Noto v. U.S.* 367 U.S. 290 (1961), and *Brandenburg v. Ohio* 395 U.S. 444 (1969).

C. Between Neutrality and Perfectionism

1. Why Do Liberals Advocate Neutrality?

It has been argued that the difference between liberal states and theocratic, communist or fascist states is not that the liberal states promote different ideals of the good, but that they promote none. Unlike illiberal states, which regard it as a primary function of the state to prescribe the moral character of society, liberal states shun such attempts and allow freedom to citizens to develop their own conceptions.[30] Defenders of liberalism argue that liberalism is in some sense neutral with respect to competing conceptions of the good;[31] that instead of adopting an interventionist policy, liberal states should adhere to neutrality. Liberals postulate that in a democracy there are often conflicting and incommensurable conceptions of the good, and that in a democratic society having diverse ideals, in light of which people lead different ways of life, is the normal condition.[32] Furthermore, this variety is conceived to be a good thing; that is, to quote Rawls, it is rational for members of a well-ordered society to want their plans to be different.[33] For, as Rawls explains, human beings have various talents and abilities the totality of which is unrealizable by any one person or a group of persons. Thus we not

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30. Raz. The Morality of Freedom. 1986. p 108.

31. Rawls. A Theory of Justice. 1971. pp 327-328, 446-452; R. Nozick. Anarchy, State and Utopia. 1974. pp 33, 48-51, 271-274; B.A. Ackerman. op.cit. 1980. pp 11-12, 347-378; R.M. Dworkin. "Why Liberals Should Believe in Equality?" XXX The N.Y. Review of Books. 1983. p 32, and A Matter of Principle. 1985. pp 191-194, 205; Will Kymlicka. Liberalism, Community, and Culture. 1989. pp 76-85, 96; Peter De Marneffe. "Liberalism, Liberty, and Neutrality". 19 Philosophy & Public Affairs. 1990. p 253.

32. We have seen that Ackerman assumes that people pursue forms of social life in accordance with their conceptions of the good. Like him, other liberals use the terms 'ideals', 'ways (or plans or forms) of life', and 'conception of the good' interchangeably. Cf Rawls. op.cit. 1971, sec. 68; Raz. op.cit. 1986, ch. 5; Kymlicka. op.cit. 1989, esp. chs. 4, 5.

33. A well-ordered society is roughly one with just institutions and which accepts his two principles of justice. Cf "A Well-Ordered Society", in P. Laslett et al (eds.) Philosophy, Politics and Society. 1979. pp 6-20; "The Idea of an Overlapping Consensus". 7 Oxford J. of Legal Studies. 1987. fn 17, p 10.

only benefit from the complementary nature of our developed inclinations but we take pleasure in one another's activities.[34] Hence liberals urge that citizens be allowed to follow their conceptions of the good as far as it is socially possible, rather than being obliged to live with convictions which they do not uphold. Neutrality is prescribed to ensure stand-off from support for what *prima facie* conceived to be valuable and moral conceptions of the good. The qualification "so far as it is socially possible" implies that there is a place for some restrictions on citizens and organizations to maintain the framework of society, but when introduced they require some justification.

Two important notions are central to our analysis. The first is the "conception of the good", and the second is "neutrality". The purpose henceforth is to clarify the meaning of these notions. The latter notion will be examined in the context of the more general concept of anti-perfectionism. Focusing our attention on the first notion, Raz contends that the easiest explanation of what conceptions of the good are is to say that they consist of all aspects of morality other than the principle of neutrality.[35] While this explanation may indeed be the easiest, the question remains as to whether it has any contribution beyond making a mere generalization. Moreover, Marxists and feminists contend that liberal conceptions are class-based and sex-based respectively.[36] Thus, some further explanation would appear to be in order.

A person, as a moral agent, has his own conceptions of the moral life, and accordingly determines what he deems to be the most valuable or best form of life worth leading. It may be suggested that a conception of the good involves a mixture of moral, philosophical, ideological and religious notions, together with personal values

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34. Rawls. op.cit. 1971. p 448.

35. Raz. op.cit. 1986. pp 134-5.

36. Marxists hold that the liberal conceptions are prejudiced by bourgeois capitalist considerations. Cf C.B. Macpherson. The Real World of Democracy. 1972; The Life and Times of Liberal Democracy. 1977. See also M. Fisk. "History and Reason in Rawls' Moral Theory", in N. Daniels (ed.) Reading Rawls. 1975, esp. pp 57-67. For a feminist perspective see A. Jaggar. Feminist Politics and Human Nature. 1983; and A. Nye. Feminist Theory and the Philosophies of Man. 1988.

which contain some picture of a worthy life. It must be noted that one's conception of the good does not have to be compatible with moral excellence. It does not mean a conception of justice. In other words, one's conception of the good does not necessarily have to be dominated by moral considerations. Leading a valuable life does not necessarily entail leading a moral life. The second may guide the first, at least to some extent, when one develops one's own conception of the good. But it is equally plausible to think that the second may be subordinated to the first. Then morality is secondary to the desire of leading a valuable life and the conception of the good is dominated by that desire.

A conception of the good, therefore, consists of a more or less determinate scheme of ends which the doer aspires to carry out for their own sake, as well as of attachments to other individuals and loyalties to various groups and associations. Rawls asserts that these convictions and attachments are part of a person's "nonpublic identity", which help to organize and shape a person's way of life; what one sees oneself as doing and trying to accomplish in one's social world.[37] Communitarians and utilitarians dispute this opinion, arguing that these convictions are part of our public identity. Nevertheless, they might all agree that these convictions mould one's way of living by bringing reasons for acting or reacting in a certain manner, for making decisions, and for reaching some practical conclusions in different situations. Accordingly, a person is free to revise his conception of the good if he so wishes when deciding to change his form of life (say, upon joining the Hari Krishna), or in the face of new circumstances. One's conception of the good is based on rational calculations and judgments about oneself, one's short and long term goals, one's immediate surroundings, and society as a whole. These judgments may be subject to revision time and time again. One's conception of the good also involves some normative assumptions with regard to these subjects. Consequently, it is internally complex and plural, encompassing both personal values and societal circumstances which may influence these values in one way or another. There is a

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37. Rawls. "Political not Metaphysical". 1985. pp 233, 241. Similarly, in "Fairness to Goodness" (84 Philosophical Review. 1975, sect. I) Rawls maintains that a conception of the good is something one advances as good for others as well as oneself. It comprises a basic part of our over-all moral scheme.

pluralism of values which presents us with a choice concerning the values we incorporate into our own conception of the good and this, in turn, means that some value ranking is required. Everyone can make his or her mixture which is regarded as the most valuable. It is agreed that it cannot be supposed that there is one uniquely correct objective ranking of values, one optimal mix that prescribes how trade-offs among them should be made. There is some range within whatever partial rankings of values are objectively correct.[38] Likewise, there is not purported to be a single way to resolve conflicts between moral or other values. Ergo, if there is no one objective "correct" set of values to guide us, then everyone should enjoy the freedom to arrive at his own ranking, his own conception of the good. Tolerance has to prevail so as to enable individuals to pursue their convictions as they see fit and proper provided they do not harm others. Tolerance is advocated by both citizens and governments, in order to enable citizens to live their lives according to their moral considerations and the values which they hold most dear. On the part of the government, or the state, an additional policy of neutrality is called for.

2. Anti-Perfectionism and Autonomy

The idea of neutrality is placed within the context of the anti-perfectionist concept which, according to Raz, comprises the "exclusion of ideas" doctrine. Raz views the "neutrality principle" as holding that government policies should seek to be neutral regarding ideals of the good. It commands the government to make sure that its actions do not help acceptable ideals more than unacceptable ones; to see to it that its actions will not hinder the cause of false ideals more than they do that of true ones. As for the "exclusion of ideas" doctrine, it does not tell governments what to do. Rather it forbids them to act for certain reasons. The doctrine holds that the fact that some conceptions of the good are true or valid should never serve as justification for any political action.

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38. Cf Robert Nozick. Philosophical Explanations. 1984. p 448.

Neither should the fact that a conception of the good is false, invalid, unreasonable or unsound be accepted as a reason for a political action.[39] The doctrine prescribes governments to refrain from using one's conception of the good as a reason for state action. They are not to hold partisan considerations about human perfection to foster social conditions.

Raz further concedes that many of the arguments in favour of any one of the anti-perfectionist doctrines can be used to support the other. Thus neutrality implies that governments must stay silent with respect to any individual's or party's endeavour to promote their own ideas of the good, whatever those ideas might be. Neutrality is the policy advocated to prevent governments from vilifying a way of life that might be dear to some, and at the same time allow individuals to explore every path in the pursuit of their beliefs. It insists that the role of government is to secure equal opportunity for citizens to further their conceptions of the good. In order to ensure that every person will be able to pursue his or her conception of the good, neutrality does not endorse any disposition which defines human good and human perfection to the exclusion of any other. It refrains from identifying essential interests with a particular conception of the good life and shrinks from the possibility that the government, which could be associated with one or more segments of society, might impose its values and ideals on others, either by propagation or by force.[40]

Accordingly, advocates of neutrality hold that government is neutral if it does not base its policies on assumptions of the superiority or inferiority of conceptions of the good. They imply that while citizens can be tolerant without being neutral, governments which take a stance and regard one conception as better, truer or more valid than others, might detract by the very taking of a position from other conceptions of the good, and thus deny pluralism. While citizens can follow their conceptions and debate with others so as to add more weight to their own conception, governments must grant citizens

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39. Raz. op.cit. chs. 5, 6. Raz uses the terms 'doctrine' and 'principle' interchangeably.

40. The assumption is that should governments not be neutral regarding the plurality of convictions that prevail in society, then their bias could generate intolerance.

equal concern and respect, and should secure possibilities for them to pursue their chosen plans of life. The role of government is not to assign citizens one path over another, but it can and should help citizens to increase their welfare, as Dworkin postulates:

> "Politics should aim that people have better lives, on the whole, and to aim at this in some way that treats that highest-order interest as equally important for each person."[41]

Dworkin makes two important clarifications. He explains that our highest-order interest lies in having as good a life as possible, a life that has in it as much of what a life should have. Then he maintains that the saying that people's highest-order interest lies in having a good life is very different from the claim that any particular person's life is **in fact** good or that his conception of the good life is worthy. So it could not provide an argument that people's lives are equally good or equally valuable lives or anything of that sort. It claims that, for any particular person, his life is, at least for him, a **subject** of value rather than an object of value.[42] Thus to respect people as free human beings, so that each and every person could have a good life, entails that governments must not influence individuals (by propaganda, not to mention more radical measures) to choose one course of action over another. They must not exclude any idea but, rather, must allow for meaningful individual choice so that every person, whether considered alone or within a group, is able to adhere to his own conception of the good and to the values he appreciates most. To that effect Dworkin, among others, holds that neutrality is the policy to be adopted because no one should be allowed to dictate to any one else what their convictions and priorities in life should be.[43]

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41. Dworkin. "In Defense of Equality". I Social Philosophy & Policy. 1983. p 26.

42. Ibid. p 27 (Dworkin's emphasis).

43. In "What Liberalism Isn't" (XXIX The N.Y. Review of Books. 1983) Dworkin writes: "Whatever we may think privately, it cannot count, as a justification for some rule of law or some political institution, that a life that includes reading pornography or homosexual relationships is either better or worse than the life of someone with more orthodox tastes in reading or sex. Or that a life suffused with religion is better or worse than a wholly secular life" (p 47). See also his "Liberalism" and "Can a Liberal State Support Art?", in A Matter of Principle. 1985. Rawls (op.cit. 1971. sect. 50) argues that from the point of view of the parties in the original position, no form of life is

The general concept of anti-perfectionism maintains that governments ought to acknowledge that every person has his own interest in acting according to his own convictions; that everyone should enjoy the possibility of considering alternative conceptions. There is no single belief about moral issues and values that should guide all and, therefore, each has to enjoy autonomy and to have freedom to promote his ideals. Individuals are conceived of as being entitled to the respect which enables them to determine the course of their lives as reasoning beings who are capable of deliberation, of taking responsibility for their specific conduct as well as for the kind of life that they wish to lead. That is, respecting others entails viewing others as people who are realizing themselves as autonomous choosers who examine their goals and, when needed, revise not only their ideas regarding their goals but also their views about the ways to seek them.[44]

The concept of anti-perfectionism further emphasises that:

(a) The government is not to act so as to affect some idea in a way that differs from its attitude toward other ideas, and that if it does affect some ideas, then it should take action to compensate the others for its involvement, or cancel the effects of its action.[45] That is to say, a doctrine of neutrality is a doctrine of restraint for it advocates neutrality between valid and invalid ideals of the good. It demands that the government not help acceptable ideals any more than unacceptable ones, that its actions (to use familiar terminology) not hinder the cause of false ideals more than that of true ones.

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intrinsically better or worse than another form of life. Cf Ackerman. op.cit. 1980. p 6; and Kymlicka. op.cit. 1989. pp 33-36.

44. This view is implied by the Kantian approach. Haksar (Equality, Liberty, and Perfectionism. 1979. p 179) postulates that there is a second version which does not carry this implication. According to this second version, we can respect others by respecting their way of life and conception of the good, without necessarily respecting their autonomy.

45. Cf Raz. op.cit. 1986. ch. 5; and Rawls. "The Priority of Right and Ideas of the Good". 17 Philosophy & Public Affairs. 1988. pp 262-264.

(b) A plurality of conceptions of the good is valuable. People like to be exposed to different views, to enjoy variety of possibilities.[46] It is better to have many conceptions and sets of values than one unified, dominant conception which might constrict life projects and might prescribe one pattern for all, and thus exclude the values and aspirations of minority groups within society. The fear of exploitation, of some form of coercion, leads to the advocacy of plurality and diversity. Some bring forward the claims of philosophers who held diversity to be a good in itself.[47] Diversity entails openness and more opportunities for living a valuable and richer life. Thus Dworkin argues that in the case of free political speech, we might concede that each person has an important interest in developing his own independent political convictions, because that is an essential part of his personality and because his political convictions will be more authentically his own, more the product of his own personality, the more varied are the opinions of the others whom he encounters. Dworkin maintains that we might also concede that political activity in a community is strengthened by variety, even by the entry of wholly despicable points of view.[48]

From these arguments it would appear that the advocates of neutrality, in their striving to convince us of the necessity of the doctrine, are conveying the assumption that the decision regarding the proper policy is one of crucial importance because its consequences are absolute: all (i.e. pluralism, diversity, freedom, non-interference, vitality

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46. Having the ability to choose between alternatives contributes to the development of personal tastes, creative imagination, and independent attitude. In making choices one defines for oneself the level of conformity with one's society in general, and with prevailing specific fashions in different spheres. Indeed, the very making of choices may prove to oneself how capable one is to face dilemmas and find solutions. In addition, the choosing between conceptions of the good also contributes to the development of free, autonomous thinking. It fosters the intellectual and moral development of the individual. When one is faced with different options, one has to deliberate, to make calculations, and to reason what may be the best way of life to pursue.

47. Cf Mill (On Liberty, pp 114-115) who wrote: "As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living". See also p 125.

48. Dworkin. "Do We Have a Right to Pornography?". 1985. p 352.

etc.) or nothing (in terms of good outcomes). If we do not adhere to neutrality, then we shall be left with none of these virtues, but with their opposites. This picture is somewhat misleading. A more appropriate one, it may be suggested, would involve less extreme implications. It would, rather, view the conduct of policies on a continuous scale between the two extremes of strict perfectionism and complete neutrality. The policy to be adopted does not have to be either the one, or the other. It could well take the middle ground, allowing plurality and diversity without resorting to complete neutrality; involving some form of perfectionism without resorting to coercion. For perfectionism does not necessarily imply governmental exercise of force, nor does it impose the values and ideals of one or more segments of society on others, or strive to ensure uniformity, as neutralists fear. Raz asserts:

> "Perfectionist goals need not be pursued by the use of coercion. A government which subsidizes certain activities, rewards their pursuit, and advertises their availability encourages those activities without using coercion."[49]

By perfectionism, Raz means that government should support valuable ways of life, arguing that perfectionist ideals require public action for their viability. He offers a pluralistic account of perfectionism which aims to promote liberty and autonomy, and which *ipso facto* draws governments away from neutrality. They allocate funds in a way which is conducive to liberty and autonomy of citizens. Against Dworkin's and Rawls's position Raz holds that neutrality is both an undesirable and morally unattractive idea.

Some may try to down-grade the importance of the dispute by asserting that the sense of neutrality advocated by Rawls and Dworkin is, in essence, similar to Raz's "exclusion of ideals" doctrine. Thus David Knott argues that Rawls and Dworkin advocate a specific sense of neutrality which he, in turn, terms "judgmental neutrality". He explains that since neutrality is defined negatively, as a prohibition against using certain kinds of reasons to justify political action, it alone suffices to say something for

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49. Raz. The Morality of Freedom. 1986. p 417.

no state action in particular. Neutral political concern insists that all citizens are entitled to equal access to secure context of choice.[50]

Knott's arguments become confused when he tries to reconcile his powerful defence of neutrality and Raz's perfectionist position. Knott argues that there may be no objections to a government offering its citizens arguments and information for and against different ways of life.[51] He acknowledges that Raz's position is much broader, since Raz suggests that government can properly use its powers in order to subsidize worthwhile pursuits for citizens. Knott maintains that this ve5~rsion of perfectionism differs greatly from the two versions of perfectionism he is attacking, namely conservatism and communitarianism, for while the latter versions seek to secure uniformity and conformity to a dominant good, the former endeavours to ensure diversity and plurality. Consequently there is no real difference between Dworkin, Rawls and Raz. All three philosophers aspire to promote the same things. All of them regard pluralism and diversity as essential for the development of personal autonomy.

On this point, indeed, there is no controversy between them. But this is not really the issue. Rather, the crux of the matter lies in Raz's assertion that the autonomy principle is a perfectionist principle.[52] In other words, the dispute between Raz (and Haksar) on the one side, and Rawls and Dworkin on the other, revolves around the issue of whether it can be said that by endorsing autonomy one is taking a perfectionist stand or is still being neutral. Raz thinks that the liberal adherence to autonomy is a perfectionist principle because it regards autonomy as a precondition for developing a valuable life.

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50. Knott. Liberalism and the Justice of Neutral Political Concern. 1989. p 78. Knott defines judgmental neutrality as saying that "government should remain agnostic on questions of the good life by ensuring that political decisions... do not rely on the truth of any particular conception of the good, regardless of whether it is controversial in society or not." (p 12).

51. Ibid. p 205.

52. Raz. op.cit. 1986. p 417. See also Vinit Haksar. "Autonomy, Justice and Contractarianism". III British J. of Political Science. 1973. pp 487-509; and Liberty, Equality and Perfectionism. 1979. passim.

The autonomy principle permits and even requires governments to create morally valuable opportunities and eliminate repugnant ones.

Raz's reasoning seems to be valid. We should note that the basic characterization of liberalism lies in focusing on the individual, on viewing the individual as the core of attention. Communitarianism, fascism, and Leninism, among other perfectionist doctrines, consider groups as the centre of attention. The three doctrines see the role of government as promoting certain types of conceptions of the good. They assume that these conceptions should be pursued because they are conducive to human excellence and perfection. In liberalism, too, there is an underlying assumption regarding questions of the good that directs governmental activities. The liberal perspective is that citizens can realize their conceptions of the good only when possibilities are supplied for advancing their autonomy. Rawls, for example, views the parties in the original position as people who are concerned with protecting their autonomy. But it is plausible to suggest that people in the original position can prefer to choose non-autonomous lives.[53] Rawls, however, thinks of the normative ideal of personhood as one which is "implicitly affirmed" by our living tradition of modern liberal-democratic judgments and practices.[54] At any rate, in adding autonomy to the original position it is implied that a government

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53. Haksar argues (Ibid. 1979. p 205) that autonomous people sometimes find autonomy such a burden and cause of despair that they might be willing to opt for a non-autonomous life. Raz made a similar argument in a private discussion.

54. Indeed, we should note that in A Theory of Justice Rawls, like Dworkin, aspired to formulate a theory that would be applicable for any time and place. Rawls contended that his theory was neither produced by specific historical and social circumstances nor intended to defend any existing order. The theory was constructed with regard to the human situation "not only from all social but also from all temporal points of view" (p 587). However, in the Dewey lectures and subsequently Rawls abandons this effort. Political philosophy, he now asserts, is always addressed to a specific "public culture" and, therefore, "we are not trying to find a conception of justice suitable for all societies regardless of their particular social or historical circumstances. We want to settle a fundamental disagreement over the just form of basic institutions within a democratic society under modern conditions". ("Rational and Full Autonomy". LXXVII J. of Philosophy. 1980. p 518. See also "Political not Metaphysical", p 225). On the changes in Rawls' thinking during the 1980s see R.J. Arneson. "Introduction". pp 695-710; W. A. Galston. "Pluralism and Social Unity". pp 711-726; and G. Doppelt. "Is Rawls's Kantian Liberalism Coherent and Defensible?". pp 815-851. All three articles appear in 99 Ethics. 1989.

can use certain kinds of reasons to justify political action. It may (and indeed, it does) promote a certain set of conceptions of the good rather than others. In order to foster people's personal autonomy, it does not only provide information for different ways of life (i.e., not for and against as Knott notes), but also strives to secure certain conceptions, such as respect for others, and not harming others. Knott is right in saying that this version of perfectionism is different from the two other versions he discusses - communitarianism and conservatism - but this does not preclude his own recognition that this perfectionism is not only about the reasons for policies, but also about the content of beliefs. Indeed, Knott himself agrees that some element of perfectionism is in place;[55] therefore it is difficult to see how can he still think that there is no departure from neutrality.

Hence, if we are to pursue Raz's reasoning, there can be no sense in any suggestion of total or absolute neutrality with respect to every possible conception or to each and any option that might ever be exercised by any citizen in society. It seems that the introduction of some element of perfectionism is unavoidable. Here we may recall that Rawls, while saying that perfectionism would be rejected for not defining a feasible basis of social justice, maintains in the same breath that "[E]ventually of course we would have to check whether the consequences of doing without a standard of perfection are acceptable".[56] In addition, we may note that the concept of tolerance in itself is incompatible with neutrality, at least in so far as the process of establishing a position is concerned. True as it is that the underlying motivation for tolerance may be neutral, i.e., respect for others; nevertheless tolerance in itself cannot be value-neutral, for as it was previously suggested, it assumes the taking of a certain disapproving stand against the conduct or phenomenon in question. Tolerance is thus bound to be biased in favour of certain opinions and beliefs that are important to the tolerator. More specifically, if we reflect on the implicit assumption that neutrality alone is conducive to pluralism, we

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55. Knott. op.cit. 1989. p 211.

56. Rawls. A Theory of Justice. 1971. p 331.

may argue that there is no inherent contradiction between non-neutral policies and pluralism. Conductors of policies may reject perfectionism and still regard refraining from taking any position as being no less harmful than perfectionism. The middle ground which this thesis advocates combines perfectionism with the Respect for Others Argument without distorting or vilifying ways of life that some people hold to be valuable. This sort of middle-grounds policy may adhere to impartiality rather than to neutrality. As Montefiore explains by using the example of a referee in a football game:

> "There is only one class of conflicts in which the referee can intervene *qua* referee, namely the class of game-conflicts, the very possibility of which is created by and dependent on the constitutive rules of the game... The role of the referee... is a neutral one in that its duties are so defined that any influence that the referee may exercise on any footballing conflict is to be determined solely by factors for which provision is made within the rules of the institution and which could, in principle, count for or against any conflicting party."[57]

If we follow this example, when a referee gives a penalty kick against side **A** he is obviously in one sense helping **B**. Yet we cannot accuse him of lack of neutrality, for he is applying the rules impartially, meaning that he is awarding penalty kicks only where appropriate fouls are committed, whether by side **A** or side **B**. Impartiality requires that he not show more concern for one side (for which he may feel some sort of affection, whether genuine or the result of antipathy for the other side) than for another. The impartial agent is a person whose judgment and reasoning are not prejudiced by his selfish, partisan interests or by his personal feelings.[58] His impartial exposition will aim not to distort any of the rival views, in so far as they permit clear exposition.

Accordingly, a government has to play the role of umpire both in the sense of applying just considerations when reviewing different conceptions and also in trying to

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57. Alan Montefiore. Neutrality and Impartiality. 1975. pp 224-225. See also Mill's Utilitarianism (1948. p 42), where Mill explained that it is inconsistent with justice to be partial, while impartiality does not seem to be a duty in itself, but rather instrumental to some other duty.

58. If we take a Rawlsian position we may say that an impartial judgment is one rendered in accordance with the principles chosen in the original position. An impartial agent is one who forms judgments according to these principles without bias or prejudice.

reconcile conflicting interests, trends and claims. This is a delicate task, one which demands integrity as well as impartiality: to refrain from identifying with one group rather than with the other;[59] not to exploit its role for self-advantage; bearing in mind when making decisions the relevant considerations and demands which concern society as a whole, and not only one or some fractions of it.

This is to say that governments should not reject out of hand considerations deemed to be relevant and cling to neutrality when this policy is thought to contradict basic values and rules. There must be rules, for otherwise there can be no game. This reasoning applies to a football game as much as it does to democracy:[60] there are certain fundamental values and rules which should bind everyone. These are not to harm others and to respect others. If we accept the validity of this assertion, then it should be clear to us that we cannot be neutral with regard to certain conduct which fall within the parameter of harming others; when the dangers to democracy, to our fellow citizens, to the moral basis of society, to values which we hold dear, might be too grave. I shall develop this argument later on in the following chapters. Now I wish to reflect on a different set of arguments that is sometimes mentioned (not necessarily by anti-perfectionists) in favour of non-interference. These arguments evolve from the school of moral relativism. They are held to be relevant since they are occasionally mentioned in support of neutrality on the part of the government (or state), and tolerance on the part of the government and the citizens, so as to enable individuals to pursue their conceptions of the good.

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59. Again, it has to be emphasised that I am not speaking of all groups within society, but only of those who accept the Respect for Others Argument. Groups of terrorists, murderers, rapists, etc. are subjected to partial treatment by government.

60. There could hardly be a game if some footballers would decide to play wearing spurs on their shoes. We obviously would regard this as a clear violation of the rules.

3. Two Variants of Relativism

The first variant of relativism, which may be entitled cultural relativism, adopts the argument that a plurality of conceptions of the good is valuable[61] and places it within a cultural context. This variant of relativism emphasises pluralism and diversity, while postulating that moral principles are relative to cultures. It urges that there are cultural differences which differentiate one conception of the good from another, and a liberal democratic state has to tolerate these differences. It should not impose the dominant values and culture on those who differ from that culture. This argument, then, presupposes that a liberal democratic society (or any society) does not necessarily consist of one homogeneous culture. It assumes that the decision as to how to lead one's life may ultimately be left to the person himself; nevertheless this decision is always a matter of selecting from various available options, determined by the cultural context. Different cultural contexts dictate different norms and values according to a particular vision of morality. One section of society (**A**) may have specific codes of morality which the other sections (**not-A**) might regard as immoral but, this notwithstanding, **not-A** sections should not try to cause **A** to adopt their own moral codes, and thus compelling **A** to give up its own convictions. For example, the Eskimo tradition of abandoning the elderly in the snow deserts is a cultural norm, which is part of their conception of the good. Moral relativists contend that we may hold a different view with regard to that norm, but we cannot say that our conception of the good is better, or more valid than the Eskimo's, nor should we enforce them to adopt our own conception. Each person has to be able to choose and pursue his own conception of the good in the light of his own cultural experience, to decide what he considers to be his valuable options according to the cultural norms and values which he appreciates.

It is not clear, however, whether cultural pluralism entails moral relativism. That is, whether recognition of the importance of cultural association implies that we should allow any cultural norm, whatever it might be. We may accept that there can be a

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61. The main reasoning of this argument is similar to the one postulated by the anti-perfectionist school. Cf argument (**b**), sect. 2 *supra*.

plurality of cultures within a liberal democratic society, but what is it, then, that characterizes the society as liberal? There seems to be a common basis which establishes a forum within which members of cultural communities are able to exercise their specific norms. There need to be some moral codes that constitute a public culture which are shared by all members of society, despite their cultural differences. What if certain cultural norms challenge fundamental moral codes, which underlie liberalism? Relativism disregards this possible tension as it assumes that each culture is to be judged according to its own criteria, and one cannot interfere in the business of the other, since one cannot really insist that one's norms should be adopted by members of other cultures: one can be a judge with regard to one's own culture, but not where other cultures are concerned. Non-interference in cultural norms is prescribed regardless of the possible need for reconciliation between norms, because no one is capable of being in a position to carry out such a project. It would appear that relativism considers this issue as lying beyond the confines of ethics.

The second variant of relativism, which seems to be stronger than the first, urges that no one is in a position to know that one conception is as good as the other. According to this variant, it is impossible to show that one conception is more worthwhile or precious than any other, or that one conception is either intrinsically more valuable than others or is as valuable as the others. There is no given set of values or terms to enable us to determine that one conception is better, or more valuable than the rest. Consequently, every individual may hold his own set of values in the order he wishes and act accordingly. The further assumption is that it is impossible to rank conceptions in some form or another, since any attempt at their elucidation involves the making of normative judgments. Any criteria that we may have to evaluate normative judgments are bound to be influenced by our own conception of the good, which itself involves normative judgments. Therefore, how can we say that one set of normative judgments is better than the other? Likewise, it is impossible to say that the morality of one is more or less true than that of the other. In a similar fashion to the Argument from Truth,[62] it

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62. To be discussed in ch. 6 *infra*.

is argued that no moral values can be logically ordered without bias. We can never know which values are true, and whether some values are better or truer than others, because there are no moral grounds that are shared by all.

However, this variant of moral relativism inevitably leads us to conclude that any moral debate is pointless, that we should accept the fact that we cannot judge between moral codes and, therefore, that each of the moral codes is equally valid and has to be allowed. Relativism defeats itself by claiming that it is true, because relativism is in no position to claim truth. Moreover, it is impossible to reconcile between values because this task necessarily involves the ranking of conceptions in order to decide how this process is to be effected. In addition, relativism rejects the introduction of constraints and so it runs the risk of defeating moral principles with immoral norms that others hold dear. Consequently relativism could defeat morality. If we are not in a position to know whether or not, for instance, Pol-Potism is as good as liberalism, then we should never interfere in the dissemination and implementation of either idea because we are not able to determine that one is more valuable or more just than the other. The implications of moral relativism for our specific context might make the introduction of confines for tolerance an impossible task, while at the same time it implies that tolerance has to make way when intolerant norms prevail since there is nothing that allows us to say that it is more moral than intolerance. Hence the prescribed policy is impotence. Relativism leads to apathy when claiming that the discussion about conceptions and beliefs should be excluded from ethical debates. If we believe that democracy should allow each person to follow his inclinations and beliefs without interference, then we should permit every behaviour. The first variant of relativism qualifies the argument by emphasising the importance of cultural justifications and norms. This, however, could imply that while a certain conduct may be outlawed in society, members of a specific minority might be required by their culture to follow this conduct. Then culture may be said to supply enough reason to override law.

It is of importance to scrutinize these variants of relativism in order to divorce them from the concept of anti-perfectionism. All the neutralists mentioned do not claim that neutral political concern has to be employed because we do not know whether all

conceptions of the good are as good as the others. It is acknowledged that establishing a position with regard to different beliefs is a matter of degree, and clearly some conceptions may appear to be more appealing, moral, or valuable than others. The egalitarian argument of Rawls and Dworkin assumes that each and every conception does matter (at least to its holders), and that it matters equally. But it does not assert that we are in no position to say that one is better than another. Moreover, as Dworkin exemplifies,[63] neutrality does not imply impotence. A liberal government should regulate conditions and distribute resources in a fair manner to enable citizens to pursue their different conceptions. It should also promote welfarism and enrich the citizens' lives.

At this point we are confronted with the inevitable question of whether neutralists assume - in the name of liberty, tolerance and pluralism - that all conceptions of the good should be open as options to be pursued in a liberal democratic society. Bearing in mind that neutrality proscribes any attempts on the behalf of governments to force others to lead lives in which they do not believe, should it prescribe governments to remain silent in the face of such phenomena as female circumcision, or preventing abortions even when there is a danger to the life of the mother, or abandoning the elderly? The question is, then, whether or not there is a place for every norm, which any culture appreciates or considers to be of importance, to exist within the framework of a liberal society.

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63. Dworkin. "In Defence of Equality". 1983. p 26.

Chapter 4

THE RESPECT FOR OTHERS ARGUMENT AND CULTURAL NORMS

A. The Dilemma

Reflecting on the dilemma of whether or not all conceptions may have a place in liberal democracies, Rawls concedes that no society can include within itself all forms of life. He argues that in a democratic culture a workable conception of political justice must allow for a diversity of doctrines and the plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life affirmed by members of existing democratic societies.[1] But given the profound differences in beliefs and conceptions of the good, we must recognize that, just as on questions of religious and moral doctrine, public agreement on the basic questions of philosophy cannot be obtained without the state's infringement of basic liberties.[2] Rawls explains that conceptions which directly conflict with the principles of justice, or which wish to control the machinery of state and practices so as to coerce the citizenry by employing effective intolerance should be excluded. He further asserts that if a conception of the good is unable to endure and gain adherents under institutions of equal freedom and mutual toleration, one must question whether it is a viable conception of the good, and whether its passing is to be regretted.[3] Rawls explicitly says that there is no social world

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1. Rawls acknowledges that it is a disputed question whether and in what sense conceptions of the good are incommensurable. He states that incommensurability is to be understood as a political fact, an aspect of pluralism: namely, the fact that there is no available political understanding as to how to commensurate these conceptions for settling questions of political justice. Cf "The Idea of an Overlapping Consensus". 1987. p 4.

2. Rawls. "Political not Metaphysical". 1985. pp 225-230.

3. Rawls speaks only of "just constitutional regimes". He admits that the questions of whether the corresponding form of life would be viable under other historic conditions,

that does not exclude some ways of life that realize in special ways certain fundamental values:

> "By virtue of its culture and institutions, any society will prove uncongenial to some ways of life. But these social necessities are not to be mistaken for arbitrary bias or for injustice."[4]

To argue that some conceptions of the good may have no place requires a recognition that there are some values that underlie a liberal society, which bring members of society to view some other conceptions as uncongenial. Rawls (and also Berlin) imply that there need to be some norms and moral codes that are shared by members of the community, despite their cultural differences. This is not to say that there is one dominant culture, or one dominant conception of the good; but rather that there need to be some basic norms which should be safeguarded in order to make the working of a liberal-democratic system possible and to ensure its survival. These accepted norms, by virtue of their existence, enable each individual and group to pursue their conceptions of the good, as long as convictions are not contradictory to them. Thus, these norms set limitations on the range of values that society can respect. The most basic norms democracy has to secure are, in my opinion, respecting others as human beings (under the Respect for Others Argument), and not to inflict harm upon others.[5] Upholding these two principles safeguards the rights of those who might find themselves in a disadvantageous position in society, such as women; ethnic, religious, national and cultural minorities; homosexuals and others.

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and whether its passing is to be regretted, are still left open. Cf "The Priority of Right and Ideas of the Good". 1988. p 266.

4. Ibid. 1988. pp 265-266. See also "Fairness to Goodness". op.cit. 1975, sect. VI; and "Representation of Freedom and Equality". LXXVII J. of Philosophy. 1980, sect. II. A similar view is enunciated by Berlin who holds that we cannot conceive a situation which would enable a joint realization of all values in one society. It is impossible to suppose that all goods and ideals can be united into a harmonious whole without loss: there are logical, psychological and sociological limits on what range of values one society can respect in the lives of some of its citizens. Cf Bernard Williams's introduction to Berlin's Concepts and Categories. 1980. pp xi-xviii.

5. As will be formulated in ch. 7 *infra* under the Harm and the Offence Principles.

Rawls believes that the public culture of democracy is obligated to pursue forms of social co-operation which can be achieved on a basis of mutual respect. This co-operation involves the acceptance of certain common procedures to regulate political conduct. Citizens should be accorded equal respect in their pursuit of their idea of the good. Rawls's concept of justice is independent from and prior to the concept of goodness in the sense that its principles limit the conceptions of the good that are permissible. His ideal polity would not be congenial toward those who believe that their personal conception of the good involves enforcing others to abide by it. It would exclude certain kinds of beliefs, such as those which entail coercion of others, causing harm to others, or deriving profit at the expense of others. The justification for excluding controversial beliefs from the original position lies in the social role of justice, which is to enable individuals to make mutually acceptable to one another their shared institutions and basic arrangements. It is accompanied by an agreement on ways of reasoning and rules for weighing evidence which govern the applications of the claims of justice. Mutual respect would enable social cooperation between individuals who affirm fundamentally different conceptions of the good. Thus, for instance, Rawls does not exclude religious groups with strong beliefs who may demand strict conformity and allegiance from their members, but he could not endorse the formation of a theocratic state, for some people lack such intensity of religious belief.[6]

Rawls's theory of justice as fairness is a moral conception which provides us with an account of the cooperative virtues suitable for a political doctrine in view of the conditions and requirements of a constitutional regime. It is a theory, in his view, of an "overlapping consensus" between different groups and individuals with divergent and even conflicting doctrines and life-styles as to the fair procedures for making political demands in a democratic society, where mutual toleration and fairness must be the norm.[7] Such a consensus, he alleges, is moral both in its object and grounds, and so is

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6. Cf A Theory of Justice, sects. 33-35; "Fairness to Goodness", sect. VI; "Representation of Freedom and Equality", sect. II; "Political Not Metaphysical", sect. VI; "The Priority of Right", sect. VII.

7. By an "overlapping consensus" Rawls means a consensus which is affirmed by the opposing religious, philosophical and moral doctrines likely to thrive over generations in

distinct from a consensus founded solely on self- or group-interest. He acknowledges that such a consensus is not always possible. Indeed, we have little empirical reason to believe that all of the diverse conceptions of the good people embrace provide the overlapping consensus which Rawls speaks of.[8] Nevertheless, Rawls thinks that through this idea we may be able to show how, despite a diversity of doctrines, convergence on a political conception of justice may be achieved and social unity sustained in a long-term equilibrium, that is, over time from one generation to the next. We may add that the consolidation of any sort of long-lasting consensus inevitably necessitates some form of coercion.

Thus, an acceptance of a concept of justice can be achieved in spite of differences, but some conceptions may have no place within a well-ordered society. Notwithstanding his recognition that culture and institutions may cause people to reject some convictions, and that the cultural context of choice is important in deciding ways of life, we should note that Rawls still does not explicitly state that culture is a primary good.[9] He does not single out culture as a necessary social condition to enable people to pursue their determinate conceptions of the good life and to develop and exercise their moral powers. However, a close analysis of Rawls's argument for the importance of liberty as a primary good could imply that it is also an argument for the importance of cultural membership as a primary good. This is Kymlicka's position which asserts that Rawls does not make this argument clear because his model of the nation-state is very

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a more or less just constitutional democracy, where the criterion of justice is that political conception itself.

8. Critics have plausibly argued that there are conceptions of the good in our society (e.g., the good as competitive economic achievement, or the good as worker-controlled, unalienated labour) which fail to exhibit a consensus concerning primary goods and the political values inherent in Rawlsian justice as fairness. Cf Gerald Doppelt. 99 Ethics. 1989. p 848.

9. "Primary goods" are "things that every rational man is presumed to want". These are rights and liberties, opportunities and powers, income and wealth. Cf Rawls. op.cit. 1971. pp 62, 92.

simplified, where the political community is co-terminous with a single cultural community.[10]

Kymlicka wishes to correct that picture of cultural homogeneity and replace it with a more realistic picture of the state as it is, consisting of a plurality of cultures, whose freedoms ought to be secured by the liberal state. He does not claim that the community is more important than the individuals who compose it, or that the state should impose the best conception of the good life on its citizens in order to preserve the purity of the culture, or any such thing. He maintains that cultural membership is important in pursuing our essential interest in leading a good life, and therefore taking account of that membership is an important part of having equal consideration for the interests of each member of the community.[11]

If we adopt this line of argument and place it within the context of the Rawlsian original position, we may say that behind a veil of ignorance, among the various particular facts that people are aware of, is cultural membership. People in the original position know that they are representatives of cultural communities, but they do not know to which culture they belong. Neither do they know whether the contingencies of culture are to their advantage or to their disadvantage. Hence they would accept that tolerance should prevail so as to enable each and everyone to be part of, and to cultivate his own cultural association. They would reject any sort of political and religious fundamentalism that urged that the best community is one in which only some preferred practices are allowed. Granting cultural membership the status of primary good will not provide fundamentalists with claims to further their aims for, as Kymlicka explains, so long as everyone has one's share of the resources and the freedom to lead the life of one's choice within one's cultural community, then the primary good of cultural membership is properly recognized:

> "Promotion of fundamentalist politics in these circumstances, far from appealing to the primary good of cultural membership, conflicts with it, since it undermines the

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10. Will Kymlicka. Liberalism, Community and Culture. 1989. p 177. Dworkin and Raz seem to have the same simplified view.

11. Ibid. pp 166-168.

> very reason we had for being concerned with cultural membership - that it allows for meaningful individual choice."[12]

Following this line of argument, consider then the example of certain orthodox Jewish sects who do not allow the study of biology in their classes. Specifically they do not welcome (to use an understatement) Darwin's theory of the genealogy of man. As long as they limit the restriction of this study to their own schools we may say, by implication, that an outsider has no voice to interfere. But when they try to force their truth on people outside their community, then there is a case for state interference. The reason for respecting the other's beliefs, as well as minority rights, is to enable "meaningful individual choice" so that every person, whether considered alone or within a group, can exercise his liberties in the way he wishes. Thus, e.g., allowing religious coercion might be considered as giving the coercer "meaningful individual choice", but it comes at the expense of the right of the coerced to seek "meaningful individual choice" for himself. Therefore, the requirement of reciprocity in according due weight and respect to the other's choice-making must be safeguarded as necessary. This is a derivative from our Respect for Others Argument and from the qualification introduced to it, which insists on a principle of mutuality. The Respect for Others Argument recognizes that people have different conceptions of what constitutes a worthwhile life, and at the same time guides us to restrict toleration at the point where respect ceases.

Kymlicka's arguments help us to establish that a minority group has no claim to coerce the entire society into following their conception of the good and abiding by their cultural norms. Yet we are still left with another no less important, related question. The question is whether or not the dominant culture has any right to interfere with the business of the cultural minority, if one or some of their norms are conceived as having no place in a liberal society because they cause harm to members of that same minority culture.

Kymlicka objects to the interference of one culture in the business of the other, arguing that people are bound to their own cultural community, and that cultural

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12. Ibid. p 172.

structure is crucial not just to the pursuit of our chosen ends and convictions, but also to the very sense that we are capable of pursuing them efficiently. He supports his arguments with historical evidence that shows that members of one culture very reluctantly relinquish their cultural associations, even in the face of negative costs of membership. The affront minority groups feel when attempts are made to force them into another culture is grounded in the perception of real harm.[13] This argument objects both to the possibility of forcefully taking members of one culture and transferring them to another, or of assimilating one culture by forcing its members to accept another. There is no disagreement with regard to either of these possibilities. Individual judgments cannot be divorced from the social context in which they are made, and more specifically from the cultural background.[14] This, however, is not the issue I am addressing here. Rather, the question is whether democracy should tolerate every norm which members of a cultural community bring with them, even if this entails that harm might be inflicted upon some members of that same cultural community. That is, the question is whether cultural norms possess enough weight to allow things that are conceived as having no place in a liberal community; whether culture may supply reasons for the toleration of behaviour which is regarded as unacceptable when evinced by other members of society who are not members of the considered culture. The question involves conflicting considerations. Respecting one culture could entail allowing members of that culture to show disrespect to some of its own members.[15] If we believe that a liberal society should tolerate all norms so as to allow each member of society to follow his own inclinations and beliefs without interference, then we should tolerate things such as widow burning, female infanticide or female circumcision. Do these norms have a place in a liberal society?

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13. Ibid. p 176.

14. Cf ch. 1 *supra.*

15. By 'disrespecting' others it is meant denying a person the right to live as a free, autonomous human being.

One (Y) may say that the women of that culture accept these norms as part of their cultural structure; that through these norms they define themselves and their place in the world, making sense of their lives. Another person (X) may say that notwithstanding people's willingness, even desire, to belong to their culture, some may be of the opinion that norms of the kind mentioned should be excluded; some members may feel that these norms had lost their validity in a liberal society. Individuals want to belong to their culture, but they do not necessarily accept all norms as valid within the society in which they now live.

Yet it seems that both answers avoid the fundamental question. For the issue is one of principle, not a contingent question dependent on the preferences of some members of a certain culture with regard to their tradition. Rather, the question is whether or not these norms, which deny basic rights that everyone is supposed to respect, have a place in a liberal democratic society. True as it is that to forbid these cultural norms is certainly to interfere with the possibility of making, to use Kymlicka's terminology, "meaningful individual choice"; thus burning one's widow might be considered as giving the man "meaningful individual choice". Nevertheless, by the same token, this act abridges the woman's right to seek meaningful choice for herself, and it contradicts the two basic liberal norms that were underlined before: it violates both the requirement of not harming others and that of mutual respect for others as enunciated by the Respect for Others Argument.

Let us press this argument one step further. Nozick comprehends that we can individually and collectively illuminate our understanding of what is good and moral by allowing individuals to lead their lives as long as their way of life includes reflection on and discussion of their tentative notions of value and of the best life.[16] Nozick's underlying assumption is that there are common grounds for discussion, but this may not always be the case. It can be argued that there are cultural minorities with which there are not even enough common grounds for liberals to conduct a discussion. There are no

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16. Nozick. Philosophical Explanations. 1984. pp 505-506.

common grounds because their conception of the good, their cultural norms and moral codes are different to such an extent that the gap between that culture and liberalism becomes unbridgeable, and any form of discussion, an impossible task. Thus, if we recall our discussion on weak forms of manifest tolerance, one may refuse to debate with one's opponent because one does not think that any sort of agreement, or compromise can be reached. The only possible outcome of such a debate would be legitimization of the opponent, and this might conflict with one's intentions.[17] Reflect then on the question whether a liberal democratic society should tolerate not only specific norms, but intolerant minority cultures as such. I shall examine this question with the assistance of Rawls's analysis of toleration of the intolerant, as presented in his Theory of Justice.

B. Not Tolerating the Intolerant: A Radical View

Toleration is conceived in the Rawlsian theory as part of justice. Accordingly, the principles of justice give reason for tolerance. This, we may say, is the rule. However, the question is what should be society's attitude towards the intolerant. In his discussion whether to tolerate the intolerant, Rawls argues that if an intolerant sect appears (Rawls does not say how) in a well-ordered society, the others should keep in mind the inherent stability of their institutions. The liberties of the intolerant may persuade them to a belief in freedom. Rawls explains that this persuasion works on the psychological principle that those whose liberties are protected by and who benefit from a just constitution will, other things being equal, acquire an allegiance to it over a period of time. He maintains:

> "So even if an intolerant sect should arise, provided that it is not so strong initially that it can impose its will straightaway, or does not grow so rapidly that the psychological principle has no time to take hold, it will tend to lose its intolerance and accept liberty of conscience".[18]

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17. See ch. 2 (C) *supra*.

18. A Theory of Justice. 1971. p 219.

Rawls does not address the questions of who determines whether that group is "not so strong" and according to what criteria this decision is being made. Instead he explains that the intolerant loses his intolerance because of the stability of just institutions, for stability means that when tendencies to injustice arise, other forces will be called into play that work to preserve the justice of the whole arrangement. Thus, Rawls's underlying assumption is that it is for society's benefit to encounter such a phenomenon because it would strengthen the beliefs of its members in the face of the threat. But, Rawls warns, we should take into account that the extent of the threat not be too strong. Hence it is implied that tolerance should take place as long as it is safe for it to win over the threat, and not in all events. If the threat seems to be serious, then justification for intolerance might be in order.

Rawls adds that, of course, the intolerant sect may be so strong initially or growing so fast that the forces seeking stability are unable to convert it into liberty. In such a situation just institutions, or democracy, must be held prior to philosophy: "This situation presents a practical dilemma which philosophy alone cannot resolve".[19] In other words, then practical considerations of self-defence and survival take precedence, and these considerations may regard toleration as an inappropriate policy. Tolerance is derived from consideration for others, but it does not exclude consideration for ourselves. Adherence to a policy of tolerance does not imply that we have to give up our most fundamental interest of survival. Rawls further postulates a second requirement, following the same line of reasoning, that circumstances too should be taken into account. He maintains that whether the liberty of the intolerant should be limited to preserve freedom under a just constitution depends on the circumstances. Change of circumstances may prescribe different attitudes to the same phenomenon:

> "Knowing the inherent stability of a just constitution, members of a well-ordered society have the confidence to limit the freedom of the intolerant only in the special cases when it is necessary for preserving equal liberty itself."[20]

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19. Ibid.

20. Ibid. p 220.

Rawls concludes that the freedom of the intolerant should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger. That is to say, one who wishes to restrict tolerance should bring substantive overriding considerations to justify this action: the onus of justification is always placed on those who wish to exercise the restriction. The leading guideline must always be maintained, that is, to establish a just constitution with the liberties of equal citizenship.

Two salient criticisms may be suggested against these arguments. The first adheres to the Rawlsian line of practical reasoning which is contingent on the magnitude of the threat. It articulates that Rawls fails to consider the intentions of the intolerant, and whether or not these are strong enough to persuade the intolerant to manifest them in some way. Rawls does not acknowledge that it is not only a question of how strong the intolerant are and what are the circumstances, but also to what extent the intolerant are motivated to exercise some form of coercion. An intense, well-organized group, with strong motivation to exhibit intolerance, although it may not pose a threat to democracy, might still be able to put their disliked target group in danger. Moreover, it is also plausible to argue that while the intolerant group may not be strong enough to impose its will, the conviction and determination of its members might still be strong enough to resist the forces of liberty. Thus instead of convincing the intolerant to believe in freedom, the intolerant group might spread anti-democratic ideas and fight its way to gain further power through the democratic means that are open to its members.

The second criticism I wish to offer is that Rawls simply misses the point. Instead of discussing the ethical question of the constraints of tolerance, he shifts the discussion to the practical consideration of the magnitude of the threat. But this is a matter of moral principle, rather than one which is contingent on the level of the danger. The fundamental question is not practical, but ethical. Rawls pursues a line of argument that avoids the philosophical issue which is the essence of the question of what we may

consider as constraints on tolerance and liberty. In a way similar to Scanlon's theory on freedom of expression[21] he does not explain from an ethical perspective why we should withhold tolerance. Rawls prefers to concentrate on considerations of circumstances and the extent of the threat. His contention is that tolerance has to prevail when there is no real danger that the consequences will be harmful: we should adhere to tolerance only if it is likely to win over the threat. For reasons of expedience, these considerations will be grouped under the heading "the Rawlsian Principle". I shall refer to this principle in **part II**, when exploring this subject further, especially in discussing the "clear and present danger" test and its modifications as they find expression in the rulings of the Israeli High Court of Justice. Here, however, let us reflect for a moment on what we may call "an extreme case" in which the issue is not whether democracy is to tolerate an intolerant minority, or interfere with its specific cultural norms, but more importantly, whether or not it should allow entry to a minority group, whose culture is known to conflict with liberalism. I shall assume that if we can establish that there are sufficient grounds in exceptional cases to deny entry to such a group, then democracy is not to tolerate similar extreme groups that are already present in society, who strive to bring the end of democracy in its liberal form.[22] Consider then the question whether or not a liberal democratic society can exclude a minority culture, whose members intend to immigrate to it, on the grounds that its values are incompatible with the liberal values. In such a case, should all paths for pursuing life projects still be left open, or should some be closed to start with, even before entering a liberal society?

Suppose that a large group of Huns, who survived somehow, wishes to enter England. One (**Z**) may argue that a liberal state cannot deny entrance merely on the basis of beliefs and that the Huns may establish their own cultural community within the liberal society. If we deny them entry, we forgo the requirements of respecting others

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21. Cf Thomas Scanlon. "A Theory of Freedom of Expression", in R.M. Dworkin (ed.) The Philosophy of Law. 1977. I shall reflect on Scanlon's theory in ch. 5 (B) *infra*.

22. I am not talking about tolerating opinions, but rather about tolerating actions aiming to bring about anti-democratic, illiberal consequences.

and respecting the ideas of others, and we defeat cultural pluralism.[23] Another person (**X**) does not agree. **X** argues that the entire culture of the Huns is incompatible with, and contradictory to the basic norms and moral codes which establish a state as liberal democracy. **X** contends that it is not only possible to, but that we ought to, limit immigration on the grounds of preserving human values and the rights of the community. **X** further maintains that the very nature of the Huns makes them resort to violence. The use of and incitement to violence has an integral role in their conception of the good, on which they base their culture and their entire way of life. The intolerant sect is so strong initially that the democratic forces making for stability cannot convert it to liberty. Consequently, the government may refuse them admission on the grounds that they are morally incapable of being tolerant, since their culture lacks a concept of tolerance and respect for others, and their ideas are hostile to the values of the liberal state, as well as because they are likely to have a negative impact on the values regarding the society's common good.[24] As Rawls argues, there is a limit to the extent that a liberal democracy can accommodate and allow all convictions and beliefs.

A counter argument, however, can be made that the Huns might be willing to change their views and acquiesce to learn and to internalize the liberal norms through the socialization process. They might willingly relinquish their self-identification as Huns and characterize themselves instead as English. Even in such a case, **X** would regard this effort with suspicion, because he does not believe that they are really capable of changing their entire moral views and adapting to a culture that is so different from

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23. We may distinguish between treating all conceptions of the good with equal concern and respect, and treating individuals with equal concern and respect. In this as well as in many other instances, however, one necessarily determines the other. Rawls concedes that we may rule decisively against certain conceptions without feeling guilty for failing to show the holders equal concern and respect.

24. Notice that **X** does not claim that democracies must always open their borders for immigrants. Democracies can, and do, set quotas on immigration and may decide that for some reasons they are not willing to admit immigrants to their territory. **X** refers here to the right of democracies to limit immigration on the grounds of immigrants' beliefs. It is implied that only in special cases this should serve as grounds for restricting immigration.

their own. At most they would be willing to make tactical compromises,[25] without being able to change their aims and priorities. Another person, **Y**, may take the middle ground and be less suspicious to the point of conceding that, in such a case, if they are sincerely willing to give up their Hunnish convictions, they may be admitted. Following Rawls, **Y** would say that the psychological effects of such an encounter would be of benefit for democracy and that, given the Huns' willingness to give up their intolerant convictions and accept the prevailing norms, this is a risk worth taking. Even if the birth-pangs were to be somewhat painful, it would help the other members of the community to strengthen their own beliefs. This combination of reasons makes, in **Y**'s view, a strong case for tolerance. But if the Huns intend to keep their ideas, then democracy has no reason to allow them entry: a tolerant society ought not to supply conditions for Hunnish values to prosper, and thus allowing them to undermine the liberal moral codes.

The example of the Huns is an extreme case and, indeed, its conclusions may be applied only to extremely radical groups. Democracy can deny entry to certain groups on the grounds of their holding different set of basic beliefs only when their culture, their conception of the good is fundamentally different from the liberal culture (which may consist of sub-cultures, but all of its sects accept some basic liberal principles) to the extent where discussion and communication between the two cultures becomes impossible and the making of some common grounds implausible.[26] Toleration is not derived from practical necessities or reasons of state. Hence, whatever interest individuals may have in cultural membership, it is subordinated to their interest in securing what Rawls calls "the liberties of equal citizenship". The same applies to intolerant religious groups who may wish to coerce others to adopt their religion. Moral and religious freedoms follow from the principle of equal liberty and, assuming the priority of this principle, the only grounds for denying equal liberties is to avoid an

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25. The notion of tactical compromise was explained in ch. 2 (D).

26. Cf ch. 2 *supra*.

even greater injustice, an even greater loss of liberty.[27] Individual liberty is important to such an extent that in order to secure an extensive system of overall liberties for everyone, we may restrict a particular basic liberty of some sects. The principles of respect for others and not harming others provide grounds for and set limits to liberty and tolerance. Otherwise democracy might not be able to triumph over its own "catch": the very principles which underlie democracy might bring its end.

Taking a more realistic example, this could be the case if a considerable group of fascists (or neo-Nazis) were to organize elsewhere in Europe and then intended to take advantage of their status as EEC citizens and immigrate to England with the aim, known to the authorities, of leading the National Front to new prosperity. Here too it could be argued that the very nature of fascist movements makes them resort to violence. The use of and incitement to violence has an integral role in their activities, on which they base their political platform and ideology.[28] Coming in a large group, their power would be strong enough to pose a real threat to democracy and to the minorities which they object to. United as a group under a fascist emblem, we can assume that they would not be lacking determination to fight for their convictions. England would be justified in denying entrance to that group on the grounds that the fascist convictions lack a concept of tolerance and respect for others; because fascist ideas stand in striking opposition to the liberal culture of this country; because fascism is hostile to human rights and to the fundamental values which underlie a liberal state. It is the business of government to protect and foster the interests of the public, and allowing immigration to this group does not coincide with these aims. Democracy ought to defend itself against threats, even if sometimes the measures include steps which exclude members of intolerant groups altogether from a democratic state.[29] As Hayek asserts, morals must be restraints

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27. We may recall Rawls' assertion that we should allow pluralism of religious beliefs, however strong the convictions, but we should not tolerate attempts to transform society into a theocratic society. Cf sect. A *supra.*

28. Cf Colin Sparks. Never Again. 1980, esp. pp 12-42. See also M. Glass. "Anti-Racism and Unlimited Freedom of Speech: An Untenable Dualism". VIII Canadian J. of Philosophy. 1978. pp 559-575.

29. The example speaks of England but it can be referred to any other liberal-

on complete freedom, and the principle of tolerance does not require us to tolerate a wholly different system of morals within our community.[30] Thus, it seems that we have a strong case for exclusion where fascists are concerned, since their ideas are incompatible with a commitment to human dignity and respect for others.

To conclude, the purpose of this discussion was to suggest that **(i)** liberal democracy may be intolerant toward the intolerant. More specifically that **(ii)** it can interfere to curtail some cultural norms (like female circumcision) which subvert its basic principles. And that **(iii)** democracy may prevent cultural groups from entering society not only because there is enough reason to believe that their strength is intimidating to the extent of confronting democracy with a substantial danger but, more fundamentally, because their conceptions of the good essentially conflict with its norms. In such circumstances the entire society may be regarded as the target group which is threatened. Thus while it is true that every idea possesses a claim to equal validity within a democratic society, considerations of context and intentions must be taken into account, and they may require the introduction of constraints.

These arguments bring us to the question whether or not the intolerant has any right to complain. For when such far-reaching restrictions on freedom are introduced, then the groups in question might complain that **(1)** something of value is denied them when they cannot exercise their liberties; **(2)** more specifically their freedom of conscience is curtailed; **(3)** that something of value is denied society; and **(4)** that they are discriminated against. Here the claim of discrimination is raised by those who advocate

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democratic state. However, it should be noted that in the specific case of England, under the Race Relations Act of 1976 it is a crime for a person, with the intent to stir up hatred against any section of the public distinguished by colour, race, nationality or ethnic or national origins, to publish or distribute threatening, abusive or insulting matter, to use in any public place insulting words, if the matter or words are likely to stir up hatred against that section on grounds mentioned above (cf Part 1). On the laws of other countries concerning racist speech see Lee Bollinger. The Tolerant Society. 1986. pp 253-256.

30. F.A. Hayek. "Individual and Collective Aims", in S. Mendus et al. On Toleration. 1987. p 47.

unequal treatment of certain groups, in their struggle to exercise their liberty so as to implement their discriminatory ideas. Let us now consider these complaints.

As to the first argument, it is true that something of value is lost whenever we prevent a person from pursuing his convictions wherever he may wish to do so and whatever these convictions might be. To someone who enjoys inflicting pain upon others, something of what he considers to be valuable is denied when we restrict his acts. To the sadist, torturing others is of some value. Cruelty has a value for him and it does play a part in his conception of the good. When we decide not to tolerate sadistic acts the sadist is unfree to do what he wishes. His liberty is diminished. Indeed, we can say that a loss of value occurs whenever an agent's freedom is curtailed; at least there is a loss of what he (wrongly) values. But is the diminishing of the sadist's liberty a bad thing? Fundamentally, the issue is whether or not acts of this sort should be allowed a place in a liberal society. If allowed then torture and cruelty are to be included among the social values of a liberal society, among the liberal framework which encompasses conceptions of good.

Similarly, we may accept the argument that fascists are conscientious believers, in the sense that they are true believers in their cause and ideas, who pursue their conception of the good according to the best of their knowledge. Yet it is equally evident that their convictions might endanger democracy. Furthermore, although fascists enjoy the right to freedom of expression, still it may as well be the case that in certain circumstances the very utterance of these ideas constitutes a serious offence to some sections of the population. Then the issue of the proper boundaries of free expression becomes relevant.[31] One may claim that we always ought to listen to their views, otherwise we cannot be absolutely certain that they are not well-founded. But, as Tinder postulates in relation to the anti-Semitic diatribes of American Nazis, being mortal we cannot waste our time with such remote possibilities.[32]

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31. This issue will be discussed in ch. 8.

32. Glenn Tinder. "Freedom of Expression, the Strange Imperative". LXIX The Yale Review. 1979. p 168.

As to the third argument, it may be true that something of value is denied society when democracy defends itself against such phenomena. But this is not sufficient reason to imply that any conscientious conduct should have a place within a liberal society, especially when the conscientious believers might have the power to cause considerable harm to some "disliked" people. Moreover, as was previously stated, we should postulate as a matter of moral principle that the justification of tolerance also sets its confines, for what is implicit is the recognition that unrestrained toleration should not be accorded to those who would deny respect to others.

Lastly, in considering the fourth argument, i.e. whether fascists have a right to complain that they are discriminated against, it is necessary to explain first the meaning of 'discrimination'. Discrimination is commonly defined as treating like cases differently. Here, however, like cases are not at issue; for it is difficult to consider conduct (acts as well as speeches) of discriminatory nature as any other conduct. Hence, sometimes the policy of equality of treatment has to clear the way for more important considerations, such as securing the dignity of individuals as human beings. In such instances an unequal policy is preferable to the equal, simply because the cases differ significantly and cannot be viewed in the same light. As Rawls contends, intolerance of an intolerant person who wishes to coerce others does not supply grounds for him to complain because he wanted to deny the principle of equal liberty. Rawls concludes that "[J]ustice does not require that men must stand idly by while others destroy the basis of their existence".[33]

A different stand is postulated by Anthony Skillen. While asserting (as Rawls does) that the intolerant cannot complain against illiberal treatment, Skillen contends that we cannot derive from this that upholders of freedom cannot object to illiberal treatment of the illiberal, or that the illiberal have no political right to protest and ought not to be allowed to promote their illiberal views.[34] He explains that the illiberalism of a view no

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33. A Theory of Justice. 1971. p 218.

34. Anthony Skillen. "Freedom of Speech", in Graham (ed.) Contemporary Political Philosophy. 1982. p 140.

more justifies its suppression in the name of liberty than does the advocacy of torture merit torture in the name of humanity; that intolerance does not justify, *a priori*, retributive intolerance: "Suppression is, arguably, an evil in itself, simply *qua* restriction and frustration".[35] Skillen then proceeds to make two further points: firstly, that as a general "tactic", illiberalism in relation to speech can be dangerous to its advocates. Movements that called to "smash the fascists" have helped bring about a general increase of law-and-order legislation aimed not so much at suppressing fascists as at imposing tighter state control of public space. Secondly, he says that racism is the ideology of the excluded, a way of seeing the world in which you are defined as belonging through the exclusion of others. Skillen thus agrees that excluding the racist exhibits a certain poetic justice, but is more deeply characterised as playing the same game.[36]

The first point views the side effects of the defensive measures that liberal democracy takes as a main reason not to defend itself against those who wish to undermine democracy, hence tolerating everything.[37] It is founded on deep suspicion of the government, disregarding the effects which might result if we do allow every ideology, every conception of how we should lead our lives, to be pursued. It advocates tolerance because of a speculative fear of possible further effects of restrictions. Thus it ascribes enough weight to these possible effects to outweigh no less significant considerations regarding the harmful effects that might result from fascist ideas. From the argument we may infer that it does not matter that a certain speech might dehumanize a certain category of people. There is no real attempt to evaluate harm and to prescribe constraints on the grounds that the harm might be intolerable. No concrete endeavour is

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35. Ibid. p 142.

36. Ibid. p 148.

37. Similar reasoning is employed by Dorsen who argues that we should not suppress speech because of the fear from an underground movement. Cf "Is There A Right to Stop Offensive Speech? The Case of the Nazis at Skokie", in L. Gostin (ed.) Civil Liberties in Conflict. 1988.

made to confront the ethical questions involved in the subject of freedom of speech. The consequentialist reasoning, be it of the speculative fear of a future underground movement, or the fear of government's future attempts at exploitation,[38] or the positive contribution that hateful speech may make to the shaping of a more tolerant society,[39] outweighs the importance of the actual pain. This reasoning does not concede that there are, as Dworkin and Rawls postulate, fundamental basic principles which prescribe mutual respect and human dignity, principles that underlie a free democratic society.[40]

In response to Skillen's second point I reiterate the Respect for Others Argument which insists on mutual respect for others. This argument is similar to Rawls's emphasis on the requirement of equal liberty. When we exclude the racist we are doing to them what they wish to do to others. In that sense the result is the same. But Skillen does not recognize that it is not the same game. It is not the same game because the rules of the game are different. The racist bases his rules on exclusion, whereas the liberal bases his game on mutual respect. The former wishes to limit the respect granted to others from the start, according to a criterion that others cannot change or control, at least from the racist point of view. The latter's starting point is based on respect for every member of society, and restrictions are introduced when the other is not willing to accept this primary rule. So one can say that when the racist is excluded this is some sort of "poetic justice". But the games of the racist and of the liberal are not the same.

Skillen further maintains that

> "if I am told that I cannot present or discuss my core beliefs because they are disgusting or vile or dangerous or simply false, then I am, to that extent, placed outside the community, able to move normally within it only through adopting a hypocritical mask."[41]

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38. Scanlon in his defence of political speech reaches the same conclusion. See ch. 5 *infra*.

39. As Bollinger argues. Cf The Tolerant Society. 1986. pp 197-200.

40. Skillen, Dorsen and Bollinger, among others, may fit into what may be entitled "the consequentialist school", as distinguished from the "absolutist school" which will be considered in ch. 5.

41. Skillen. op.cit. p 145.

However, there is a significant difference between disgusting, or vile, or dangerous, or simply false. Here the reference is only to the dangerous because of its striking incompatibility with the most fundamental liberal moral codes. Furthermore, there are two faces of the same coin and each of them can be illuminated. We can say when considering the examples of the Huns and the fascists that they are excluded by the liberal society, and it may be equally true to say that the fascists exclude themselves by holding illiberal views which intend to transform democracy into an intolerant form of government through the implementation of coercive means.[42]

The upshot of this discussion is to suggest that there are some constraints which are substantive, as distinguished from contingent constraints. Accordingly, we may discern between substantial or irrevocable constraints, and contingent or alterable ones. The first category consists of constraints which are non-consequentialist, prescribed by the most fundamental principles of liberalism: they present hard-and-fast restraints as a rule, urging that there are some things which lie beyond the ability of society to tolerate. Democracy cannot endure norms which deny respect to people and which are designed to harm others, although they might be dictated by certain cultures. Some norms are considered to be by liberal standards intrinsically wrong, wrong by their very nature.

The latter category consists of contingent constraints. Here the view is that some constraints may be removed when circumstances change, therefore they are introduced conditionally: they are a matter of time, place and manner. In other words, if the circumstances are altered, the constraints may be removed. This category may include familiar controversies on issues such as conscientious objection, alcoholism, drugs, capital punishment, sexual intercourse, abortions, euthanasia, and paternalism on matters of safety. This is not to say that a wide consensus may be reached with regard to each and every one of the above subjects. I am sure that some will argue that some of these are matters of principle and should never be permitted (say capital punishment) or

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42. Again it is emphasised that the argument postulates that fascists exclude themselves from liberal society not because their holding of certain beliefs. Rather, it is the combination of holding illiberal, anti-democratic beliefs and acting in accordance with them which makes grounds for exclusion.

prohibited (say sexual intercourse of consenting men), regardless of the circumstances. But since prophecy is not necessarily given to philosophers, it seems to be quite difficult to dismiss out of hand the notion of at least possible debate in future circumstances that are hard to envisage.

One final comment is relevant with regard to Skillen's arguments. In his defence of free expression Skillen emphasises the distinction between speech and action. He postulates that an opinion does not necessarily entail action, and that we cannot treat speech in the same manner as we treat deeds because they cannot hurt in a similar manner. Thus Skillen argues that when we silence opinions we act as if words "could causally affect you in an almost physical way rather than through their according with your grasp of things and thus their being 'acceptable' to you".[43] Words, however, can affect in an almost physical way, sometimes in a physical way. The maxim "Sticks and stones can break my bones but words will never hurt me" is plainly wrong. This is why I see it essential to prescribe the confines of freedom of expression. Indeed, this issue is the centre of attention of the remaining discussion of the theoretical part of the thesis. Meanwhile I wish to make two brief comments, to be developed *in extenso* later: first, when words come near to being translated into action with harmful results, it is difficult, sometimes even impossible, to separate freedom of speech from freedom of action. The borderlines between the two become blurred, and the speech cannot enjoy the special status usually reserved for expression. Then speech can be considered as part of an action.

Second, it has been acknowledged by the U.S. Supreme Court that speech can hurt almost physically, and that there are some types of speech that are hurtful, i.e., that by their very utterance inflict injury.[44] More specifically, it has been argued that some

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43. Skillen. op.cit. p 145.

44. In *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942) the Court ruled that a "fighting words" speech is in itself hurtful, by its very utterance, inflicting injury or tending to incite immediate breach of the peace. In Britain the "fighting words" doctrine came into expression in Lord Parker's phraseology, that a speaker must insult his audience in the sense of hitting them with words for an offence to be committed (*Jordan v. Burgoyne* 2 QB 744, 1963).

utterances cause psychological pain, which can be equated with physical pain. As Justice Powell asserted in *Rosenfeld v. New Jersey* that "the shock and sense of affront, and sometimes the injury to mind and spirit, can be as great from words as from some physical attacks".[45] In such instances, those who suffer the injury will not find much use in the argument, shared by Skillen and Dorsen, among others,[46] which suggests fighting opinions with opinions, for psychological offence is not remediable by more speech.

The distinction between "expression" and "action" is designed to protect the whole general area of expression, regardless of whether that expression creates a danger of subsequent harm. There are many situations in which the distinction is quite clear. It is recognized, however, that there are enough situations in which the line of demarcation between these two categories becomes obscure. In fact, expression frequently takes place in a context of action, or is closely linked with it. Sometimes expression is equivalent to action in its impact. In these mixed cases it is necessary to decide, however artificial the distinction may appear to be, whether the conduct is to be classified as one or the other. This judgment must be guided by consideration of whether the conduct partakes of the essential qualities of expression or action. As Emerson argues, in the main this is a question of whether the harm attributable to the conduct is immediate and instantaneous, and whether it is irremediable except by punishing and thereby preventing the conduct.[47] This is the concern of the coming discussion.

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45. Cf *Rosenfeld v. New Jersey* 408 U.S. 901 (1972).

46. Meiklejohn and Ross also share this view. Cf ch. 5.

47. Thomas. I. Emerson. Toward a General Theory of the First Amendment. 1966. pp 60-61; The System of Freedom of Expression. 1970. p 9. For criticism of the "action" - "expression" approach see J.P. Yacavone. "Emerson's Distinction". 6 Conn. L. Rev. 1973. pp 49-64, and L.R. BeVier. "The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle". 30 Stan. L. Rev. 1978, esp. pp 319-322. Emerson provides some counter-arguments in "First Amendment Doctrine and the Burger Court". 68 California L. Rev. 1980, esp. pp 477-481.

Chapter 5

FREEDOM OF EXPRESSION

A. Words: "Keys of Thought", and "Triggers of Action"

The subject of the extent of freedom of expression that democracies should tolerate is very controversial among authorities in the field. While the defensive reaction of democracy towards those who violently aim to destroy it is commonly viewed by many scholars and theorists as the right and necessary step to be employed, the arguments are much more equivocal when the subject of freedom of speech, without resorting to violent actions, is discussed. Although it is well recognized that words are not only "keys of thought", but also "triggers of action", and that free discussion can and often does produce good, but also that it can and often does produce harm, still freedom of expression enjoys a distinct status. Some even argue that this status grants freedom of expression immunity; thus maintaining that speech has to be protected in principle, not only when it is considered to be harmless, but also despite the fact that it might generate momentous harm. These scholars prefer to concentrate on the good that speech may bring, and overlook the responses it might induce, and the harm it might cause.[1] Others acrobatically develop arguments by which they wish to accord freedom of expression special status, praising the need for this unique status and while recognizing the harm that might result, still give preference to their starting point. Nicholson's views are characteristic of these manoeuvring.[2] He starts by articulating the view that one of

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1. However, even those "absolutists" who would wish to grant immunity to expression as a rule recognize that sometimes exceptions are to be made. I shall elaborate on the "absolutist" view in the next section.

2. Peter P. Nicholson. "Toleration as a Moral Ideal", in Aspects of Toleration. 1985. pp 158-173.

the common constituents of tolerance is its goodness, that it is part of our moral vocabulary. Then Nicholson agrees that not every expression of opinion ought to be tolerated. He puts two constraints on tolerance: first, we should reject whatever contravenes the moral base on which the ideal of toleration rests, namely, respect for all persons as full moral agents.[3] He explicitly claims that we have no obligation to tolerate someone who speaks defamatorily or assaults[4] a person, since

> "these are violations of individuals' legitimate rights and do not belong to the class of expression and action covered by the moral ideal of toleration - the question of toleration just does not arise here."[5]

The second major constraint is that we should reject whatever contravenes the idea of toleration itself, arguing that "to tolerate the destruction of tolerance" is self contradictory. Nicholson maintains that the crucial practical problem is to be able to distinguish between the expression of opinions, which must always be tolerated, and the acting out of opinions, which need not always be tolerated.

After stipulating his two major qualifications, Nicholson contends that any and every expression of opinion ought to be tolerated, including the advocacy of intolerance. The moral good remains to strive for the widest possible extension of toleration. Nicholson praises tolerance, so as not to leave any door for mistaken interpretations. Then he recognizes the need for restrictions, saying that the crucial practical problem remains to identify the boundaries of tolerance and to draw the lines when to tolerate, and when to say stop. Nicholson holds that the suggestion that one ought to tolerate the destruction of toleration is self-contradictory. He concedes that we should tolerate the advocacy of intolerance, admitting that intolerant opinions can be spread and put into practice, and then challenge and undermine institutions and values one holds dear. But, Nicholson

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3. Nicholson resorts to the term 'contravene', which is not very clear. It seems that his meaning is "whatever annuls the moral base of toleration".

4. Nicholson probably means "hitting a person by words". Cf *Jordan v. Burgoyne* (1963) 2 QB 744 (DC) and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

5. Nicholson. op.cit. 1985. p 169.

urges, "the mere possibility does not justify intolerance of the expression of opinions."[6] He asserts that toleration permits restrictions on itself when that is necessary in order to protect the moral values which justify it. It is not clear, however, what are these moral values. Moreover, Nicholson neither postulates examples or specify when there is "mere possibility", and when it is necessary to protect the moral values. Hence it is not clear when advocacy stops and the acting out of opinions begins. So there is only a little wonder why Nicholson is in trouble when he tries to draw the lines.

Witnessing these arguments, the pressing and inevitable question that comes to mind is: what makes freedom of expression so special? Several arguments are commonly proffered to explain its importance, and the need for securing special status for this freedom. These arguments can be sub-divided under the headings of autonomy, democracy, infallibility, and truth. The basic arguments concerning autonomy have already been articulated. I shall review them in brief and later reflect on them in the context of Scanlon's theory of freedom of speech. The discussion will concentrate in the main on the arguments under the other three headings.

B. Grounds for Special Status

1. The Main Arguments

The main arguments which explain the special status of freedom of expression and therefore insist on granting it broad protection can be summarized along the following lines:

A) The Arguments from Autonomy. These arguments postulate that

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6. Ibid. pp 169, 170.

1) freedom of expression is necessary to enable individuals to advance their faculties, and to realize themselves by advocating ideas and beliefs.[7] To use a familiar phraseology, words are "keys of thought and persuasion", and there is a need for free communication to enable individuals to learn about the different options that are open to them.

2) Emphasis is put on the contribution of free speech to rationality, asserting that freedom of expression is needed to make up one's own mind, to decide what to believe, and to weigh reasons for action.[8] It is maintained that while reliance on government to act as the arbiter of tastes and values (such as in the case of pornography) provides no assurance that the decisions it makes for us will be the best ones, it guarantees that whatever capacity people have to make healthy choices for themselves will remain underdeveloped.[9]

3) It is further argued that there is a need to convey beliefs, to vigorously contest the opinions of others, for otherwise they will degenerate into prejudices, with little comprehension of their rational grounds.[10] Thus, freedom of expression is needed to assure the development of individuals as autonomous, rational, and independent beings. It is required to protect the moral sovereignty of people, the self-determination of our moral powers of rationality and reasonableness in conceptions of a life well and humanely lived.[11] A further argument has been made that

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7. On the self-realization and self-fulfilment arguments see F. Schauer. "Must Speech Be Special?" 78 Northwestern L. Rev. 1983. pp 1284-1306. See also K. Greenawalt. Speech, Crime and the Uses of Language. 1989. pp 26-27, 31-33.

8. T. Scanlon. op.cit. 1977. pp 158-159. See also Emerson. Toward a General Theory of the First Amendment. 1966. pp 5-6; and Simon Lee. The Cost of Free Speech. 1990. pp 63-69, 130.

9. Franklin S. Haiman. Speech and Law in a Free Society. 1981. p 181.

10. Mill. On Liberty. 1948. p 112.

11. Cf Frederick Schauer. Free Speech. 1982, chs. 4, 5; and David A.J. Richards. Toleration and the Constitution. 1986, ch 6.

4) free speech is protected not because it is instrumental to any societal good, but because it inheres in people solely by virtue of their being people.[12] In addition, it has been proclaimed that

5) restrictions on free discussion and open exchange of opinions inhibit the intellectual and "spiritual progress" of individuals,[13] and that

6) free speech is a precondition for social progress.[14] Progress is valued in the sense of improvement in the moral and intellectual qualities of the individual, which will contribute to the development of society.[15] This argument is closely related to the Infallibility Argument, and to the Arguments from Truth.[16]

B) The Infallibility Argument is based on the assumptions that

1) all humans are fallible and therefore they should have the right to express their thoughts and to compete in the free market of ideas. The further assumption is that

2) any intolerance of opinions involves, *ipso facto,* a claim to infallible knowledge. Mill explained that this mischief, which involves the undertaking to decide questions for others, without allowing them to hear what can be said on the contrary side, assumes infallibility, and that these are exactly the occasions on which authority has been employed to root out "the best men and the noblest doctrines".[17] In turn,

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12. D.A.J. Richards. "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment". 123 Un. of Pennsylvania L. Rev. 1974. p 45.

13. Cf Murphy J. in *Jones v. Opelika* 316 U.S. 584 (1942).

14. Cf Utilitarianism (pp 28-29) where Mill wrote: "... moral associations which are wholly of artificial creation, when intellectual culture goes on, yield by degrees to the dissolving force of analysis".

15. There is a line of thinking which connects many of the arguments expressed here. It seems that Mill, for instance, had in his mind some sort of a pyramidical view in which rationality is set at the base as a precondition for exchanging ideas and communicating with others. Free speech, in turn, is conducive to the promotion of autonomy and self-government which, in turn, are conducive to human progress and truth and thus happiness. Cf Mill. Principles of Political Economy. 1869. p 458.

16. The arguments under these headings, infallibility and truth, will be elaborated on in ch. 6.

17. Cf Mill. On Liberty. 1948. p 83. This issue is discussed by Skorupski John Stuart

C) the Arguments from Truth assert that

1) the principle of freedom of expression allows (almost) any opinion the right to be heard because no one is in a position to claim complete hold on the truth. It is maintained that although an opinion may have been silenced because it was thought to be in error, it may have contained a portion of truth. This argument was also developed by Mill and at the beginning of this century was embraced by the U.S. Supreme Court. Thus, Justice Holmes in a celebrated opinion stated: "the best test of truth is the power to get itself accepted in the competition of the market".[18] The underlying assumption is that truth will prevail in a free and open encounter with falsehood.[19]

2) Freedom of expression is necessary for keeping the vitality of beliefs. The meaning of doctrines will be in danger of being lost, "and deprived of its vital effect on the character and conduct", unless there is freedom to express any challenging opinion.[20]

3) Toleration of any opinion, even one conceived to be of a gross error, is important, since silencing such an error can lead to two negative consequences: it would open the gate for further constraints on free speech on the government's account, and it would intimidate discoverers of truth, discouraging them from investing in further efforts, and lead to their silence. The further assumption, therefore, is that the evil, or damage, caused by the suppression of ideas outweighs the damage that might emerge from these ideas. This assumption brings us to

D) The Arguments from Democracy which assume

1) that an opinion does not necessarily entail action, and that, in most cases, opinions do not automatically translate into action; thus there is enough time to stop ideas that aim

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Mill. 1989. pp 376-383.

18. *Abrams v. United States,* 250 U.S. 616, 630 (1919). See Mill. On Liberty. p 111, and Black J. in *Martin v. Struthers* 319 U.S. 141 (1943). For criticism of the marketplace of ideas approach see C. Edwin Baker. Human Liberty and Freedom of Speech. 1989. pp 6-24.

19. Aryeh Neier (Defending My Enemy. 1979) is an ardent advocate of this view. See, for example, pp 4, 110-111, 135, 146-147.

20. Cf Mill. On Liberty. p 112.

to endanger democracy before they materialize. This argument is supported by the further assumption that

2) the public is rational enough to recognize evil expressions, and thus in a free discourse of opinions the "good" are bound to triumph over the "bad": the open confrontation of ideas strengthens the self-correcting powers of society.[21] In turn, it is also argued that

3) even if speech might cause injury, it still should enjoy protection because the damage incurred from its restriction outweighs the harm that might result from exercising that speech.[22]

4) Moreover, freedom of expression should be protected because of the lessons that society is likely to learn from such experiences, and because these experiences contribute to the shaping of a wider culture of tolerance.[23]

5) In addition, it has been argued that freedom of expression is a necessary component for securing participation in the democratic life.[24] It is the way in which relevant information is made available to the electorate who then can, on the basis of that information, decide their conduct. Furthermore,

6) given the fact that transitions are constantly in the making, freedom of speech is necessary for citizens to reflect upon their current situation, and to suggest accommodations: freedom of expression is needed to maintain a balance between stability and change in society,[25] and

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21. Skillen. "Freedom of Speech". 1982. p 150.

22. Cf Dorsen. "Is There A Right to Stop Offensive Speech? The Case of the Nazis at Skokie". 1988. p 133.

23. Bollinger. The Tolerant Society. 1986. pp 198-200.

24. T.I. Emerson "First Amendment Doctrine and the Burger Court". 1980. pp 426-428.

25. T.I. Emerson. Ibid. p 428; op.cit. 1966. pp 11-15; op.cit. 1970. p 7; and Kent Greenawalt. op.cit. 1989. pp 24-25.

7) freedom of speech is a means for controlling the government, and assuring its legitimacy; it is a means against the government's attempts at exploitation; against possible corruption of public officials, and a necessary requirement for securing the consent of the citizens.[26]

8) Finally, freedom of expression is important to indicate causes of discontent, the presence of cleavages, and possible future conflicts.

These arguments make a strong position for freedom of speech. Thus scholars and judges who may be associated with what is commonly called the "absolutist" school assert that when free expression is considered, tolerance must prevail in any situation as a principle.[27] This school puts its trust in the human being, believing him to be rational and clever. Therefore it implies that people can recognize undemocratic notions, are capable to understand their destructive power, and that they would not help them to flourish. One has to tolerate every view in principle and appreciate others' rights to say whatever they wish and think right. This is one of the foundations of liberal democracy: to discover what we may call "the will of the people" through a process of constant discussion, which reveals the range of opinions and allows for any idea to attract people and become the most influential one in society. Thus it is argued that, e.g., on the issue of group and individual libel "one of the presumptions of citizenship in a democracy must be the ability of people to learn to restrain themselves in the face of symbolic provocations by others and to fight offensive speech with more and better speech rather than with fists and clubs". Accordingly, so the argument goes, "[c]hildren as well as adults must develop the ability to detect and reject dehumanizing values and false prophets, looking to the law to protect them only from those charlatans whose

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26. Greenawalt. Ibid. pp 25-26.

27. A preliminary note about terminology is in place. Judges and philosophers associated with this school are called "absolutist" because they are reluctant to restrict freedom of expression or assembly. However, "absolutists" do not hold that all restrictions on these liberties are automatically unconstitutional.

blandishments can lead directly and immediately to material loss or physical injury".[28] Let us now look at the "absolutist" approach more closely.

2. The "Absolutist" School

The "absolutists" tend to believe that once we limit the expression of opinions, the system will come under constant pressure to continue to do so. Thus, for the sake of democracy and its basic pillars, we must allow every political opinion to be heard, and should we choose to contest certain ideas, this can only be done by posing contradictory opinions.[29]

Alexander Meiklejohn, one of the leading exponents of this school, takes the fifth Argument from Democracy (as postulated above) to be of such importance as to outweigh any restrictions on expression. He asserts that without freedom of expression, taking part in the democratic life is impossible. It is an essential means without which citizens cannot participate in the decision making. Meiklejohn further argues that public political speech should be absolutely protected from all abridgment.[30] He claims that the principle which assigns equality of status to opinions springs from the necessities of the programme of self-government, and that the First Amendment of the U.S. Constitution protects this commitment: when citizens govern themselves it is they, and they alone, who must pass judgment upon unwisdom, unfairness and danger.[31] Citizens may not be

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28. Franklin S. Haiman. op.cit. 1981. pp 94, 426 (underline mine).

29. In the United States the absolutists believe that the command of the First Amendment is absolute in the sense that no law which restricts freedom of speech is constitutionally valid. Black J. was the leading advocate of the absolutist approach. Cf, e.g., *Martin v. City of Struthers* 319 U.S. 141 (1943); *Barenblatt v. United States* 360 U.S. 109 (1959) (Black J., dissenting); *Konigsberg v. State Bar of California* 366 U.S. 36 (1961) (Black J., dissenting).

30. Cf Meiklejohn. Political Freedom. 1965. pp 8-28, 101-124. See also Hugo Black. "The Bill of Rights". 35 N.Y. Un. L. Rev. 1960. pp 865-881.

31. This is not to say that the First Amendment is not subject to regulations at all. Meiklejohn explains that its purpose is to make people self-educated, to make self-

barred from speaking because their views are thought to be false or dangerous. The fact that speech can cause harm does not constitute in itself sufficient grounds to abridge that speech. The Free Speech Principle takes this possibility into account. Meiklejohn maintains that no suggestion of policy can be denied on the grounds that it is on one side of the issue rather than on another. Conflicting opinions, including the most absurd views, must be heard not because they are valid, but because they are relevant. He concludes by saying that to be afraid of ideas, any ideas, is to be unfit for self-government.[32] Speech cannot be restricted because of its content, but only if it interferes with "necessities of the community", such as when meetings are held in public places, and thus - for instance - causing traffic jams.[33]

The common criticism of Meiklejohn's arguments attacks the very core of his views. It is quite clear that although emphasizing self-governing, Meiklejohn views the protection of speech as a restriction on the authority of government rather than as an individual right. He contends that free speech is required to make self-government work but avoids the question what to do when citizens, in the self-governing process, decide to prohibit some types of speech. As Schauer remarks, "the very notion of popular sovereignty supporting the argument from democracy argues against any limitation on that sovereignty"; it thereby argues against recognition of an independent principle of

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government a reality, asserting that the First Amendment does not protect speech. Rather, it protects political freedom in speech or whenever else it may be threatened. It protects the freedom of those activities of thought and communication by which we govern. See Meiklejohn. "What Does the First Amendment Mean?" 20 The Un. of Chicago L. Rev. 1953. p 471; "The First Amendment Is an Absolute". Supreme Court Rev. 1961. p 255.

32. Cf *Garrison v. Louisiana* 379 U.S. 64 (1964), where the Court ruled: "... speech concerning public affairs is more than self-expression; it is the essence of self-government".

33. Cf Meiklejohn. "The First Amendment Is an Absolute". 1961. pp 260-261; "The Balancing of Self-Preservation Against Political Freedom". 49 California L. Rev. 1961. pp 5-14; and "Freedom of Speech", in P. Radcliff (ed.) Limits of Liberty. 1966. pp 19-26. See also William Douglas. The Right of the People. 1958, esp. pp 35-66; and Michael J. Perry's defence of free speech, aiming to secure it an overwhelming immunity ("Freedom of Expression: An Essay on Theory and Doctrine". 78 Northwestern Un. L. Rev. 1983. pp 1137-1211).

freedom of speech.[34] It is not clear, therefore, what Meiklejohn means by "self-governing", and why self-governing excludes putting restrictions on freedom of expression.

Moreover, I am disturbed by Meiklejohn's argument that in "emergency" situations, when something must be said and no other time, place, circumstances, or manner of speech will serve for the saying of it, a citizen may be justified in "taking the law into his own hands".[35] Meiklejohn does not clarify the meaning of "emergency" situations. He elucidates his contention only by bringing Holmes's trivial example that we cannot allow falsely shouting "**Fire!**" in a crowded theatre,[36] arguing that if there is a real fire, one is duty-bound to inform others of the danger. This is an obvious situation in which one is indeed obliged to warn the others, but here one is not taking the law into one's hands. One is simply exercising one's common sense without violating any law. There is a difference between the suggestion that in emergency situations one can take the law into one's hands, and this example. Meiklejohn's suggestion, in the strong phrasing that it is put, might open the way for challenging the law on quite vague and wide grounds.[37]

A further criticism is concerned with the immunity Meiklejohn wishes to grant for political speech. Thus Bork argues that there is one category of such speech that must be excluded. This category consists of speech advocating forcible overthrow of the government or violation of law. Bork explains that such expressions cannot be considered as political speech because they violate constitutional truths about processes,

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34. Schauer. Free Speech. 1982. p 41. Justice Frankfurter in his *Dennis* opinion [341 U.S. 494, (1951) at 519, 525] referred to Meiklejohn's book and described the absolutist school as "a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict". He further characterized the absolute statements as "dogmas too inflexible for the non-Euclidean problems to be solved".

35. Meiklejohn. "The First Amendment Is an Absolute". 1961. p 261.

36. *Schenck v. U.S.* 249 U.S. 47 (1919).

37. Another criticism are concerned with the distinction that Meiklejohn tried to draw between public and private speech. Cf Zechariah Chafee. Book review of Meiklejohn's Political Freedom, in Harvard L. Rev. 1949. pp 899-901.

and because they are not aimed at a new definition of political truth by a legislative majority. He maintains:

> "Violent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech. It follows that there is no constitutional reason to protect speech advocating forcible overthrow."[38]

Following Bork's reasoning, I may add another question. That is whether Meiklejohn, by his own standards, would allow everything that is concerned with politics to be discussed in the open. Meiklejohn avoids addressing extreme cases in which such a debate might endanger life, or in which political speech amounts, in fact, to betraying one's country. It seems that in such cases he might had qualified his position. However, Meiklejohn refrains from testing the limits of absolutism. He has accorded political speech absolute freedom which is far broader than can ever realistically be accepted by any legal system.

Another scholar who can be associated with the "absolutist" school is Alf Ross. He defines freedom of speech as "the freedom to propose any political opinion whatsoever and agitate for it, irrespective of its substance, but on condition that the propaganda does not make use of inadmissible means, nor aim at using violence".[39] It is not entirely clear what 'agitate' includes. It seems that here Ross follows Justice Holmes's assertion that "[E]very idea is an incitement".[40] The aim of ideas is to convey messages, to awaken people to action. Ross embraces the view that the public in democracies is rational enough to recognize evil expressions, and fight them to safeguard democracy (Argument no. 2 from Democracy). Ross develops the argument further, explaining that when the ideas of liberty, justice and humanity are rooted in society, they have the inner force to fight against conflicting ideas. He maintains that when democracy in Germany

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38. Robert H. Bork. "Neutral Principles and Some First Amendment Problems". 47 Indiana L. J. 1971. p 31.

39. Alf Ross. Why Democracy? 1952. p 237.

40. *Gitlow v. N.Y.* 268 U.S. 652, 673 (1925).

and elsewhere succumbed defencelessly, it was not because it recognized its opponents' right to speak, but because - among other reasons, the ideas of democracy had never seriously taken root in those newly democratic societies.

The first argument seems to be rather peculiar. It is difficult to agree that every opinion which preaches violence is not considered as a part of free speech and therefore, it is implicitly argued, it ought not to be heard. Let us contemplate, for instance, a mass or a minority struggle against a cruel and exploitative oppressor. Can we impose, in such a case, a taboo on agitation to counter-violence, and condemn certain groups to slavery? Is abstention from preaching violence, and the value of forbearance from violence, higher than the value of freedom? Is violence enacted by one group more terrible than violence that is enacted against the same group? If the answer to this triple dilemma is 'no', then it is the right of any enslaved group to do anything it can to free itself from the condition of exploitation under which they live.

The second argument emphasises the importance of political culture, implying that "ripe" democracies cannot be endangered by extremist threats for the simple reason that the democratic principles are well rooted in society, and the people are reasonable enough to acknowledge the risk involved, so that they would never support threats aimed at destroying the system. Experience has shown that these assumptions are valid when states with a long democratic tradition are considered, but what about those democracies which are not yet "ripe"? It is not clear what Ross's stand is regarding young democracies, where "the strength and life of the people's love for and faith in ideas of liberty, justice and humanity" are lacking. He does not believe that these ideas can be safeguarded by means of prohibitions.

One may concur with Ross that states with a long democratic tradition are less likely to face internal threats against democracy, and that even when fascist, anti-democratic groups arise (like Mosley in England in the 1930s) they are less likely to gather considerable force than similar groups appearing in states with, say, authoritarian tradition. One may also agree that ideas of liberty, justice, and humanity cannot be safeguarded only by means of prohibitions. But I do not see why the resort to such prohibitions should be denied altogether from young, "unripe" democracies, which in the

face of grave threat to their existence find it necessary to supplement the educational struggle with well-defined legal restrictions.[41] Should they give their rivals the potential power to destroy them? Alternatively, maybe they should accept their destiny, adopting the fatalist view that there is nothing they could do, since their future has already been determined by the lack of a democratic tradition. Ross overlooks these questions, and as to the "ripe" democracies he goes on to advocate a simple rule, asserting that:

> "it is vital for democracy to adhere to the clear principle: Force may be used against force; opinions can be combatted only with opinions".[42]

This formula appears, at first glance, to be quite convincing. This may be because of its style of phrasing. But upon closer examination we can say that this formula is both unrealistic and idealistic. We can understand the concern for open and free flow of opinions, and entirely agree that to be able to talk freely, to be able to protest against injustice, to mould and be moulded in open disputation with others are, indeed, essential components of self-realization. Therefore, the state should provide broad open channels for free discussion and exchange of opinions. We may further agree with the view that every opinion should be heard. Nevertheless, we may also be inclined to think that the simple principle that "opinions can be combatted only with opinions" is too wide a generalization and should not be adopted as a rule. Its implication is that freedom of expression should be extended to all groups, even those who seek to destroy it. What are we to do, for instance, if we try to combat discriminatory opinions by employing only opinions and fail at the end? Are we simply to surrender, even if we think that the opposing party is hazardous to the public good, or to part of it?

Moreover, the statement "force may be used against force" needs some qualification. We must fight against force with any means we possess, but force should be the last resort, after the peaceful options have been exhausted and failed. The right that the individual has to implement a certain act is not sufficient reason for him to perform it.

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41. This issue will be the concern of part II of the thesis.

42. Ross. op.cit. p 241. In a similar manner MacIver (The Web of Government. 1959. p 200; The Modern State. 1926. p 153) maintained that the democratic principle requires that all opinions be allowed free and full expression, and that opinion can be fought only by opinion, because only thus it is possible for truth to be revealed.

Exactly the same applies when fighting opinions. Thus, for instance, the right to free speech does not supply sufficient reason for unjustifiably destroying the opponent's reputation; it does not imply that one can slander, disseminate false information or make false charges against innocent individuals. This right does not include distributing unsubstantiated malicious publications which harm the reputation of single individuals whose opinions are opposed.[43]

Ross further states that delusion and fanaticism should not be repressed: if left alone they are as harmless as a germ which will be destroyed or purified in the fire of free criticism; therefore, "there must be freedom for evil as well as for good". In support, Ross cites Renan:

> "Freedom is the great means of destroying all fanatical opinions. When I demand freedom for my enemies, freedom for him who would like to oppress me had he the power, I actually present him with the smallest of gifts. Science can bear the virile force of freedom; fanaticism, superstition cannot bear it".[44]

Yet again, Renan's assertion seems to be quite naive for three reasons: firstly, because the germ can spread and kill the body before the immunization devices of science have a chance to react; secondly, that "smallest of gifts" may be viewed by the receiver as a springboard for curtailing further freedoms. And thirdly, it is not clear who is to guarantee free criticism if the germ should grow to power.

A distinguished philosopher who does recognize the harmfulness of expression and thus refrains from granting it immunity is Thomas Scanlon. Scanlon attempts to construct a theory of freedom of speech which considers the extent to which a defender of freedom of speech has to rest his case on the claim that the long-term benefits of free expression outweigh certain obvious and possibly severe short-run costs, and to

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43. It is not clear what is Ross's stand with regard to cases of libel, defamation and slander. His theory excludes protection from propaganda which makes use of "inadmissible means", or which aims at using violence (op.cit. p 237). Ross, however, does not explain the meaning of "inadmissible means".

44. Ibid. p 116. Nevertheless, Ross maintains that there can be no doubt that freedom of speech as a democratic idea cannot mean that any verbal statement should be legal, and that there are several kinds of verbal or written utterances that are forbidden, without this having anything to do with a limitation of the democratic freedom of speech (p 234).

what extent this calculation of long-term advantages depends upon placing a high value on autonomy and intellectual pursuits as opposed to other values. Scanlon's theory aims to limit the powers of a state to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents. Let us now devote some space to his theory.

3. Scanlon's Theory

Scanlon in "A Theory of Freedom of Expression" aims at formulating a principle of freedom of expression which would provide *a priori* constraints on the authority of governments. Like Meiklejohn, Scanlon strives to accord this principle a kind of absoluteness or at least partial immunity from balancing against other interests. He, however, wants his theory to include all types of speech, and not be limited to the political. Scanlon's starting points are Meiklejohn's self-governing argument, and the Millian theory. He formulates his theory as constituting the protection of "individual autonomy", asserting that a person is autonomous if he conceives himself as sovereign in weighing competing reasons for action. Scanlon examines a number of different ways in which speech-acts can bring about harm. Speech-acts are defined in a very broad manner as any act that is intended by its agent to communicate to one or more persons some proposition or attitude.[45] Scanlon emphasises that the harms he mentions are not always sufficient justification for abridging speech, but that they can always be taken into account, and that the distinction between expression and other forms of action is less important than the distinction between expression which moves others to act by indicating what they see as good reasons for action, and expression which gives rise to action by others in other ways. However, we can think of instances in which it is

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45. These acts include expressions which can bring about injury or damage as a direct physical consequence; assaults; defamation and interference with the right to a fair trial; Holmes's assertion that we would not protect a person who falsely shouts "**Fire!**" in a crowded theatre; expressions which cause a severe harmful act by someone else; and expressions which might cause a drastic decrease in the general level of personal safety. Cf Scanlon. "A Theory of Freedom of Expression". op.cit. 1977. pp 158-159.

difficult to draw a line and determine when a justification for action superseded the agent's own judgment.[46] Thus Scanlon's distinction may hold in clear-cut cases, but not in border-line cases. Indeed, Scanlon himself admits that it is difficult to say exactly when legal liability arises in some cases. Then he proceeds to formulate the principle of freedom of expression, which he entitles "the Millian Principle":

> "There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing".[47]

Scanlon views the Millian Principle as the basic principle of freedom of expression, and rejects any goal-based or consequentialist reasons that might interfere with this principle. Following the Millian defence of liberty of thought and discussion, Scanlon argues that speech may not be prohibited on the grounds that harms to individuals or society may result due to the individual's acceptance of the validity of the speech; individuals must be given the freedom to make judgments and decide for themselves. He assumes that autonomy, in his "weak" sense, is something that all rational people conceive as extremely valuable.[48] Scanlon further argues that violations of the Millian Principle interfere with a person's autonomy and therefore ought not to take place. Citizens need to be exposed to all sorts of information to exercise their faculties and to make up their mind. Therefore, the harm of coming to have false beliefs is not one that an autonomous person would allow the state to protect him against through restrictions on expression. In other words, the authority of governments to restrict the liberty of citizens in order to prevent certain harms does not include the authority to prevent these

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46. Geoffrey Marshall pointed out to me the case of Thorpe, the MP who was blackmailed with regard to his secret of being a homosexual. Thorpe approached a friend of his and explained to him why it was important to kill the blackmailer, saying that otherwise his party might be defeated in the elections. Thorpe could have argued that he only persuaded to murder, and that he did not incite to murder.

47. Scanlon. op.cit. 1977. p 161.

48. See ch. 1 *supra.*

harms by controlling the sources of information so as to ensure that they will maintain certain beliefs.[49] The legitimate powers of governments are limited to those that can be defended on grounds compatible with the autonomy of their citizens. This argument can be regarded as a similar version to Meiklejohn's self-governing idea.

It is worth mentioning Dworkin's criticism of Scanlon's theory which focuses on three points. First, that it ignores the interests of the **speaker**. He asserts that Scanlon's conception of autonomy concentrates on the rights of those who wish to hear the speaker; yet some may feel that the right of free expression belongs, in the end, to the speaker, and not to the potential audience.[50] Furthermore, Scanlon suggests that the audience might consent not to hear opinions it detests, and so warrant exceptions to the principle. And thirdly, that we may infer from his arguments that the government might be justified in restricting speech on the basis that it does not contribute any new ideas.[51] Frequently speakers simply wish to repeat well-known arguments, and this type of speech does not fall within the Millian Principle.

Upon reflection, when canvassing his arguments in a more recent article, Scanlon has arrived at the conclusion that his theory, in some important respects, is inadequate. Bearing Dworkin's criticism in mind, Scanlon now makes a distinction between interests of participants; interests of audiences; and interests of bystanders.[52] Yet again, he speaks of the central interest of the audience in having a good environment for the formation of its beliefs and desires and ignores the fact that speakers have exactly the same interest. We all wish, as spectators and as speakers, to promote a framework within which we might pursue our ideas and beliefs. I find this point interesting because Scanlon urges

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49. Ibid. p 167.

50. I would suggest that both Scanlon and Dworkin are right, i.e., that the right of free expression belongs to the speaker, as well as to the listeners.

51. R.M. Dworkin. "Introduction". The Philosophy of Law. 1977. p 15. Further criticism is made by C. Edwin Baker. Human Liberty and Freedom of Speech. 1989. pp 51-52.

52. T.M. Scanlon. "Freedom of Expression and Categories of Expression". 40 Un. of Pittsburgh L. Rev. 1979. p 521.

arguments from autonomy which are naturally concerned with the agents, but reaches conclusions which characterize the arguments from democracy and from truth, i.e., conclusions which focus on the benefits for the wider range of society. It has to be noted, however, that Scanlon develops his theory of group interests as far as the category of bystanders is concerned and refrains from speaking of the overall societal interests in promoting a good environment. Scanlon continues to believe that speech-acts are fundamental human interests. Now, however, he admits that his mistake was that in the effort to generalize Meiklejohn's theory beyond the category of political speech he took what were in effect features peculiar to this category and presented them, under the heading of autonomy, as *a priori* constraints on justifications of legitimate authority.[53] He further concedes that additional information is sometimes not worth the cost of getting it, and that we should not be willing to bear unlimited costs to allow expression to flourish, under his Principle. Scanlon also recognizes that speech not related to political issues may legitimately be restricted on paternalistic grounds. However, when political issues are concerned Scanlon advocates a strong level of protection for expression:[54]

> "... where political issues are involved governments are notoriously partisan and unreliable. Therefore, giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important participant and audience interests."[55]

Strangely enough, this argument serves him to defend the Skokie decision, where it is quite difficult to think of any benefit for the audience witnessing the march, who clearly did not wish to communicate with the actors, or be exposed to their ideas.[56] Here it is hard to see the rally as compatible with the "central audience interest" in having "a

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53. Ibid. p 535.

54. It should be noted that Mill did not draw such a distinction between political and non-political speech.

55. Scanlon. op.cit. 1979. p 534.

56. I refer to the residents of Skokie, who are the direct audience. Of course, one may argue that in reality the audience would be much wider through the work of the media.

good environment". But Scanlon is not speaking of audience interests at all. He recognizes that the racist expression is deeply offensive only to bystanders, without supplying any explanation for not considering the interests of the audience. And since the march is a political issue, this fact outweighs the offence imposed upon them. In his fear of government interference he is willing to allow speech-acts, however offensive they might be.

Scanlon's theory is of importance for several reasons. Like Meiklejohn, he takes the arguments from autonomy to be crucial in protecting freedom of expression, but unlike him he tries to construct a broader philosophical theory which does not resort to the American constitution. He prescribes the boundaries of government interference as derived from the respect that a legitimate government owes to personal autonomy. The state cannot enact laws to protect citizens against holding false beliefs because, in so doing, it would be depriving citizens of grounds for making an independent judgment. Autonomy is valued since it promotes the effective pursuit of our opinions, and Scanlon ascribes to this value primary importance within his Principle. He acknowledges the importance of the Millian Principle, but nevertheless recognizes that it is incapable of accounting for all the cases that strike us as infringements of free speech. Then, Scanlon appeals to our intuitive view of freedom of expression, which rests upon a balancing of competing goods, and also concedes the importance of circumstances. He explains that the Millian Principle allows us hazardous publication, which might inflict certain harm at a time of peace, but the same publication might be intolerable in wartime.[57] Furthermore, Scanlon maintains that there are a number of different justifications for the exercise of coercive authority. He concludes that it would take a situation of near catastrophe to justify coercion, but he does not elaborate what he means by "catastrophe"; whether or not harm to some part rather than to the whole of society would qualify as a catastrophe, and essentially what sorts of harms are not to be tolerated.

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57. Scanlon. op.cit. 1977. p 170.

Moreover, the essential question is why we should wait until the stage of catastrophe. That is, why should we wait until the last minute when it may be clearly recognized that the speech in question is incompatible with the moral principles which characterize a liberal democratic society as such? Scanlon holds that we should tolerate political expressions as a matter of principle, but then he recognizes what I call the "democratic catch", hence conceding the "near catastrophe" exception, where it becomes legitimate for democracy to be on the defensive. Thus it would appear that, from Scanlon's standpoint, the issue of restricting tolerance is a practical, rather than an ethical question. He prefers to ponder considerations of circumstances and the extent of the threat, without explaining from an ethical perspective why we should withhold tolerance. Instead Scanlon argues that tolerance has to prevail as long as there is no real danger to democracy. Like Rawls, he avoids addressing the issue of whether there should be moral restrictions on tolerance and, if there are, what these should be.

Scanlon's hypothesis is designed to restrict government activities in matters of free speech. As such it supplies us with a general background theory of freedom of expression. The Harm Principle serves Scanlon to draw confines for state interference. I want to go one step further and probe the subjects which Scanlon discusses in brief at the end of his theory, in order to expand upon the generalizations which he makes. The aim is to consider the Millian theory as a guideline for drawing boundaries for freedom of expression, which are conceived to be essential for the defence of democracy. In other words, the purpose is to confront the ethical question of the constraints of tolerance: what restrictions on tolerance may be prescribed by morality? Here the focus is set on the harm: can we say that sometimes, the harm caused as a result of speech constitutes such an injury that it cannot be tolerated? If it does, as Scanlon concedes, then we have to determine what harm is intolerable, and whether circumstances are of importance. It is necessary to note, however, that when speaking of restrictions on freedom of expression, these should be as clear and precise as possible. Too vague and overly broad a definition might lead to administrative abuse on the part of the government in its attempt to silence "inconvenient" views. An imprecise definition might

have a snowballing effect, paving the way for a syndrome whereby freedom of speech might become the exception rather than the rule. Moreover, the restrictions cannot be occasional. We have to seek a criterion that could serve both as an evaluative guideline and be suitable for a range of cases, covering all types of speech (racist, ethnic, religious etc.).

In order to explore this issue, it is necessary to consider the Millian theory and to see what he had to say when freedom of expression was under scrutiny. This is the concern of the next two chapters. I shall first examine what grounds were supplied by Mill (and others who followed him) for tolerating expression. Emphasis will be put on the need for a free market of ideas to enable the discovery of truth. Then, in the following chapter, I will probe the confines suggested by Mill to freedom of expression. Before doing that, however, in order to give a complete view of the Millian Harm Principle I wish to consider in brief how it was applied to action. The arguments are well versed in the literature and thus I do not wish to expand on them.[58] Thus I shall only summarize them and then clarify how they are to be applied by an illustrative example.

C. The Harm Principle

Mill drew a distinction between self- and other-regarding actions. He prescribed interference in another's self-regarding conduct when:

1. the doer is likely to harm himself, and

2. there are sufficient grounds to believe that the doer does not have an interest to do so, and

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58. For detailed discussions see, *inter alia*, John C. Rees. "A Re-reading of Mill on Liberty". 8 Political Studies. 1960. pp 113-129; C.L. Ten. Mill on Liberty. 1980; John Gray. Mill on Liberty: A Defence. 1983; John Skorupski. John Stuart Mill. 1989.

3. the circumstances are such that the time factor is pressing, and the opportunity to deliberate is denied from the doer.

Whereas in other-regarding cases, when the doer's conducts inflict harm upon others, interference in his liberty is vindicated when:

1. the conduct violates distinct and assignable obligation/s to another person. Mill clarified that a conduct can be seen to violate such an obligation when

a. the degree of harmfulness is weighty enough to outweigh the loss of freedom incurred as a result of the interference, and

b. the damage is definite.

In other words, with regard to other-regarding cases **(a)** + **(b)** are conducive to identify **(1)**. Nevertheless, the degree and the probability of the harm still do not explain Mill's intention when speaking of 'assignable obligation'. Here we can only assume that by 'assignable' Mill meant 'undoubted': an obligation that one can clearly attribute to another.

It has to be said that the entire distinction between self- and other-regarding activities is problematic. Indeed, Mill was well aware of the inherent ambiguities and difficulties likely to be involved in trying to differentiate the two with regard to a certain conduct. Thus in the Logic he admitted that all social phenomena are interrelated, and that no part of society could be described adequately in isolation from the effects of other phenomena.[59] In On Liberty Mill asked:

> "How... can any part of the conduct of a member of society be a matter of indifference to the other members? No member is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them."[60]

Mill went on to concede "that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected

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59. System of Logic. 1961. Bk VI. 9;2, p 586.

60. On Liberty. p 136.

with him, and in a minor degree, society at large".[61] Nevertheless, it seems that Mill thought that from a methodological point of view one could gain further insight, whose benefit may outweigh the potential vagueness of such a conceptualization. He assumed that in many spheres of life, with regard to a variety of actions, the implications of the self- and other-regarding principles might be clear enough to serve as guidelines. Let us reflect on the Millian formulation by considering the following example.

A gifted American athlete has failed for the second time to qualify for his country's team to the Olympic games, and this is for him the dream of his life. The athlete thinks that only by participating in these games could he fully realize himself. He knows that given a chance to take part in the next Olympics he could represent his country well. He also recognizes that this would probably be his last chance. He decides to take the initiative and improve his chances of participating in the Olympics in any way that he can. Under the Harm Principle, as long as he does not harm others, he is free to take every option to realize his dream, including ones which may require some sort of self-sacrifice. He may decide, after deliberation, to emigrate to another country and qualify there. Or else his national identity may be of more importance to him than his sexual identity. The athlete is free then to change his sex and gain the desired ticket as a woman. Furthermore, he has the right to hinder himself and so be eligible to participate in the disabled Olympics. Though repellent, one does have this option and one can enjoy one's liberty to harm oneself without interference, so long as one is not coerced into taking either of these options. All three possibilities demand sacrifice, and all are permissible if one willingly decides to take them. It may argued that by taking either of these three alternatives our athlete deprives his fellow country people of his achievements. Nevertheless, all three actions cannot be said to violate distinct and assignable obligations of other people. The athlete did not commit himself not to develop his career as he sees right only to satisfy enjoyments that other derive from watching him run. But if our athlete decides to take a different path and, e.g., eliminate

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61. Ibid. p 137.

those who are ranked above him in order to improve his chances, here his liberty has to be curtailed.

Thus far for liberty of action. In chapter 7 I shall discuss the restrictions which were introduced by Mill to expression. Before taking this endeavour, however, it is in order to analyze the Argument from Truth which provides, in the sphere of expression, one of the most conspicuous answers to the question: why tolerate?

Chapter 6

WHY TOLERATE? THE MILLIAN TRUTH PRINCIPLE

A. Preliminaries

One of the major arguments for tolerance of expression, frequently made in order to grant immunity to expression which is not accorded to action, is the Argument from Truth. Incorporating the Infallibility Argument[1] it postulates that since there is a possibility of being wrong we must not rely only on what appears to us to be true. That is, one has to remain somewhat uncertain even while being certain, for toleration is connected with the willingness and the ability to acknowledge the presence of different approaches which are remote from one's own. Moreover, one may discover in time that while there are grains of truth in one's view, it nevertheless remains partial and could be completed by joining with other partial truths. Even if one believes that one knows what the truth is, one must not rest but should continuously submit one's truth to trial-and-error tests, in order to prove to oneself, as well as to others, that one is not mistaken.

It is further argued that we should guarantee each and every opinion the opportunity to be heard, for otherwise we might put barriers in the way for the discovery of the truth. The assumptions are that to admit the possibility that the other's ideas may be true, though I do not believe in them myself, is to acknowledge the possibility that my ideas may be false and to recognize that there is enough room for groups and individuals who may hold totally different opinions. Suspicion of views simply because they are held by a minority might hinder the discovery of new truths. After all, every new idea, every innovation, starts with a minority of one. And we have to bear in mind

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1. Cf ch. 5 (B) *supra*.

that even the most unpopular idea may contain some truth in it and may contribute to the advancement of knowledge.

The Argument from Truth further commands us to contest those opinions, which are believed to be true, vigorously and earnestly to explore some further truth, and to uncover their false aspects. This argument was asserted by the United States Supreme Court in a number of decisions.[2]

The argument that we should keep questioning what we hold to be true postulates that each may hold his own truth and by seeking truth he develops his autonomy, his own faculties. Thus, if **A** offers **B** 'The Truth', **A's** promised truth, without offering **B** some alternatives for searching for the truth through the exercise of **B**'s own power, then **B**'s autonomy will be diminished. This is because one's truth is not necessarily the other's truth, and everyone should be able to decide for himself which avenues to pursue. No party enjoys a monopoly on the truth. No one has full possession of an exclusive truth. This argument may resemble an argument of a skeptical spectator, who contends that he believes that the pictures he sees are real and alive, but nevertheless questions the objectivity of the photographer (or the director) who decides where to place his camera. Our spectator, therefore, wishes to explore the same scene from every possible angle, not only from that of the photographer, so as to bring to light the whole picture. The underlying assumption is that the search for truth is infinite, and hence there should be a free market place for truths, in which every person is able to advance his own partial truth while considering other truths.

The further assumption concerns the existence of a fundamental need for discussion and for a flow of opinions in order to facilitate and to promote political action. Unless I am permitted to have an opportunity of directing and concentrating the majority will in order to make a meaningful reform, there is no political action that I can take. Democracy has been called government by discussion and the entire democratic process

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2. Cf Holmes J. in *Abrams v. U.S.* 250 U.S. 616 (1919); Brandeis J. in *Whitney v. California* 274 U.S. 357 (1927); and Frankfurter J. in *Kovacs v. Cooper* 336 U.S. 77 (1949).

presumes the exchange of criticism and opinions, conducted within a consensus on basic principles. Therefore, governments ought to allow the pursuit of different paths to truth and encourage open debates and the free flow of criticism, so as to explore different aspects of the truth.

In sum, one has to remain open to different views that may, on occasion, be contradictory to one's own, out of the respect that one feels for the other's freedom of thought and expression; because one realizes that one is not infallible; because of the desire to advance the search for the truth; and also because debates on different views help citizens to become aware of the interests of others, which may be different from theirs, and thus contribute to a sense of community.

Let us now consider the Millian Truth Principle in some more detail. We may note that Mill was not the first[3] (or the last) to develop the Argument from Truth. Still, no other figure has emerged who is more closely associated with this argument than Mill. Under his influence this argument became to be one of the keystones of the plea for tolerance.

B. The Millian Truth Principle

According to Mill, the quest for truth is both an important as well as an expedient endeavour. He contended that every opinion should be checked against experience, without the fear of consequences, further stressing that when opinion is verified by experience and observation, then we have sufficient grounds for holding it to be true. Sufficient, but not absolute. One can never be sure that the truth in one's possession is the truth, the whole truth, and nothing but the truth. One cannot expect to find more than provisional truths. The result of these views was an avowed commitment to the

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3. Cf John Milton who published his Areopagitica in 1644, advocating that truth is a perpetual progression, therefore every idea should be tolerated.

idea that we can never be sure where the truth lies, hence all our answers must be tentative: a universal, single truth is not, and cannot be found.

In formulating his Truth Principle Mill regarded truth as an ideal, for absolute certainty can be a dream to which we should all aspire, but one which can never be reached in reality. The search for truth is a search for beliefs which we might hold with more confidence, rather than for beliefs of which we could be absolutely certain. Mill put forth the familiar hypotheses that, firstly, we can never be sure that the opinion we are endeavouring to stifle is a false one; and secondly, that even if we were to be sure, stifling it would still be an evil.[4] He urged that false opinions be tolerated for the sake of the true, for it is impossible to draw any clear line that would distinguish between true and false views: everyone who "has even crossed the threshold of political philosophy" knows that on many of its questions the false view is greatly the most plausible and "a large portion of its truths are, and must always remain, to all but those who have specially studied them, paradoxes; as contrary, in appearance, to common sense, as the proposition that the earth moves round the sun".[5] Therefore, we should always question common beliefs which are held as "truths", for truth is an ideal that we can never reach, but for which we should nevertheless continue to struggle.

Two crucial considerations in support of the Truth Principle were offered: the infallibility and the vitality arguments. The infallibility argument is based on the familiar assumptions[6] that **(1)** there are beliefs which claim truth in areas in which it is impossible to hold with certainty any belief to be true; and that **(2)** any intolerance of opinions involves, *ipso facto,* a claim to infallible knowledge. Even those opinions of whose truthfulness we are confident, such as "Newtonian philosophy", must be exposed

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4. On Liberty. 1948. p 79.

5. "Appendix", in Dissertations and Discussions. 1973. Vol. I. p 474. Reprinted under the title "Democracy and Government", in G.L. Williams (ed.) John Stuart Mill on Politics and Society. 1976. p 184.

6. Cf ch. 5 (B).

to scrutiny and doubts.[7] Those who assume that they know what the truth is provide reasons against pursuing constant inquiry and debate, depriving humanity of exploring further truths, and so blocking the wheels of progress. Silencing an opinion is likened to "robbing the human race". Mill urged this argument in support of his demand for tolerance in the spheres of politics, morality, religion, and taste; spheres which are frequently invaded by intolerance.

In turn, the vitality argument suggests that without the free exchange of ideas, the common views would be rigid, lack adaptability and soon turn into dead dogma. However true an opinion may be, if it is not fully, frequently and fearlessly discussed, it will cease to be held as a "living truth".[8] While acknowledging the fact that, indeed, "the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes",[9] Mill reasoned that free and open discussion is bound to bring about truth. In a somewhat similar way to Adam Smith's belief in the function of the "invisible hand" in regulating the economic powers of the market, Mill believed in one such "hand" that regulates the "marketplace of ideas", leading to the discovery of truth. He proclaimed that in the long run, truth never fails to prevail over error: it may be extinguished once, twice, or many times, but in the course of the ages people will usually be found to rediscover it.

Together Mill's arguments seem to establish quite a powerful defence of tolerance in the name of truth. The question is whether it can be said that in the name of truth we should allow every opinion, whatever this may be, to be heard. We may press this

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7. On Liberty. p 83.

8. Ibid. p 95. Bearing these arguments in mind, it is quite puzzling to reflect on Mill's reaction when asked to join a society he did not appreciate. Mill declined the invitation of the **Neophyte Writers Society**, commenting that he was not interested in aiding the diffusion of opinions contrary to his own, but only in promoting those which he considered "true and just". Cf Mineka. The Later Letters of J.S. Mill 1849-1873. 1972. p 205. 23.4.1854.

9. On Liberty. p 89.

question further, asking whether it follows that all paths for discovering the truth should be left open, so as to enable each person to find his or her truth; and whether it is entailed that the Argument from Truth is immune to qualification, e.g. that we should never lie. Surely this was not what Mill had in mind when formulating his principle, for he himself acknowledged that lying is wrong-depending on the circumstances. Despite his emphasis on truth, its value and its contribution to well-being, Mill was willing to allow exceptions to his professed principle. Look at the tentativeness of his remarks against lying, in support of the virtue of justice:

> "Yet that even this rule, sacred as it is, admits of possible exceptions, is acknowledged by all moralists; the chief of which is when the withholding of some fact (as of information from a malefactor, or of bad news from a person dangerously ill) would save an individual (especially an individual other than oneself) from great and unmerited evil, and when the withholding can only be effected by denial".[10]

If we bear this argument in mind, then it is possible to envisage situations in which we may reach the paradoxical conclusion that lying may serve to safeguard the conditions for searching for truth. It is plausible to conceive of occasions on which one might resort to lying, believing that in so doing one could gain further knowledge. One might also deny freedom of expression to others, claiming that they obstruct, with their "nonsense", the way to the discovery of truth. Thus the Argument from Truth might be stretched to absurdity, to a point at which it not only demands compromises, but also allows for its refutation. In neglecting the task of prescribing well-defined boundaries for his principle, Mill, it would appear, opened the way for the negation of the principles in which he believed. Consequently, the Truth Principle might permit the defeat of liberty, tolerance, and indeed, the very Principle of Truth itself.

Mill continued to say, in a similar fashion, that it is confessedly unjust to break faith with anyone. Yet again, this obligation is not an absolute, but rather is "universally considered" as capable of being overruled by a stronger obligation of justice on the other side.[11] That is to say, if the withholding of some fact or information would save

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10. Utilitarianism. 1948. p 21. Note Mill's caution in phrasing this exception to one of his most "sacred" ideas, appealing to "all moralists" in support.

11. Ibid. p 41.

an individual, then the Truth Principle admits to "possible exceptions". The direct derivative from this argument is, therefore, that restrictions on freedom of expression are legitimate if applied for the same reasons. Indeed, in his early essay "Law and Libel and Liberty of the Press" Mill wrote:

> "There is one case, and only one, in which there might appear to be some doubt of the propriety of permitting the truth to be told without reserve. This is, when the truth, without being of any advantage to the public, is calculated to give annoyance to private individuals."[12]

Two points are in order here: one concerns the place of this 'annoyance principle' within the Millian theory, and the other touches on its practicality for our discussion. Firstly, this principle is quite puzzling, for Mill himself implied when formulating his theory that there has to be more than annoyance to justify interference in one's liberty.[13] Secondly, it is unclear what the meaning of the term 'annoyance' is.[14] Mill preferred not to use the terms 'harmful', or 'offensive', but this much more general term instead; one so vague that we may wonder if it could serve as a guideline at all. It is difficult enough to clarify the meaning of 'harm', or of 'offence',[15] but 'annoyance' may encompass so wide a range of possibilities that it resists any kind of systematic analysis. What annoys one may enchant another. And more fundamentally, what if truth might annoy some individuals?

Mill does not supply any answers to these questions. In any event, surely there has to be more than 'annoyance' to persuade us to restrict liberty. To take a common example, when one decides to enter politics or to become a celebrity, a figure whose life is of public concern, then one has to take into account the possibility of being criticized, laughed at and discredited for things and behaviour that one does or does not do. Some

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12. "Law and Libel", in G.L. Williams (ed.) op.cit. 1976. pp 160-161.

13. On Liberty. p 138.

14. I thought that possibly the term 'annoyance' had a stronger sense in the nineteenth century than the one prevailing today. The first edition of the Oxford Dictionary, however, did not supply grounds to validate this suspicion.

15. The next chapter analyzes the Millian Harm and Offence Principles.

of the slurs may go well beyond mere annoyance, to the border of slander, and then there could be sufficient reason for appealing to the courts. Those who decide to live their life in the spotlight are well aware of the pros and cons involved, and they know that they might be the target of annoying jokes. Therefore, it is very difficult to consider this 'annoyance principle' seriously. Only when the level of annoyance is such as to bring about substantial harm to the point of ruining one's name, is there a case for the courts to decide whether or not there is a reason for restraining the defamer's freedom.[16]

Incidentally, Mill went on to speak of another qualification, concerning the publication of falsehoods. In distinguishing between the publication of opinions and of facts, Mill explained that while the publication of false opinions should be tolerated for the sake of the true, there is no corresponding reason for the publication of false statements of facts:

> "The truth or falsehood of an alleged fact, is matter, not of opinion, but of evidence; and may be safely left to be decided by those, on whom the business of deciding upon evidence in other cases devolves".[17]

Later in On Liberty Mill modified his views, further compounding any attempt at reconciliation between these two qualifications and the general arguments as presented in his book. In On Liberty Mill contended that it is impossible to fix the bounds of fair discussion. He admitted that the manner of asserting an opinion may be very objectionable and justly incur severe censure. However, the principal offences of the kind are such that they are rarely brought to conviction. He maintained that the gravest are those which twist the facts: "to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion". Nevertheless, Mill urged, all this, "even to the most aggravated degree, is so continually done in perfect good faith" that it is rarely possible to stamp the misrepresentation as morally

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16. There are specific categories of cases in which prior restraint by injunction is thought legitimate (as it is sometimes in cases of libel, privacy, security, contempt of court and copy-rights).

17. "Law and Libel". op.cit. p 160.

culpable, and still less could law presume to interfere with this kind of "controversial" misconduct.[18]

Another criticism of the Truth Principle concerns the infallibility argument. In formulating this argument Mill assumed that all suppression is based on the asserted falseness of the opinion to be suppressed. However, this is often not the case, for opinions are more commonly suppressed because their expression is thought to cause inconvenience or discomfort to certain powerful people. Furthermore, it is perfectly plausible to argue that the dissemination of certain views, quite possibly true, ought to be banned in certain circumstances because of their destructive impact on the public good. Putting restrictions on the freedom of expression does not ultimately involve a claim to infallibility. As we have seen, Mill himself acknowledged this when he introduced qualifications to what otherwise be regarded as an "absolute" principle.

In addition, Mill's arguments imply that the value of truth is superior to other social interests. He believed that the inherent value of truth outweighs the values of those goods which are endangered through the discovery, or debating, process. His appeal was for "the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered".[19] This assertion can hardly be reconciled with the annoyance qualification. In the name of intellectual development, Mill was willing to allow the expression of every opinion, however annoying these might be. Moreover, the endeavour of discovering the truth through the free expression of opinions might, as Mill thought, contribute to self-development and progress; but by the same token, it might also endanger them by advancing, to use Mill's terminology, 'false' views. Although he acknowledged that most of the people lack the degree of rationality he wished they would have, Mill allowed almost complete liberty of expression to convince them to believe in false views. This is because he believed that

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18. On Liberty. p 112. The U.S. Supreme Court accepted this reasoning in *N.Y. Times v. Sullivan* 376 U.S. 254 (1964).

19. On Liberty. p 78. In a letter to Sterling (Cf Mineka The Earlier Letters of J.S. Mill 1812-1848. 1963. p 77) Mill wrote: "In the present age of transition, everything must be subordinated to freedom of inquiry". 20-22.10.1831.

truth is bound to win over the false in the end.[20] The questions are, however, how to recognize that it is the end, and how important the developments that take place in the meantime are. In addition, Mill ignored the possibility that an unscrupulous propagandist may cause a rationally grounded, true belief to be abandoned for a false one based on pure emotion, and that free speech can also have a debilitating effect, weakening rather than strengthening human consciousness of truth.[21] For, as Rawls reflects, not all truths are established by ways of thought recognized by common sense; and it would be highly arguable to proclaim that everything is, in some definable sense, a logical construction of what can be observed or evidenced by rational scientific inquiry.

In parenthesis we should note that Rawls, indeed, has come some way since he offered us his constructivist model of justice, arguing unequivocally that justice is the first virtue of social institutions, as truth is of systems of thought, and that a theory must be rejected or revised if it is untrue,[22] to asserting nine years later in his third Dewey Lecture that "[T]he idea of approximating to moral truth has no place in a constructivist doctrine".[23] Rawls explains that what justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.[24] He implies that whenever the pursuit of truth comes into conflict with his

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20. On Liberty. p 90.

21. Barendt (Freedom of Speech. 1985, pp 10-13) makes two more important notes: first, that it seems facile to argue that in all circumstances the best remedy against evil speech will be more or better speech. Secondly, Barendt agrees with the Millian claim that it would be wrong to prohibit even false speech. He admits that if opinions are not contested, their vitality will decline. Nevertheless, Barendt thinks that a government worried that inflammatory speech may provoke disorder is surely entitled to elevate immediate public order considerations over the long-term intellectual development.

22. A Theory of Justice. 1971. p 3.

23. "Construction and Objectivity". LXXVII J. of Philosophy. 1980. p 564.

24. "Rational and Full Autonomy". 1980. p 519.

doctrine, the latter must be held prior. This is in a similar line to his argument that in some situations liberty has to be limited in order to preserve just institutions.[25]

Mill would probably not agree with this assertion. He viewed truth as superior to all other social values without realizing that if we pursue this reasoning, truth might become an extremely discriminatory argument. It might even come into conflict with our first argument for tolerance - the Respect for Others Argument.[26] This argument urges that, contrary to utilitarianism, each individual possesses inviolable rights that the benefit or welfare of everyone else cannot override. Consequently the loss of liberty for some is not made right by the greater sum of advantages to be enjoyed by the entire society as a result of discovering further truth. To grant toleration solely on the grounds that it advances truth is a proposition that might serve intolerance. The reason <u>for</u> tolerance could make tolerance a self-defeating idea. We might ask, therefore, the following: **(a)** what if in order to achieve the desired end of "truth", a person (or people) would have to suffer? and **(b)** does the end of truth justify all costs? Let us first look at a case which involves infringement of individual privacy. Here the story of Oliver Sipple may serve as an example.

Sipple is the ex-marine who knocked a gun out of the hands of a would-be assassin of then President Gerald Ford. Shortly after the incident, it was revealed that Sipple was active in the San Francisco gay community, a fact that had not been known to Sipple's family, who thereupon broke off relationship with him. He then sued for invasion of his privacy.

Sipple's homosexuality surely was not a fact relevant to the actual act of saving the life of the President. The news media would not have made a point of his being heterosexual if that had been the case. Nevertheless, the media did not distort the truth.

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25. <u>A Theory of Justice</u>. 1971. p 219.

26. The Respect for Others Argument and the Truth Principle both supply grounds for liberty of expression. It is reiterated that while the Respect for Others Argument (as formulated above) may be applied both to action and expression, the Truth Principle refers to the category of expression alone.

It brought a true fact to public attention. Accordingly, a strict view may be offered that in the name of truth, every item that may be seen relevant to the making of "a story" can be published, no matter what may the consequences be. On the other hand, a less rigid view would qualify the former, holding that the Argument from Truth cannot be seen as a sufficient justification, and that attention should be paid also to the consequences of the publication. In this context, however, some have argued that Sipple's sexual identity was of importance because there were members of the gay community who found relevance and value in this news report, for it publicized the idea that a homosexual can be a hero like anybody else.[27] That is, in reflecting on this issue we should consider the benefit accruing to the entire gay community from the publication. However, this argument concentrates on hypothetical benefits for some, while ignoring the actual damage inflicted upon Sipple. His act of bravery had shattered his family life. Thus the crucial question is whether the making of Sipple into a "hero model" for the gay community outweighs the harm that was caused to Sipple and to his family. The answer appears to be negative. The gay community would prefer to identify with someone who is proud of his sexual identity than with someone who tries to hide it. Moreover, truth was not the main motivation of the journalist who revealed this fact about Sipple. The desire to sell more newspapers by pumping gossip was the main drive, without paying enough consideration to the harmful results which Sipple was likely to endure, or appreciating Sipple's right to privacy. Hence, my view is that the consideration of privacy outweighs in such matters the consideration of profit (disguised as coming from consideration of truth), unless there is a public interest at stake, such as when the issue involves a public figure whose trustworthiness is a matter of public concern.

It is not clear what would be Mill's position regarding this matter, for he did not consider cases in which his Harm Principle clashes with the Truth Principle. In this incident the harm was inflicted on one individual. Moving from the particular to the

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27. Haiman. Speech and Law in a Free Society. 1981. p 73.

general let us now consider two related, though different issues. One is concerned with commercial speech; the other with group libel. Focusing on the first issue, liberals who are generally for a free market of opinions are reluctant to endorse this position when it comes to expressing views in the free market of goods. The common arguments are that given existing economic structures, commercial speech is not a manifestation of the liberty of the speaker, and that market determination breaks the connection between commercial speech and individual choice.[28] The inclination is to give precedence to the Harm Principle when it is proved that the good in question has harmful results, no matter whether the commercial speech promoting it is true or false. A clear example is the note incorporated in cigarette advertisements. An advertisement may claim that a certain cigarette is low in nicotine, excellent in taste, cheap, and made from tobacco of the highest quality. All of these assertions may be true. Still the advertisement is required to contain an additional statement that smoking is bad for one's health.

The matter of libel and particularly of group libel presses the issue of weighing the end of truth against the costs involved furthermore. We can envisage situations in which the belief that we should tolerate anything that could assist the progress of truth might serve those wishing to curtail tolerance. Consider the case of the North American scientist who conducted the research on the brain configuration of the blacks and brought forward evidence to prove that they are intellectually inferior to whites. Let us assume for a moment that this scientific, or quasi-scientific, proof may contain a grain of truth. Moreover, let us say that this evidence is completely true. Should we allow the publication of this research?

One view may answer this question positively, holding that we may allow the publication of this research. It might postulate that the reason for permitting the publication has nothing to do with whether its findings contain some truth, or with the value or the "truth" of the research, or its contribution to science. Rather the underlying reasoning could be that through this research we might learn more about the white-

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28. Cf Baker. Human Liberty and Freedom of Speech. 1989. pp 194-224.

black relations, the prejudices and the anti-black feelings and views pervading the white population of the United States, and maybe elsewhere. This knowledge could assist us in bridging gaps and in fighting these opinions. We may allow the publication not because consideration of the scientist and his followers is foremost in our eyes, but because consideration for the blacks and the whites who resent these findings, as well as those who remain undecided, is what really counts. The Argument from Truth is still in place, but not the truth that the research explores. Rather the truth with regard to race relations; the truth as emerged from the discussion of these findings.

However, let us go one step further and add more factors to this example. Assuming that we accept this view and allow the publication of these findings under the arguments of free inquiry and the search for truth; now, however, we give an account of the specific time, manner and place in which this scenario takes place. Suppose that this scientist wishes to disseminate the results of his research in a violent pamphlet in Atlanta, Georgia at a time of severe riots against black people in the South of United States;[29] should we still remain faithful to our belief in the free exchange of opinions in the marketplace of ideas? Here it would appear that the circumstances prescribe a restrictive attitude. This is not because the racist view has to be banned *per se*, because of its repugnant content, but because of its harmful consequences and its probable inimical contribution to the current mood in the South. The general line that is plausible to pursue is that if truth is likely to lead to the persecution of some people, we ought better to leave knowledge in its present state, without clinging to the desire of discovering a further truth. The mere possibility of contributing to the truth does not justify endangering certain groups of society by publishing unsubstantiated (or even substantiated) evidence, which might be biased by certain prejudices.[30] In this example

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29. Consideration of how the research is published is of crucial importance. It is one thing to release the same study in the same circumstances in a violent pamphlet and quite another thing to publish it in a scientific journal. While I am inclined to think that we should prohibit the first means of publication, I would be hesitant to urge prohibition on the second. We should be extra careful in exercising prohibition on books and journals.

30. A radical argument may hold that the important question here is not whether the racist claim for the distinction between noble and inferior races is true or false. Even if the research contains a grain (or grains) of truth, the issue is not that one's truth

the implications are that the possibility for the discovery of truth should be postponed. Sometimes, however, it may be argued that certain possibilities in the pursuit of truth should be terminated altogether. Thus, for instance, consider a very relevant issue.

Suppose a distinguished scientist, in opposition to all other experts in his field, and without relying on facts and scientific evidence, urges that AIDS can be passed to others by merely shaking hands with a homosexual. One (**X**) may argue that such an assertion, when not substantiated by facts, should be prohibited. AIDS is such a traumatic disease because a cure for it is yet to be found, that we can expect horrendous consequences for the homosexual community. The search for the truth may be infinite, **X** would say, but the ways and means according to which the truth is advanced and pursued are finite.

Many liberals would dispute **X**'s reasoning. Following Mill they would allow the publication because this form of expression cannot be considered as an instigation. According to this view grounds for restricting speech are provided when it is closely linked with action, and thus might lead to causing harm to others.[31] To publish an unsubstantiated theory of the sort in a newspaper or journal is simply to advocate it, and the way to fight against it is by counter-arguments, by more speech.

In response, **X** may then assert that although the scientist's theory may be denied by many other distinguished scientists who would show that there is nothing of substance in what that scientist had said, still his theory is likely to get much publicity and to fall on prejudiced ears. **X** may maintain that nowadays, experts explain time and again that the most common ways by which the HIV virus can be transmitted to others are sexual

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contradicts the other's. Rather, what is of importance here is that that very truth in itself and its resultant conclusions with regard to the destiny of the races, namely that the superior, *ipso facto*, should rule the world, and the inferior are doomed to perish, is harmful and destructive. It, therefore, does not deserve to be tolerated and contested in the market-place of ideas. Tolerance is not the guiding formula in such a case, for tolerance means respect for people, and it ought not to be granted to those who base their views on degrading certain groups. This view, however, may introduce excessive restrictions on freedom of expression. I shall further discuss this issue in ch. 8.

31. Cf Mill's corn-dealer example. On Liberty. p 114. The next chapter will consider in detail the distinction between advocacy and instigation.

intercourse, infected mothers to their children, blood transfusion, or by the use of contaminated needles or syringes.[32] Still, many people do not want anything to do with people who are infected by AIDS. There are doctors and nurses who are familiar with the scientific data, who are nevertheless reluctant to give medical assistance to AIDS victims. There are so many prejudices with regard to AIDS that such a theory would create segregation between heterosexuals and homosexuals. It would vilify and condemn an entire group of people. Thus, **X** would agree that this is not a case of instigation, in the sense that the harmful results are immediate, but it is a group damning. This bogus argument, coming from a scientist, might even entail persecution of the entire homosexual community. It might condemn the homosexuals to live in isolation from the entire society, and thus it might bring upon them the same faith which lepers shared in the past. In such instances, after considering the reasonableness of the advocated truth, examining the grounds on which it is based, as well as the seriousness of the objections to it, if we come to believe that **(a)** the "truth" is controversial and **(b)** that the consequences of preaching that "truth" might cause harm to others - then the Argument from Truth does not possess sufficient force to demand toleration on our part. Recalling Scanlon's argument **X** may say that the interests of the homosexual community in particular and of society in general in having a "good environment", are more important than the interests of the scientist in publishing his beliefs.[33] In sum: the Argument from Truth cannot justify cases in which there are grounds to believe that the intention is to condemn a specific group.

If **X** is correct in his assumptions, then we may have a new category of forbidden speech. This is the category of group damning. However, liberals would then argue that **X** is too pessimistic in his assumptions. They would further assert that not long ago

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32. Another possibility of infection that is hypothesised is through the saliva. The HIV virus is present in the saliva and it might be transferred from an HIV carrier to another through the spit if the other has a cut in his mouth.

33. T.M. Scanlon. "Freedom of Expression and Categories of Expression". 1979. pp 519-550.

three distinguished scientists had brought a somewhat similar theory, which might have condemned the homosexual community in the way that **X** describes. Nevertheless, reality shows that the homosexual community, although it may have suffered a draw-back in its position in society, is not treated (not yet, anyway) in the way that lepers were treated in the past. Thus we may recall that in 1988 Masters, Johnson and Kolodny published a book, claiming that it is possible to become infected with the AIDS virus from skin contact with contaminated toilet seats, and further implying that people might contract the HIV virus by mosquito bites.[34] Because AIDS is very much associated with homosexuals, their thesis might have had the potential of being group damning in the way described by **X**. The implication could have been to propose segregation in order to prevent the spread of the disease. In reality this did not happen. The scientists' theory evoked much discussion and debate. It was not totally refuted, nor substantiated by scientific research but the scientific community did not adopt their theory.[35] As far as the homosexual community is concerned, it is not persecuted or segregated as a result of the publication. Thus, it appears, the facts support the liberal viewpoint of affirming the publication. However, liberals would agree that if we were to add considerations of time, manner, and place in a similar vein to our example of publishing a study about the inferiority of blacks during a period of riots, then the pursuit of truth should be held secondary so as to secure the safety of individuals and groups.

To summarize, if the two arguments for tolerance are to confront each other, then the Respect for Others Argument has to have precedence over the Argument from Truth. This is not only for ethical reasons but also for methodological reasons; for we have

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34. W.H. Masters et al. Crisis: Heterosexual Behaviour in the Age of AIDS. 1988. pp 83-92.

35. Dr. Anne Edwards of the Radcliffe Infirmary asserts that theoretically, there is a very slim chance to get AIDS either by contaminated toilet seats or mosquito bites. She adds that it is immoral to publish such hypotheses without substantiated evidence. Dr. Tim Pito of the John Radcliffe agrees. He thinks that the toilet seats hypothesis is "rubbish" and that the mosquito theory is quite implausible. Dr. Pito argues that Masters and Johnson know nothing about AIDS and that they probably wanted "a bit of a fun". He adds that it is almost impossible to refute hypotheses that suggest a very low risk.

seen that the Argument from Truth cannot serve as a well defined principle for prescribing tolerance and its confines within a well-organized framework, safe from the fallacies of the argument itself. Truth should not be held superior to other social values, for as Arendt contends, truthfulness has never been counted among the political virtues. Lies have always been regarded as necessary and justifiable tools not only of the politician's or the demagogue's but also of the statesman's trade.[36] If we consider one of the basic principles which underlies the working of democracies then we may say that the majoritarian principle is viewed as a more just procedure than minority rule not because it is thought that the ideas of the majority are truer than the ones of the minority, but despite the acknowledged possibility that it might be wrong. The liberal view is that it is not truth which we ought to seek in politics, but rather a way in which we will be able to secure the rights and liberties of all citizens, without supplying a basis for attempts at exploitation; without allowing some to further their interests at the expense of others. The deontological argument, as constructed above, qualified with the requirement of mutuality, seems to be appropriate for this task by furnishing reasons for tolerating and prescribing boundaries for its working. The Argument from Truth on the other hand defends tolerance, but its very reasoning might open the way for the intolerant, and paradoxically even for the negation of truth.

In the next chapter I will examine the confines which were set by Mill on freedom of expression. I shall discuss two different principles - the Harm Principle and the Offence Principle, asserting that these render speech liable to restriction when it is, or is most likely to be, harmful. Before examining the Millian theory, however, two methodological notes have to be made: one with regard to the Offence Principle; the other with regard to the Harm Principle.

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36. Hanna Arendt. "Truth and Politics", in P. Laslett et al (eds.) Philosophy, Politics and Society. 1969 (Third Series). p 104. Arendt makes a further point which I dispute. She assumes that truthfulness has little to contribute to the change of world and circumstances which is among the most legitimate activities (p 123). I do not see why the mere telling of facts leads to no action whatsoever, as Arendt claims. Indeed, the very selection of the facts in itself is frequently intended to bring about some action (or inaction).

As for the first note, the common liberal interpretation of Mill is that any speech which falls under the category of 'advocacy' is immune to restrictions. Indeed, the above examples of the prejudiced scientists are an illustration of how the dichotomy between 'advocacy' and 'instigation' brings liberals to assert that there is no punishable advocacy. Only forms of instigation which bring about instant harm are punishable, and these cases constitute the exception to the free speech principle. My view is different. I will assert that Mill introduced an exception to advocacy, holding that there is a category of cases of advocacy that has to be restricted. This category of cases is concerned with offensive conduct which is done in public. Thus I will argue that there are certain offensive expressions which may be considered as advocacy which nevertheless have to be prohibited. However, it seems that my view and the liberal view differ only in terminology, not in essence. That is, there are certain utterances which do not induce anyone to take an harmful action but which should still be excluded from the protection of the free speech principle because of their imminent offensive effects on those who are exposed to it. Liberals would probably not agree with my vocabulary, and would not consider what I call advocacy to be advocacy. They would rather put the case under the rubric of instigative speech. But I think that they would agree with my conclusions.

The second methodological observation is concerned with the Harm Principle. Although it is grounded on utilitarian arguments, it does not necessarily entail that employing the Harm Principle amounts to accepting utilitarian ethics. Thus we have seen that Scanlon sees the Millian Principle as the "only plausible principle of freedom of expression" which applies to expression in general and makes no appeal to special rights or to the value to be attached to expression in some particular domain. Scanlon maintains that it specifies what is special about acts of expression as opposed to other acts, and constitutes in this sense the "usable residue of the distinction between speech and action".[37] Richards, who adopts a similar line of reasoning, even contends that there

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37. Scanlon. op.cit. 1977. pp 161-162.

are grave objections to grounding this principle on utilitarian argument. He maintains that it is not a corollary of utilitarian tenets, but the contrary. The basic desideratum of utilitarianism is to maximize the surplus of pleasure (or well-being) over pain (or deprivation). However, Richards explains, in certain circumstances utilitarianism would call for criminalization of certain conduct in violation of the principle. He gives an example of hatred of the non-conforming minority, which reinforces the majority's pleasurable feelings of social solidarity and self-worth in a way that toleration could not engender. Then the greater pleasure thus secured to the majority may not only outweigh the pain to the minority, but compared to the toleration required by the Harm Principle, results in a greater aggregate of pleasure. In order to avoid collapsing into a utilitarianism that is unable to capture either the force or the sense that the Harm Principle intuitively carries with it, Richards concludes that we should develop a background theory to explain why constitutional argument applies to certain areas of conduct, and what is the meaning of "harm".[38] This is, indeed, the aim of the ensuing discussion. It will be first argued that there are circumstances in which speech amounts to action. Then it will be further suggested that there are grounds for abridging expression not only when it is intended to bring about physical harm, but also when it is designed to inflict psychological offence, which is morally on a par with physical harm, provided that the circumstances are such that the target group cannot avoid being exposed to it. I will explain the notion of "offence", arguing that in either case, when physical harm or psychological offence is inflicted upon others, four considerations have to be borne in mind:

- The content of the speech.[39]
- The manner in which the speech is expressed.
- The intentions and the motives of the speaker.
- The circumstances in which the speech takes place.

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38. D.A.J. Richards. Toleration and the Constitution. 1986. pp 240-242.

39. When people speak of the content of the speech, they may refer to its truthfulness, or to its consequences, or to both. Here I refer not to the truthfulness of the speech, but rather to the consequences that it is intended to bring.

Chapter 7

BOUNDARIES TO FREEDOM OF EXPRESSION

A. The Millian Arguments

In formulating his Harm Principle, Mill did not say that any forms of expression ought to enjoy perfect immunity. Being aware of the fact that expressions are other-regarding, and that as such they might inflict evil, Mill did not deny that they may cause harm. In chapter two of On Liberty: "Of Thought and Discussion" he recognized that in thinking, one's activity is directed inwards upon one's consciousness and operates solely in the spiritual level, so that there is no reason for interference in one's thought; whereas when one advocates ideas, one's activity is directed outwards, and no longer exists only in one's private domain, hence it may have a bearing on others.[1] Though Mill insisted as a general rule that the harmfulness of utterances was not sufficient to warrant their restriction, he did not argue that they ought never to be restricted. In what he regarded as extreme circumstances, Mill explicitly admitted the importance of restricting them.

Mill proffered two main qualifications for the immunity which freedom of expression should, as a general rule, enjoy, and in an earlier article concerning freedom of the press he formulated two other qualifications.[2] He did not introduce them in a systematic manner, but rather in an *ad hoc* way, allowing for interference in what he conceived to

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1. Mill did not argue that the liberty of expressing and publishing opinions is of the same importance as freedom of thought; he said it is **almost** as important. Nor did he say that the former is identical, or inseparable from the latter; he said that it is practically inseparable from it (p 75). Thus, freedom of expression does not enjoy absolute immunity as does freedom of thought. In Mill's methodological hierarchy we may say that Mill granted freedom of speech a middle-way immunity between freedom of thought and freedom of action: it does not enjoy absolutism but one must be extremely careful when one considers interference with it.

2. We have seen in the previous chapter that the qualifications presented in "Law, Libel, and Liberty of the Press" are quite problematic.

be special cases. The first qualification proposed in On Liberty is concerned with the case of instigative speech. The second qualification considers the case of indecent conduct that is performed in public. Let me first examine the case of instigation.

As a consequentialist, Mill acknowledged that speech loses its immunity when it constitutes an instigation to some harmful action. However, he refrained from elaborating on this issue. Mill considered this subject of instigation in only two places in On Liberty: the first time, in a footnote, not in the text itself, at the beginning of chapter II; the second time in the following chapter, when he discussed in brief the example of the corn-dealer.

In the footnote Mill addressed the case of instigation to Tyrannicide, asserting that in a specific case it may be a proper subject of punishment, "but only if an overt act has followed, and at least a probable connection can be established between the act and the instigation".[3] This definition of instigation is problematic. On one side it is too narrow, because it does not consider instigative speeches as such, irrespective of whether or not action follows. We may think of an instigation which does not lead to action because, for example, large police forces are present to stop the instigator and/or to stop the crowd he addresses before it starts to take action. Only if an overt act follows, only if actual consequences take place, will a speech be considered by Mill as instigation. On the other side this definition is too broad. Mill did not clarify the meaning of "an overt act", nor the meaning of "probable connection". As a result, an advocacy can be causally connected to action. Almost any form of speech may have a probable connection to "an overt act". Thus it seems that this definition cannot take us very far in establishing what instigation is.

The picture becomes clearer when reflecting on Mill's example of the corn-dealer. Mill asserted that opinions lose their absolute immunity when the circumstances in which they are expressed are such as to constitute by their expression a positive instigation to some mischievous act. Thus, the opinion that corn-dealers are starvers of

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3. On Liberty. p 78.

the poor may be prevented from being delivered orally to "an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard".[4] Nevertheless, that same opinion ought to go unmolested when simply circulated through the press. Accordingly we may deduce that Mill considered as instigation a speech, which intends to lead to some mischievous action, in circumstances which are conducive to the taking of that action. It seems that in instances such as that of the corn-dealer, Mill would regard certain speech as instigation irrespective of whether overt harmful action follows. Though he did not explicitly say that, Mill implied that the intention to lead people to take a harmful action - in circumstances which are likely to mobilize people to take that action - constitutes an instigation.[5] However, advocacy which does not induce someone to take an action, which is voiced as a matter of ethical conviction, is protected under Mill's theory. This is, indeed, his main contribution to the free speech literature. Mill was the first to distinguish between speech (or discussion) as a matter of ethical conviction, and instigation.

The essential distinction between 'instigation' and 'advocacy' or 'teaching' is that those to whom the instigation is addressed must be urged to do something now or in the immediate future, rather than merely to believe in something. In other words, instigation is speech which is closely linked to action. Mill in the corn-dealer example implicitly opined that when an audience has no time for careful and rational reflection before it pursues the course of action urged on it, then this speech falls outside the protection of the free speech principle, since the people are too excited to be responsible for their acts.[6] Mill did not restrict the advocating certain opinions *per se*. Rather, it is

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4. Ibid. p 114.

5. Mill acknowledged the importance of intentions in other places. Thus, for instance, speaking of employing military commanders by ministers Mill said that as long as a minister trusts his military commander he does not send him instructions how to fight. He holds him responsible only for intentions and results. Cf "Appendix", in Dissertations and Discussions. 1973, Vol. I, pp 471-472.

6. Similar reasoning, as far as shortage of time is concerned, guided Mill in supporting interference in the other's freedom in the case of the unsafe bridge.

the combination of the content of the opinion, its manner, the intentions of the speaker, and the circumstances that necessitates the restriction.[7] In the corn-dealer example the harmful results of a breach of the peace, disorder, and harm to others were imminent and likely, and therefore they outweigh the importance of free expression.

The implications of this reasoning are that it will not be correct to say that all opinions bring the same results. It seems, then, that Justice Holmes's assertion "[E]very idea is an incitement" is too hasty.[8] Rather, we may concede that words which express an opinion in one context can become incendiary when addressed to an inflammable audience. The peculiarity of cases of instigation is that the likelihood of an immediate danger is high, and there is little, or no opportunity to conduct a discussion in the open, and to submit conflicting considerations into play, which may reduce the effects of the speech. Holmes J. himself agreed that in certain circumstances, when speech is closely related to action and might induce harmful consequences, it should be curtailed. In a similar way to the Millian corn-dealer example, Holmes J. asserted in a renowned opinion that we cannot allow falsely shouting "**Fire!**" in a crowded theatre.[9] Here too a restriction on speech is justified on the grounds that the content of the speech, its manner, and the intentions of the agent are aimed to bring about harm, and the audience is under conditions which diminish its ability to deliberate in a rational manner, and therefore such a shout might lead it to act in a harmful manner (harmful to themselves as well as to others).[10] Hence, to the extent that speech entails an immediate effect, the

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7. We can think of situations in which the manner is not so important, yet the three other factors are sufficient to constitute an instigation. Consider, e.g., a leader of a fundamentalist religious sect who urges his followers to some mischievous act in a very cool and quiet tone. I shall discuss this issue further in ch. 8 *infra*.

8. *Gitlow v. N.Y.* 268 U.S. 652, 673 (1925).

9. *Schenck v. U.S.* 249 U.S. 47 (1919).

10. Note that in this instance it does not matter whether the intention of the actor was only to do this specific act, and not to bring about harmful consequences. The actor may say that he only wanted to break the silence, or to attract public attention, and that he did not think of creating panic. Still he will be held accountable for his action. The same reasoning guides us in prosecuting those who press emergency buttons in trains just because they could not resist the temptation of touching those "beautiful, red buttons".

arguments which assign special status to freedom of speech are less compelling. Boundaries have to be introduced in accordance with the context of the speech, otherwise the results could be too risky. As Chafee stated: "Smoking is all right, but not in a powder magazine".[11]

Therefore, from the Millian and the Holmesian examples the following argument may be deduced:

Argument number one: When speech is very close to action, then it may be restricted under the Harm Principle. Alternatively, if asked to assert the argument in more precise terms we can say that any speech, which instigates (in the sense of meeting the four criteria of content, manner, intention, and circumstances) to cause physical harm to certain individuals or groups, ought to be curtailed.

Let us now move on to examine Mill's second exception which qualifies, in my opinion, the immunity Mill generally granted to advocacy. This exception considers the case of an indecent conduct that is performed in public. Although Mill spoke of "conduct" and did not explicitly mention speech, it is plausible to argue that he included utterances, as well as acts, when he displayed this qualification. Mill implied that there are certain cases which fall within the scope of social regulation and people not only have the right, but the duty, to put a stop to those individuals' activities. In a brief paragraph he discussed a category of actions which being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, "if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightly be prohibited".[12] This argument is in accordance with Mill's position on the importance of autonomy. There are intimate matters which do not concern anyone

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11. Z. Chafee. Free Speech in the U.S. 1946. p 397.

12. On Liberty. p 153.

but the individual, so long as they are done in private. But when they are done publicly, then they might cause offence to others, and the State may legitimately control them.[13] Of this kind, Mill said, are offences against decency.

Hence, in certain circumstances, one is culpable not because of the act that one has done, though this act might be morally wrong, but because of its circumstances and its consequences. Mill assumed that one can evaluate the rightness and wrongness of an action by considering its consequences, believing that the morality of an action depends on the consequences which it is likely to produce.[14] Since one is to judge before acting, then one must weigh the probable results of one's doing, given the specific conditions of the situation.

From these arguments we may infer that it is usually not the act itself which is crucial for taking a stand on this subject, but rather the forum in which it is done. In other words, a certain conduct in itself does not necessarily provide sufficient grounds for interference. But if that same conduct is being done in public then it might be counted as morally wrong and, in turn, constitutes an offence, and hence it is legitimate to curtail it. Enforcement of sanctions is allowed when a conduct causes offence to others.[15]

To sum up: the two exceptions brought forward by Mill touch upon the time factor which distinguishes speech from action. Thus, action - if it endangers the public, or part of it - might have immediate consequences; whereas speech, if it has any endangering

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13. Skorupski (John Stuart Mill. 1989, pp 347-359) speaks of the concept of moral freedom which is conceived by Mill as rational autonomy. The autonomy which one values as an independent part of one's own good is the freedom to lead one's own life. But this is not just "freedom to do as one likes" either. Autonomy is sovereignty over one's own life, not sovereignty over anyone else's.

14. "Bentham", in Dissertations and Discussions. 1973. I. p 386.

15. In Utilitarianism (p 45) Mill explained: "We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow-creatures; if not by opinion, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency. It is a part of the notion of Duty in every one of its forms, that a person may rightfully be compelled to fulfil it...".

effect, would have it in most cases sometime in the future, whether near or the more remote, and thus allowing us a much wider range of manoeuvres.[16] Even if a specific view might cause harm, or risk of harm to others, but the danger is not immediate, then free speech has to be allowed. However, in some circumstances the time factor might lose its distinctiveness, with the result that the effects of the expression in question are immediate. Indeed, both in the case of instigation as well as in cases of moral offence (say when one vulgarly praises in public the sexual qualities of one's next door housewife or her performances in bed), the effects of the expression are instantaneous, and thus might bring about hurtful consequences now, rather than at some remote point in the future. That is, when we discuss the issue of obscene speech or defamation,[17] the line between conduct and speech, according to the criterion of time, becomes blurred and consequently these utterances are not protected under the principle of freedom of speech.

The preliminary argument (*number one*) included the term 'physical'. I have formulated the argument, using this term, in order to avoid at that stage the question of whether the formula ought to include other sorts of harm. I have now argued that both the cases of instigation and cases of indecent conduct done in public, the effects of the communication are immediate. Yet, however, such conduct does not necessarily fall under the first argument, for offences against decency may not be physical. There seem to be other notions of injury that Mill articulated when he introduced this qualification. The expression in question may fall under the rubric of 'advocacy', in the sense that it does not induce anyone to take an harmful action. Nevertheless, the expression may still be excluded from the protection of the free speech principle because of its offensive effects on those who are exposed to it. This is the only exception that is implied in

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16. As postulated above in ch. 5, argument no. 1 from Democracy.

17. There are situations in which the offence that is done by the defamatory remarks is immediate and irreparable, when there is no time for a reply. An example would be the publication of false accusations against a rival candidate on the eve of elections, claiming that he tries to listen-in the discussions held in the offices of the other candidates.

Mill's theory with regard to advocacy. It is the combination of the content of the advocacy, its manner, the intentions of the speaker, and the fact that it is done publicly which gives grounds for restriction. Certain types of advocacy constitute a violation of good manners thus coming within the category of offences and, consequently, may rightly be prohibited. In order to understand what notions of injury may be included under this qualification, which may be put under the heading of the Offence Principle, it is necessary to devote some place to explain the distinction between 'harm' and 'offence'. Here Joel Feinberg supplies some useful guidelines.

B. The Offence Principle

Feinberg explains that like the word 'harm', the word 'offence' has both a general and a specifically normative sense, the former including in its reference any or all of a miscellany of disliked mental states (disgust, shame, hurt, anxiety, etc), while the latter refers to those states only when caused by the wrongful (right-violating) conduct of others. He postulates that offence takes place when three criteria are present: one is offended when (a) one suffers a disliked state, and (b) one attributes that state to the wrongful conduct of another, and (c) resents the other for his role in bringing one to that state.[18] Feinberg maintains that the seriousness of the offensiveness would be determined by three standards: (1) "the extent of offensive standard" - meaning the intensity and durability of the repugnance produced, and the extent to which repugnance could be anticipated to be the general reaction of strangers to the conduct displayed; (2) "the reasonable avoidability standard" - which refers to the ease with which unwilling witnesses can avoid the offensive displays; and (3) "the *Volenti* standard" - which considers whether or not the witnesses have willingly assumed the risk of being offended either through curiosity or the anticipation of pleasure.[19] Feinberg categorically

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18. Joel Feinberg. Offense to Others. 1985. pp 1-2.

19. Ibid. p 26.

asserts that offence is a less serious thing than harm, and so he ignores the possibility that psychological offences might amount to physical harm, with the same serious implications. The following chapter specifically reflects on this subject through consideration of Feinberg's standards. Here, however, if we return to Mill's second qualification, we may say that morally wrong actions which concern others satisfy Feinberg's criteria: they cause one to suffer a disliked state, which one attributes to the doer's conduct. Consequently one resents the doer for his acts. Nevertheless, offences against decency are problematic since what is offensive to one may not be regarded as offensive at all by another. If we want to make the Offence Principle an intelligible principle, the offence has to be explicit, and it has to be more than emotional distress, inconvenience, embarrassment, or annoyance. We cannot outlaw anything that causes some sort of offence to others. If the Offence Principle is broadened to include annoyance, then it would become too weak to serve as a guideline in political theory, for almost every action can be said to cause a nuisance to others. Cultural norms and prejudices, for instance, may irritate some people. Liberal views may cause some discomfort to conservatives; and conservative opinions might distress liberals. One, for instance, might be offended when hearing a woman shouting commands, or just by the sight of black and white people holding hands. This is not to say that we should curb these sorts of behaviour simply because some people are "over-sensitive" to gender or inter-racial relations. Similarly, if someone is easily offended by pornographic material, one can easily avoid the pain by refraining from buying magazines marked with the warning: "The content may be offensive to some". Under Feinberg's "reasonable avoidability" and "*Volenti*" standards the offence cannot be considered to be serious. Injuries, to be restricted under the Offence Principle, have to cause more than annoyance. They must involve serious offence to be infringed. By "serious offence" it is meant an irremediable offence which might affect the ability of the listeners to function in their lives. It is an offence which is morally on a par with physical harm.

Moreover, bearing in mind Mill's argument regarding public immoral actions, and Feinberg's "reasonable avoidability standard", then the offence has to be committed in such circumstances that those offended by it cannot possibly avoid it in order for there

to be grounds for restriction. Hence, for example, if a person takes a stool to Hyde Park corner, advocating the getting rid of Parliament, throwing out all Indians, expressing his desire to become the new Stalin of tomorrow, and claiming that yesterday he was Napoleon, the offence at that point cannot be considered as more than annoying, or to cause more than an inconvenience to the listeners, for they can simply leave the place and free themselves of the speaker's presence, as well as of his speech. We are not able to say that the audience interest in "having a good environment" is more important than the speaker's interest in conveying his thoughts.[20] Also, the argument that this communication does not carry substantive content cannot serve as sufficient reason for abridging it, for then we might supply grounds for curtailing many other speeches that just repeat familiar stands. In addition, "the extent of offence standard" and "the *Volenti* standard" do not provide reasons for restriction.

The situation is different, however, when the avoidance of offensive conduct in itself constitutes a weighty pain. Then we may say that the matter is open to dispute. That is to say, if those who are offended by a certain speech feel an obligation to stay because they think that they would suffer more were they to avoid the speech by going away, then there are grounds for putting restrictions on speech, provided that the extent of the offence is considerable. In any event, it is the combination of a severe offence and unavoidable circumstances that warrants the introduction of sanctions.

In the next chapter I shall discuss the Nazi's decision to march in Skokie as an illustration of this argument. This discussion is in order because principles are much more powerful when applied to life situations, making much more sense when put in the context of specific instances. In this case the conflict over freedom of expression involves the issue of freedom of assembly. I shall attempt to assess the preliminary court decisions to ban the march, as well as the Illinois Supreme Court ruling which allowed the demonstration, and explore whether the Offence Principle supplies us with grounds for supporting one over the other. Before embarking on this endeavour, however, one clarification is needed. In applying the Offence Principle to Skokie I do

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20. Scanlon. op.cit. 1979. pp 527.

not claim that racist speech should be considered a distinct case, as some philosophers and commentators urge, and thus excluding it from the protection usually accorded to expression.[21] It may be suggested that if we are to speak on matters of principle, then racist speech is incompatible with liberal democracy, and hence it should be outlawed. My reluctance to pursue this reasoning evolves from two basic considerations. First, I do not see why attacks on one's race, colour, religion etc., should be regarded as a unique type of speech which does not deserve protection. I find it difficult to see why racist expressions should be thought different from verbal attacks on one's most fundamental ethical and moral convictions - as, for instance, in the abortion case.[22] I do not see why dignity or equal respect and concern is so much at stake in the former than in the latter.

Second, there is lack of agreement on the meaning of the term 'racism'. Different countries and forums put under the heading of 'racism' different types of speech. Thus by excluding racist expressions we might open the way to curtail expressions which we may want to defend. For instance, Zionism was condemned as a racist form, so accordingly any one who expresses his desire to live in Zion (Israel) might be considered by some as a racist. This claim is less strong than the former, for we can define exactly what sorts of speech should be put under 'racism'. However, the argument is in place because in applying common terms from one place to another, definition might be lost on the way.

Consequently, my intention is to formulate general criteria to be applied consistently not only in cases of racial hatred, but also to other categories of offensive speech. Any speech, be it on religious, ethnic, cultural, national, social or moral grounds, should be submitted to the confines of the Harm and the Offence principles.[23] Speech which

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21. Cf Kretzmer. "Freedom of Speech and Racism". 8 Cardozo L. Rev. 1987. pp 445-513. See also Jean-Paul Sartre who wrote that anti-Semitism does not fall within the category of ideas protected by the right of free expression ("Reflexions sur la Question Juive". Gallimard. 2nd ed. 1954).

22. On this point I concur with Dworkin who expressed this same view in a private discussion.

23. Accordingly, e.g., pornography may be dealt with under the confines of the Offence Principle. This issue, however, may require a separate analysis, maybe a separate thesis.

instigates the causing of immediate harm to the target group, and speech which is designed to offend the sensibilities of the target group - in circumstances which are bound to expose the target group to a serious offence (an offence which is morally on a par with physical pain) - should be restricted.

Chapter 8

APPLYING THE OFFENCE PRINCIPLE: THE SKOKIE CONTROVERSY

A. Background

What came to be known as "the Skokie case" began in April 1977, when Frank Collin, the leader of the National Socialist Party of America (NSPA) announced that a march would be held in Skokie, one of the outskirts of Chicago, inhabited mostly by Jews; about a hundred of them being survivors of Nazi concentration camps.[1] The Skokie citizens obtained an injunction in court that banned the march. Referring to the *Brandenburg* case, they contended that the display of the Nazi uniform and the swastika was the symbolic equivalent of a public call to kill all Jews, and consequently that it constituted a "direct incitement to immediate mass murder".[2] After a long legal struggle which lasted until January 1978 the Illinois Supreme Court, in a 7 to 1 decision, ruled in favour of Collin.[3] The main argument was the "content neutrality rule", according to which political speech shall not be abridged because of its content, even if that content is verbally abusive. Speech can be restricted only when it interferes in a physical way with other legitimate activities; when it is thrust upon a "captive" audience, or when it directly incites immediate harmful conduct. Otherwise, no matter what the content of the

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1. Skokie has the highest number of holocaust survivors of any city in the United States, outside the city of New York.

2. In *Brandenburg v. Ohio* 395 U.S. 444 (1969), the court ruled that the expression of a particular idea may not be suppressed unless it is both directed to and likely to incite or produce imminent unlawful conduct (at 447). See also *Hess v. Indiana* 414 U.S. 105 (1973).

3. Clark J. dissented without submitting any explanation.

speech, the intention of the speaker, and the impact of the speech on non-captive listeners, the speech is protected under the First Amendment to the Constitution.[4]

The Court dismissed the main arguments of the citizens of Skokie, enunciating that the display of the swastika was symbolic political speech, which was intended to convey the ideas of the NSPA, even if these ideas were offensive. Similarly it was argued that the plaintiffs' wearing uniforms need not meet standards of acceptability. The judges further concluded that anticipation of a hostile audience could not justify prior restraint or restrict speech, when that audience was not "captive". Freedom of speech cannot be abridged because the listeners are intolerant of its content.[5]

Two basic things concerning this case are plain and generally agreed upon. First, that Skokie was not a case of a captive audience, because there was advance notification of the Nazis' intentions. Second, that the argument that the Nazi march or speech was designed to convince some members of the audience to embrace all, or part of the Nazi ideology, was not an issue. It was obvious that Collin's aim was not to convince his audience, but rather to offend the Jewish population in Skokie. Nevertheless, the Illinois Supreme Court ruled that it was not a case of "fighting words",[6] because the display of the swastika did not fall within the confines of that doctrine, and because it was no longer the prevailing thought that it was up to the court to assess the value of

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4. *Village of Skokie v. NSPA* 373 N.E. 2d, 21 (1978). Chief Justice Vinson wrote in *Dennis v. U.S.* 341 U.S. 494 (1951) that the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the widest governmental policies. Powell J. argued in *Gertz v. Robert Welch* 418 U.S. 323 (1974) that under this amendment there is no such thing as a false idea.

5. Under constitutional precedents, the threat of violence could not serve as an argument to prevent assemblies, rallies, and the like. Cf *Terminiello v. Chicago* 337 U.S. 1 (1949); *Feiner v. New York* 340 U.S. 315 (1951); *Edwards v. South Carolina* 372 U.S. 229 (1963); *Tinker v. Des Moines* 393 U.S. 503 (1969); *Street v. N.Y.* 394 U.S. 576 (1969), and *Bachellar v. Maryland* 397 U.S. 564 (1970).

6. *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942). See also *Cohen v. California* 403 U.S. 15 (1971). The "fighting words" doctrine is not applicable to Skokie for it gives grounds to punish a person who, in a face-to-face encounter, states something so provocative and insulting as to cause an immediate violent response. This was not the case in Skokie.

utterances. The Court ruled that the wearing of Nazi uniforms and the display of the swastika constituted political speech that was protected under the Free Speech clause.[7]

In coming to examine the Skokie decision, Feinberg agrees that the Nazis did not come with the intention of advocating their beliefs in order to convince the others of their "truth". They did not come to offer their opinions in the free market-place of ideas. Their message was close to pure insult and since they deliberately decided to march in Skokie, it can be assumed that their purpose was malicious: they came to offend the sensibilities of the Jewish population of Skokie. Feinberg acknowledges that the Jews would be offended by the demonstration not because of their curiosity, and certainly not from the anticipation of pleasure. He concedes that they did not willingly assume the risk of being offended. Hence "the *Volenti* standard" was satisfied. Nevertheless, he does not think that the extent of the offence was considerable because the two other standards which determine the seriousness of the offensiveness do not supply grounds for restriction. With reference to the opinions of the Illinois Supreme Court and the lower federal courts that the display of the swastika is symbolic speech,[8] Feinberg argues that it is almost as absurd as saying that giving of "the finger" or shouting "Death to the Niggers!" are the expression of a political opinion. Assertions of the kind, or such as "Jews are scum", are not a political speech. They are very close to pure menacing insult, no less and no more.[9]

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7. One may suggest, following *Chaplinsky*, that there may be a place for a "fighting symbols" doctrine. I tend to disagree. The crux of the matter in the "fighting words" doctrine is that certain utterances are seen as having no essential part of any exposition of ideas, or rather utterances which do not communicate any ideas. Therefore they are ruled out of the Free Speech clause of the Constitution. On the other hand the very using of a symbol intends to convey a certain idea, otherwise it would not be considered a symbol. It may be intended to insult, intimidate, etc.; but one cannot employ the reasoning of *Chaplinsky* here: "fighting words" seem to contain no idea; symbols, by their very characterisation as such, do contain a certain idea.

8. *Village of Skokie v. NSPA* 373 N.E. 2d 21 (1978); *Village of Skokie v. NSPA*. 366 N.E. 2d 347 (1977); *Collin v. Smith* 447 F. Supp. 676 (1978).

9. Joel Feinberg. op.cit. 1985. pp 86-93. For an incisive criticism of this view see Robert Amdur. "Harm, Offense, and the Limits of Liberty". 98 Harvard L. Rev. 1985. pp 1946-1959. Note that the Supreme Court ruled in *Stromberg v. California* 283 U.S. 359 (1931), that the display of a symbol may communicate ideas no less than the

Since Feinberg does not regard the swastika and assertions such as "Jews are scum" as political speech, it appears that it was easier for him to justify the Illinois Supreme Court's ruling. For Feinberg it is merely a case of insult. It is interesting to note that Scanlon - who regards racialist speech as political - and Feinberg - who disputes this opinion, arrive at the same conclusion: the former justifies the ultimate Skokie ruling because it constitutes political speech,[10] whereas Feinberg's main contention is that given the relative ease by which the malicious and spiteful Nazi insults could be avoided, there was not an exceptionally weighty case for legal interference. Since the Nazis announced the demonstration well in advance, it could easily be avoided by all those who wished to do so, in most cases with but minimal inconvenience:

> "Despite the intense aversion felt by the offended parties, there was not an exceptionally weighty case for legal interference with the Nazis, given the relative ease by which their malicious and spiteful insults could be avoided."[11]

In other words, Feinberg reiterates the reasoning of the Illinois Supreme Court in favour of the NSPA, in accordance with his "reasonable avoidability standard". He maintains that "the scales would tip the other way" if their behaviour were to become more frequent, for the constant need to avoid public places at certain times can become a major nuisance quickly.[12] Since the issue concerned only one demonstration, the solution is easy enough: those likely to be offended simply have to be elsewhere when it is held. These assertions are in accordance with Feinberg's "the extent of offence standard".

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articulation of words.

10. Scanlon. "Freedom of Expression and Categories of Expression". op.cit. 1979. p 538.

11. Joel Feinberg. Offense to Others. 1985. pp 87-88.

12. For a similar line of argumentation see Bollinger. The Tolerant Society. 1986. p 60.

B. The "Avoidability Standard"

From Feinberg's analysis we can deduce that the crux of the matter lies in the "avoidability standard": the Jews can ignore the offence, as others ignore giving of "the finger". For Feinberg, as it was for the court, the claim of Skokie's inhabitants does not contain enough power to restrict an essential freedom because the Jews do not have to attend the rally. However, for these Jews this was no solution at all, because it took them back to the days when they had to hide from the Nazis. The survivors of the holocaust learned the lesson not to keep silent, not to wait until another "wave of hatred" was over. The lesson of 1933 was enlightening enough. Hiding and running away was their solution in Europe, when they could not do anything else. That solution, they thought, was over and done with when they came, after the war, to live in the United States. For them as Jews, when the Nazi phenomenon is at issue, there is no other way but to stand against it with all their power, especially when the Nazis decide to come to their own neighbourhood with the intention of hurting, and awakening fear. Therefore, the suggestion that the Nazis would march in their own front yard without them being present was inconceivable. It is not a matter of a "nuisance" to avoid "public places" as Feinberg suggests; it is neither a matter of a nuisance, nor of a public place. If the Nazis were to march elsewhere in Chicago (say in the city centre), then their right to be heard is granted protection under the free speech principle.[13] Then one can say that this march is equally offensive to the Jews of Chicago, New York, or Tel-Aviv.[14] But this is not the case when Nazis come to a populated Jewish neighbourhood, when the clear and deliberate intention is to offend and excite the inhabitants, especially when knowing that many of them are survivors of the holocaust. Intentions and motives do matter because they may lead to a wrong interpretation being given to the real and true

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13. Those who hold the "fighting words" doctrine (or the "hitting with words" doctrine) as valid may argue that certain types of speech as such should be restricted, no matter where they are pronounced. I do not endorse this view.

14. Cf Feinberg. op.cit. p 87.

motives of the agent. Indeed, it is true that the same conduct may be interpreted in different ways, according to the motives of the doer.[15] But here there is no fear of such possible confusion. Here it is not a case of interpretation at all for the Nazis voiced their reasons for coming to Skokie. It has to be emphasised that the intentions and motives were manifested by Collin himself, who said that he had decided to march in Skokie in order to spite and offend the Jews. Under such circumstances, refraining from attending the march was not a solution for the Jews, as Feinberg suggests, for it would not make them evade the injury. It might even increase it.

Clearly Collin did not mean to persuade the Jews that he was right, or that his ideas were justified. He chose Skokie not only because there was a big community whom he could offend; but also because he wanted to gain public attention. As Dworkin suggests,[16] it was the grotesqueness of the venue that gained attention. This is, of course, true. The choosing of a venue is cardinal to the success of the demonstration. Protests are made where they could convey their message best. We, for example, will not seriously consider a demonstration against sending troops to Saudi Arabia, say, in a zoo. We would expect such a demonstration to take place outside the draft offices, or opposite 10 Downing Street. By the same logic, we would expect a Nazi to propagate his ideas in a Jewish neighbourhood. The question is, however, whether or not our understanding of Collin's motives in choosing Skokie to attract public attention and media coverage should convince us to allow the march. My conclusive answer is 'No'. I repeat once again: when the offence is serious; the intentions of the offender are clear;

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15. The same conduct can be interpreted in totally different ways, according to the motives of the agent. Witness a farmer who takes his old donkey to be killed. In the first scenario because he wishes that the donkey not be subjected to further pain. Then we would regard this act as a humanitarian act *per se*. But if the same farmer takes his old donkey to be killed in front of the gates of the White House, not because its time is due, but rather in protest of the high interest that the farmers of the South are required to pay, which brings many of them to bankruptcy, stating that a similar end awaits the Democrat donkey (referring to the Democrat president), then this act is surely a political act, and many humanitarians are likely to raise their voice in protest.

16. In comments made by Dworkin on this chapter.

and the target group is not in a position to avoid the offence, then democracy should draw the line and constrain freedom of expression.

Furthermore, these arguments do not intend to suggest that only demonstrations that are meant to persuade should be allowed, whereas those that mean to protest or to offend, should be prohibited. As aforesaid, the intentions of the demonstrators is only one of the considerations that we should bear in mind when deciding on boundaries of freedom of expression. No less important are the seriousness of the offence, and the circumstances in which the protest is being made; that is, whether or not the target group can avoid the demonstration without being hurt by the very act of going away.

To recapitulate, avoiding the march, particularly from the viewpoint of the survivors, was tantamount to hiding, and this they could not have accepted, not in their own village. For the Jews there was no solution but to stand up and declare that "Nazism won't pass!". For them any other policy would effectively be the same as conceding the opposite. Consequently it seems that the situation as it developed put the Jews of Skokie in such a position that in either case they would have been offended: if attending the demonstration, they would have to see the swastika, the Nazi uniform etc; and if not, it would have been as if to allow Nazism to pass, pass in their own vicinity. However, an acceptance of that conclusion only criticizes the main argument of the Illinois Supreme Court, later to be adopted by Feinberg. It does not constitute in itself sufficient grounds to imply that the Nazi right to freedom of expression had to be curtailed in that instance. What we have tried to establish until now is that the seriousness of the offence was severe according to "the *Volenti* standard" and "the reasonable avoidability standard". We still have to clarify the scope of "the extent of the offence standard", and explain how serious the offence has to be so as to make it liable to restriction. First we have to examine whether the case falls under the argument regarding the Harm Principle.

Reflection on *argument number one* brings us to conclude that Skokie does not fall under the Harm Principle. We may recall that the argument provides grounds to abridge

speech if it instigates the causing of physical harm to certain individuals or groups. We may say that Collin's advocacy was designed to offend the Jews, and that the very reason for coming to Skokie was to inflict pain upon them. But this case was undoubtedly not a case of instigation, since the time factor to translate hatred speeches into practice did not play a role. On this point I endorse the *Brandenburg* Court's decision. The Jews were not in imminent danger of a physical pain as a result of the march, and it can be argued that the expression was not directed to produce imminent lawless action.[17] However, by holding that this should be the only grounds upon which expression may be abridged, the Court ignored the possibility that expressions - although they do not produce imminent lawless action - still might cause, by their very utterance, harmful results as action might do.[18] Thus it seems that the *Brandenburg* test is too strict in its demands and, therefore, restrictive in its application. My view is that the fact that Skokie was not a case of instigation might have been a sufficient reason to protect the expression and allow the march, unless we can say that the expression in itself constitutes pain that can be considered morally on a par with physical harm. In other words, while it is true that Skokie was not a case of instigation and therefore cannot fall within the confines of the Harm Principle, nevertheless, if strong argument were provided that the very utterance of the Nazi expression constitutes psychological damage that can be equated with physical pain, then we can make a strong case against tolerance under the Offence Principle, and in accordance with "the extent of offence standard". Then we may say, contrary to Feinberg's presupposition, that an offence might be as serious as harm.[19]

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17. Cf fn 2 *supra*.

18. The Court did recognize it three years later in *Rosenfeld v. New Jersey* 408 U.S. 901 (1972).

19. Cf Feinberg. op.cit. 1985. p 2.

C. Psychological Offence, Morally on a Par with Physical Harm

The issue of psychological damage is problematic for two reasons. First there is the general claim that the law is an inappropriate instrument for dealing with expression which produces mental distress or whose targets are the beliefs and values of an audience.[20] Second, speaking of psychological damage necessarily involves drawing a distinction between annoyance or some emotional distress, and a significant offence to the mental framework of people.

As for the first claim, Haiman postulates that individuals in a free society "are not objects which can be **triggered** into action by symbolic stimuli but human beings who **decide** how they will respond to the communication they see and hear".[21] He conceives people as rational human beings, who carefully weigh arguments and decide according to them. He does not acknowledge that people also have feelings, drives and emotions, which are sometimes so powerful as to dominate their view regarding a certain object, or a phenomenon, or other people. He is not willing to concede that a personal trauma, for example, might prevent an autonomous person, who is usually capable to reason and to make choices, from developing a rational line of thought about the causes of his trauma. As far as Haiman is concerned, the anguish experienced by those exposed to scenes that remind people of their trauma is a price that must be paid for freedom of speech. He admits that it is difficult not to seem callous in holding this position, but he "must take that risk and so argue".[22] Otherwise, those who display Nazi symbols would have to be prohibited from appearing not only in front of the Skokie Village Hall but in any other public place where it might be expected that they would be seen by survivors of the holocaust. Furthermore, a television documentary examining and vividly

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20. Haiman. Speech and Law in a Free Society. 1981. p 425.

21. Ibid. pp 425-426 (Haiman's emphasis).

22. Ibid. p 97.

portraying neo-Nazi activity might have to be censored because of its impact on holocaust survivors.[23] However, both arguments are not sufficient to explain why the law should not deal with expressions which produce mental distress, for the "avoidability standard" takes the sting out of them. The Offence Principle, as postulated, does not supply grounds to restrict either of Haiman's examples. One can switch one's television off, or intentionally avoid an encounter with an offensive phenomenon in the city centre. Either of these acts may be deemed necessary to keep one's peace of mind. However, an intentional going away from facing an offensive phenomenon occurring in one's own neighbourhood entails more than mere avoidance. It may seen by some as surrender. This Haiman, like Feinberg and others, fails to understand.

With regard to the second issue, the distinction between annoyance or some emotional distress and a severe offence to one's psyche, is not clear-cut, and it is bound to awaken controversy. For the task obviously requires professional judgments, which further complicates this issue. These reasons, among others, have influenced the literature to the effect that it lacks sufficient consideration regarding the potential psychological injury that certain speech-acts might cause. But these difficulties should not make us overlook the issue. Rather, because we are aware of the complexities that are involved, we must make the qualifications as conclusive as possible, and the requirements equally stringent, in order not to open avenues to further suppression of freedom of expression. As previously stated, we must insist that restrictions on freedom of expression be as clear as possible, for otherwise they might become counter-productive in the sense that instead of protecting our liberties, they will assist in their denial. Hence, there can be no doubt that when we speak of a psychological offence, we refer to an offence which is well beyond inconvenience, irritation, or some other marginal form of emotional distress. Only a considerable pain, one which is not speculative, and which is preferably backed by material evidence, may provide us with a reason to restrict freedom of expression under the Offence Principle, assuming that the circumstances make the offence

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23. Ibid. p 154.

inescapable. With regard to Skokie our task, therefore, is to establish that the offence was such as to constitute an injury which outweighed the special status reserved for freedom of expression.

There was testimony by psychologists on the possible physical injuries that many Jews would suffer as a result of the march. They argued that this speech-act could be regarded as the equivalent of a physical assault.[24] Accordingly, not only may the speech be seen as morally on a par with physical harm; such speech in itself might cause such harm. This entails that the speech-act was properly subject to regulation (if we recall Scanlon's theory) as was any physical attack.[25] Thus, in opposition to the *Brandenburg* and *Skokie* decisions, the argument being forwarded here is that the content of speech is of significance. In emphasising the importance of content, the focus is put not on the truth of the speech, but rather on its effects. When the content and the purpose of expression are overlooked, freedom of speech may be exploited in a way that rebuts fundamental principles which underlie a democratic society. Indeed, the U.S Supreme Court recognized in a series of cases several classes of speech as having "low" value, and thus deserving only limited constitutional protection.[26] The Court held that otherwise speech can be exercised wilfully to inflict injury upon the target persons and groups, thus transforming freedom of speech into a means for curtailing freedoms of others. Therefore, we should bear in mind the content of speeches, and when they are

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24. Bollinger. op.cit. pp 197-200. See also New York Times. 7.2.1978, (Dr. William Niederland's letter); D.A. Downs. Nazis in Skokie. 1985, chs. 1, 8; and the statement of Sol Goldstein, a concentration camp survivor whose mother was buried by the Nazis, in Neier (Defending My Enemy. 1979, p 46).

25. Scanlon ("A Theory of Freedom of Expression", 1977) contemplates that an assault is committed when one person intentionally places another in apprehension of imminent bodily harm. He maintains that instances of assault necessarily involve expressions since an element of successful communication must be present (p 158).

26. There were several occasions on which the United States Supreme Court considered whether certain types of speech are of only "low" First Amendment value. Among them are the fighting words doctrine (*Chaplinsky v. New Hampshire* 315 U.S. 568, 1942); incitement (*Dennis v. U.S.* 341 U.S. 494, 1951); obscenity (*Miller v. California* 413 U.S. 15, 1973); and false statements of fact (*Gertz v. Robert Welch* 418 U.S. 323, 1974). Cf Stone. "Content Regulation and the First Amendment" 25 William and Mary L. Rev. 1983. pp 189-252.

designed to inflict psychological damage upon their target group, then there is a basis to consider their constraint. Here it is worth mentioning the Illinois Appellate Court ruling, later to be overruled by the Illinois Supreme Court, which justified the restriction of the Nazi march because of the likelihood of such injury. The court said that

> "the tens of thousands of Skokie's Jewish residents must feel gross revulsion for the swastika and would immediately respond to the personally abusive epithets slung their way in the form of the defendant's chosen symbol, the swastika...".[27]

It maintained that the swastika was a personal affront to every member of the Jewish faith, especially to the holocaust survivors. These beliefs were powerful enough to rule in favour of Skokie's residents, and against Collin. However, this ruling supplies a weaker standard than the one that was just declared to restrict free speech. "Gross revulsion" and "personally abusive epithets" make a more general standard for constraining freedom of speech. As I have said, one might be offended simply at the sight of black and white people holding hands. Another may feel gross revulsion when watching a commercial featuring a woman in a bathing suit. We cannot extend the scope of the Offence Principle so as to include any potential reaction of disgust on the part of some people. Therefore, we ought to insist on the more stringent requirement, the one which holds that a restriction on freedom of speech under the Offence Principle is permissible only if we can show that the speech in question causes psychological offence, which may be equated with physical pain.

Now, however, we are facing the problem of making this distinction between an offence which causes "emotional distress", or "personal affront", and an offence which causes "psychological injury" amounting to physical pain, an intelligible distinction. It has been argued that offensive acts in general cause unpleasant distressful psychological states to one degree or another. To be offended is, by definition, to suffer distress or anguish.[28] It is, therefore, reiterated that the Offence Principle allows infringement of freedom of speech only in specific cases, when the damage is deemed to be irreversible.

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27. *Village of Skokie v. NSPA*. 366 N.E. 2d 347 (1977).

28. Donald Vandeveer. "Coercive Restraint of Offensive Actions". 8 Philosophy & Public Affairs. 1979. p 177.

Skokie is a relevant case because racist utterances, as stated before, have a harmful psychological impact on the target group which is difficult to overcome or to reverse. Consequently it would appear that "the extent of offence standard" is satisfied to an extent that Feinberg himself does not acknowledge when formulating his standards. In some instances the seriousness of the offence is such that it can be viewed as morally on a par with physical harm. A Nazi march in a Jewish neighbourhood populated by holocaust survivors is a case in point. To some of the Jews it might even cause physical injuries.

A further clarification is called for in order to make the argument under the Offence Principle more precise. The Principle does not provide grounds to restrict racial hatred as such. It insists that we should take into consideration the circumstances in which the speech is made. A Hyde Park speaker wishing to preach racial hatred could not be denied expression, because the listeners are free to leave the place at will, thereby avoiding the offence. Relying on the Millian formulation of the Offence Principle which speaks of a combination of consequences and circumstances, and also on Feinberg's standards which determine the seriousness of the offensiveness, it is emphasised that the fact that some types of speech (such as racial and discriminatory advocacy) create great psychological distress is not in itself a sufficiently compelling reason to override free speech. As the Home Affairs Committee of the House of Commons in its fifth report (1979-1980) recommended not to create power to ban marches where there was a likelihood of racial incitement. Barendt, concurring, writes:

> "... however distasteful the views of these [racist] organizations may be, they are entitled to the same freedom of speech as those with more orthodox opinions, and the suppression of such views may be the first slide down the 'slippery slope' towards total government control of political discourse".[29]

This, indeed, was Scanlon's fear which brought him to defend the *Skokie* resolution.[30]

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29. Fifth Report of the Home Affairs Committee of the House of Commons 1979-80, HC 756, para 51. Cf Barendt. Freedom of Speech. 1985. p 198.

30. Scanlon. "Freedom of Expression and Categories of Expression". 1979.

One additional comment has to be made before formulating our argument under the Offence Principle. Among the justifications voiced for the *Skokie* decision was the contention that if the Nazis were denied free expression, this would jeopardize the entire structure of free speech rights that has been erected. According to this argument, to permit Skokie to ban this speech because of its offensiveness would mean that Southern whites could ban civil rights marches, especially those that are held by blacks.[31] Let us assume that it is plausible to argue that the degree of the irritation resulted in this case amounted to psychological offence. Then these Southern whites could claim that these demonstrators act in a manner which they found to be seriously offensive; that they maliciously, recklessly, or negligently disregarded their interest in not being harmed by seriously offensive actions, such as marching in "their" territory; that the corollary of these marches was severe injury, conducive to further impairment of those whites who were offended, and difficult to reverse. However, the Offence Principle is intended to defend against the abuse of freedom by those who deny respect for others. It is not to assist those whose motivation is to cause harm to others, whose aim is either to intimidate or to discriminate and to deny rights to others. There is a set of values that underlie a liberal society and we judge in accordance with it. The fact that some individuals are offended by a speech which advocates equal rights cannot supply sufficient reason for its restriction. The Principle bears its effects on freedom of expression when the speech in question contradicts fundamental background rights to human dignity and to equality of concern and respect.[32] Otherwise, every speech which some might find psychologically offensive may be curtailed. Members of the civil rights movement who come to demonstrate in the Southern United States do not deny the rights of whites. Their motives are not to offend them but rather to protect the rights of those who are discriminated against by those who now claim that they are being

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31. Bollinger. op.cit. 1986. p 34. In a similar vein Neier (op.cit. 1979. p 142) rightly contends that speakers characteristically carry their messages to places where their views are anathema. He, however, fails to distinguish incidents of protest from demonstrations aiming to offend a specific target group, who cannot avoid being exposed to it.

32. See ch. 3 *supra*.

offended. The right to freedom of speech is here exercised out of respect for others, aiming to preach values that are in accordance with the moral codes of a liberal society, not values which deny these accepted moral codes. Those who are offended by the values adopted by the entire society implicitly argue when wishing to prevent the demonstration that their problem is not with the march as such. Rather, their problem is a matter of principle which concerns their own place within a liberal society.

Hence, we may suggest four major elements to be taken into account when we come to restrict expression on the grounds of psychological offence: the content of the expression; the tenor and the manner of the expression; the intentions and the motive of the speaker; and the objective circumstances in which the advocacy is to take place. As noted above, sometimes the manner of the expression is not so important.[33] On the other hand, sometimes the manner of expression also covers the requirement of content. When the manner of the expression (say symbolic speech) is explicit to the extent that it does not leave room for misinterpretation, and can be regarded as pure speech, carrying unmistakeable content, then the manner of expression also covers the requirement of content.[34] That is to say, when a group comes to a Jewish neighbourhood, wearing Nazi uniforms, with swastika arm-bands, they do not have to say anything. Their message is clear enough given their appearance.[35] Then the requirements for abridging the harmful expression are satisfied. It has to be stressed once more that were the Nazis to decide to

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33. Cf ch. 7 (A), the example of a fundamentalist leader who calmly calls for a "Jihad".

34. Samuel Krislov (The Supreme Court and Political Freedom. 1968. p 151), in his reference to the Ku Klux Klanners in robes, asserts that we forbid such paramilitary uniforms precisely because they symbolize, and therefore threaten and intimidate. The manner of expression constitutes clear content. In a similar fashion, those who object to the burning of flags in public argue that they do not object the message, but rather the action. It seems that they would agree with those who see flag desecration as a legitimate form of expression that in such cases the content of the expression, and its manner, are inseparable.

35. In *Tinker v. Des Moines School District* 393 U.S. 503 (1969) the Court ruled that the wearing of black arm-bands in school to protest against the Vietnam war is closely akin to pure speech.

hold their demonstration elsewhere, other than in a Jewish neighbourhood, then there would be no right to restrict their freedom, for it can be said that the offence is equally shared by Jews wherever they are, without specifying a certain target group in a particular place. Alternatively, if the Nazis were to wear street clothes and not display the swastika, then again we might not have a case to withhold expression. In both instances Feinberg's "the extent of offence standard" does not constitute a serious offence.

In Skokie, however, the manner of the expression was intended to cause an offence, and the objective circumstances were such as to make the obvious target group exposed to that serious offence. Applying Scanlon's distinction it seems that the interest of the audience in avoiding the demonstration outweighs the interest of the Nazis to practise their right to freedom of expression in the heart of a Jewish neighbourhood.[36] It is difficult to claim that the Nazis wanted to have a "good environment" for the formation of their beliefs and desires, specifically in the village of Skokie. Thus, the special circumstances of Skokie make a strong case against tolerance, and accordingly we can now lay down our second qualification of free speech. This restriction is made under the Offence Principle. The argument is:

Argument number two: Strong argument against the free speech principle is supplied under the Offence Principle when the content and/or manner of a certain speech is/are designed to cause a psychological offence to a certain target group, and the objective circumstances are such that make the target group inescapably exposed to that offence.

At this stage one last point has to be made. It may be argued that the Offence Principle as formulated here may be good for Skokie, but that the circumstances of Skokie make it a very special case. Therefore, the applications of the Principle are extremely limited. I agree that the applications of the Offence Principle are limited. I

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36. Cf "Freedom of Expression and Categories of Expression". 1979. p 521.

made every effort to prescribe it as precisely as I could. I think that any principle aiming to restrict freedom of expression has to be well defined so as not to open way for further restrictions. The Offence Principle outlines specific conditions as grounds for abridging speech. Skokie satisfies these conditions and thus my conclusion is that the Illinois Supreme Court decision was wrong. But Skokie is not the only incident to which the Offence Principle may be applied. Skokie makes a very interesting case, but it is not a unique case. We can think of other instances in which the same reasoning can be applied. In **part II** I will show that Kahane's visits to Arab villages is a case in point. Here I wish to consider for a moment the Salman Rushdie affair as a further example.

It is out of the scope of this thesis to delve into the entire range of complexities of this story.[37] My intention is only to suggest that it is one thing to allow the publication of "The Satanic Verses" and quite another to grant Rushdie permission, if he so wishes, to disseminate his ideas out of spite in a religious Pakistani neighbourhood. Suppose that Rushdie would decide to hold a rally in promotion of his book outside the central mosque of Bradford. In this case it is obvious that the point of coming to that neighbourhood could only be to affront, insult, and lacerate the feelings of the Pakistani population. Even if Mr. Rushdie himself were willing to take the risk and bear the consequences of his act, the offence involved in such an act to the relevant neighbourhood remains too great to be overridden by his right of free speech. Forms of freedom of expression should be compatible with a commitment to human dignity and respect for others. If they are not, then the given circumstances and the evaluation of the likely result should be taken into account. This example is clearly a case of disregard for the beliefs of certain people. Here we have reason to believe that the speech is psychologically offensive to an extent that is equivalent to physical harm; there is a specific target group, and the circumstances are such as to make the offence unavoidable. Hence, there is strong justification against tolerance. Similarly, McClosky and Brill have articulated that a cross burning by the Ku Klux Klan might be more

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37. For a stimulating discussion on the Rushdie affair see Lee. The Cost of Free Speech. 1990. pp 73-105.

easily tolerated in a field outside a southern town than in Harlem.[38] Analogous considerations guide us when canvassing Kahane's visits to Arab villages. In all three examples the interests of the audiences seem to be more important than the interests of the participants. In these instances Feinberg's standards are satisfied.

To sum up, we ought not to tolerate every speech, whatever it might be, for then we elevate the value of freedom of expression, and indeed, of tolerance, over other values deemed to be of no less importance such as human dignity and equality of concern and respect. Tolerance which conceives the right to freedom of expression as a *carte blanche* allowing any speech, in any circumstances, might prove to be counter productive, assisting in the flourishing of intolerant opinions and movements. Therefore, we have to be aware of the dangers of words and restrict certain forms of expression when designated as levers to harmful, discriminatory actions; for words, to a great extent, are prescriptions for actions. Moreover, when suggesting defensive principles of democracy, with the aim of putting liberty and tolerance within boundaries, I am not talking solely about restricting expression intended to inflict physical or psychological pain upon others, but also about opposing ideas and theories which dehumanize a certain category of people, according to general criteria which clearly involve no criminal commitment, i.e., criteria of race, religion, colour, sex, sexual preferences, status, class, etc.

These concluding assertions take us to the final part of the thesis which analyzes the struggle of the Israeli democracy against Kahanism. I shall examine the mechanisms applied in this anti-'Kach' (Kahane's party) campaign, the justifications given for the limitations that were set, and how justified they were according to the Respect for Others Argument and the Harm and the Offence Principles.

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38. H. McClosky and A. Brill. Dimensions of Tolerance. 1983. p 24.

PART II. APPLICATION

DEMOCRACY ON THE DEFENSIVE: ISRAEL'S REACTION TO THE KAHANIST PHENOMENON

"What is hateful to you do not do unto your fellow people".

Hillel.

A. Introduction

The aim of this part of the thesis is to apply the theoretical principles to a specific case study and to see how a democracy dealt with challenges that threatened to undermine its existence. I propose to look at the Israeli democracy and its fight against the Kahanist phenomenon. There are two major merits in doing so. Firstly, it is most important to combine theory with application, for generalities and principles are much clearer when they are illustrated by particular instances. Hence, the following discussion will analyze the reaction of society to Kahane, reflecting on the inherent problems which were theoretically discussed: what should the limits of tolerance be?; what constraints on freedom should be introduced, and in what circumstances?

Secondly, the subject of the Israeli struggle against Kahane has not been developed and explored to a satisfactory degree. I do not know of any study that analyzes how Israeli society dealt with the phenomenon, or which discusses whether or not its treatment of Kahane was in accordance with democratic principles.

In chapter 9 I will shed light on the character of Kahane and his activities in the United States and Israel. This chapter also deliberates on the principal ideas which made Kahane the enemy of the establishment. The reading of his proposals will explain why extraordinary measures were taken against Kahane's movement (Kach) not only by the political system, but also by the media and the educational system. These measures included attempts to de-legitimize Kach and to obstruct its activities. To this end, members of the Knesset (with the exception of some members of ultra-orthodox parties) united and abandoned the plenum whenever Kahane rose to speak. Organizations were established with the specific aim of fighting Kahanism. Parties, groups and individuals refrained from meeting and debating with Kahane, thinking that any such act might help to legitimize him. As I have said, being prepared to enter into discussion with a party

accords him some degree of moral legitimacy.[1] In Kahane's case, the willingness to confer such legitimacy on him was very limited.

Since much of the struggle against Kahanism involves legal considerations, chapter 10 provides the necessary background for understanding the judicial decisions concerning Kahane. It probes the normative considerations and the doctrine of precedent which guided the Supreme Court in formulating its decisions. Specific attention will be given to the Declaration of Independence and to three precedents that the Court often cites when constitutional matters are at issue. These precedents are *Kol Ha'am* (1953), *Jeryis* (1964) and *Yeredor* (1965). The discussion will be on two levels: judicial and philosophical. The first level will address the issue of whether the justices acted in accordance with the law. That is, attention will be given to the written law and to the existing normative considerations which allow justices an exegetic latitude. Then we will be in a position to decide whether the judges were correct or incorrect in their judgments in the light of the law (written as well as unwritten). As for the philosophical level of discussion, there I shall consider further whether the legal arrangement is a desirable one or whether it should be replaced by something more suitable.

Chapter 11 probes the attempts that were made to restrict Kahane's freedom to compete in the elections. I will mainly discuss the *Neiman* decision of 1984 which allowed him this freedom, arguing that it was wrong. My basic contentions will be that the Court was incorrect in ignoring the licensing effect of its decision, and that democracy does not have to allow a list propounding the destruction of democracy in order to fulfil its aim. It is neither morally obligatory, nor morally coherent, to expect democracy to place the means for its own destruction in the hands of those who either wish to bring about the annihilation of the State, or to undermine democracy. These two cases are the only cases in which democracy has to introduce self-defensive measures and to deny representation in parliament to lists which convey such ideas and which act

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1. Cf part I, ch. 2.

to realize them. Therefore, when a list such as Kach bases its political platform on discrimination and disrespect towards others, aiming to harm some people and to undermine democracy, it should be disqualified, as Kach indeed was in 1988. The basis for this disqualification was an amendment to the Basic Law: The Knesset (1958) which prohibits a party whose political platform is anti-democratic, or incites racism, or negates the existence of Israel as the State of the Jewish people, from standing for elections. This legislation was specifically aimed at banning Kach.

Chapter 12 reflects on the attempts to restrict Kahane's freedom of expression and movement. Applying the Offence Principle, I shall argue that the decision to restrict Kahane's freedom of movement was justified. There was no other way of stopping Kahane from conducting his provocative visits to Arab villages, where he intended to preach his Orwellian idea of "emigration for peace". However, I shall differentiate between restricting Kahane from holding rallies in Arab places, and withholding his freedom of demonstration as such. While the former was necessary, the latter abridged Kahane's fundamental rights without a sufficient reason.

The chapter also discusses Kahane's appeals to the Supreme Court, seeking its assistance in securing his rights. No less than five of these appeals were against the Speaker of the Knesset, Shlomo Hillel, who stood in the forefront of the campaign against Kahane. The Court upheld Kahane's right to raise motions of no-confidence in the Knesset; to submit racist bills; and to express his opinions in the media. I will review those decisions, arguing that while the decision to allow him to submit racist bills was wrong, the other decisions were correct. Bearing the *Neiman* ruling in mind, the Court was consistent in allowing Kahane to introduce his bills. For my part, I see a difference between allowing the expression of racist diatribes, and permitting a racist list to gain legitimacy through elections and to further its aim of discriminating against others through legislation. Thus, freedom of speech may not be abridged, unless it comes under the Harm Principle or the Offence Principle.

I shall close by discussing some of the developments since the disqualification of Kach, arguing that although Kahane is no longer present on the political scene, his ideas have gained deep roots in Israeli society. That said, it has to be emphasised that I am not arguing that anti-democratic, racist ideas have only emerged since Kahane's ideas became known to the public; rather that these ideas were discussed more in the open as a result of Kahane's activity on the political scene, and that he helped establish them as part of the political agenda. It would take a long process of education, accompanied by a significant political effort to solve the Israeli-Palestinian conflict, in order to change the current feelings towards the Arab minority, and the status of that minority in society.

Chapter 9

THE KAHANIST PHENOMENON

A. Background[1]

Meir Martin Kahane was born in 1932 in Brooklyn, New York. In his youth he joined the "United Zionist-Revisionist Movement of America", affiliated to the world organization of the 'Heirut' party in Israel. In June 1968 Kahane, together with Bertram Zweibon and Morton Dolinsky, founded the Jewish Defence League (JDL). The slogan that was adopted was "Never Again",[2] and the symbol was of the Jewish Magen David together with a clenched fist. At first the main aim was to fight against anti-Semitism and more specifically to defend the Jews of New York from black attacks. The emphasis was on a return to Jewish roots, combined with physical and quasi-military training involving the use of weapons. Later, the JDL became more and more involved in the struggle for Soviet Jewry. In December 1969 Kahane announced that henceforth the league's primary concern would be Soviet Jewry. The league opened a campaign against the Soviet Union: it suggested a boycott of American companies trading with the U.S.S.R; disrupted Russian cultural events; had members phone Soviet agencies and residences in the United States day and night; harassed Soviet diplomats, and generally made the lives of Soviet delegates in the United States difficult.[3]

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1. I wanted to interview Kahane for this research and to ask his opinion about the contents of this chapter. Kahane, however, refused to speak or to comment.

2. Kahane wrote (The Story of the Jewish Defense League. 1975. p 5) that as long as anyone attempted to repeat the Holocaust, "never again there be that same lack of reaction, that same indifference, that same fear".

3. Cf Shlomo M. Russ. The 'Zionist Hooligans'. 1981. pp 170, 310-357; and Janet Dolgin. Jewish Identity and the JDL. 1977. ch. 1.

At the peak of its success, the JDL organization had 19,000 members throughout the United States and in several other countries. This was in the year following the Skokie affair. However, Kahane and the JDL never gained the support of the leading Jewish organizations. The Jewish leadership denounced JDL activities against the Soviet Union, and what seemed to be unnecessary violence in the Jewish neighbourhoods of New York. Another factor which decreased Kahane's status in the eyes of the Jewish leadership was his association with Joe Colombo - the head of a Mafia family in New York.

The early seventies was a period of detente in East-West relations and the JDL's activity was anything but a contribution to easing the tensions between the two sides. According to confidential State Department documents, President Nixon became concerned that Kahane would wreck the Strategic Arm Limitations Talks.[4] For this reason, the American F.B.I., whose attitude towards the JDL's violent acts had been quite lenient until then, decided to adopt a new policy towards the league. Evidence was gathered against Kahane, connecting him with a number of illegal activities: holding weapons without a licence; putting bombs in several offices, including those of the P.L.O and Soviet organizations[5]; participation in violent rallies; attacking Russian buildings and harassing Russian and Iraqi diplomats; disturbing the peace,[6] etc. At that time many JDL activists decided to leave the United States in order to escape the trials. Israel served their purpose as a state of refuge.

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4. Robert I. Friedman. The False Prophet. 1990. p 5.

5. Five notable incidents occurred between October 1970 and April 1971: on October 6, 1970 a bomb ripped through the offices of the PLO in N.Y; on November 23, 1970 a pipe bomb blasted the glass of the Intourist and Aeroflot offices; on January 8, 1971 a bomb exploded outside the Soviet cultural building in Washington D.C. The same month three Soviet diplomats' cars were destroyed by firebombs. On March 30, a pipe bomb exploded outside the national offices of the Communist Party in Washington; and on April 22, 1971 a bomb went off at the Soviet freight office. The same week a heavy explosion rocked the Soviet trade delegation in Amsterdam. Each of the above explosions was followed by a phone call, declaring "Never Again".

6. On March 21, 1971 more than a thousand league members and supporters were arrested when they blocked traffic near the Soviet Mission in Washington D.C.

In July 1971 Kahane stood trial and the verdict was a suspended prison sentence of five years, together with a fine of $5000.[7] He was warned not to deal any more, directly or indirectly, verbally or actively, in any business involving violence and the use of weapons.[8] Kahane decided to emigrate to Israel and to make Jerusalem his permanent base. In summer 1971 he announced the opening of the JDL "International Office" in Jerusalem and the adoption of *aliya* (emigration to Israel) as the core of league ideology. For financial reasons, among others, it was very important for Kahane to keep close contacts with the American organization; consequently he made frequent visits to the United States. In May 1972 an American court decided that Kahane had violated the probation conditions by aiding the dissemination of information about weapons in Brooklyn.[9] The stringency of Kahane's probation conditions was increased. A few years later, in January 1975, during a visit to New York, Kahane created disturbances near the Soviet Mission to the U.N. Two shots were directed at the Mission. Kahane was brought before a judge and this time he was sentenced to one year's imprisonment. Kahane tried to appeal against the decision but his motion was denied.[10]

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7. Kahane and eleven of his men were charged with conspiracy to violate provisions of the Federal Firearms Act of 1968. The government was willing to dismiss indictments against nine of the defendants if three would plead guilty. Those three (Kahane, Bieber, and Cohen) were convicted under Title I of the Act, which is concerned with the transportation of firearms across state lines, and under Title II, which deals with legal procedures regarding the making of firearms. Cf Russ. op.cit. 1981. pp 487-535; Friedman. op.cit. 1990. p 122.

8. A few years later Weinstein J. explained his decision not to put Kahane behind bars by saying that the fact that Kahane appeared to be motivated by consideration of the welfare of others rather than himself, and the recommendations of authorities that probation be utilized in such circumstances were among the reasons which persuaded the court to decide on probation. Cf *United States v. Kahane* 396 F. Supp 687 (1975).

9. In January 1972 there were explosions at two offices which served as impresarios to Soviet performers. One person was killed and over a dozen people were injured. No sufficient evidence was found to connect Kahane directly to these incidents, although it was clear that the JDL was responsible for them.

10. *United States v. Kahane* 527 F. 2d 491 (1975).

From the time of his arrival in Israel in September 1971, Kahane was active on the political scene. At first he thought of continuing his terrorist acts. Thus, following the massacre of eleven Israeli athletes in the Munich Olympic games, Kahane initiated an operation to sabotage the Libyan consulate in Rome. The security forces foiled that attempt at Ben-Gurion airport. Kahane was not arrested in connection with the operation, but the failure certainly had an impact on him, convincing him of the need to be extra cautious in planning his future illegal activities. Nevertheless, he continued to propagate his extreme views, and from time to time he resorted to violent activities. Despite those views and actions, the attitude of the political and judicial systems towards Kahane (like that of the parallel systems in the United States between 1968 and 1971), was quite lenient.[11] The first step to limit Kahane's activity was taken in September 1972, when the military commanders of the West Bank and the Gaza Strip prohibited his entry to the territories. Seven months later, in April 1973, an indictment against Kahane was submitted by the Attorney of the district of Jerusalem. It said that between December 1972 and January 1973 the Jewish Defence League of Israel (Kach) had launched a campaign among the Arabs of Israel, calling on them to emigrate from Israel in return for compensation. The charge against Kahane was of sedition.[12]

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11. As late as 1979, a superior court judge in Los Angeles dismissed a felony complaint against Irving Rubin, a leader of the JDL, who had been charged with soliciting the murder of American Nazis. At a press conference Rubin said that "we are offering $500, that I have in my hand, to any member of the community... who kills, maims, or seriously injures a member of the American Nazi Party". The judge accepted the argument of the ACLU attorneys that these utterances were political hyperbole, intended to attract national media exposure and evidencing a lack of serious intent to solicit the commission of crime. Thus, they were protected by the First Amendment. A state appellate court, however, by a 2-1 vote, overruled the lower court's ruling. Cf *People of the State of California v. Rubin* 96 Cal. App. 3d 968 (1980), cert. denied 101 S.Ct. 80 (1980).

12. Cf Yair Kotler. Heil Kahane. 1985. pp 153-154 (in Hebrew). It has to be noted that in 1973 the British Criminal Code Ordinance of 1936 was still in force. It was replaced in 1977 by the Penal Law. Seditious intention was defined, *inter alia*, as either raising discontent or disaffection amongst inhabitants of the state, or promoting feelings of ill-will and hostility between different sections of the population. Cf Part II, ch. viii, section 60 (1). Compare to Section 136 (3) and (4) of Article One of the Penal Law, in Laws of the State of Israel. Special volume: Penal Law.

The trial began in May 1973 and was never brought to a conclusion. Itzhak Zamir, who later became the Attorney General,[13] explained that the sedition law was problematic since there was not one newspaper that did not publish every day things that could be seen as a violation of this section. Therefore, this was not the appropriate instrument to deal with Kahane's statements.[14]

On June 7, 1973 Kahane was arrested for conspiring to commit acts of violence in the U.S. and for attempting to harm relations between Israel and the U.S. This was after letters written by Kahane to friends in America were intercepted by the Israeli military censor. In those letters Kahane gave instructions for the blowing up of the Iraqi Embassy in Washington; the assassination of Russian diplomats;[15] a shooting attack on the Soviet Embassy; and the placing of a bomb at the offices of Occidental Petroleum as a warning against deals with the Russians. Kahane was convicted and received a suspended sentence. Judge Bazak said he doubted the seriousness of Kahane's criminal intent because he had sent the letter "by regular mail, without using any form of code". He maintained that "it seems more likely this was an emotional and noisy presentation than it was an actual underground plan".[16]

That same year, two months after the outbreak of the Yom Kippur war, Kahane stood for elections for the first time and failed, though he was quite close to his aim.

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13. The roles of the Attorney General in Israel (the title in Hebrew is "Legal Advisor to the Government") are broader than those of the Attorney General in England. He is the main legal figure in Israel. He is not, however, a political figure.

14. Quoted in Kotler. op.cit. 1985. p 290.

15. Kahane wrote: "Where are the Jews who strike now immediately at a Soviet diplomat, causing Brezhnev to cancel his trip to the U.S.A. that stops the detente that will decimate Soviet Jewry". Cf Protocol No. 14 of the Central Elections Committee. 17.6.1984. p 11 (in Hebrew).

16. Cr.A. 167/1973. The Jerusalem District Court. Cf Friedman. op.cit. 1990. p 158. The case was not published.

To be elected it is necessary to gain the support of one per cent of the electorate. Kahane received 12,811 votes (0.81% of the votes).

In 1974 Kahane started advocating the idea of Jewish terror against Arab terror. At that time the right-wing movement "Gush Emunim" ("The Block of the Faithful") was going from strength to strength and Kahane had to find a strategy to distinguish himself, and thus to create a rubric for Kach by crossing the Rubicon. He exacerbated the political atmosphere by initiating violent encounters with Arabs. His position of a strong Jewish stand inspired the first illegal bodies who held that *lex talionis* ("an eye for an eye") is the only answer to the rivalry with the Arabs. Three years later Kahane tried to be elected for the second time. His failure then was more dramatic. He received only 0.25 per cent of the electoral vote (4396 votes). However, these election failures did not discourage him, nor did they induce him to change his opinions. On the contrary. The Camp-David Accords radicalized Kahane even further. He thought that the way to increase his popularity was to resort to more extreme and violent activities. The same methods that had served him well in the United States were adopted in Israel. Kahane advocated militant solutions, used black-and-white slogans drawing a distinction between "us" and "them", and manipulated the media by staging newsworthy events. Kahane always believed that it was not enough to speak; activities had to be undertaken to show "them" (in Israel the term "them" refers to the Arabs) that he was serious in his plans, and to attract the attention of the public media. As stated above, neither the political nor the judicial systems learned from the American experience in their dealing with Kahane. Thus Kach enjoyed a great deal of latitude in conducting its activities. Three major violent incidents are worth recalling:

1) On October 18, 1978 members of Kach, headed by Yossi Dayan, the then General Secretary of the movement, penetrated into "Abraham Avinu" synagogue, situated at the heart of the City of Hebron. They ignored a military ordinance that declared the place a closed area, attacking soldiers who were instructed to get them out. The maximum

penalty for such an act is five years in prison. Dayan was the only person who was convicted. He received a six-month conditional sentence and a fine of 1000 IL.

2) Dayan learned from this incident that he could continue his activities. On January 20, 1979, despite an ordinance that specifically prohibited him from the Cave of Machpelah in Hebron,[17] Dayan entered the area and prevented a soldier from doing his job. He was prosecuted and this time his sentence was two weeks imprisonment and a fine of 2000 IL. The defendant appealed for amnesty to the local military commander who reduced the punishment.

3) At the end of March 1979 there was a violent incident in the Temple Mount involving Kach activists. The bill of indictment included threats, religious insults, terrorist attacks, and trespassing. The verdict was 23 days in prison, later reduced to six months conditional sentence.

If asked to explain this lenient attitude I would say that the tendency at that time was to repress the issue by not bringing it to the public agenda. It was believed that if Kahane were ignored then his legitimacy would be curtailed. Many people within the establishment seem to have thought that Kahane's opinions did not deserve to be discussed like any other idea in the marketplace of ideas, and that any open disputation with them would help Kahane generate a better atmosphere to spread his views. The widely held view was that democracy had to tolerate any idea, but that nothing required anyone to take part in debates on the same platform with Kahane, an action which might be interpreted as suggesting that his ideas had a legitimate place in society.[18] In fact, the outcome was that the problem was ignored. This was typical of decision making in Israel, a country whose politicians like to postpone confronting problems as long as possible. The tendency is to fall back on attractive, simple solutions rather than

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17. The burial place of the Patriarchs and their wives.

18. See my discussion on weak forms of tolerance, part I, ch. 2 (C).

devote time, resources and effort to dealing with problems considered unimportant, or not pressing. Here this tendency was reinforced by a misunderstanding of, or a lack of will to deal with the core of the problem, i.e., the fact that Kahane's support was based on ideas that have deep roots in Israeli society, views for which Kahane was a catalyst, not a midwife.

The Kahanist phenomenon did not go the way the decision makers wanted. Kahane refused simply to fade away. He became better known to the public and his ideas received wider public attention. Kahane recognized that the seeds of acceptance for his radical ideas had been sown and had germinated. The positive reaction of the public to his ideas encouraged him to intensify the campaign against the Arab population. In an article dated May 11, 1979 entitled "It Cannot Continue", Kahane called for attacks on Arabs in order to teach them a lesson. In this article Kahane discussed terrorist attacks on Jewish people all over Israel, complaining that while there were times when such activities led Jews "to angrily attack Arabs and demand action", the public had now "grow[n] numb" and accepted terrorist bombs as a natural thing. He angrily advocated one ultimate solution, namely the removal of the hostile Arab minority from the Land of Israel. Realizing that it would take some time for this plan to be implemented, he postulated an immediate programme which included the death penalty for terrorists, the expulsion of a fixed number of Arabs after every terrorist incident, and "**terror against terror**" (Kahane's emphasis). He explicitly called for the establishment of an anti-terror group whose job would be to retaliate after every incident. Kahane also suggested what the government's attitude should be towards this group: "The government need never acknowledge its existence or it can deal with it on the same basis as the relationship between the P.L.O and the Arab host governments". Recognizing that some would see this advocacy as "immoral", to "these products of gentilized culture" Kahane recommended the words of the rabbis: "He who is merciful at a time when he should be cruel, is destined to be cruel at a time when he should be merciful".

These arguments did not fall on deaf ears. A few years later it was discovered that two Jewish terrorist groups had been organized to retaliate against Arabs. The "small

group" was comprised of 5 Kach activists who set fire to Arabs' cars.[19] The "big group", which was organized in 1980, was comprised of 27 people. That group took the law into its own hands, setting out to kill and maim Palestinians who were considered to be instigators of terrorist activities. Its members seriously injured two of the leaders of the National Guidance Committee and launched an attack on the Islamic College in Hebron in which three Palestinians were killed and some 30 others were wounded. The group also intended to blow up the Dome of the Rock and to booby trap five Arab buses in Jerusalem, so as "to show the Arabs that terrorism was a two-way street".[20] The Jewish terrorists were arrested just after sabotaging the buses and before they exploded.

At the time that this terror group was active (1980 to 1984) there were enough signs to indicate that Kahane himself was involved in organizing attacks against Arabs. It was understood that the lenient policy had to be replaced with a stringent one. In May 1980 the decision was taken to use one of the most anti-democratic procedures that exists in Israel against Kahane and another Kach member. Kahane and Baruch Green were put in administrative detention for six months. Section 2(a) of the Detention Law provides:

> "Where the Minister of Defence has reasonable cause to believe that reasons of state security or public security require that a particular person be detained, he may, by order under his hand, direct that such person be detained for a period, not exceeding six months, stated in the order".[21]

This was one of the very few occasions on which the measure has been taken against Jews. Detention was implemented after evidence was found to connect Kach with a big arsenal of ammunition in the "Hacotel" Yeshiva (the Yeshiva of the Wailing Wall). The charge against Kahane and Green was that they had planned assaults against Arabs and

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19. Cf Noami Gal-Or. The Jewish Underground: Our Terrorism. 1990. pp 33-34 (in Hebrew). According to Friedman (op.cit. 1990. p 239) this group, which called itself TNT (Terror against Terror) committed hundreds of terrorist bombings and beatings, as well as several murders.

20. Cf Haggai Segal. Dear Brothers. 1988. p 181.

21. Emergency Powers (Detention) Law, 5739-1979. This law, in fact, replaced a less liberal procedure, enacted by the British mandate authorities as Emergency Regulations.

the bombing of the Temple Mount mosques. Kahane appealed to the courts, but this time without any success. In his affirmation of the administrative detention, Itzhak Kahan J. said that the danger to the State's security was so severe in this case, that this extreme means represented the only way of preventing it. He explained:

> "I do not accept the argument that the provisions of the Law can be used only against someone who wants the destruction of the State of Israel. No such restriction is contained in section 2(a) of the Law... [T]hese provisions can be used also to protect state security or public security against persons who, from a belief that they are acting in the interests of the State or in the interests of public security, commit or contemplate acts likely to impair state security or public security according to the test of a reasonable person".[22]

In the early 1980s Kahane broadened the scope of his activities. In his appearances and publications he frequently urged the necessity of fighting assimilation, stressing that it was always Arab men who seduced Jewish women. Kahane also emphasised the dual effect of the split-labour market that had been created after the Six Day war, asserting that manual workers (mainly of *Sephardi* origin[23]) had lost their jobs because of the entrance of cheap Arab labour into society, and that Jews were superior to Arabs. Ideas like these, which clearly entailed discrimination against Arabs, attracted wide public attention and gained a great deal of support.[24] However, Kahane still did not succeed in

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22. *Kahane and Green v. Minister of Defence.* Appeal on Administrative Detention. No. 1/1980, at 261. It should be noted that at that period of time the view was that the only business of the court was to check the formal requirements of the ordinance. The prevailing opinion was that if the Defence Ministry decided to take such a measure, there was bound to be sufficient reason to believe that this act was necessary to protect public safety. Nowadays the Court does consider the discretion of the Defence Minister. The Court is willing to scrutinize this discretion and sometimes questions are raised with regard to the need for such an extreme measure.

23. It is common to distinguish between three segments in Israeli Jewish society: *Sephardim*, *Ashkenazim*, and *Sabras*. Roughly speaking, *Sephardim* are Jews whose origins are from Asia and Africa, whereas *Ashkenazim* are Jews from Europe and America. Those who are born in Israel are called *Sabras*.

24. After the Six Day war managers and contractors preferred to hire cheap Arab workers who did not demand social benefits and who were willing to work in any employment for salaries that Jews rejected with contempt. For the same work there were different salaries for Jews and Arabs. Some characterized the situation by saying that there were certain jobs that were suitable for Arabs; jobs that Jews would not be willing to take. From a psychological perspective this situation was of significance for the lower class, comprised mainly of *Sephardi* Jews, who found that they no longer occupied the lowest class of society. As a result, feelings of superiority developed: there was one status for Jews and another for Arabs. Kahane propagated ideas that helped to legitimize these feelings. His entire

translating that support into electoral gain. In 1981 Kach failed to be elected to the 10th Knesset, receiving merely 5128 votes (0.26%), only a slight improvement on the 1977 elections. In that year voices were first heard, asserting that Israeli democracy should resort to defensive measures against Kahane's anti-democratic and racist ideas. A petition was submitted to the Supreme Court prior to the elections to disqualify Kach, but it was denied.[25] Two years later, the Socialist Party (Mapam) urged the need to outlaw Kach on the grounds that it was a fascist movement, whose ideology, propaganda and deeds were clearly and manifestly racist, leaving no choice but the enactment of a law to prohibit its activities.[26] That call was exceptional for its time. The prevailing doctrine was that democracy had to endure any opinion, discriminatory views included.

The case for extending latitude to Kahane's opinions in the free market-place of ideas was based on two different grounds: on the level of principle it was argued that every citizen in a democracy should enjoy the freedom to advocate any idea, however repulsive it might be. Israel would show its society's strength by resisting Kahane's views. This argument is in line with what I have called "arguments from democracy"[27]. It was common in political and legal circles and was expressed by the Attorney General who said that in order to defend the value of free speech we should be willing to hear exceptional views that lay outside the mainstream consensus.[28]

On the pragmatic-political level the claim was that Kahane was only a peripheral phenomenon, who had no real chance of becoming a major force in politics. He could therefore be given the latitude to implement his ideas. The view was that Kahane was,

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ideology emphasised the special role of the Jew in the world in general and in Israel in particular; *ipso facto*, it defined the status of the Arabs in society.

25. Cf ch. 11 *infra*.

26. Davar. 4.8.1983. p 2.

27. Cf ch. 5 (B).

28. Itzhak Zamir on June 30, 1983. Cf Negbi. Paper Tiger. 1985. p 120 (in Hebrew).

and always would be, a political pawn who would never be able to increase his power substantially. An additional argument, popular among some sections of the public, held that it was a good thing to have someone like Kahane on the scene, so as to put the Arabs in their "right" place, and to remind them that their situation could become worse if they did not behave as expected.

In April 1982 Kach received considerable public attention as a result of the evacuation of Yamit, the capital of the Rafiah settlement, which was to be returned to Egypt. Kach was one of the components of the "Movement Against the Retreat from Sinai". Being the most radical faction within the movement, Kach dictated the most dramatic incidents in that affair. Kahane's followers fortified themselves in an underground shelter, declaring their intention to commit collective suicide as an act of protest. Kahane, who "happened" to be in New York, was rushed by the Israeli government to Yamit to persuade his supporters not to commit suicide. The entire negotiation process received wide media coverage in Israel and abroad, and Kahane skilfully mastered-minded a peaceful solution to the drama.

Two months later the Lebanon war (known also as "Operation Peace for Galilee") broke out. It opened a new chapter in the history of the Israeli-Palestinian conflict, deepening the hostility between Jews and Arabs. The operation was intended to end within three days (according to Prime-Minister Begin) and lasted three years. The elections of 1984 were held under its influence and that was the turning point for Kahane. Kach gained the support of 25,907 voters (1.2% of the votes) and as a result succeeded in entering parliament. Indeed, looking at Kahane's attempts to be elected, it is easy to discern two peaks: in 1973 and in 1984. The explanation for his relative success in the former and his success in the latter cannot be separated from the wars that were held in those years. In both cases there was an atmosphere of agitation against and dissatisfaction with the establishment. In 1973 that atmosphere resulted from the oversight of the IDF intelligence, and the lack of predictive preparations when faced with the surprise attack launched by the Egyptians in *Yom Kippur*. However, Kahane

was new in the country then and had not had time to establish himself in the political arena. In 1984 Kahane enjoyed a much more conducive atmosphere for his views which were by then well known. The combination of the Lebanon war, together with severe economic problems, made his clear-cut slogans attractive to the people. The war deepened the political and ideological polarization of Israeli society. It contributed to the radicalization of political opinions among Jews and Arabs,[29] and within the Jewish population it deepened the split between the left and the right wings. The war also drove a wedge between the leadership and wide sectors of the population. Israeli society, tired of the vague promises of its leaders, sought solutions there and then. Kahane was there to offer his decisive plans and to capitalize on them. As the war continued, and every day more names were added to the list of casualties, feelings of hostility and hatred towards Arabs were fuelled. More voices were heard calling for a harder line, based on the motto of "teaching the Arabs a lesson", and "speaking to them in a language they understand". Kahane became the voice of "everything you wanted to say but never dared to say in the open". He supplied the nation, which was in a state of crisis and yearning for change, with conclusive answers.[30] In his public addresses Kahane emphasised the anti-Arab message, while concealing his anti-secular notions and the plan to transform Israel into a *Halacha* state.[31] Kahane appealed to the feelings of deprivation

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29. The Lebanon war did two main things: first, it made the Palestinians realize that nobody was going to do their job for them. The PLO had to evacuate its forces to distant places, and thus the inhabitants of the occupied territories understood that the burden was now on them to do something. Second, the Palestinians realized that they did not necessarily need a big, well-equipped army to harm the "best army in the Middle East". Terrorist acts, guerilla warfare, or mass civil violence could do enough damage: the Lebanese swamp brought about a change of consciousness, a necessary condition for any uprising.

30. The American Council for Foreign Relations conducted a research project in 1984-1985 about Israeli society. Its conclusions were that the people were emotional and indecisive, deeply split in regard to their political, material, and spiritual preferences. It also asserted that the gaps within the Jewish population, not to mention the gap between Jews and Arabs, had deepened. In addition, the research warned of the danger of fundamentalist Jews disobeying the law (Yedioth Ahronoth. 10.5.1985. Pol. Sup. p 2.)

31. The ignorance shown by many of the secular followers of Kahane regarding his plans to transform Israel into a theocracy was striking. Many of those who were aware of his programme believed that it was more important to deal with the Arabs. Afterwards, they assumed, a *modus vivendi* would be found between a

and bitterness among the lower classes of the population, stressing his claim that Arabs were taking work from Jews, and that the government was helping them by subsidizing their big families through generous social security benefits. Kahane's anti-establishment image helped him to exploit the prevailing mood of mistrust and frustration towards the leadership and its policies. In addition, Prime Minister Begin's retirement helped Kahane win the support of Likud followers who were seeking a new charismatic leader; one who could (at least to some extent) fill the vacuum that was created by Begin's resignation.

From the very first day of his election to the Knesset, Kahane MK became the target of fierce attacks. He was the man who (almost) everyone in the establishment liked to hate. The entire Israeli democracy seems to have been recruited to fight him and to curtail the influence of his ideas. Immediately after the 1984 elections the then General Director of the Education Ministry, Eliezer Shmueli, instructed headmasters throughout the country to deny Kahane entrance to schools. He also encouraged meetings between Jews and Arabs so as to bridge gaps and to increase understanding between the two parties.[32] Schools were supplied with compulsory material, produced by the "Van-Leer" Institute, to teach children about democracy and civil rights, with the aim of fighting Kahane's discriminatory ideas.[33] Parties, groups and individuals refrained from meeting

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religious state and the current situation. They assumed that the "sacred" *status quo* would be kept.

32. While the General Director advised the mainstream of the education system to encourage meetings between Jews and Arabs, the religious section of the Ministry - which is in charge of the orthodox schools in Israel, and as such enjoys the autonomy to decide on its own policy separately from the instructions of the General Director and the Minister - directed its schools not to allow such meetings. It also published a new educational series, entitled "On the Good Earth", which emphasised the sole right of the Jewish people to Eretz Israel, asserting that the Arabs had no roots in the Land and that the idea of Arabs sitting together with Jews under the same tree was a utopia. In addition, it has to be said that only few religious leaders publicly denounced Kahane and his programmes. When the *Ashkenazi* Chief Rabbi of Israel was asked to publish an address denouncing Kahane, he refused.

33. Every year one topic is selected by the Ministry of Education to be thoroughly discussed in schools. The year of 1986 was dedicated to the study of "Democracy". In 1987 the Declaration of Independence was selected to be of focal interest.

and debating with Kahane, thinking that any such act might help to legitimize Kach. Organizations which did not usually involve themselves in politics raised their voice in denunciation of Kahanism.[34] Furthermore, special organizations were formed to fight his discriminatory ideas. Thus, a group of citizens came together "to stop the evil", calling themselves "Citizens against Racism". This was the first organization to be established in reaction to Kahane's success. During that same year "The Movement for Co-Existence and against Racism" was formed. In 1985 the socialist party Mapam established the "Youth against Racism" organization, and the same year "Maane" ("Super Organization against Racism") was formed. This latter body, composed of some twenty different organizations, guided and headed the activities against the Kahanist phenomenon in Israel.

Two national figures stepped forward in the campaign against Kahane. These were the President of the State, Haim Herzog, and the Knesset Speaker Shlomo Hillel. They both believed that the way to fight Kahanism was by excluding Kahane, treating him as a special case and thus denying him legitimacy. President Herzog broke a long established custom according to which, after national elections, the President meets with representatives of all the political parties to discuss the formation of a new government. All the parties of the House but Kach were welcomed to his residence. From that point onwards Herzog stood at the forefront of the battle against Kach and the ideas that Kahane represented. It was the first time in Israeli history that the President of the State, who is supposed to represent every faction of society, decided to take a clear stand against a political party. The Knesset Speaker also made every effort to curtail Kahane's

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34. One day after the election, "The Second Generation to the Holocaust Remembrance" organization decided to raise its voice for the first time over a political matter. This voluntary organization, comprising some 2000 people, second and third generations of holocaust survivors, published a press notice saying that it was appalled by the thought that quasi-fascist ideas, similar to those expressed in another place, at another time, should be represented in the Israeli Knesset. It maintained that for too long Israel had resisted the idea that there could be such a thing as Jewish-fascism. Now was the time for the Israeli system to oust this phenomenon.

legitimacy. I shall deal with these efforts later on, when discussing the legal issues involved in the fight against Kahane. Here however, it is necessary to explain how one person succeeded in unifying almost all the parties against him, and in creating a consensus towards his views. This is no small feat, considering the wide differences between the left and the right wings in Israel. To comprehend this, we shall take a closer look at Kahane's ideology and political platform.

B. The Ideology of Kach

Kahane spoke of a complete change in Israeli society: not merely a political change, but a total remaking of Israel. In Kahane's view, the only authentic Jewish State is "a state of Jewish totality," where Jewish leadership is selected on the basis of knowledge of and adherence to the *halacha*, the traditional Jewish Law. He called for the creation of "a truly Jewish state in Israel rather than a Hebrew speaking gentilized one", where people would live according to the Jewish laws.[35] In the Kach magazine, "Only Kach" (No. 2, 1986), Kahane asserted that the question of law and order in a Jewish state is not the same as in the United States, France or Australia. As the Jew is different and unique, the question of law and order is different and unique. Kahane explained that in the western democracies, the "secular-natural" view is that the people give government the right to speak in their name, that the government **is** the people and that the individual therefore must not nullify government's decisions. The people, in this view, are the ultimate authority, and since the government represents the people, government is the ultimate authority. But this has nothing to do with the Jewish people, whose origins as a nation are **not** natural and evolutionary, and whose authority is not derived from within, but is external to it. There was a defined moment in time, when the Jewish people became a nation:

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35. A Kach undated flyer entitled "A Message to the Jewish Community from Rabbi Meir Kahane" (in English).

> "Now, therefore, if ye will hearken unto My voice indeed, and keep My covenant, then ye shall be Mine own treasure from among all peoples; for all the earth is Mine; and ye shall be unto Me a kingdom of priests, and a holy nation... And all the people answered together and said: 'All that the Lord hath spoken we will do'" (Exodus XIX, 5-8).

This reference to the birth of the nation was reiterated just before the death of Moses:

> "Ye are standing this day all of you before the Lord your God... that thou shouldest enter into the covenant of the Lord thy God... that He may establish thee this day unto Himself for a people, and that He may be unto thee a God..." (Deuteronomy XXIX, 9-12).

Accordingly, the ultimate authority and the right of decision regarding the destiny of the Jewish nation lie outside the nation, in the hands of God. It is not the people who decide its future, as is the case of the other nations but, rather, the external power which crystallized it. This is an ultimate authority which is not open to second thoughts or appeals. The entire Jewish nation comes under this authority, including the earthly government. A Jew has to respect and to obey government, **as long as** this government respects and obeys the Law of the Bible, respects and obeys the yoke of divine government. The government loses its authority when it nullifies the Divine Laws.

The implications of these views are of great significance. When the ideologist of the Jewish terrorist group, Yehuda Etzion, was asked whether or not he respected the legitimacy of the government, his answer was that he recognized its legitimacy as the sovereign. But he did not acknowledge the legitimacy of every law: "Every law has to be analyzed separately, whether or not it coincides with the ultimate yardstick of the Law of the *Torah*, as we understand it".[36] Etzion and Kahane believed that the prohibition against the abandonment of lands, and the need to settle in every place in *Eretz* (The Land of) Israel, were more than ordinary commands. These acts amounted to *"Kidush Hashem"* (sanctification of the Holy Name). This was how the struggle between the settlers and the government had to be viewed. The settlers had a right derived from God Himself to act against the law. Seen in this way, nullifying illegal government orders became a command of the *Torah*. The concept of the Jewish nation was clear in Kahane's mind: government exists to serve the nation; the nation exists to

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36. Aviva Shabi. "In Tel-Mond I established the redemption movement". Yedioth Ahronoth. 6.1.1989. (Pol. Supp., p 12).

serve the people; the people exist to serve God. When government disobeys the Law, it brings anarchy. It is to blame, for it loses any legal and moral right to demand obedience from citizens who wish to live according to the Law.[37]

Kahane did not see the democratic principle of majority rule as obligatory, because when the majority acts against the Laws of the Bible, it does not count as a majority. This is a majority of evil, and of course must not enjoy any right to rule. Those who object to that which is required by the Bible are the ones who vilify Law; **they** question the Law; **they** annul order; **they** bring danger and destruction on Israel. It is not a question of Jews who rebel against government who nullify the Law. It is a question of Jews who wish to keep the Law, who disobey government whose conduct breaches the Law and tries to prevent Jews from living in accordance with the Law.[38]

Kahane's views on Israeli society, its laws and practices, as well as its relations with the Arabs living in the land, were directly derived from his picture of Judaism, on the one hand, and his view of non-Jews, on the other. Kahane stated that as a Zionist, his main concern was the future of Israel. To be a Jew, he said, is to understand that Jewishness is different, special. The concepts of chosenness, holiness and separation are an integral part of the Jewish ritual. There is a standard of excellence, holiness and purity, and the mission of the Jewish people is to maintain this standard. Kahane urged:

> "The Chosen people. Chosen by the father of all as a particular, special child to live the kind of life that raises man to the heights of holiness, that turns him into a thing of beauty, that makes creation comprehensible".[39]

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37. On 25 August 1989, in the Jewish Press, Kahane openly called for revolution in Israel because the government "is incapable or unwilling to protect to the utmost, and in every way possible, the lives of its citizens". Since, in Kahane's view, the only way to suppress the Palestinian *Intifada* was to expel each and every Arab, something that the government was not willing to do, Kahane contended the government "loses every legal and moral right to rule". Cf Friedman. op.cit. 1990. p 269.

38. Kahane wrote (The Story of the Jewish Defense League. 1975): "Those who love Israel must learn to distinguish between the state and the government. The state is inviolate but the government is not" (p 323).

39. Kahane. Listen World, Listen Jew. 1983. p 15.

Being associated with the chosen people rules out the possibility of choice. Kahane argued that this concept of being "chosen" and "set apart" is the first understanding which the Jew has to grasp, for it establishes his role on the face of the earth. It also sets out well-defined obligations for the Jew. Consequently, in Kahane's view, the concept of choice, or of "live and let live", is "the most un-Jewish of all concepts", for all Jews are one. All Jews - as the one, chosen people - are judged together. They stand together; they fall together. The sins of one are visited upon all, and hence "there are no individual seats or sides in the Jewish boat. The sinners, the choosers of evil, knock holes in the boat and we all go under".[40] Since there is no freedom of choice for the Jewish individual, and the sinners condemn not only themselves but others by their wrong doings, it is no wonder that Kahane saw it right to coerce others to live according to the way of life that Judaism, in his view, demands. He clearly stated that should he - through the democratic system - gain power, it is totally acceptable for him to pass laws, within the democratic system, that would make people conform to Judaism.

Kahane claimed that there is a clear intellectual, ideological and philosophical contradiction between Zionism and western democracy, between Judaism and liberal values. In contrast to the liberal tradition, Judaism demands limitation, discipline, and the subordination of the ego. Judaism clearly declares that "unto the L-rd is the earth and all that it contains". Consequently there is no such thing as a person's ownership of anything on this earth. Kahane postulated:

> "We live in a world that revels in 'freedom', in the right to do what we wish. Rights and freedom have become the watchword of our times, and they grow like some cancerous disease into license and moral anarchy. For the Jew there can be no such thing. For the Jew there can only be the yoke of the heavenly kingdom".[41]

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40. Kahane. Uncomfortable Question for Comfortable Jews. 1987. pp 262-263.

41. Kahane. op.cit. 1983. p 19. In another place (op.cit. 1987. p 129) Kahane wrote that Judaism defines freedom as follows: "'For no man is free but he who occupies himself in the study of *Torah*' (*Avot* 6;2). The only freedom recognized by Judaism is that which is within the bounds, the framework of *halacha*".

Kahane further explained that democracy is based on the idea that we are incapable of knowing the truth, whereas Judaism is founded on the idea that we know the truth. Therefore, those who acknowledge it should enlighten others. Kahane strongly believed that democracy is an alien idea born of a gentile mind, that democracy and humanism are the values of the Hellenists.[42] These values run counter to and stand in contradiction to the basic principles of Judaism-Zionism and a Jewish people. He said that the era of false democracy in which nothing is better than anything else and in which everything and everybody is reduced to a common denominator, invariably the lowest, is not appropriate to Judaism. A Jew must choose between Judaism and Zionism on the one hand, and western liberal culture on the other. They are different: "The one represents spiritual life and the other death, the one truth and the other falsehood and delusion, the one blessing and the other curse".[43]

As for Kahane's view of the Arab population in Israel, he regarded them at best as thieves who entered the Jewish land when the Jews had been forcibly exiled from it. On some occasions he made derogatory references to them. Thus Kahane opened some of his public appearances with the statement: "Shalom Jews, Shalom Dogs". The latter part of the statement referred to Arabs attending his assemblies.[44] The purpose was clearly to dehumanize the Arab population, and one can think of other experts in mass communication who resorted to similar methods. Kahane wrote that the Arabs were "a time-bomb", "a malignant disease", and that they "multiply like fleas".[45] In other

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42. 'Hellenism' was one of Kahane's favoured terms. It has to be explained that this is not the precise translation of the parallel term in Hebrew. The Hebrew word conveys, in addition to the cultural notion, a notion of betrayal. Jews who conformed to Greek culture and religion were considered as traitors. Some of them were executed as such by the Maccabeans.

43. Kahane. op.cit. 1987. p 179.

44. This was the case in the assemblies held in the Hebrew University, Haifa and Acre.

45. To an English newspaper Kahane said that the Arabs "multiply like rabbits", and that Jewish women who live with Arabs are "Jews who live with animals".

writings he explained that the Arabs were simply "our enemies", and they were only to be redeemed from this status through proselytizing. No other way was acceptable to Kahane because he did not trust them. He always said that there were no "good" and "bad" Arabs. There were only stupid and clever ones: the stupid declared openly that they wanted to destroy Israel, whereas the clever ones hid their intentions by speaking of compromise and peace. In truth, no one of them wanted peace. A "good Arab" was one who wished to establish a country according to the laws of Islam in the place of Israel. There were no Arab moderates, and those who seemed to be moderates only differed in tactics, not in goals. Kahane wrote:

> "The enemies of Israel will never make peace; they will never seek less than the total elimination of the Jewish State; they do not want compromise because they look upon us as robbers and bandits".[46]

Kahane, therefore, urged an end to "the insane delusion" of peace through concessions. Jews had to recognize that peace was not possible under the given circumstances, and they did not need to "weep or wail". Zionism, he declared, "from the first, was not created primarily for peace but for a Jewish State. Hopefully, it was believed, this could be accompanied by peace. But with or without peace, the primary goal was and is a Jewish State".[47] Jews had to adopt a realistic outlook regarding their place and destiny on earth. They had to establish their priorities in a way that would give precedence to these considerations, rather than to universal humanist principles. The latter were an obstacle to reaching the former. Thus, in an interview Kahane urged that this was neither the right time nor the right place to apply the rule "What is hateful to you do not do unto your fellow people".[48]

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46. Kahane. op.cit. 1983. p 139.

47. Kahane. op.cit. 1987. p 271.

48. Raphael Mergui et al. Israel's Ayatollahs. 1987. p 87.

Kahane also warned against the threat of Arab population growth which could destroy the Jewish State from within. Evidence showed that the Arab birth rate was more than twice as high as that of the Jews'; this meant that they would achieve numerical parity with the Jews before the middle of the next century.[49] Thus Kahane posed the question: do the Arabs have the right to become the majority in Israel, through peaceful, democratic means? Anyone who feared such a possibility should act **now** to prevent it from materializing.

The proposed solution to the demographic problem was to induce the Arabs to leave, by persuasion if possible, by coercion if necessary. According to this perspective, the non-Jew had no share in the Land of Israel. This Land belonged to the people of Israel; it was they who controlled and defined it. It was their vessel, their territory in which to create the society of Israel, the *Torah* society of God. Kahane said that he did not hate Arabs, rather he loved Jews. And because of that he would do everything to insure that Jews survived. Moreover, the expulsion of the Arabs through the process of transfer would also result in the moral regeneration of Israeli society and would prepare the way for acceptance of the Laws of the *Torah*, the *halacha*, as the Law of the state.[50] Kahane cited Rashi - Rabbi Shlomo Yitzchaki: "And you shall drive out the inhabitants and then you shall inherit it, you will be able to exist in it. And if you do not, you will not be able to exist in it". Kahane urged:

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49. This assumption did not forecast the mass *aliya* from the Soviet Union, which started in 1989. In an article (without date or place of publication) prior to the emigration movement entitled "For Israel: A Government of National Emergency", Kahane in his picturesque language contended: "The demon of demography roars with satanic laughter as the huge Arab birthrate and the pitiful Jewish one... combine to threaten the continued existence of Israel as a Jewish State". He maintained that "[T]he blunt contradiction between Zionism-Judaism and western democracy is glaring as Israel faces a clear threat to its existence either through Arab bullets or babies".

50. Kahane wrote (They Must Go. 1981. pp 275-6): "The Arabs of Israel represent *Hillul Hashem* (defamation of God) in its starkest form... Their transfer from the Land of Israel thus becomes more than a political issue. It is a religious issue, a religious obligation, a commandment to erase *Hillul Hashem*... Let us remove the Arabs from Israel and bring the redemption" (Kahane's emphasis).

> "... there is only one path for us to take: **the immediate transfer of Arabs from Eretz Yisrael**... For Arabs and Jews in Eretz Yisrael there is only one answer: separation, Jews in their land, Arabs in theirs. Separation. Only separation".[51]

Nevertheless, Kahane was willing to concede that up to a maximum number of Arabs, limited by the security considerations of the State, might be allowed to continue living in Israel, provided that they were deprived of all political rights and accepted some basic obligations.[52] He stated that Judaism laid down legal, *halachic* conditions for the privilege of being a non-Jew allowed to live in the Land of Israel. These conditions postulated that the non-Jew had no rights of ownership, citizenship, or destiny in the land: whoever wished to live in Israel had to accept basic obligations. He could then live in Israel as an **alien resident** but never as a citizen with any proprietary interest or political say, never as anyone who could hold any public office that would give him dominion over a Jew or a share in the authority of the country.[53] Accepting these conditions and admitting that the land was not his, the non-Jew could live quietly in Israel, conducting his own private life separately, with all religious, economic, social, and cultural rights. Kahane asserted that "[O]ne is obligated to run miles to help a decent gentile in his personal problems but not an inch in the sphere of national equality".[54]

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51. Ibid. p 7 (emphasis mine).

52. Ibid. p 252.

53. Kahane's image of an alien-resident was someone who was not a citizen and did not cast a vote for the Knesset. Someone who had personal rights to culture, religion, economy and society, but no political rights. The purpose of this concept served Kach purposes adequately. The concept was based on religious grounds, and it was sufficient to exclude Arabs from potential political influence thus avoiding the hazardous result of changing the Jewish character of Israel.

54. Kahane. op.cit. 1987. p 173.

C. The Political Programme

Kach undertook to carry out the following steps as part of its campaign to reorder society, if it achieved the power to do so:

- Democracy would be frozen so as to allow a truly strong Jewish hand. Kahane explained that Israel should learn from the measures taken by Great Britain during World War II. At that time British democracy froze the democratic political system, suspending elections and major political rights. Israel would have to transfer the power of the people to a new system of strong and forceful government "to take over the rudder of the ship that, today, drifts toward the shoals and rocks of catastrophe".[55]

- In the reformed Jewish State, intermarriage and sexual relations between Jews and gentiles would be forbidden by law. From Kahane's point of view, assimilation with the Arabs was the greatest possible threat: "... that is the worst of the tragedy and the most dangerous".[56] Efforts would also be made to put a stop to the process of assimilation between Jews and Christians in the U.S.A.[57]

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55. From "For Israel: A Government of National Emergency". This article was written under the influence of the Palestinian *Intifada*.

56. Kahane. op. cit. 1987. p 206. Kahane established the "Jewish Guard of Honour" to fight the danger of assimilation. He claimed that there were about 7000 to 8000 mixed marriages with Arabs in Israel, and that this should be regarded as a crime. Cf interview with Kahane in Mergui et al. op.cit. 1987. p 80.

57. Kahane. Listen World, Listen Jew. 1983. p iv. An undated Kach flyer (in English) entitled "Don't Date Gentiles" states: "Intermarriage is the spiritual Auschwitz of the Jewish People". The message to the "Young Jew" clearly postulates that "Life is not ours to do with as we see fit. Only the sick, selfish animalist babbles about his "right" to do with his life whatever he wishes without any restraint or obligation. It is not "my" life or "my" business or "my" right. We are not islands unto ourselves". This is because "You are a link to a glorious past and the initiator of a glorious future", and "**You have no right**" to throw away that Judaism which "your grandparents so struggled for and **died for**... You have no right to rob **your children and theirs and all the generations who will come from you**..."

- Arabs would be excluded from all spheres of work.

- The sovereignty of the Jewish people over the whole Land of Israel should be proclaimed "by virtue of the promise of the Almighty and the historical fact of tenure and unbroken hope of return based on that promise".[58] Jews were forbidden to give up any part of the Land of Israel, including the areas which were liberated in 1967[59]; unlimited Jewish settlement would therefore be allowed throughout the Land of Israel together with a formal announcement of integration of the liberated lands into the State of Israel.

- Camp-David agreements would be rejected altogether. There was no place for granting any sort of autonomy to Arabs in the Land of Israel.

- The Israeli Communist Party 'Hadash' would be outlawed, for its members were fifth columnists who cooperated with Israel's deadly enemies.

- The curriculum of all public schools would be thoroughly overhauled and a large percentage of the timetable would be given over to the study of Judaism. This was designed to put an end to the disastrous ideological bankruptcy of young Israelis who had little or no knowledge of, and emotional links with Zionism, Judaism, or Jewishness.[60] Kahane postulated: "Jewish pride will be the first order of business".[61]

(emphasises are within the text).

58. Kahane. op.cit. 1983. p 137.

59. Notice the nuance: the parties of the right in Israel refer to the West Bank and the Gaza Strip as "the liberated territories", whereas parties of the left refer to them as "the occupied territories".

60. Kahane. "For Israel: A Government of National Emergency".

61. Kahane. op.cit. 1987. p 268.

- A new state television and radio authority with a positive attitude toward Judaism and Jewish nationalism would be established.

- There would be no stores or restaurants that publicly sold non-kosher food, or which "wave leavened bread, *chametz*, about on Passover".[62]

- Book stalls and newspapers kiosks would no longer "titillate and destroy Jewish minds and souls with pornography", and movies and theatres would no longer be free "to stand on the soapbox of 'freedom of expression and art' to demolish the purity and sanctity of the Jewish soul".[63]

- Abortion would be regulated by Jewish law; "no one will be allowed to murder unborn children".[64]

- Missionary work in Israel would be forbidden. Kahane saw it as a crime to allow Christian missionaries into Israel to steal Jewish souls: "missionaries will be allowed to proselytize in China but not in the Jewish State".[65]

- The Temple Mount would be freed of its Moslem presence. The latter would be "taken down from there along with their mosques", which would be "carefully removed" to another site.[66]

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62. Ibid. p 271.

63. Ibid.

64. Ibid. p 272; and Kahane. op.cit. 1983. p 20.

65. Kahane. op.cit. 1987. p 272. See also The Story of the JDL. 1975. p 310.

66. Kahane. op.cit. 1987. pp 272-273.

- Normal and acceptable standards of dress would be demanded and the foreign tourists who came to Israel "will be greeted at the airports with polite welcomes to the Holy Land and with instructions on how they are expected to behave and dress and conduct themselves in our Holy land".[67]

- There would be a five-day working week in Israel, with work ending at 2 p.m. on Friday and leisure extending until Monday morning. From Saturday night onwards, Jews would be free to do what they pleased in terms of sports, vacations and leisure, but the Sabbath day would be holy: "**No one will check to see what the Jew does in the privacy of his home but the public character of the Sabbath will be respected and demanded**".[68]

- Finally, it is interesting to note that in the economic sphere Kahane's demand was: "**Let the people breathe!**". He contended that Israel was riddled with economic inefficiency caused by the socialist bureaucratic system, which strangled the individual and prevented him from striking out on his own economic path.[69] Israel had to cut taxes instead of raising them. People should be allowed to gamble with their money in business, in the hope of making a profit. Kahane held that only free enterprise that brought in foreign investment and that encouraged domestic capitalism and provided incentives, would allow Israel to escape from its present position as "a beggar basket-case".

It is no wonder that the Israeli system found these proposals very difficult to digest and fought against them as an act of self-defence. The Israeli establishment viewed

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67. Ibid. p 272.

68. Ibid (emphasis mine).

69. Ibid. p 273.

Kahane with disgust and shame. Kahanism was conceived as a phenomenon that did not deserve legitimization; one that contradicted everything Israel stood for as a Jewish-democratic State; and one that should be tackled to reduce its influence. In chapters 11 and 12 I shall evaluate the Israeli reaction to the Kahanist phenomenon. Much of that struggle took place within the legal system. After the 1984 elections, issues concerning Kahane and his party were brought before the Supreme Court, which repeatedly returned them to the legislature, suggesting that the decisions had to be made by the legislative body. To understand why the Court resorted to this formalistic view, it is essential to reflect on the Israeli judicial system and to see the sources from which it derives its decisions. This is the business of the following chapter. I shall argue that the Court, in formulating its decisions, was influenced by three major sources: acts of the legislature; principles that might not be explicitly expressed in any binding legal document but which were nevertheless regarded as part of the legal system; and precedents.

Chapter 10

LEGAL BACKGROUND: THE FOUNDATIONS OF THE LAW

A. The Declaration of Independence and Normative Considerations

Israel has neither a written constitution, a bill of rights, nor a basic law to protect fundamental civil rights such as freedom of speech, of association and of the press. As things now stand, the Knesset can pass any law which might infringe or diminish these essential freedoms.[1] Attempts have been made to form a constitution but none of them have materialised because of the inability to reach a consensus with regard to its content. More specifically, the religious parties have always opposed the idea of being governed by a written document which would be secular in its essence, and which might contradict the *Halacha*. A compromise had been reached to construct the constitution in chapters, in such a way that each chapter will be considered a fundamental law and together they will eventually form a constitution.[2]

Up to now the Knesset has adopted eight Basic Laws on various issues.[3] These Laws have some characteristics that grant them a special normative status which - according to Justice Barak of the Supreme Court - brings them close to having a constitutional status. He argues that there are no judicial norms that stand above the

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1. Theoretically, a government having a majority in the Knesset may pass a law that will cancel the need for elections.

2. The "Harari Resolution" of June 13, 1950 (5 Knesset Protocols).

3. Basic Law: The Knesset (1958); Basic Law: Israel Lands (1960); Basic Law: The President of the State (1964); Basic Law: The Government (1968); Basic Law: The State Economy (1975); Basic Law: The Army (1976); Basic Law: Jerusalem (1980); Basic Law: Judicature (1984).

Basic Laws.[4] However, constitutional scholars argue that it is difficult to see how these Laws could be moulded into a constitution,[5] since some of them do not relate to constitutional principles regarding the foundations of the political system,[6] and those dealing with constitutional matters fail to cover the most fundamental issue of human rights. Moreover, from the technical point of view most of the Basic Laws do not differ from conventional laws and do not enjoy any sort of immunity.[7] It is possible to cancel a Basic Law by a majority in the Knesset. It is also possible to enact a conventional law that contradicts a Basic Law.[8]

A very important source to which the courts can appeal is the Declaration of Independence which contains the fundamental principles of the Jewish State. The Declaration was written and affirmed by the Founding Assembly, which was not an elected legislature. The Declaration was not intended to be a constitution, for it was

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4. Aharon Barak. Judicial Discretion. 1987. p 319 (in Hebrew). A translation of the book to English (albeit in a shorter version) appears by Yale University Press. 1987.

5. Cf Rubinstein. Constitutional Law of Israel. 1980. pp 280-281; Negbi. Above the Law. 1987. pp 32-35 (both in Hebrew); and Ruth Gavison. "The Controversy over Israel's Bill of Rights". 15 Israel Yearbook of Human Rights. 1985. p 119.

6. Basic Law: Israel Lands (1960); Basic Law: Jerusalem (1980).

7. Three of the laws are entrenched, in the sense that an absolute majority is required to change them. Basic Law: The Knesset (1958), provides that the election method can be amended or cancelled only by the consent of at least 61 MKs, and that emergency regulations may not affect the law absent a two-thirds majority (sects. 4, 44, 45). Basic Law: The President of the State (1964) is entrenched so as to ensure that it could not be altered by emergency regulations (sect. 25); and Basic Law: The Government (1968), requires an absolute majority in order to be altered by Emergency Regulations (sect. 42).

8. There is a contesting view (expressed by Eli Salzberger in a private discussion), according to which these Basic Laws can be moulded into a Constitution, provided that two additional Basic Laws will be enacted. These are Basic Law: Human Rights, and Basic Law: Legislation. The latter will regulate the legal framework and provide answers to the above-mentioned problems. I must admit that in the current political affairs in Israel the passing of the Human Rights Law seems to be almost impossible.

decided that a constitution would be written no later than October 1, 1948.[9] It is not even a regular law. As its name reveals, the principles it contains are viewed as possessing a declarative validity. Indeed, the purpose of the Declaration was to deliver a message to the world with regard to the intentions of the Jewish people in establishing the State of Israel. Thus the Declaration was first conceived as a political instrument to be used at the international level.[10] At a later stage the courts resorted to it as an interpretive instrument. The Declaration was invoked when they were confronted with ambiguous legislative intent; they then preferred the interpretation compatible with the Declaration.[11] However, the Declaration could not overrule the Knesset's laws: when a law was unequivocal it was given preference over the principles of the Declaration.[12]

Thus, it was acknowledged that the Declaration of Independence lacked constitutional force and that it did not enjoy the status of a supreme norm. Nevertheless, it was conceived to articulate the "prophecy of the people, and its credo". The Court stated that each and every authority had to see the principles of the Declaration as obligatory,[13] and

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9. An English translation of the Declaration can be found in Henry Baker. The Legal System of Israel. 1961. pp 8-10. Some argue that the date mentioned in the Declaration refers to the establishment of the Assembly, not to the writing of a constitution.

10. Cf High Court (henceforward H.C.) 10/1948. *Ziv v. Gubernik.* The Court referred to the first part of the Declaration as having a normative status. This part is concerned with the establishment of Israel as a sovereign state.

11. Cf H.C. 73/1953;87/1953. *Kol-Ha'am v. Minister of the Interior*; and Election Appeal (E.A.) 1/1965. *Yeredor v Chairman of the Central Committee for the Elections to the Sixth Knesset,* to be discussed in the next section. See also H.C. 262/1962. *Perez v. Kfar Shmaryahu Local Council,* where the Court ruled that a municipality must rent community halls to non-Orthodox Jews for religious services. The same year on the question "who is a Jew?" the Court invoked the Declaration as an instrument for the interpretation of the Law of Return (Cf Cohn and Landau JJ.'s judgments in H.C. 72/1962. *Rufeisen v. Minister of the Interior*).

12. Cf Civil Appeal (C.A) 450/1970. *Rogozinsky and Others v. the State of Israel.* There the Court held that when the will of the Knesset, in light of the laws it enacted, is clear beyond doubt then this will should be respected even if it cannot be reconciled with the principles of the Declaration.

13. Sussman J.'s opinion in H.C. 262/1962 *Perez v. Kfar Shmaryahu.*

in a more recent case it maintained that the Declaration was "a judicial norm that reflects the national charter of values".[14]

The Declaration is not the only source from which one may learn about the basic values of the State. In the absence of written statutes, the Supreme Court relies on principles of international law, as embodied in international treaties. It refers to judicial decisions and to statutory enactments of other democracies, mainly England and the United States. The Court also derives constitutional standards from normative considerations which lie beneath the text. These considerations consist of basic principles about law and society, about the judiciary and its role in society, the aspirations of the nation, and its goals and traditions.[15] The Court uses different phraseology and it seems that there is no coherent jurisprudential conception that directs the Court in applying the standards. The Court speaks of "the basic principles on which the rule of law is founded"[16]; "basic principles on which the State is founded" and "the way of life of the citizens of the State"[17]; and "the basic principles of equality, liberty and justice which are the property of every enlightened states".[18] The Court also refers to "basic rights that are not written in a book but directly derived from the character of our State as a democracy seeking freedom"[19]; and to "constitutional principles that underlie the entire Israeli legislation"[20]. Furthermore, the Court draws inspiration from "the fundamental

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14. H.C. 953/1987. *Poraz v. The Mayor of Tel-Aviv.*

15. Cf Barak. Judicial Discretion. 1987. p 97; and his "Freedom of Speech in Israel: The Impact of the American Constitution". 8 Tel-Aviv University Studies in Law. 1988. p 241.

16. H.C. 163/1957. *Lubin v. Tel-Aviv Municipality.*

17. H.C. 262/1962 *Perez v. Kfar Shmaryahu Local Council.*

18. Cohn J. in H.C. 301/1963. *Striet v. the Chief Rabbi of Israel.*

19. H.C. 243/1962. *Filming Studios v. Geri.*

20. Cohn J. in H.C. 175/1971. *Abu-Gush Music Festival v. Minister of Education.*

ideas of democratic-liberal regimes as they find expression in the classic declarations of human rights, beginning with the French Declaration of the Rights of Man and of the Citizen of 1789 and ending with the Universal Declaration of Human Rights of the U.N. of 1948".[21] In addition, a law from 1980 named Foundation of Law instructs the Court that when it encounters a judicial question to which no answer may be found in statute law or case-law or by analogy, it should then adjudicate in the light of "the principles of freedom, justice, equity and peace of Israel's heritage".[22]

Since Israel has a centralized political system, and politics invades almost every sphere of life, the Supreme Court is often asked to intervene in matters of dispute between citizens and governmental authorities. The Supreme Court is primarily an appeal court, considering appeals of trial court judgments and appeal decisions of the District Courts. In addition, it sits as the High Court of Justice, a trial court from which there is no appeal. In its latter capacity, the two main roles of the Court are to supervise the public administration to see that actions are made in accordance with the law, and to supervise the other judicial systems (military courts, religious courts, and labour courts).[23] These roles are commonly viewed as the most essential in securing democracy and basic human rights in Israel. Some commentators consider the Court as the sole guarantor of rights in Israel and as the only body that can prevent the collapse of the rule of law.[24] Justice Barak writes that "[i]n a way, I... have the sense that we are now the framers of our unwritten constitution".[25] However, the Court has refrained from using judicial

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21. *Per* Landau DP. in H.C. 112/1977. *Fogel v. Broadcasting Authority.*

22. Foundation of Law, 5740-1980, in 34 Laws of the State of Israel. 1979-80.

23. For further discussion see Asher Maoz. "The System of Government in Israel". 8 Tel-Aviv University Studies in Law. 1988. pp 9-57.

24. Cf Negbi. Above the Law. 1987. p 84 (in Hebrew).

25. Aharon Barak. 8 Tel-Aviv University Studies in Law. 1988. p 248.

discretion in many instances in which political issues have been on the agenda. On many occasions the Court has not resorted to the above-mentioned normative considerations, insisting instead that the legislature should address itself to seeking remedies for political questions. This attitude was taken by the Court in many of the matters concerning Kahane.

Before discussing Kahane's appeals to the Supreme Court, it is necessary to reflect on some of the important precedents that have shaped Israeli jurisdiction. Through these precedents we will be better able to understand the reasoning of the Court in the appeals. Most importantly three cases have specific relevance to our issue. These are *Kol Ha'am* (1953), *Jeryis* (1964) and *Yeredor* (1965).

B. Precedents

1. *Kol Ha'am*[26]

This case is one of the central adjudications in Israeli law.[27] It arose as a result of Israel's identification with the United States during the days of the cold war. On 9 March 1953, the daily newspaper Ha'aretz reported that Abba Eban, the then Ambassador to the United States, had said that in the case of war between the two superpowers, Israel would put its troops behind the United States. The Israeli Communist Party dedicated the editorials of its two newspapers to this matter, publishing fierce attacks on the government. Kol Ha'am (The People's Voice), the party's newspaper in

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26. H.C. 73/1953; 87/1953. *Kol-Ha'am v. Minister of the Interior*. A translation of the case can be found in Selected Judgments of the Supreme Court of Israel. Vol. I. 1948-1953. pp 90-124.

27. For thorough discussions of this case see Pnina Lahav, "American Influence on Israel's Jurisprudence of Free Speech". 9 Hastings Constitiutional L. Q. 1981. pp 23-108; and A.E. Shapiro. "Self-Restraint of the Supreme Court and the Preservation of Civil Liberties". 2 Iyunei Mishpat. 1973 (in Hebrew, with summation in English).

Hebrew, called for a heightening of the struggle against the anti-nationalist policy of the Ben-Gurion government, "which is speculating in the blood of the Israeli youth".[28] A few days later, the Minister of the Interior ordered suspension of publication of the two papers, basing his decision on section 19 of the Press Ordinance (1933) which empowered him to take this measure if any matter appearing in a newspaper was, in his opinion, "likely to endanger the public peace".

The newspapers appealed to the High Court of Justice who overruled the decision. In his judgment for the Court, Agranat J. saw the crux of the matter as the interpretation of the term 'likely'. He argued that several possibilities were open for the Court and that the decision between them had to be made in accordance with the "intention of the legislator". The "intention of the legislator", in turn, could be inferred from the basic principles of the Israeli system, which was a democratic system. He said that it was a well-known axiom that jurisprudence had to be thought of in the context of the people's national life system, and that the Israeli system could not be understood in isolation from the Declaration of Independence.[29] Agranat J. maintained that although the Declaration of Independence lacked authoritative power, it still "expresses the prophecy of the people and its credo".[30] Hence, interpretation of the State's laws should be made in accordance with the Declaration (at 884). It has to be noted, however, that the terminology used in the Declaration is general. It says that the State of Israel will be based on the foundations of freedom, but it does not specifically guarantee freedom of expression.[31]

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28. A similar article was published in the party's Arabic newspaper Al-Ittihad.

29. The Declaration of Independence says: "The State of Israel... will be based on the foundations of freedom, justice and peace as envisaged by the prophets of Israel; it will uphold complete equality of social and political rights to all its citizens irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions".

30. Cf Smoira P. in H.C 10/1948. *Ziv v. Gubernik.*

31. Prime Minister Ben-Gurion rejected the demand of the Communist Party to

After establishing that laws were to be interpreted according to the Declaration of Independence, Agranat J. went on to reflect on the possible interpretations of the term 'likely' which was used in the Press Ordinance. He concentrated on two extreme possibilities: one was based on the "bad tendency" test; the other on the "probable danger" test. Both were taken from the American jurisprudence.[32] According to the first test, which was popular during the 1920s,[33] a publication could be suspended if it revealed any tendency - however slight or remote - towards breaching the peace, while according to the second test, the Minister of the Interior had to be convinced of a link between the publication and a resulting breach of the peace, which necessarily led to the inference that such a consequence was probable. Agranat J. rejected the bad tendency approach, arguing that it might be suitable for a country which was founded on autocratic or totalitarian principles, but that it undermined the process which constituted the very essence of any democratic regime, namely, the process of investigating the truth (at 884).[34] On the other hand, he endorsed the "probable danger" test because he thought that the statutory term 'likely' fitted a probable formula better than any other.[35]

This test had been advocated two years earlier in the *Dennis* case[36] as a modification to

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include this right in the Declaration. He said: "This is not a constitution; there shall be a constitution separately". Protocols of the State Provisional Council. May 14, 1948.

32. Agranat J. was very much under the influence of the American legal system. He transplanted many of its principles to Israeli jurisprudence. Cf Lahav. op.cit. 1981. passim.

33. Cf *Pierce v U.S.* 252 U.S. 239 (1920); *Schaefer v. U.S.* 251 U.S. 466 (1920); *Gitlow v N.Y* 268 U.S. 652 (1925).

34. Compare to Chafee's fierce attack on the "bad tendency" test. Free Speech in the United States. 1946, chs. 1, 2.

35. Agranat J. looked at the Shorter Oxford Dictionary, where the term "likely" is defined as "seeming as if it would happen... probable... giving promise of success... come near to do or be..."; and the term "probable" is "... that may reasonably be expected to happen...".

36. Learned Hand J. was the originator of this formula in *U.S. v. Dennis* 183 F. 2d

the "clear and present danger" test.[37] It enabled the Court to avoid the explicit burdens of the latter test and to substitute for them the vaguer and less demanding approach of balancing interests.[38] The "probable danger" test and the balancing approach also rejected the absolutist approach which assigned freedom of expression preferred position.[39] This is because the balancing technique inevitably deprives speech of any privileged status, and makes it simply one of a number of interests to be weighed by the courts. Concurring with the Hand-Vinson's formula, Agranat J. asserted that we should consider the gravity of the evil discounted by its improbability, rather than focus on the imminence of the danger. Thus, importing the interest balancing approach of American law, Agranat J. argued that the solution had to be sought through the balancing of contradictory principles, in this case the interests of state security and freedom of expression (at 881). Agranat maintained that the Minister of the Interior did not give sufficient consideration to the value of freedom of expression. He concluded that what the role of the Minister was to consider the content of the speech and to make an estimate of its results according to the circumstances of publication. Even if the

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201 (1950). Vinson C.J. adopted it in *Dennis v U.S.* 341 U.S. 494 (1951).

37. The "clear and present danger" test was formulated by Holmes J. in *Schenck* (1919), saying: "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (at 52). It was further developed by Brandeis J. in *Whitney v. California* 274 U.S. 357 (1927).

38. The balancing approach weighs societal and individual interests against each other. It first appeared in majority opinions of the American Supreme Court in the late 1930s and early 1940s. During the 1950s this approach was established as a rival to the clear-and-present-danger test. See *American Communication Association v. Douds* 339 U.S. 382 (1950). Nowadays balancing analysis is still very much ingrained in all areas of constitutional law. For further discussion see T.A. Aleinikoff. "Constitutional Law in the Age of Balancing". 96 Yale L.J. 1987, esp. pp 943-945.

39. The preferred position doctrine held that freedom of speech is a vital medium through which the public interest is pursued, hence is entitled to an exceptional rigorous judicial protection. The doctrine was enunciated by Stone J. in *U.S. v. Carolene Products Co.* 304 U.S. 144 (1938), fn. 4. See also *Jones v. Opelika* 316 U.S. 584 (1942); *Murdock v. Pennsylvania* 319 U.S. 105 (1943), and *Thomas v. Collins* 323 U.S. 516 (1945).

Minister was convinced that danger was probable, it was still desirable to consider whether the danger was serious enough to require suspension of publication, or whether there was enough time to curtail the influence of the publication through less extreme measures, such as examination, negation, and counter-explanations (at 892).

I would like to draw attention to Agranat J.'s assertion that speech may only be suppressed when the publication in question has left the framework of the mere explanation of an idea and has taken on the form of advocacy, which in the given circumstances makes it likely that public peace will be endangered (at 888). Here again, the influence of *Dennis* is noticeable.[40] However, Agranat refrained from using the term 'instigation' which describes a close connection between words and deeds.[41] He said that by 'probability' he did not necessarily mean proximity in time. If the Minister of the Interior thought that, in the light of the given circumstances, there was almost a definite possibility that a serious danger to public peace would ensue, then there was nothing to stop him from using his authority (according to section 19 [2A]), even if he estimated that the danger was not imminent.

Agranat preferred the term 'advocacy' which is stronger than the notion of the mere explanation of an idea but which, unlike instigation, does not emphasise the imminence of the danger. Here his view differed from that of American jurisprudence which for many years maintained the distinction between 'advocacy' and 'instigation'. In *Gitlow v. N.Y* both the majority and minority agreed that advocacy could not be punished, while incitement was punishable;[42] and in *Yates* a distinction was made between the advocacy

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40. Cf 341 U.S. at 544, where Frankfurter J. said that "there is underlying validity in the distinction between advocacy and the interchange of ideas". He acknowledged that such a distinction could be used unreasonably by those in power against hostile or unorthodox views.

41. See part I, ch. 7.

42. *Gitlow v. N.Y* 268 U.S. 652 (1925).

of abstract political doctrine, and advocacy designed to promote specific action.[43] Elsewhere the United States Supreme Court postulated:

> "[D]ecisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action".[44]

The ruling of *Kol Ha'am* is an important milestone in the Israeli jurisprudence for three reasons:

- The origins of the "balancing approach" lie in *Kol Ha'am.*

- The "probable danger" test was endorsed as the best solution there is when the interests of national security, on the one hand, and fundamental freedoms, on the other, are weighed against one another.

- It was established that when it is possible to interpret a law in different ways, the Court will prefer the interpretation that is in accordance with the Declaration of Independence.

Accordingly, by invoking the Declaration, the Court decided that the democratic character of the State necessitated the limiting of the Minister's power to cases where the danger to public peace was a probability and not a bare tendency. The application was accepted.

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43. *Yates v. U.S.* 354 U.S. 298 (1957).

44. *Brandenburg v. Ohio* 395 U.S. 444, 447 (1969). See also *Kingsley Int. Pictures Co. v. Regents of the University of N.Y.*, where the Court ruled that "Advocacy of conduct proscribed by law 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 immediately acted on" (360 U.S. 684, 1959, at 689).

2. *Sabri Jeryis*[45]

The High Court of Justice refused to intervene in the District Commissioner's refusal to register the "El Ard" group ("The Land" in Arabic) as an association, noting that its objectives rejected the existence of Israel. The main objective of the group, as declared in its platform, was to find "a just solution to the Palestinian problem - through its consideration as an indivisible unit - according to the will of the Palestinian people" (at 675). The Court upheld the decision of the District Commissioner despite the assertion of the organizers that there would be no attempt to engage in illegal or terrorist activities, and the lack of evidence proving such an intent. Speaking for the Court, Witkon J. admitted that the articles of the association did not explicitly deny the sovereignty of the state of Israel, but claimed that this aim was **implicit** in them (at 679); for the goal of the group denied resolutely and absolutely the existence of the State of Israel in general and its present borders in particular. He argued that "it is **natural** that those who support the association's goal disregard the existence of the State and the rights of the Jewish People in it" (at 677), because the group's demand for self-determination for the Arab people in the entire land of Palestine did not leave any possibility for self-determination to the Jewish people.[46] Witkon J. concluded that history had shown that fascist and totalitarian movements had taken advantage of the freedoms of expression, press and association, granted to them by the democratic regimes, with the aim of destroying these regimes: "Those who have witnessed this in the days of the Weimar Republic will never forget the lesson" (at 679).

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45. H.C. 253/1964. *Sabri Jeryis v. Haifa District Commissioner.*

46. Both emphasises are mine.

Landau J., concurring, said that according to the evidence there was enough reason to suspect that the "El-Ard" group would become a fifth column, betraying the duty of loyalty that every citizen should grant to the state in which he lived (at 681).

Thus we see that despite the straightforward rejection of the "bad tendency" test in *Kol Ha'am*, as well as in other cases,[47] here the Court referred to the two elements of the bad tendency test - constructive intent and indirect causation - to outlaw an Arab national association.[48] The Court took a similar position one year later, in the *Yeredor* case, when members of the same group, joined by Israeli Jews, wanted to compete in the elections.

3. *Yeredor*[49]

i) The disqualification of the Socialist List

The Central Elections Committee (Henceforth CEC)[50] disqualified the Socialist List "for the reason that this candidates list is an illegal organization, since its initiators deny the integrity and very existence of the State of Israel". Landau J., who chaired the Committee, argued that there was a tremendous difference between a group of people aiming to undermine the very existence of the State, or, at any rate, its territorial

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47. H.C. 241/1960. *Kardosh v. Registrar of Companies*; Further Hearing (F.H.) 16/1961. *Registrar of Companies v. Kardosh*; Criminal Appeal (Cr.A.) 126/1962. *Dissenchik and others v. Attorney General*; H.C. 243/1962. *Film Studios v. Geri.*

48. Cf Pnina Lahav. 9 Hastings Constitutional L. Q. 1981. pp 66-67.

49. Election Appeal (E.A.) 1/1965. *Yeredor v. Chairman of the Central Committee for the Elections to the Sixth Knesset.*

50. The Knesset Elections Law (Consolidated Version) 5729-1969 empowers the CEC to supervise the elections process. This Committee is a political body comprising all parties represented in the Knesset, in proportion to their power. It is chaired by a judge of the Supreme Court.

integrity, and a party recognizing the political being of the State but wishing to change its internal regime. He asserted that we could read into the Election Law and into the Knesset Law an implied condition that an unlawful association could not be confirmed as a list. In his opinion, the Socialist List was a new version of the "El-Ard" group which had been dissolved under section 84 of the Defence (Emergency) Regulations, 1945. The political platform of both associations were identical. Both absolutely denied the existence of Israel. Landau J. asserted that such a list could not be confirmed because the Knesset, which was the sovereign institution in the State expressing the will of the people, could not incorporate within it an element that propounded the destruction of the State. Democratic procedures were not to be used to undermine the democratic regime itself.

The statements of Landau J. were straightforward. He did not make contingent assumptions regarding the actual power of the list in question to implement its political platform. The Chairman of the CEC did not say that a list may be banned when it might endanger the foundations of the State. He refrained from discussing the magnitude of the threat (the Rawlsian Principle).[51] Rather he conclusively held that certain ideas do not have any place in the parliament. A list that wishes to destroy the State should not be allowed to be represented in the Knesset, seeking to further its ideas. This is what we call the "paradox of tolerance". Tolerance should prevail but it also has to have its limits; otherwise democracy might supply its destroyers with the means to carry out their task more quickly and efficiently. Notice that Landau J. did not say that members of the list should be denied freedom of expression altogether. He advocated what I called "qualified tolerance",[52] implying that democracy may endure any opinion, but this is not to say that each and every view has to be represented. Anti-democratic opinions deserve no legitimization by democracy to help them prosper and attract more people.

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51. Cf part I, ch. 4 (B).

52. Cf part I, ch 2 (C).

ii) The Court's decision

Members of the Socialist List appealed to the High Court of Justice, who in a 2 to 1 decision confirmed the decision of the CEC. The majority judges, Agranat and Sussman JJ., agreed with the opinion of their colleague Landau J., asserting that the character of the Socialist List was in polar opposition to the purpose of the elections, because the list's essence and objectives were to bring about the annihilation of the State of Israel. A group of people whose open political objective was to undermine the very existence of the State could not *a priori* have any right to take part in the process of consolidating the will of the people, and could not, therefore, stand as candidates in the Knesset elections. Thus Agranat J. (who was by this time the President of the Court) contended that the existence of the State, its continuity and perpetuity, is a fundamental principle of the legal system, and that the Jewish character of the State must be considered a basic concept underlying its juridical order. The Elections Law should be interpreted in the light of these principles, and we may expand the authority of the Elections Committee by virtue of it, allowing it to refuse the registration of a list that denies the very existence of the State and aspires to bring its annihilation (at 387).

In this case, then, Agranat P. did not observe the balancing approach which he so powerfully advocated in *Kol Ha'am*. He could have struck a balance between the value of the nation's existence, on the one hand, and the value of freedom of election, on the other. However, he chose to represent the existence of the nation as a constitutional requirement that all lists had to acknowledge, as a principle that was not to be weighed against any other consideration. Here his approach was absolutist - in the sense that no interest was comparable to the State's existence - rather than balancing.[53]

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53. Barak J. criticizes Agranat P. for taking this approach. See his "President Agranat: "Kol Ha'am" - the Voice of the People", in Essays in Honour of Shimon Agranat. 1986, esp. p 142 (in Hebrew).

Ruth Gavison raises the question of granting legitimacy to a list by approving it. In her opinion, when democracy does not outlaw a questionable list, it legitimizes it. I have discussed the importance of this issue in the context of explicit forms of tolerance.[54] Thus Gavison reads Agranat's decision as saying that when the problem is the combination of a threat to democracy and a conspicuously, equivocal attitude irreconcilable with the values of the State, the test is not one of probability that the danger might materialize, but rather a test of licence, of legitimacy. In such cases there is no need to require that the danger be present or probable.[55]

Agreeing with her view, I read the majority judgment as implying that the Court has an important role, additional to its conventional ones. This is the role of granting or preventing legitimation. The Court ruled that certain reasons require, as a matter of principle, the disqualification of lists, that some regulations of content must be applied. Accordingly, the majority judges postulated that when the contradiction between the political principles of a list and the basic principles which underlie the State is clear and manifested, the issue does not touch upon the question of the imminence or the magnitude of the danger. The Court did not rule against the confirmation of the list because the judges were afraid that its ideas might gain public support. It was obvious that the Jewish majority would not adopt the political ideas of the list. Rather, the Court implied that these ideas could not be represented in the Knesset like any other idea, that they had no place within the parliament to compete in the free marketplace of ideas. And if the law did not explicitly provide grounds for the exclusion of certain ideas, then the Court had to use its discretion to find a solution to this apparent *lacuna*. Here Sussman J.'s reasoning is of special interest.

Sussman J., concurring, introduced the notion of supra-constitutional considerations, emanating from natural law, which were superior to any form of legislation, whether

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54. See part I, ch. 2.

55. Gavison. "Twenty Years to Yeredor Ruling - the Right to Be Elected and the Lessons of History", in Essays in Honour of Shimon Agranat. 1986. pp 146, 170 (in Hebrew).

ordinary laws or Basic Laws.[56] Sussman J. relied on a decision of the Supreme Court of West Germany from 1953, where the Court spoke of the notion of "militant democracy", which aimed to protect parliamentary functions from abusive attacks by subversive groups:

> "[T]he German Constitutional Court, in discussing the question of the legality of a political party, spoke of a "**militant democracy**" which does not open its doors to acts of subversion under the cover of legitimate parliamentary activity. As far as I am concerned, regarding 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 expressly specified in the Elections Law" (at 390, bold mine).

Accordingly, the State (or rather, the CEC) possesses an implied power, which is similar to self-defence, to fight against subversive attempts designed to destroy Israel. The holding of this ruling was that even where the existing law did not contain a provision allowing for the disqualification of a list, it was necessary to avoid the moral incoherence involved in allowing a person, who aspired to the cessation of the existence of the State and its authorities, to compete in the Knesset elections. In certain circumstances judicial quasi-legislation beyond the written text might be permitted to fill a gap as required by existential necessity. Sussman J. maintained:

> "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 and to despair from the absence of a positive rule of law when a plaintiff 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, aim is the annihilation of the State." (at 390).

Again we may recall that when discussing Popper's "Paradox of Tolerance", emphasis was put on his assertion that it is paradoxical to allow freedom to those who would use it to eliminate the very principle upon which they rely, and that we should therefore claim in the name of tolerance the right not to tolerate the intolerant. Popper urges that we should claim that any movement preaching intolerance places itself outside the law, and that we should consider incitement to intolerance[57] and persecution as criminal, in

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56. This notion is discussed by Shlomo Guberman, "Israel's Supra-Constitution". 2 Isr. L. Rev. 1967. pp 455-460.

57. Notice that Popper fails to distinguish between 'preaching' and 'inciting' as the Millian theory and American jurisprudence do. I shall return to this issue in the Epilogue. Cf ch. 13 *infra*.

the same way as we should consider incitement to murder, or to the revival of the slave trade as criminal.[58] Acts of self-defence against the intolerant may necessitate the inflicting of pain upon them. And sometimes this may be the only way to prevent the pain one person is willing to cause to others. Onora O'Neill explains:

> "The right of self defence which is a corollary of the right not to be killed is a right to take action to prevent killings. If I have a right not to be killed then I have a right to prevent others from endangering my life, though I may endanger their lives in so doing only if that is the only available way to prevent the danger to my own life. Similarly, if another has the right not to be killed then I should, if possible, do something to prevent others from endangering his life, but I may endanger their lives in so doing only if that is the only available way to prevent the danger to his life. This duty to defend others is **not** a general duty of beneficence but a very restricted duty to enforce others' rights not to be killed."[59]

Sussman J.'s reasoning coincides with O'Neill's argument. Democracy has to find answers to the "catch" emanating from the practice of the very principles which underlie democracy. Arguments which convey similar notions have been employed in England by those seeking to restrict the activities of the National Front. As we have seen, an analogous argument claiming the right to self-defence against a clamour for racist hatred was relied upon by the citizens of Skokie in their efforts to ban the Nazi march. The majority of the Court, like Landau J., said nothing about circumstances, potential power, gravity of danger or similar considerations. They made no reference to any criterion. Since Agranat P. and Sussman J. thought that the matter in hand involved a combination of security factors, together with an ideological threat to the State and the basic principles that it embodies, neither of them saw it necessary to discuss the level of the danger. This view is explicit in Sussman's reasoning. For him the subject is a matter of principle, rather than one that is contingent on various facts and factors. I shall call this reasoning "the Sussmanian Principle", in contradiction to "the Rawlsian Principle".

The main problem with the reasoning of the majority judges is the lack of lucid distinction between endangering the existence of Israel as such, and endangering its

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58. K.R. Popper. op.cit. 1957. I. p 265. Cf part I, ch. 2 (B).

59. O'Neill. "Lifeboat Earth", in International Ethics. 1985. p 263 (emphasis in text).

Jewish character, or its democratic regime. On this point there are differences between the reasoning of the two justices. Sussman J. did not say at all that the Socialist List had to be outlawed because it endangered the Jewish character of Israel. He spoke of defending the State against attempts aiming at its destruction. However, Sussman also drew an analogy with the Weimar Republic, where the Nazi Party did not pose a physical threat to Germany. Furthermore, reading what Sussman had to say about "self-defending democracy", it is not clear whether "acts of subversion" include acts which threaten democracy, or refer only to acts which aim to annihilate the State. In the next chapter we shall see how crucial this distinction between endangering the State, and endangering democracy, is. The fight against Kahanism would have taken a different route if Justice Sussman had elaborated and clarified his judgment. As for President Agranat's judgment, a careful reading of his reasoning reveals that he refused to confirm the Socialist List not only because it denied the existence of Israel, but also because the list's aims were irreconcilable with the fundamental values underlying the State. Most important of these values was the idea of Israel as a Jewish State. Thus, Agranat referred to the Declaration of Independence (as he did in *Kol Ha'am*), saying that we can learn from it that Israel was not only a sovereign, independent country which sought freedom and was characterized by the rule of the people; it was also established as a Jewish State in the Land of Israel (at 385).

Agranat P. saw the Declaration of Independence as a constitutional principle. In his opinion, a judge may refer either to the Knesset legislation or to the Declaration as grounds upon which rulings can be based. His approach may be described as the creative interpretation approach.[60] In fact, if we employ a graphic description we may say that this approach is situated between the approaches taken by his two colleagues, Sussman and Cohn JJ., though closer to the former than to the latter. For Sussman J., by appealing to natural law, took upon himself the actual endeavour of creating law, while Cohn J. did not regard the Declaration of Independence as a judicial norm, and

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60. Positivists would probably be inclined to call this approach the judicial legislation approach.

thus resorted to strict positivism. Let us now reflect on the opinion of the minority judge.

Cohn J. disputed the three central issues that were raised by his colleagues. These issues were concerned with the authority of the CEC; the relevance of the degree of danger; and the notion of supra-constitutional considerations.

a) **The authority of the CEC** - as aforesaid, Cohn J. adhered to the positivist approach, which emphasises the existing statutes, seeing them as a binding authority. Only the rule of law can place restrictions on political rights. In his dissent, Cohn J. was of the opinion that in the absence of a statute authorizing the CEC to refuse to register a list for reasons other than those formally provided for under the law,[61] one could not deduce that the CEC had the power to refuse the confirmation of a list on the grounds of its ideology or its political objectives. This technical reasoning evolved from his reluctance to read into the law a broad authority which would contradict fundamental principles of the Israeli system regarding the citizen's essential right to express his ideas through voting. It is implicit in Cohn's judgment that he did not think that a political body such as the CEC should be vested with further authority in coming to decide whether or not a list has to be disqualified.

b) **The seriousness of the danger** - Cohn J.'s judgment confronted the issue which the majority judges avoided, i.e., whether or not the degree of danger was such as to supply enough grounds for banning the list. His view was Rawlsian, rather than Sussmanian. Cohn J. said that no evidence was brought before the Court to suggest any danger likely to accrue from allowing the list to participate in the elections. Cohn J. maintained that

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61. The law grants formal powers to the Committee; Section 6 of the Basic Law: The Knesset (1958), sets out only two prerequisites for candidacy to the Knesset: Israeli citizenship and an age of at least 21. All Israeli candidates who are 21 years of age or over enjoy the right to be elected unless a court has deprived them of that right by virtue of some law. The Knesset Elections Law (Consolidated Version) 5729-1969 provides some additional technical requirements like a certain number of signatures, a deposit of a sum of money, etc.).

there was no proof of probable danger (at 381). That is to say that even if there was a law, it is not clear that Cohn J. would have joined his colleagues.

c) **Supra-constitutional principles** - resorting to this notion is problematic since it attributes a very wide authority to the Court. Theoretically, reference to supra-constitutional considerations can refute any law. Thus Cohn J., in his criticism of this notion, used language similar to that of Agranat J. in *Kol Ha'am* regarding the "bad tendency" test. He asserted that in certain countries, the attempt to safeguard values such as the security of the State or to resist revolutions, had brought about an appeal to "natural laws" which were set above the existing law, with the effect of having legal precedence over other legislation, be it ordinary laws or Basic Laws. Israel, however, did not adopt such methods. Rather, "its ways are the ways of the law, and the law is given by the Knesset or by him whom the Knesset has given its express authorization" (at 382). Otherwise the Court would take on the role of the legislature, and confusion and uncertainty would prevail.[62]

iii) Critical evaluation of the Court's decision

I agree with Justice Cohn that the notion of supra-constitutional principles is problematic. The very use of the saying "supra-constitution" implies that there are considerations that may be put above the law. This notion is bound to lay itself open to attack. It is not clear, however, why Sussman J. had to resort to this terminology in the first place. He could have thinned out much of the criticism simply by using a different phrasing, without changing the essence of the reasoning. Thus, my criticism of Sussman's judgment does not refer to its content but rather to its terminology. Instead of

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62. It is interesting to note that in his article "Faithful Interpretation in Three Senses" (7 Mishpatim. 1976, in Hebrew) Cohn defends the duty of the judge to interpret the law on occasion in a way which is contradictory to its phrasing. This is in order to advance the "spirit of justice". He even asserts, referring to the majority decision in *Yeredor*, that the judge owes loyalty to the principles on which the democratic regime is founded (p 6).

speaking of "supra-constitutional" considerations which transcend the limits of positive law, he could have spoken of considerations that should be taken into account together with the *lex scripta*. However, both justices were influenced by the positivist approach which holds that only specific rules, declared by the legislature and the courts, are the law. Cohn J., whose approach was conservative, believed that judicial discretion could be made only according to and within the confines of these rules, while Sussman J. thought that there was room for other considerations when a case posed a dilemma to which no adequate answer existed in statute. Because he believed that *Yeredor* was such a case, and that these considerations were weighty enough to decide the case, he entitled them 'supra'. In other words, unlike the positivists, Sussman J. believed that there were legal principles which may be considered as part of the law. Here he went even further than Agranat P. by referring to natural law. Like the positivists he understood his argument to be for the "higher law" theory, that these principles were the rules of a law above the law.

Two years later Dworkin addressed this same issue and in his eloquent language conveyed a similar notion in different phrasing. In his attack on positivism, Dworkin explained that it is a model of and for a system of **legal rules**; but when lawyers reason or dispute legal rights and obligations, they make use of standards that do not function as rules. He called these standards **legal principles**, explaining that a 'principle' is a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.[63] Positivism misses the important roles of these standards, which should properly be classified as legal standards, by virtue of their having been accepted by society as binding, and part of its normative way of life. Sussman J. did recognize the role of these standards but the positivist influence made him read them as standards that are trying to be rules.

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63. Dworkin. "The Model of Rules". 35 Un. of Chicago L. Rev. 1967. pp 14-46. Later on, in "Law's Ambitions for Itself" (71 Va. L. Rev. 1985) Dworkin makes a distinction between the positive law and "the full law", urging judges to reject positivism and to adopt "the interpretive model" instead.

Applying Dworkinian terms we may understand Sussman J.'s reasoning to say that in constitutional adjudication, the Court should consider not only rules but also normative constitutional standards, which are part and parcel of the legal system. *Lex scripta* is supplemented by contextual characteristics which formulate what we may call "the spirit of the system". Thus we may sum up by saying that while the majority of the Court placed its confidence in the principles of the continuity and perpetuity of the State, stressing the Jewish-democratic character of Israel, the minority preferred to put an emphasis on the need for restraint when fundamental freedoms are at stake. Cohn J. agreed with Sussman J. that democracy had to defend itself, and that it was necessary for some body to be vested with the authority to exclude from parliament those who betrayed the State and assisted its enemies. However, this authority had to be formulated through legislation. Accordingly, we may say that the judgments of Sussman and Agranat JJ., on the one hand, and Cohn J. on the other, represented two different schools in jurisprudence. The first school may be entitled the creative school, and the second the formalistic school. Here I want to interrupt my analysis of the legal reasoning and to dedicate some space to explaining the meaning of this distinction. It will be of great assistance in the next chapters, when discussing the decisions of the Court concerning Kahane.

The creative school acknowledges the need to adapt to changing circumstances. It holds that modifications in jurisprudence are required to give answers to unfamiliar situations and to a new reality. This school asserts that as an interpreter, whether of judicial precedent or statutory law, the judge is necessarily an active analyst and not a passive oracle. It prescribes activity on the part of the judge, in the sense that his role is conceived of as examining the range of possibilities and, when he does not find assistance in statutes or precedents and thinks that a change is in order, the judge has to seek the least erroneous answer which will make a better law. In any event, even the most ardent spokesmen of the school agree that the creative judgments should be evolutionary rather than revolutionary. As Traynor contends:

> "If judges must be more than passive mechanics, they must certainly remain much less than zealous reformers".[64]

On the other hand, the formal school emphasises stability in adjudication. It sees the role of the courts as only to voice the will of the legislator. This view came into expression in Montesquieu's assertion:

> "In republics, the very nature of the constitution requires the judges to follow the letter of the law; otherwise the law might be explained to the prejudice of every citizen, in cases where their honour, property, or life are concerned".[65]

The argument is that in a democracy policies should be determined by an elected body and not by the courts. Judges have to obey the majority rule as it finds expression in legislation. Consequently, passive adjudication is viewed as preferable to creative adjudication, with the implication that judicial discretion should find formal basis in the current legislation. Even when a judge acknowledges the need for change, he should call the legislature to make the required reforms. It is the *lex scripta* that supplies the law with certainty and publicity and which guarantees equality before the law. However, adherence to the written word makes the scope of interpretation quite limited.[66]

By referring to this distinction I am not trying to imply that one is better than the other. A judge of the formalistic school can be a liberal judge if he safeguards liberal principles by his reluctance to make changes, while a creative judge can introduce illiberal changes if he thinks that they supply better answers to specific problems, or coincide with illiberal public demands for change. However, judges in states lacking a written constitution and specific laws to guarantee fundamental human rights may be required to resort to creative judgments to protect these rights. In this case, Sussman J. rejected the formal view which would leave us, as he implied, with our hands folded,

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64. R. J. Traynor. "The Limits of Judicial Creativity". 29 Hastings L. J. 1978. p 1039.

65. Montesquieu. The Spirit of Laws. 1823. Vol. I, Bk. VI, ch. 3, p 73. Montesquieu depicted the judges as mere passive beings, who are no more than the mouth that pronounces the words of the law.

66. Cf Barak. "Judicial Legislation". 13 Mishpatim. 1983. pp 27-44 (in Hebrew).

asking us to despair. He believed that the existing legislation did not supply answers to a pressing problem which, to his mind, clearly violated the very foundations of the State. He thought that it was within a judge's discretion to resort to supra-constitutional notions so as to fill the apparent legislative *lacuna*, without conceiving this to be assuming an authority beyond the powers of the Court, as Cohn J. thought. In Sussman J.'s view, the role of judicial discretion is to interpret the law, so as to bring it into harmony with the foundations of the constitutional regime. Sussman saw himself as an interpreter of the people's national life system, whose role was not only declarative, but also creative. Following Sussman J. we may say that in one sense the judge declares the existing law. In a more profound sense the judge also gives an authentic expression of the voice of the people; a voice that evolves from the people's creed, their national existence, and from the basic foundations of the system. These considerations I include under the title "the spirit of the democratic system".

It is interesting to note that Dworkin, who is associated, quite wrongly, by some with the modern declarative approach,[67] holds that judges must make fresh judgments about the rights of the parties who come before them. He maintains that these political rights reflect, rather than oppose, political decisions of the past.[68] On the one side Dworkin argues that the judge does not create rights but rather acknowledges them. This conception is derived from a liberal outlook that recognizes natural rights. The claim is that rights are too important to be left in the hands of judges. On the other side he contends that "judges are authors as well as critics".[69] Thus, in effect Dworkin's conception of law as integrity makes a synthesis between the declarative approach and

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67. Cf Barak. Judicial Discretion. 1987. pp 165, 307; and "Judicial Legislation". 1983. p 36. Dworkin does accept some of the components of the declarative model (known also as the "phonograph theory"), as formulated by Montesquieu (op.cit.) and Blackstone (Commentaries on the Law of England. 1979). Dworkin's theory, however, especially as it comes into expression in Law's Empire (1986), better fits the creative interpretation approach.

68. "Hard Cases". 1975. p 1063.

69. Law's Empire. 1986. p 229.

the creative school. For he does not exclude non-positivist norms from adjudication. Dworkin writes:

> "Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards".[70]

Accordingly, principles of political morality are conceived as judicial norms, within what Dworkin calls "the full law".[71] Consideration is also given to "background rights" which are viewed as universal, as applicable to every political framework, because they are essentially derived from conceiving persons as human beings. Such are the rights for equal respect and concern.[72]

Sussman J. did not speak of "background rights" but rather of democratic rights. His moral-liberal outlook, which was similar to Dworkin's, led him to take the creative approach to safeguard democracy. He did not say that his aim was to safeguard universal principles. Rather he said that there were principles that democracy had to secure for its own existence, and if the law did not provide a right answer to protect them, then it was the role of the judge to use his discretion in a creative way to do so.

Moreover, using Dworkin's terminology we may also say that Sussman J. would probably have regarded this case as a "hard case". He would agree with Dworkin that decisions in hard cases should be and are based on arguments of principle, and that principles are propositions that describe rights.[73] Sussman J. would also concur with Dworkin that arguments of principle justify a political decision by showing that the

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70. Ibid. p 243. See also pp 87-113, 400-413.

71. "Law's Ambitions for Itself". 1985. p 176.

72. Dworkin. "Hard Cases". 88 Harvard L. Rev. 1975. pp 1069-1070; "Liberalism". op.cit. 1985. pp 181-204. Cf part I, ch. 3.

73. Dworkin. "Hard Cases". 1975. pp 1057, 1067. See also "Political Judges and the Rule of Law", in A Matter of Principle. 1985. p 9-32.

decision respects or secures some individual or group right.[74] In this case it is the right of the Jewish people to defend their own State against those who wish to undermine its existence.[75] Sussman emphasised the importance of this right, viewing it as significant enough to outweigh any other interest. His reasoning implies that the bedrock function of the courts is to assist the State to protect itself against those who seek the annihilation of the State through collaboration with outside enemies.

The *Yeredor* precedent played a significant role in the attempts to restrict Kahane's right to be elected. In the following chapter I will reflect on those attempts. The discussion starts with a brief account of the 1981 attempt, which did not receive much attention. It continues by considering *in extenso* the decision of the CEC to disqualify Kach in 1984, a decision that was overruled by the Supreme Court.

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74. Cf "Hard Cases". 1975. p 1059.

75. The difference between Sussman and Dworkin is that the latter speaks of rights against the state, whereas the former speaks of the right of one group against another.

Chapter 11

ATTEMPTS TO RESTRICT KAHANE'S FREEDOM OF ELECTION

The first attempt to restrict Kahane's right to be elected to the Knesset was made in 1981. Some members of the CEC, including its Chairman Etzioni J., wanted to prevent the registration of the Kach list. Etzioni J. said that the aims of the list offended the principles of democracy as expressed in the Declaration of Independence. He maintained that the proposals of this list were no more and no less than the Nuremberg Laws with the only difference that where 'Aryan' was written, 'Jew' was now written, and where 'Jew' was written, 'Arab' was now written. The majority of the Committee, however, did not share this opinion and allowed Kahane to compete in the elections.

After the CEC made its decision, a citizen, Moshe Negbi, appealed to the High Court of Justice to reverse it.[1] The argument was that the aims and principles of Kach contradicted the democratic regime of Israel; for the list called for the expulsion of Arabs, the banning of sexual relations between Jews and non-Jews, and for the legislation of discriminatory laws. By doing that it induced the Arabs to rebel. It was also argued that the decision of the CEC to register the list contradicted the notion of "supra-constitutional" principles postulated in the *Yeredor* ruling. In the name of these principles Negbi sought an answer from the Supreme Court as to whether Kach, a list which was explicitly racist in its ideas, could run for elections in a Jewish democratic State or whether it should be banned. His petition was denied on the technical grounds that the Elections Law did not provide for any appeal against a decision authorizing the registration of a list. Only a list that the CEC had refused to register could appeal to the Court. The Court (*per* Barak J.) said that the Committee might well be wrong in its discretion but this in itself did not supply a basis for the Court to interfere.

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1. H.C. 344/1981. *Negbi v. Central Committee for the Elections to the 10th Knesset.*

The CEC's decision of 1981 was characteristic of the attitude of the Israeli political system towards Kahane at that time. Kach was not taken seriously, and its development and rise were overlooked by the decision makers. It took them another three years to realize the seriousness of the Kahanist threat to democracy. Only in June 1984, some weeks before the elections were to take place, and in the light of the then recent polls which showed that Kach would succeed in entering the Knesset, did the political parties decide to take an initiative by refusing to confirm Kach. From partisan political considerations and in order to keep the "balance" between the right and the left blocks in the Knesset as well as to secure wide support for the disqualification decision, the CEC also decided to ban the leftist Progressive List for Peace.

A. The CEC's Decisions of 1984

The refusal to confirm the Kach list was grounded on the argument that it "propounds racist and anti-democratic principles that contravene the Declaration of Independence of the State of Israel; openly supports acts of terror; tries to kindle hatred and hostility between different sections of the population in Israel; intends to violate religious sentiments and values of part of the state's citizens, and negates in its objectives the basic foundation of the democratic regime in Israel". The CEC also refused to confirm the Progressive List for Peace (PLP) on the grounds that "in this list there are indeed subversive elements and tendencies, and central persons in the list act by way of identification with enemies of the state". The CEC observed that the political platform of the list was no different from the "El Ard" List which was disqualified in 1965. In addition, number one in the PLP, Muchamad Miari, was the leader of the "El Ard" List. Both Kach and the PLP lists appealed to the Supreme Court which reversed the decisions of the CEC. In the next sections I shall first reflect on the reasoning of the CEC. The focus is on the struggle of Israeli democracy against Kahanism; however, it is also important to see the reasons which convinced the Knesset to use self-defensive

measures with regard to the PLP. This discussion will reveal serious reservations regarding the procedure which vests a political body with a quasi-judicial authority. I shall proceed by considering the judgment of the Court for overruling the decisions.

1. The Disqualification of Kach

In his reasoning the Committee Chairman, Bach J., urged the need to outlaw Kach, saying that the list's racist and anti-democratic principles contradicted the Declaration of Independence, and that they aimed to induce hatred and hostility between different factions of the Israeli population. As evidence Bach J. cited a document from June 15, 1984, where Kahane declared that "I am ready to blow up the mosques on the Holy Temple". He also quoted letters that were intercepted by the censor in 1973, sent by Kahane to his people in the United States, in which he specifically instructed them to kill a Russian diplomat, and to blow up the Iraqi Embassy. There Kahane wrote that "if we can't find some Jews willing to [do these acts]... then we are Jewish Pigs and deserve what we get".[2]

Speaking of the "spirit of the law", Bach J. referred to the Company Law which says that a company will not be registered if any of its aims negates the existence of the State of Israel, or its democratic character,[3] or if there is a reasonable basis to assume that the company will serve as a cover for illegal actions.[4] The Chairman noted that

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2. Protocol no. 14 of the CEC. 17.6.1984. p 11.

3. The language of the law is general. Therefore the term 'negates' may cover expressions advocating these ideas, and not only those inciting to them.

4. It may be of interest to note that in Germany another argument served as grounds for disqualifying the Socialist Reich Party. There it was argued that if a party's internal organization did not correspond to democratic principles, it could be concluded that the party sought to impose upon the state the structural principles that it had implemented within its own organization. Article 21 provides the grounds for avoiding any repetition of the one-party state that moulded the Third Reich. Cf 2 BVerfGE 1.

from a purely formal point of view the law did not apply to Kach, which existed before the law was enacted. Nevertheless, this law was relevant because the legislator forbade the formation of any association negating the democratic character of the State (p 13).

Bach J. also referred to the International Convention on racial discrimination which Israel signed in February 1979. Article 1 of this Convention defines the term "racial discrimination" as meaning

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".[5]

Two points are relevant with regard to this reference. Kahane makes a distinction that is based on religion, a ground which is not mentioned in the definition of racism postulated in the Convention. Furthermore, this definition relates to racism in the sense of discriminatory action, whereas racism as embodied in the party organization and its activities relates mainly to racism in the sense of racist instigation. There is a close connection between instigation and action, but Bach J. should at least have explained the distinction between the two, and why he thought that reference to the Convention was nevertheless appropriate. Instead the Chairman concluded that there was enough evidence to consider Kach to be a racist list according to the criteria of this Convention, and that the CEC had the authority to disqualify Kach for this reason. Thus, his reasoning exceeded the essence of the *Yeredor* ruling.

Other members of the Committee expressed opinions which were in line with their political affiliations. Thus, the representative of the leftist Civil Rights Movement (Ratz), Aloni MK, said that we are free people who live in a society, which requires the recognition that the limit of one person's liberty is the liberty of another. Otherwise everyone will do whatever they want; there will be no warning signs, speed limits or red lights. We recognize the need for red lights, and here too it is a case where such

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5. International Convention on the Elimination of All Forms of Racial Discrimination. Article 1 (1).

measures are needed. If we will not put up a red light, then human rights and equality will be in danger (p 16). In turn, the representative of the Communist party Hadash reminded the committee that six members of the Jewish terror organization were also Kach members (p 26). On the other hand, the representative of the National Religious Party (Mafdal) could not understand how Kahane could be called a Nazi; for all he wanted was to fight assimilation and to protect Jewish girls (pp 34-35).

Kahane, who appeared before the Committee, called the Declaration of Independence a "schizophrenic document". He repeated his well known view[6] that there was ultimately an insoluble contradiction between a Jewish State of Israel, and a state in which Arabs and Jews possessed equal rights: full equality for all and a Jewish State were a contradiction in terms. Kahane maintained that only those Arabs who would accept the status of alien residents should be allowed to live in Israel. He asked the members of the Committee to vote for Judaism and against the Hellenists who wished to ban him (p 39). His request was denied by the majority members in an 18 to 10 decision. Kach was disqualified.

2. The Disqualification of the PLP

An important issue in the dispute between those who requested the disqualification of the PLP and those who opposed it, was the announcement of the then Minister of Defence, Moshe Arens, who decided not to declare the PLP an illegal association. He wrote that after reviewing the information he was convinced that there were elements of conspiracy within the list, and that central figures of the list acted in a way that identified them with the enemies of the State. Nevertheless, given the circumstances (eve of elections), he decided not to use the section of the Defence Regulations (No. 14 [1B]) which empowered him to outlaw associations.

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6. Cf Kahane. Listen World, Listen Jew. 1983. p 7; Uncomfortable Question for Comfortable Jews. 1987. p 48.

Another important document was a declaration by General Ben-Gal who issued orders in 1980 to have the activities of Miari supervised. In his reasoning, Bach J. urged that the importance of this document should not be over-estimated because of the time factor (four years had passed since the general's decision), and the lack of evidence on which Ben-Gal had based his order. Indeed, Bach J. thought that the crux of the matter was whether enough evidence existed to support the demand for disqualification. He concluded that while the evidence was unequivocal in the case of Kach, in the case of the PLP it was equivocal. He said that the Committee should not ignore the announcement of the Defence Minister, but it also had to bear in mind that this announcement was quite vague: it was unknown who the subversive elements were, where they were placed in the list, and how serious the evidence against them was. Therefore he would not recommend the PLP's disqualification.[7]

Indeed, there is reason to assume that Arens refrained from outlawing the PLP because he believed that there was not enough evidence to support such a decision. He himself did not supply any documents to the members of the Committee as background material.[8] Moreover, the political platform of the PLP, which members of the right-wing parties regarded as treasonable, was very similar to the previous platforms of political parties that were represented in the Knesset (Haolam Haze and Shely, each of which had two representatives in the parliament), and to the political platform of Hadash - the Israeli Communist Party. Hadash had advocated a similar policy for many years, without ever being accused of endangering the security of the State.[9] The PLP and Hadash called for an Israeli withdrawal from the occupied territories, including Eastern Jerusalem. Both upheld the idea of establishing a Palestinian State in these territories,

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7. Protocol no. 15 of the CEC. 18.6.1984. pp 138-140.

8. Arens claimed that there were documents but they were secret, and that he would be willing to show them to Justice Bach alone. Bach refused.

9. As a matter of fact, the PLP wanted to join Hadash, but eventually this plan did not materialize, not so much because of ideological differences, but rather on the grounds of the allocation of seats and the ordering of the candidates in the unified list.

which would exist alongside the State of Israel, enjoying mutual recognition. This was to be achieved through negotiations between the Israeli government and the PLO. The PLO was regarded by both parties as the sole legitimate representative of the Palestinian people.

In addition, it has to be noted that, in their appearance before the Committee, the representatives of the PLP expressed their objection to the Palestinian Covenant.[10] They explicitly said that they were willing to declare this objection in their political platform (p 76), maintaining that their demand was for self-determination for both Palestinians and Jews. Hence, there was not substantial evidence, beyond speculation, that could make a strong case for disqualification.[11] The voting results, however, were 17 to 12 in favour of the disqualification.

This procedure, which allows a political body to disqualify lists on the grounds of their ideology and political aims, raises considerable doubts. It certainly opens the gates for settling accounts with political opponents, and getting rid of parties who are not liked through partisan deals. Although it is true that the Court still serves as an ultimate guarantor of rights to which parties can appeal, it is nevertheless wrong that a procedure in which the prosecutors are also the judges should exist in the first place. If we reflect for a moment on the voting results, the votes in favour of banning Kach were cast by the representatives of the Labour and leftist parties together with the Chairman of the CEC, Bach J.; while the votes against the decision came from the right and the religious parties. Seven representatives of the Likud decided to abstain. With regard to the decision concerning the PLP, the votes were a mirror-image of the previous decision on Kach. All seventeen votes for disqualification came from representatives of the right; the

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10. Section 21 of the Covenant declares that the aim of the PLO is to free the entire land of Palestine.

11. The then Dean of the Tel-Aviv Law Faculty, Amos Shapira, said that the political platform of the PLP did not make any claim against the existence of the State of Israel, and it did not incite people to use violence and terror. The advocacy for establishing a Palestinian State in the West Bank and the Gaza Strip did not supply sufficient grounds for disqualifying it. (Moshe Ronen. "There is No Place to Disqualify the PLP". Yedioth Ahronoth. 3.6.1984. p 3).

twelve votes against it came from representatives of the left. Bach J. abstained, together with three Labour members.[12]

The Court drew attention to the problem of giving a political body the power of authorizing lists in 1965. It did so again in 1984 and 1988.[13] Up to now, however, the legislature has decided to leave the procedure unchanged. I am inclined to think that such important decisions should be made by a special panel of the Supreme Court, or by a special committee comprised of judges who would decide **(a)** whether the appeals put forward should be considered at all, and **(b)** whether they possessed enough weight to rule in favour of disqualification. Cohn J. in *Yeredor* and Shamgar P. in *Neiman I* refer to the West German Grundgesetz which, in their opinions, provides the appropriate solution. There the Constitutional Court decides, through a special procedure, whether or not to ban parties according to section 21 (2) of the Grundgesetz.[14] Since the establishment of the Federal Republic, two parties had been banned through this procedure: the first was the neo-Nazi party, and the second was the Communist party.[15]

In the next section I shall consider in detail the reasoning of the Court's special panel of five justices who reviewed the decisions of the CEC.[16] A unanimous Court

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12. One representative of the Labour did not participate at the meeting.

13. The *Neiman I* decision of 1984 will be discussed in the next section. The *Neiman II* decision of 1988 will be considered in the Epilogue.

14. Section 21 (2) reads: "Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or endanger the existence of the State, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality". Cf Donald P. Kommers. The Constitutional Jurisprudence of the Federal Republic of Germany. 1989. p 222.

15. 2 BVerfGE 1 Sozialistische Reichspartei (23.10.1952); and 5 BVerfGE 85 KPD (17.8.56).

16. Such a review is rare and occurs only "if the Supreme Court's decision contradicts a previous ruling of the Supreme Court or is a matter of importance, difficulty, or first impression and there is, in their opinion, need for additional review" (sect. 30 (b) of Courts Law. Consolidated Version, 1984). Usually the panel of the Court consists of

accepted the appeals of both Kach and the PLP. I will argue that the decision regarding Kach was wrong, while the decision regarding the PLP was correct.

B. The Court's Decision in *Neiman*[17]

1. Analysis of the Judgments

Although the Court was unanimous in deciding to overrule the decision of the CEC, there were significant differences between the opinions. Ben-Porat DP. took a formalistic view, adopting a minority opinion with regard to the authority of the Committee. Shamgar P. and Barak J. suggested two different tests as guidelines for the CEC when the latter was considering restricting the practical implementation of the right to be elected, while Elon and Bejski JJ. seem to have agreed that Kahane's right to be elected had to be curtailed, but they believed that the defence against such anti-democratic threats was the responsibility of the legislature rather than of the Court.

i) The judgment of Ben-Porat DP.

In line with the dissent of Cohn J. in *Yeredor*, Ben-Porat DP. contended that the Knesset Elections Law (1969) did not grant the CEC authority to decide whether a given list deserved to take part in the elections on the grounds of its platform or objectives. In her opinion, the CEC only had one function: to examine whether the technical conditions imposed by the Basic Law: The Knesset (1958), were satisfied. When they were, the Committee had no choice but to register the list. Ben-Porat DP.

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three justices.

17. E.A. 2/1984. *Neiman and Avneri v. Chairman of the Central Committee for the Elections to the 11th Knesset.*

relied on the *Negbi* decision where it was argued that the Elections Law did not provide for any appeal against a decision authorizing the registration of a list: an appeal to the Court could only be made if the list had been refused registration. She believed that this showed that the main concern of the legislature - evolving from a liberal outlook - was that a list should not be unjustly disqualified. Ben-Porat also believed that this reasoning had to be interpreted as indicating that the Committee was not competent to judge the dangerous character of a list. For if the intention of the legislature was to assign the CEC the role of checking the platform and objectives of lists, then it also had to determine some sort of judicial body that would be authorized to examine decisions regarding the confirmation of lists. Otherwise the result might be that lists which endangered the State's security might be registered for the elections. In Ben-Porat's opinion, the asymmetry in the possibility of appealing against a decision of the CEC would lead to an absurd situation whereby the CEC was authorized to disqualify lists in the absence of law, by an appeal to the Court, yet a list, however dangerous it might be, could not be reconsidered once authorized by the Committee.

Ben-Porat's reasoning was formalistic.[18] It did not address the philosophical questions that are involved in this issue at all, which concern the confines of liberty and tolerance. Hence we may note two basic similarities between Cohn J. in *Yeredor*, and Ben-Porat DP. in *Neiman:*

a) Both of them recognized the need for resorting to the measure of disqualification in order to defend democracy. They thought that this measure should be embodied in law.

b) Neither of them accepted the majority opinion in *Yeredor* regarding the authority to disqualify lists in the absence of legislation.

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18. It is interesting to note that in December 1989 a mock-trial was conducted involving issues of freedom of expression in an imaginary state known as Protonia. Ben-Porat, who was one of the five justices deciding the case, concurred with the majority who declared that all civil liberties flow from the universal principles protecting the dignity of persons and their equality, and that accordingly freedom of speech does not include any right to promote malicious racial incitement.

The other members of the Court agreed with Justice Ben-Porat's conclusion, but not with her reasoning. All four judges accepted the *Yeredor* ruling regarding the authority to disqualify lists in the circumstances that this ruling indicated.

ii) The judgment of Shamgar P.

The main issue, as formulated by Shamgar P., was whether the CEC was authorized to impose additional restrictions on the right to participate in the Knesset elections despite the lack of provision in the Basic Law. President Shamgar accepted Sussman's reasoning that even where the existing law did not contain a provision allowing disqualification of a list, a situation which allowed a list aspiring to the cessation of the existence of the State to compete in the elections was to be avoided. Nevertheless, Shamgar P., together with Bejski and Elon JJ., thought that in the absence of law this ruling should not be extended. He asserted that only "an extreme situation" permitted judicial quasi-legislation beyond the written text to fill a gap which arose from the absence of statute (para 5, at 244-245).

Accordingly, when coming to apply the *Yeredor* criterion to Kach, the conclusion was obvious. The *Yeredor* precedent simply did not supply any grounds for restriction. Kach did not wish to endanger the existence of the State; its aim was not to bring the destruction of Israel. Therefore, it had the right to compete in the elections. The issue was more complicated with regard to the PLP, and Shamgar P. dedicated most of his reasoning to clarifying it. He mentioned that while in the case of the Socialist List five out of the ten candidates were former members of the "El-Ard" group, in the case of the PLP only one out of the 120 candidates was a former member of that group. This was Miari, the Arab leader of the PLP. Miari himself had declared that he did not regard the PLP as the successor to the "El-Ard" group. He had also expressed reservations regarding the Palestinian Covenant. No evidence was brought to show that in other forums Miari postulated contradictory opinions. On the other hand, the evidence that was

brought before the Committee, on which it based its decision, consisted of relatively old, second-hand documents supplied by the army, which did not contain any facts to substantiate the view that the list endangered the State's security (para 11-12, at 258).

Therefore, the right to be elected which was, in Shamgar's view, among the four main political rights (along with the right to vote; the right to convene an assembly or demonstration; and the right to address a petition) should be granted to both lists: to Kach for lack of jurisdiction, and to the PLP for lack of evidence.[19]

Shamgar P. was afraid of the temptation to silence unpopular opinions. He held that a person's liberty was not to be restricted except by law, and was not to be denied merely on the grounds of objection, however forceful, to the content of an individual's statement. Shamgar P. postulated that the criteria upon which answers to questions were examined should be based on expressed statutory provision, and even more importantly, should only be activated as last resort when facing a probability of danger. If there was a probability that the exercising of a certain right would jeopardise public order and security in a concrete case, the authorised statutory body could limit the practical implementation of the right in the said circumstances (para 17, at 265). Thus it can be argued that Shamgar P.'s reasoning was in line with what I have called "the Rawlsian Principle". He did not speak of defensive steps taken by democracy against certain threats in principle; rather his reasoning was practical. He maintained:

> "There must always be a logical connection between the degree of danger and the means taken; and not any advocacy, even if it raises a justified indignation, may cause the denial of the entire scope of liberty. A democracy that activates restrictions without existential necessity... loses its spirit and force" (at 279).

Moreover, Shamgar P. thought that we should refrain from resorting to the relatively easy solution of enacting specific laws as a remedy to problems. In his opinion, the actual existence of liberties ought not be influenced by transient events or temporal sentiments, and where restrictions of fundamental rights were necessary, they ought not be improvised and shaped according to momentary needs. Israeli democracy was better

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19. Cf Klein. "The Defence of the State of Israel and the Democratic Regime in the Supreme Court". 20 Israel Law Review. 1985. p 404.

served by an educational struggle than a judicial disqualification. Even in the case of unpopular opinions, argument and methods of persuasion should be allowed, and prohibitions and restrictions should be used only as a last resort (at 278).[20] Later on we shall see that a similar line of reasoning was taken by the Court when coming to consider Kahane's right to express his views through the mass communication system.[21]

The argument against enacting specific laws is valid and correct. It is preferable to find solutions to specific problems by educational means and through the open exchange of ideas.[22] I also agree that legislation should serve only as a means of last resort. There is the constant fear that such an "instant remedy" might prove to be a two-edged sword, that it might open the way for the "slippery-slope" syndrome, in which the first attempt to restrict freedom might lead to further restrictions. Moreover, laws enacted in order to meet specific problems relevant to a specific period might become obsolete, and might also prove to be a burden or a nuisance at some point in the future.[23] Although the prevailing rule is that a recent law cancels an earlier law, it is still necessary to enact a law to overrule the old one. For precisely these reasons, it may be better to extend precedents than to ask for legislative prescriptions.

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20. This argument reminds us of the Millian defence of freedom of expression. Cf part I, ch. 6.

21. H.C. 399/1985. *Kahane v. Board of Directors of the Broadcasting Authority.*

22. Studies indicate positive correlation between education and tolerance. Cf Stouffer. Community, Conformity, and Civil Liberties. 1955; Prothro et al. "Fundamental Principles of Democracy: Bases of Agreement and Disagreement". 22 J. of Politics. 1960. pp 275-294; D.G. Lawrence. "Procedural Norms and Tolerance: A Reassessment." 70 APSR. 1976. pp 80-100; Sullivan et al. "A Reconceptualization of Political Tolerance: Illusory Increases 1950's-1970's". 73 APSR. 1979. pp 781-794; and "The Sources of Political Tolerance: A Multivariate Analysis". 75 APSR. 1981. pp 92-106.

23. In England, for example, two statutes from 1797 still exist today. Both statutes - the Incitement to Mutiny Act, and the Unlawful Oaths Act - were enacted out of the fears and anxieties regarding revolutionary activity in the 1790s.

iii) The judgment of Barak J.

The most interesting opinion, in my view, was the opinion of Barak J.; however, it was also, as Gavison says, the most frustrating opinion.[24] Barak J. disputed Cohn J.'s opinion in the *Yeredor* decision, and consequently did not share the view of Ben-Porat DP. in this case. Contrary to them, he did not confront the issue from a merely technical point of view. That is, Barak did not hide behind the claim of lack of authority. He explicitly said that the Court acted legitimately in disqualifying anti-democratic lists. Concurring with the majority view in *Yeredor,* Justice Barak thought that it lay within the Committee's powers to disqualify lists. Moreover, he believed that no distinction should be made between a platform that denied the existence of the State and a platform that recognized the existence of the State but denied its democratic character: the same principles of interpretation that had led to the *Yeredor* ruling - with respect to a threat to the State - had also to be applied in cases of a threat to democracy. Barak noted that the Declaration of Independence, "in the light of which our legislation is interpreted", referred to the principles of "liberty, justice and peace..." and assured "full equality of social and political rights to all its citizens, without distinction as to religion, race or sex". In line with Agranat J.'s reasoning in *Kol Ha'am* Barak J. rhetorically asked: would the State of Israel without the Declaration of Independence be the same State of Israel? (at 314). The principles which underlay the Declaration assumed not only the existence of the State, but also its essence as a democracy. Israel had to safeguard them in defence of democracy. Barak J. maintained that "[D]emocracy is not obliged to commit suicide in order to prove its vitality" (para 12, at 315). By this modification Barak J., in effect, broadened the *Yeredor* precedent.

On the other hand, Barak J. did not completely agree with the opinion of the majority in this important precedent. While they saw the existence of the nation as a

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24. Gavison. "Twenty Years to Yeredor Ruling". 1986. p 189.

consideration which overrode other considerations (such as freedom of expression and association), and therefore not to be weighed against any other principle, Barak J. thought that there was a scope to balance the value of the nation's existence, on the one hand, and the value of freedom of election, on the other. Thus he added a second modification to the *Yeredor* jurisprudence which restricted it, arguing that the exercise of the Committee's authority in both cases had to be on the basis that there was a reasonable possibility[25] that the threat would actually be effected (para 1, at 305). In this respect, Barak J.'s approach was somewhat similar to President Shamgar's. Like him Barak J. argued that the authority of the CEC was vested in special circumstances in which there was a probability that the use of a fundamental civil right would cause damage that was intended to be prevented. However, while Shamgar P. resorted to the "probability" test, Barak J. thought that this test should apply in cases where freedom of expression conflicted with public peace (like *Kol Ha'am*), or to cases where freedom of demonstration contradicted public order.[26] However, for the matter in hand it was better to use the "reasonable possibility" standard, which provided for wider margins of security. This standard took the middle ground between the "bad tendency" test, on the one hand, and the "clear and present danger" test and the "probability" test, on the other. It required substantial proof that there was reasonable possibility that the anticipated danger would actually be realized; thus it was not satisfied merely by the possibility of a remote danger ("bad tendency"). Like Justice Learned Hand, Barak J. concluded that what we should do was to weigh interests one against the other, and to see whether or not the degree of damage, mitigated by the chance that it would not actually occur, justified the violation of a civil right so as to prevent the danger.[27]

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25. This criterion was used by the Court in Cr.A. 126/1962. *Dissenchik and others v. Attorney General* (*per* Sussman J.); and in Cr.A. 696/1981. *Azulai v. State of Israel.*

26. Cf H.C. 153/1983. *Levi and Amit v. Southern District Police Commander* (*per* Barak J.); and H.C. 292/1983. *Temple Mount Loyalists v. Police Commander of District of Jerusalem* (*per* Barak J.).

27. Compare to Learned Hand in *U.S v. Dennis*. 183 F 2d. 201, 212, CA. 2d (1950): "In each case [the courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger". This is also Schauer's opinion. Free Speech. 1982. p 199.

Accordingly, when coming to apply the "reasonable possibility" standard, a balance had to be struck between a fundamental right to political expression, which was not to be denied merely because of the content of the political view, and between democracy's right to defend itself. Barak J. explained:

> "We are concerned with a balancing that requires a judicial position as to the probability that realization of the right to vote will prejudice the interest in the state's existence." (at 310).

The procedure for disqualifying a list was, therefore, a two-stage process: first we had to review the content of the platform and see whether there were grounds for disqualification: namely, whether the list in question denied the existence of the State or its democratic character. This was a necessary but not sufficient requirement. We also had to see whether there was a "reasonable possibility" of the list implementing its program. This approach, like the "probability test", was in line with the Rawlsian principle.

Barak J.'s approach broadened the authority of the CEC regarding the grounds on which it could refuse the confirmation of lists. Barak said that this approach stemmed entirely from the creative sources of the judicial process, maintaining that this process was nevertheless constrained within limits. He asserted that a judge could not raise himself above the legislature, and that the rule of law, not the rule of the judge, reigned in Israel. Barak J. continued:

> "Indeed, my approach in this case is based not on 'meta-principles' standing above the law, but on principles that pervade the law and emerge from it. It is not founded on a 'supra-constitutional' 'natural law' that annuls the statutory law. It is a positivist 'intra-constitutional' approach that examines the nature of the law and interprets it according to accepted interpretative standards. The law is, in the words of Sussman P.[28], **'a creature that thrives on its environment', which includes not only the immediate legislative context but also broader circles of accepted principles, fundamental objectives and basic standards that comprise a kind of 'normative umbrella', spreading over the entire field of legislative acts**" (at 320-321, bold mine).

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28. H.C. 58/1968. *Shalit v. the Interior Minister*. Sussman J. became to be the President of the Court in 1977.

Accordingly, if the law was "a normative umbrella", then we could apply it when the phenomenon at issue clearly contradicted the foundations of democracy. Barak J. was willing to concede that one could resort to this notion, but he believed that there was still a duty to take the degree of the danger into consideration, so that the normative principles were only applied when there was a reasonable possibility that the danger would be realised. Even with respect to the application of meta principles, one should ask **when** these principles should be employed (para 17, at 321).

In applying his method to the appeals of the two lists, Barak J. asserted that the Court found nothing in the PLP's platform to indicate a desire to bring about the annihilation of the State or to prejudice its democratic character. The evidence was clear enough, so there was not even a need to examine the existence of a "reasonable possibility". In the case of Kach, there was scope to apply the "reasonable possibility" standard. The CEC was right in arguing that the content of the platform was racist, and that its principles were offensive to the democratic character of the State, and "the spirit and essence of Judaism" (para 15, at 318). There was even evidence that the list seriously intended to realise its positions and did not rescind them. But the question was not whether the list was serious in its designs. The question was whether there was a reasonable possibility that its designs would be accomplished. In Barak J.'s opinion, there was not. All that was proved was "bad tendency", which reflected the content and intentions of the list, and that alone was not sufficient. As long as there was no proof that Kach created a reasonable possibility of danger to the existence of the State or its democratic character, there was no alternative but to allow its participation in the elections.

Although he thought the "reasonable possibility" standard the best existing solution, Barak J. acknowledged that it was problematic. He admitted that this standard did not constitute a precise formula that could easily be adopted in every single case. On the contrary. Barak J. said that it left broad margins of uncertainty, that the formula was difficult because it required not only evaluation of past events, but also assessment of

the probability of future events, a task which amounted to prophecy in the guise of a legal decision.[29] Nevertheless, he argued that political bodies were accustomed to such tasks, and that legal proceedings often called for decisions based on the examination of social processes (at 316). In spite of Barak J.'s awareness that it would be an implausible, as well as an impossible task, to name all the relevant criteria that had to be taken into account when considering specific bodies in a specific context, he still believed that in the absence of legislative formula, this standard commended itself as the most appropriate one. He preferred to rely on the logic of politicians and judges when they came to consider each and every phenomenon.

However, we should warn that the lack of clear criteria might open the way for misuse of the Committee's authority and might give members of the Court latitude to introduce political considerations into their decisions. Moreover, when tests are phrased in abstract terms so as to generalize, there is always scope for exceptions, as in the case of the Millian Truth Principle.[30] This is not to say that standards and tests should be rigid and inflexible. But when a judge admits that the range of considerations with regard to future events amounts to prophecy, then there is room to raise pertinent questions, and at least wonder whether it is not better to formulate guidelines in more precise terms.

Two of Barak J.'s colleagues, Elon and Bejski JJ., criticized his reasoning. Elon J. suggested that judges should not see themselves as prophets. He disagreed with Barak J. on both accounts, namely, on his extension of the *Yeredor* ruling to anti-democratic lists, as well as on the application of the "reasonable possibility" test. With regard to the former, Elon J. argued that the *Yeredor* precedent should not be extended without specified legislation. As for the latter, he claimed that there was a contradiction in allowing a party to compete in the elections in order to destroy the legislature, and that this insoluble contradiction was inherent, rather than dependent on "reasonable

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29. Reference was given to Jackson J. in *Dennis* (at 570).

30. See part I, ch. 6.

possibility" that the aim would materialize (para 4, at 291). This situation could not be allowed in principle.

For his part, Bejski J. asserted that any test that we might adopt immediately posed a double dilemma. One related to the time in which the defensive reaction might and should come. The other concerned the dimension of the measures that might be taken: whether these should be radical, aiming to eradicate the danger *tout court*, or of lesser scope (para 4, at 327). Thus, if we follow Bejski's position, the question regarding the time dilemma is: at which stage should the list be prohibited? It could either be when there was a reasonable possibility of the list gaining representation in the parliament, or when there was a reasonable possibility of the list gaining enough power to become an indispensable partner in any governmental coalition.[31] Yet again, it could also be when there was a reasonable possibility of the list gaining a parliamentary majority.

Barak J. did not give any answer to the first dilemma. Addressing himself to the second dilemma, he made a series of suggestions as to how Israeli society could fight Kahanism by other means, given that the Court had decided that it could not disqualify Kach. Barak J. first suggested considering whether or not the damage could be mitigated by methods of persuasion, explanation and education. Then he went on to offer another option, arguing that danger to the State and its democratic foundations can often be reduced by use of the penal system (para 14, at 316-317). He referred to the fact that Kahane and Green were placed in administrative detention in 1980, implying that there might be scope for examining questionable activities, so that it might be possible to find grounds for the removal of immunity from Knesset members involved in criminal activity.

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31. In the current political situation in Israel, three seats can make the difference between a Labour coalition and a Likud coalition. After Kahane's election to the Knesset, polls at some stages showed that if elections were to be held then, Kahane would have gained 11 seats in the Knesset. Shortly before the 1988 elections, the forecast was that Kach would have 3 or 4 mandates.

The first suggestion alluded in fact to the Millian Truth Principle. Quoting Justice Holmes's celebrated opinion in *Abrams*, Barak J. argued that the true test of the ideas of liberty, justice and equality, and the other fundamental principles that constitute the creed of the constitutional regime, lies in their inner strength and inner truth, and not in their coercive power.[32] Barak J. maintained that the weakness of racism and the false beliefs which it incites are exposed precisely in the free competition of ideas (at 322). Nevertheless, this depends on the "inner strength" and the "inner truth" being strong enough to win over the threat. If they are not, then we may have to apply coercive means. Barak J., like Rawls, did not assume that democracy actually possessed these inner forces. He did not exclude more radical democratic methods of self-defence, but only as a last resort. We should allow democracy to play its game, and let every opinion compete in the free market of ideas, as long as it is not too risky. Implicitly, the assumptions that underlie this opinion are (1) that it is to democracy's benefit to witness the clash between democratic and anti-democratic forces, and (2) that this confrontation fortifies the basis of democracy.[33] In Israel, however, these assumptions have been rejected, at least up to now. Barak J. assumed that it might be perilous to democracy to supply more grounds for imposing restrictions on its free-play. Reality, however, has shown the opposite to be the case, i.e., that by not resorting to restrictions, the authorities gave the destroyers of democracy the latitude to deepen their position. It was not the forces of democracy that were fortified by the free competition of opinions, but rather the anti-democratic trends. More people expressed their preference for "a strong hand", and "strong leadership". Polls revealed that the majority of the population (especially the young) thought that there was "too much" democracy in Israel, and discriminatory views against Arabs gained popularity.[34]

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32. Holmes said: "The ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out". *Abrams v. U.S.* 250 U.S. 616 (1919).

33. These arguments are in line with Bollinger's reasoning. Cf part I, ch. 5 (B).

34. A research project conducted by the "Van-Leer" Institute in September 1984 showed that one third of the youth in the sample held anti-democratic attitudes. 28.4% said that

iv) The judgments of Elon and Bejski JJ.

Elon J., an observant Jew and a distinguished expert in Jewish Law, asserted that the most serious thing about Kach's platform was that it claimed to be based on the *Halacha*. Racism had no place in the Jewish world, the fundamental basis of which lay in the values of equality and respect for others. Elon J. clarified that national minorities were accorded the status of alien residents in the *Halacha*, a status which did not exclude entitling them to full national and civic rights. He saw the content of Kach's ideology as in striking opposition to the world of Judaism, its morality and essence. Elon J. joined his colleagues not because of lack of evidence that the list was dangerous, but because the law did not empower either the CEC, or the Court to ban a list on the grounds of its political platform (para 13, at 303). With a line similar to that of Shamgar P. and Barak J., Elon J. contended that society should resort first to educational methods to defend itself. He agreed with Shamgar P. that the CEC's competence to disqualify racist and anti-democratic lists could only be granted by the legislature. However, while Shamgar P. believed that it was undesirable to extend the authority of the CEC by law, and Barak J. expressed his fear of an "unbalanced legislation", Elon J. thought that there was room to enact a specific law so as to meet the dangers presented by Kach. He asked the legislator to provide well-defined instructions that would specify reasons for disqualification, and not to be satisfied with the present situation which opened the road to various interpretations.

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a strong regime with leaders who were not dependent on parties should be established. Sixty per cent thought that the Israeli Arabs should not enjoy full equality of rights, and forty two per cent supported the limitation of democracy so as to enable curtailing the civil rights of Arabs. A similar percentage was in favour of the opinions of Kach. Cf Ehud Sprinzak. Every Man Whatsoever Is Right in His Own Eyes. 1986. pp 167-168 (in Hebrew). One girl was quoted as saying: "The Jews had a holocaust in Europe... so now there will be holocaust to the Arabs. There is no other possibility. This is what we have" (Yedioth Ahronoth. 28.6.1985. p 6).

As for Bejski J.'s decision, reading it reveals that there are basic similarities between his judgment and that of Elon J.'s. Both of them briefly addressed the issue of the PLP's eligibility to participate in the elections, agreeing with Shamgar P. that the objectives attributed to it were not sufficiently proven. Not enough evidence was supplied to show that the list denied the existence of the State or its integrity. Both agreed that there was room to extend the *Yeredor* ruling, but that this should only be done by legislation. In both judgments it is possible to identify a call for the Knesset to enact a law to fight Kahanism. Bejski J. stated that the tone of Kach's propaganda was so grating, awakening memories of the not too distant past, that Israel had to defend itself against it. Finally, both justices rejected the "reasonable possibility" standard of their colleague Barak J.

Bejski J. said that he did not accept this standard, but he could not understand how one who did accept it could still think that there were not sufficient grounds for banning Kach. The publications of that list were full of racist devilry "that even the paper cannot suffer" (at 333). There was a "reasonable possibility" of danger because evidence was brought before the CEC that members of Kach went to Arab villages to convince them that they had no place in Israel, and that if they did not leave voluntarily with compensation, other means would be found to make them go.[35]

Bejski J. further observed that the 1980 decision which justified the administrative detention of Kahane and Green indicated that the danger posed by Kach went beyond mere words and opinions. Thus Bejski asked rhetorically: what more was required and could be offered in the way of proof that had not been shown with respect to Kach? If all this was not sufficient evidence of a danger to the democratic character of the State then, he concluded, "I know not what more could be proven" (at 333).

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35. It is interesting to note that both Barak and Bejski JJ. relied only on the evidence there was since Kahane's arrival to Israel, and did not mention Kahane's activities in the U.S. This is more interesting with regard to Barak, for he explicitly said that we should take into account the past conduct of the list, its members and its head, and anticipated future dangers. Kahane's operations, especially the series of explosions in Washington and N.Y., give more than indication that if members of Kach were given the opportunity, there was more than a "reasonable possibility" that harm would be inflicted upon the Arabs.

Accordingly, if Bejski J. had found himself in agreement with Barak J. on the principled question regarding the Committee's authority to disqualify a list on the grounds of its platform, objectives and activity, which shared the purpose of endangering the foundations of democracy, then he would have ruled that the Kach list had lawfully been disqualified. Bejski J., however, decided to join his colleagues in admitting the appeal not because of any lack of evidence regarding the character and purposes of Kach, and the danger it constituted to the foundations of democracy, but because he had found no lawful authority to disqualify Kach. He said that "it is true that subversion of the foundation of democracy constitutes to a considerable degree subversion of the foundations of the state in its existing form..." (at 325). In his view, however, this did not imply that the *Yeredor* precedent should be extended to bodies undermining the foundations of democracy: denying the very existence of the state was not the same as damaging the foundations of democracy. Bejski J. explained:

> "I cannot find it possible to extend the *Yeredor* ruling beyond the matter that served as grounds for the majority opinion, since the statute does not contain the same "Archimedean-foothold" upon which broad interpretation can be grounded and constructed" (at 332).

Bejski J.'s reasoning was influenced in part by his reluctance to grant the CEC any additional authority. He argued that the CEC was clearly a political party body, and if it were empowered to decide the confirmation of lists without defined and definite legislation, then lists might be disqualified on grounds of narrow party interests. He concluded by postulating an appeal to the legislator to enact a statute in defence of democracy.

2. Conclusions and Criticism

Evaluating the decision of the Court raises two separate questions. One is concerned with the authority that is granted to the Court to disqualify lists when there is a *lacuna* (or an intentional lack of specification) in the statutes regarding the matter in hand; the other is concerned with the logic and reasoning of the ruling.

i) The question of authority

This question is strongly related to that concerning the scope of tolerance and the restrictions on liberty. Constitutional matters in a liberal-democratic society frequently turn on the decision of the courts; it is, therefore, imperative to examine the force of philosophical principles regarding societal norms and values, when the Court formulates judicial decisions in the absence of specific statutes empowering it to act. This is the context in which we should consider the authority that may be accorded to the Court when it contemplates which democratic methods of self-defence are to be resorted to on the basis of principles underlying the constitutional text.

On this issue we can differentiate between three points of view in *Neiman*: those of Ben-Porat DP.; of Shamgar, Elon and Bejski JJ.; and of Barak J.. With regard to the first, Ben-Porat presented a purely formalistic opinion: in the absence of statute there was no authority to disqualify lists. She also rejected the idea of supra-constitutional considerations. On the other hand, Shamgar, Elon, and Bejski accepted the idea of supra-constitutional considerations as expressed in *Yeredor*. However, they held that the issue of denying a list participation in the elections for reasons other than denying the State's existence should not be left open for judicial interpretation. In this sense, like Ben-Porat, they did not think that the Court should take a creative role in extending the *Yeredor* precedent. In turn, Barak explicitly said that the CEC had the authority to disqualify lists if they negated the democratic character of the State (para 16), and it was quite clear that he would approve such a decision if he were to find "a reasonable possibility" of danger even in the absence of law. That is, Barak believed that the Court could resort to a creative approach in extending precedents. Nevertheless, like his colleagues Elon and Bejski he asserted that it was desirable that the issue of denying a list participation in elections on the grounds of the content of its platform should be regulated through legislation and not left open to judicial interpretation. In other words,

it was preferable to have formal grounds for action. He added a call for caution, saying that the present situation was preferable to unbalanced legislation (para 18, at 321).

The *Neiman* decision was criticized for lack of creativity. Since Israel has no constitution, nor bill of rights, nor even a Basic Law to defend fundamental civil liberties, the Court is viewed as the only safeguard of democracy. For this reason Negbi argued that the justices of the Supreme Court should adopt the creative approach. He urged the Court not to hide behind the lack of explicit written provision when crucial questions of constitutional nature were at issue, leaving their resolution in the hands of politicians. Negbi expressed his mistrust of the Israeli political system. In his view, since parties had failed to reach a compromise over the enactment of a law to safeguard civil rights, requiring individuals and bodies to approach the Court to find assistance, the Court should not refrain from taking a creative approach. Negbi was startled by the Court's decision to throw the ball back to the legislature, because the future of democracy was then left to the arbitrary will of parliament. He could not understand how the Court could have recognized democracy's right to defend itself in 1965, and been willing to disqualify a list despite a legislative *lacuna*, while twenty years later it refused to resort to the same approach.[36] Negbi voiced his astonishment that the justices who had acknowledged democracy's right to defend itself still did not apply self-defensive measures against Kahane. Thus Barak J. asserted that Kach negated "our basic conceptions, and the general as well as the Jewish values on which we establish our national home"; Bejski J. affirmed that the opinions of Kach were so racist that even the paper on which they were written rejected them, and Elon J. maintained that these opinions were antipathetic to the world of Judaism, and to the Jewish past. Yet they allowed Kach to stand for elections.

A similar line of criticism was adopted by Klein. He asked whether what was called the "Jewish character of the State of Israel" constituted a higher principle than that of

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36. Negbi. Above the Law. 1987. pp 86-95.

the democratic nature of the State. For the cynical result of the *Yeredor* and the *Neiman* decisions was that a list which denied the Jewish character of the State was to be outlawed, while a non-democratic, discriminatory list was, in the absence of a specific statute, to be allowed to compete in the elections. Klein concluded:

> "With due respect to the Court, we doubt the political wisdom of such a decision, and we wonder whether political reality is not such as to reinforce its erroneous nature."[37]

The contesting view was that on such an important issue concerning the fundamental right to be elected, the Court should not use its discretion and resort to the creative approach. Thus, Segal justified the decision, arguing that the Court's ruling was right since the Court wanted to defend the basic principle of the rule of law. In his opinion, the role of the Court was neither to create nor to curtail rights. Its role was only to secure respect for existing rights. Since the only exception in this case, postulated in *Yeredor*, was not relevant, the Court was right in holding that there were no grounds to extend this ruling.[38]

Negbi and Segal represent two extreme views which are derived from their different outlooks. Negbi is a news editor in "Kol Israel", the national radio network. His close acquaintance with the political system has convinced him that the Supreme Court is the only authority in which citizens can put their trust. The Knesset cannot be trusted because it is motivated by partisan considerations and by narrow political interests. Therefore, he believes that the Court must take an active role in defending basic rights, otherwise deals between parties might decide the democratic nature of the State. Furthermore, Negbi does not analyze the Court's decisions from a judicial perspective *per se*, but from a more global view, relating the implications of the decision to the existing reality. Segal, on the other hand, is a university lecturer who examines the issue from a purely juristic view. He believes that the Court should not adopt an authority

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37. Klein. 20 Isr. L. Rev. 1985. p 414.

38. Zeev Segal. Israeli Democracy. 1988. p 83 (in Hebrew).

that is not ascribed to it by law. Segal is a positivist who considers only what the law says. He does not address normative considerations, asking what the preferable answer is to the issue in hand, nor does he consider the implications of the decision for Israeli society, nor ask what the law should be. His concern is with what the Court should do, in order to safeguard the rule of law.

Negbi's view is extreme for he says that only in the most minimal and necessary events should the Court refrain from using its authority.[39] The Court has to defend basic rights, with or without relying on a written law. Moreover, his views are not only extreme; they also suffer from inconsistency. Negbi was one of the first people in Israel to raise the alarm against Kahanism by appealing to the Court against the CEC's decision to confirm Kach in 1981. His entire reasoning was tailored to finding a way of outlawing Kach, without any recognition that his appeal for a Court of justice, rather than a Court of law, could undermine the entire legal framework. Negbi, so it appears, was willing to put the Court above the law, while this thesis strongly objects to such a thought. The Court derives its authority from the law, and it has to adjudicate in accordance with the law.[40] Negbi speaks generally about preserving basic rights, forgetting that this is exactly what the Court did in *Neiman*: it secured Kahane's basic right to be elected.

Notwithstanding this criticism, Negbi was right to say that the formalistic decision of the Court was out of place in this case, because it ignored the social and political environment in which the decision was made and its likely implications. My view is that in a state which lacks a constitution, the Supreme Court justices are (to use Barak's

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39. Negbi relies on Berenson J. in H.C. 287/1969. *Meiron v. The Labour Minister.*

40. It is worth quoting the opinion of President Ulshan in H.C. 29/1962. *Shalom Cohen v. Minister of Defence*, where he said: "Sometimes the feeling of justice and the desire to make justice tempt [the Court to enlarge its authority]. But if the 'rule of law' principle is not vain talk there is a must to overcome this temptation... There is an authority to give assistance for justice when the law provides some basis. Authority cannot be based merely on the reflections of the judge, however noble they might be".

phraseology) the framers of an unwritten constitution.[41] It is part of their job to consider the implications of their decisions on society, and more specifically on society's democratic foundations. I have mentioned the growing popularity of Kahane's ideas, reflected by different polls, such as the "Van-Leer" poll. This issue brings us back to Ross's assertion that the forces of democracy are likely to win in places where democratic values are well rooted.[42] I agreed with this position, but questioned what the attitude should be in the case of "unripe" democracies. Israel seems to be such a case. If we followed Ross's prescription, the defenders of democracy would simply have to look on as Israel, a democracy, surrendered to anti-democratic forces. My thesis takes precisely the opposite view. Democracy has to defend itself against such trends and ought not to stay idle in the face of growing threats. As a young democracy which encounters a tremendous number of problems in every sphere of life, Israel has to be more cautious than other democracies about the strength of democratic values within its culture. Israeli culture is still in the process of formation, and silence in the face of racist ideas might assist the creation of some form of Jewish fascism as part of its developing culture. It is beyond the scope of this thesis to reflect on the entire range of problems with which Israel, as a young nation, is confronted. I only say that over forty three years there have been six wars and a Palestinian uprising[43] which have consumed a great deal of effort and stretched resources, at the expense of overcoming the internal splits that exist within Israeli society. These are the splits between Arabs and Jews; between capitalism and socialism; between orthodox and secular Jews; between *Sephardim* and *Ashkenazim*; and between the cities and the kibbutzim. We may assume that these tensions have made Israeli democracy vulnerable to anti-democratic notions; notions which appeared and were discussed more frequently in the 1980s as a result of

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41. Barak. 8 Tel-Aviv University Studies in Law. 1988. p 248.

42. Cf ch. 5 (B) *supra*.

43. At the time of writing (February 1991) Israel is yet again in a state of war. It lives under continuous missile attacks although it is said not to be involved in the Gulf war.

both Kahane's activity and the reaction of the Israeli establishment to curtail his growing popularity.

Given these tensions and notions, it is also the role of the judge to set more defined standards for action for both politicians and the courts when they are faced with constitutional matters, especially where attacks on the very foundations of democracy are concerned. Hence there is scope for taking normative constitutional principles into account. These principles may in some "hard cases" convince the Court to take a creative approach. Here there are two set of considerations that inevitably play their part when a judge comes to formulate a judgment. One set is related to the moral convictions held by the judge, influenced by his own personal upbringing and his educational background, as well as by the tradition and values of the society in which he lives. The other is concerned with the specific legal history. Precedents and other legal facts are bound to limit the moral considerations of the judge but they should not exclude them altogether. When faced with an unprecedented situation, in which he is required to use his discretion to find a judicial solution to a "hard case" (such as this one), a judge should decide the case by interpreting the political structure of his community so as to find the best possible justification, in principles of political morality, for the structure as a whole.[44] Accordingly, if the right of people to be treated as equals and not to be harmed by others can only be defended by creative adjudication, then creativity is not only in order but necessary. This is the case so long as the judge tries to make the creative decisions in line with previous ones rather than starting a new direction as if writing on a clean slate. In my view, there was room in *Neiman* to take unwritten values of the judicial system into account, as Shamgar P. did in more recent rulings.[45] And if the Court could not find an answer in statute law and could not draw an analogy with *Yeredor*, it could have referred to "the principles of freedom, justice,

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44. Dworkin calls this theory of adjudication "a naturalist approach". Cf "'Natural' Law Revisited". 35 Un. of Florida L. Rev. 1982. pp 165-188.

45. H.C. 483/1986. *Aloni MK v. Minister of Justice*; and M.A. (Miscellaneous Application) 298/1986. *Citrin and Nvo v. Disciplinary Court.*

equity and peace" as the law of Foundation of Law provides.[46] The Court should have done so not only because of the alarming nature of the Kahanist phenomenon, but also because questions concerning the eligibility of a list to participate in the elections are inevitably connected with granting legitimacy to the list in question.

Indeed, it is interesting to note that none of the five judges raises this issue of licensing. I have argued that an issue concerning the eligibility of a list to compete in the elections necessarily involves the question of legitimacy.[47] It is not merely a question of allowing certain opinions the right to be heard. Of course, it is possible for a court to approve something with reluctance, or for judges to hold that they do not have the authority to regard something as unconstitutional, without giving the impression that it is in some broader sense right. Nevertheless, the final decision of the court is bound to influence the way in which those opinions are viewed: whether they are given the status of any other opinion, which may be held with or without reservation but is still free to compete in the marketplace of ideas on the right to be represented in parliament, or whether they are dismissed as opinions that even the courts of justice think should have no place in society.

ii) The logic and reasoning of the ruling

All five justices did not reject the idea of disqualifying lists in order to defend democracy as such. They said that this measure should be resorted to with caution, only in extraordinary cases. Kach and the PLP were not seen as such cases. Regarding the PLP, the unanimous judgment was straightforward: the procedure used by the CEC to disqualify the PLP was seen as incorrect, in that it referred to either unconvincing or relatively old documents. The Court was right in its judgment. As aforementioned, the PLP's political platform did not differ significantly from those of other parties that were

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46. Cf ch. 10 (A) *supra*.

47. Cf part I, ch. 2.

allowed to compete in the elections, and no evidence brought before the Court established that the list constituted any danger to the State. But the decision concerning Kach is less clear. The Court should have used its authority to declare that explicit anti-democratic ideas and aims cannot claim a right to be represented in the Knesset.

Barak J. argued that there was a difference between freedom of expression and freedom to be elected. I concur with his view that democracy must allow itself wider security margins when considering the eligibility of questionable lists. Hence it is one thing to express views and opinions, however repugnant they are, and quite another thing to use parliamentary methods to put them into effect by legislative means.[48] These two issues should be dealt with separately. In discussing the issue of restricting freedom of expression I have argued that four considerations should be taken into account, namely, the harmful (or offensive) content of the speech; the speaker's manner of expression; his intentions; and the circumstances, which must be such that the target group cannot avoid being present.[49] When it comes to restricting the right of a list to be elected, the focus is on the opinions and the goals of the list, and on its actions to realize them. If the content of the political platform of a given list and its explicit intentions are to bring about the annihilation of the State or to undermine democracy, and members of the list are acting along these lines, democracy has the right to defend itself and not to allow that list representation in parliament to further its aims by legal means. It is neither morally obligatory, nor morally coherent, to ask democracy to place the means for its own destruction in the hands of its potential destroyers.

From this argument it follows that Barak J. was right in saying that there was scope to broaden the *Yeredor* ruling. He was the only judge who saw some similarity between *Yeredor* and *Neiman*. According to his line of thought endangering democracy amounted, in fact, to endangering the basic foundations of the State. Hence, lists that wished to

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48. Cf my discussion on different degrees of toleration in ch. 2 *supra*.

49. Cf part I, chs. 7, 8.

participate in the democratic rules of the game and to gain power to implement their ideas through legislation and other democratic means, had first to accept democratic principles. As Bejski J. said: "Whoever claims rights in the name of democracy must himself act in accordance with its rules" (at 326). However, Barak J. added a restrictive qualification to the *Yeredor* ruling, namely, the "reasonable possibility" standard, and here lies my disagreement with him. On this issue my view is similar to Elon and Bejski JJ.. I do not share either Shamgar's or Barak's opinions that in the face of such dangers a standard of some sort should be applied in order to evaluate the danger, and it should then be decided what defensive means to apply. In my view the Sussmanian approach rather than the Rawlsian approach is in order. To take a more moderate position, Agranat's "creative interpretation" approach should at least have been resorted to.[50]

Shamgar P. and Barak J. believed that all parties should enjoy the right to be elected, including those who threatened the existence of the State (Shamgar and Barak), or its democratic foundations (Barak), unless the threat they posed was severe; unless they had a reasonable chance of translating their ideas into deeds. Their reasoning was founded on balancing and evaluating probabilities, a process which, as Bejski articulated in his criticism of Barak, raised substantial questions. But it is not only the process that raises doubts. The essential question is: why should we wait for the stage of probable or reasonable possibility of danger to be reached, while the list in question goes from strength to strength and, meanwhile, its ideas and acts undermine democracy and deliberately discriminate against others? It was acknowledged that the values of Kach were not compatible with the fundamental values of democracy; that it did not reject the use of violence to further its aims; and that it had no commitment to democracy. Its increasing popularity against a background of severe economic problems, combined with societal and national crises, posed a danger to Israeli democracy. It was not as if the political platform of Kach was dubious, or the intentions of its members were unclear, or they did not act in accordance with their declared aims. I do not therefore see why

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50. Cf ch. 10 *supra*.

such a list should be allowed representation in parliament to help it achieve its purposes. More fundamentally, the issue of defending democracy is a matter of moral principle, rather than one which is contingent on the level or the proximity of the danger. It is clear that Barak J. preferred to consider circumstantial considerations thus avoiding a discussion of the ethical constraints of liberty and tolerance. This thesis argues that there are moral restrictions deriving from the defence of democracy which necessitate the outlawing of anti-democratic lists. A similar line of reasoning guided the framers of the European Convention of Human Rights when they enacted Article 17, recognizing the necessity of preventing specific groups from exploiting the principles enunciated by the Convention in their own interests.[51]

To conclude: this thesis accepts Barak's reasoning in part, and Elon's and Bejski's reasoning in part, to the effect of restricting the right of parties to compete in the elections if they endanger the very existence of the State or its democratic foundations. In line with Elon and Bejski JJ.'s acceptance of the majority decision in *Yeredor*, and with Barak J.'s extension of the rule, it is argued that lists which are unequivocally anti-democratic, or which aim to bring about the annihilation of the State, should not - as a matter of principle - be eligible to take part in the elections so as to be enable them to further their ends. To avoid the possibility of the slippery-slope syndrome, it is emphasised that only in these two instances may a list be disqualified. A list that wishes to participate in the democratic procedures and to gain power to implement its ideas through legislation and other democratic means, has first to recognize the right of the State to exist, and to comply with the basic principles that underlie its democratic foundations. If the political platform of a list negates the basic requirements of liberal democracy, those of respecting others and not harming others; if the list's ideology advocates not accepting these principles when they are applied to a certain group, it disqualifies itself from the right to participate in the democratic process according to

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51. Article 17 provides: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

democratic terms. When democratic institutions accept such a list, they then assist the promotion of anti-democratic notions.[52] Therefore, no evidence of a danger, near or remote, is needed when a list aims to undermine democracy or the State. The evidence that is required concerns the content and the intentions of the list in question, and the fact that certain acts were undertaken to accomplish the declared aims. The evidence must be explicit and clear and it must be substantiated, to use Barak's contention, by "qualified administrative evidence", that is, "such testimony as any reasonable person would consider to be of probative value and would have relied upon to a greater or lesser degree" (at 304).[53] The burden of providing the evidence is on whoever argues for refusing to confirm the list.

In the following chapter I shall review other decisions of the Supreme Court concerning Kahane and his party. In the attempt to de-legitimize Kahane after his election to the Knesset, members of the House led by the Speaker Shlomo Hillel resorted to different means of restricting Kach, not all of which were justified. After each of these attempts Kahane appealed to the High Court of Justice. The Court repeatedly returned issues concerning Kahane and his party to the legislative body. The judges insisted that restrictions on essential freedoms should be backed by laws, trying to divest their judgments of political references to the utmost.[54] Thus the Court upheld Kahane's right to raise no-confidence motions in the Knesset, to submit racist bills, and to express his racist views over the airwaves. I start by reflecting on the restrictions

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52. Cf *Glimmerveen and Hagenbeek v/the Netherlands* (1980) 18 Decisions and Reports. E.Comm.H.R. pp 187-208.

53. References were given to H.C. 442/1971. *Lanski v. Minister of the Interior*; and to H.C. 297/1982. *Berger v. Minister of the Interior.*

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

imposed on Kahane's freedom of movement and expression, and then proceed to consider the five appeals submitted by Kahane against the Knesset Speaker.

Chapter 12

CURTAILING KAHANE'S FREEDOM OF MOVEMENT AND EXPRESSION

A. Freedom of Movement

Two weeks after his election to the Knesset, Kahane started a series of provocative visits to Arab communities with the avowed aim of persuading the inhabitants to emigrate from Israel. The first visit, on August 30, 1984, was to the Arab town of Umm El Fahm. Kahane and his supporters attempted to enter the town. The *a priori* position of the police was to allow them to carry out their intention. At some stage, however, the police realized that a situation of substantive danger to the public peace was being created.[1] In fear of disturbances and bloodshed, the police forces did not allow Kahane to enter the town. They stopped the Kach group two miles from Umm El Fahm. In this incident, as in others, the police was there to intervene and to prevent bloodshed. However, the efforts to maintain public peace were not always successful. Time and again there were violent incidents between Kach supporters, who caused agitation by their visits to Arab villages, and Arabs and Jews who stood against them, blocking the way and shouting: "Racism Won't Pass!"

Kahane knew that the denial of entry to Umm El Fahm would serve as a precedent to stop him from going to any other Arab village. He sought the assistance of the Court to overrule the police decision.[2] However, this appeal was cancelled by Kahane himself

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1. A testimony by commander Karty. 100 Divrei Haknesset, 11 Knesset. 36th meeting. 25.12.1984. p 885.

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

on July 4, 1985 on the grounds that it was no longer relevant. The issue ceased to be relevant as a result of measures taken by the Knesset to stop the visits. In December 1984 the Knesset House Committee voted in a 12 to 8 decision to restrict Kahane's parliamentary immunity. The provision in law secures members of the Knesset free access to any public place.[3] The restriction was intended to enable the police to prevent Kahane from entering Arab communities in which his presence might invoke a breach of the peace. At the time of the debate concerning this issue the Attorney General, Itzhak Zamir, justified the proposed restriction by saying that the Kahanist phenomenon fundamentally contradicted the values cherished by society. It distorted Judaism, exhibiting the Jewish tradition in a twisted way. Zamir asserted that Judaism was sensitive to the lives of human beings and respected people *qua* people, whoever they were, while Kahanism impugned these beliefs. Moreover, the phenomenon was also incompatible with Zionism, for Zionism aimed to establish a just society in Israel, in which everyone enjoyed the same rights irrespective of their race, nationality, or religion. Zamir admitted that he was wrong when he refrained from acting against Kahane before the elections. He said that he had misjudged the force of Kahanism and what its resulting influence might be; that he had regarded Kahanism as a "sick phenomenon", but also as a peripheral, harmless one. Meanwhile the situation had changed. Kahane had won legitimacy since his election to the Knesset and Kahanism had become a danger to society, for it encouraged the violation of Knesset laws and, by so doing, it weakened the societal framework. Zamir postulated that it was inconceivable for a member of the Knesset to act in the Knesset against the Knesset. He therefore urged the House Committee to act against Kahane immediately.[4] Sarid MK (Civil Rights Movement), one of the two Knesset members who initiated this measure,[5]

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3. Knesset Members (Immunity, Rights, and Duties) Law, 5711-1951. Section 9 (a) states: "A direction prohibiting or restricting access to any place within the State other than private property shall not apply to a member of the Knesset unless the prohibition or restriction is motivated by considerations of State security or military secrecy".

4. Al-Hamishmar. 20.11.1984. See also Kotler. Heil Kahane. pp 287-292.

5. The other MK was Soloder from the Labour. Kahane called them S.S. (Sarid-Soloder).

explained the necessity of restricting Kahane's immunity by saying that Kahanism was a psycho-political phenomenon. Kahane incited Arabs and Jews to murder, and praised the Jewish terror organization. The serious thing was that his views had gradually received legitimization and public support. Sarid MK warned that "today Kahane's views are accepted with less shock than before. More people are willing to listen to him. Kahane is already part of this place and, therefore, the Knesset has to stop him here and now."[6] Ramon MK (Labour) acknowledged the risks involved in taking this measure, but nevertheless gave his support to it, maintaining that

> "the voting today is the beginning of Kahane's exclusion from this House and the law, outside of Israeli society. The Knesset decides today not only on a parliamentary act, but also on an educational act. The entire youth will know that this man symbolizes an illegitimate thing, an immoral thing... [that] there is Kahane and the other 119 MK's".[7]

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

Kahane appealed to the High Court of Justice on preliminary, procedural grounds.[8] He claimed that his voice had not been heard during the debates of the Knesset House Committee. The House Committee, for its part, responded that Kahane had been invited to each and every session but had chosen not to come. Kahane was quoted as saying that "I would not degrade myself by appearing before the committee". On the day of the trial Kahane had not appeared and the case was closed. Hence the Court did not have to address itself to the essence of the case, i.e., whether or not the curtailment of Kahane's right, granted to every MK to travel freely throughout the country without being prevented by the police, was justified.

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

7. 100 Divrei Haknesset, 11 Knesset. 36th meeting. 25.12.1984. pp 885-905.

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

Here, of course, freedom of movement was interwoven with freedom of expression. Restricting Kahane's free movement was intended to prevent him from preaching his views in Arab villages. Under the Offence Principle[9] this measure was justified. It was designed to abridge the expression of opinions, of which the content as well as the manner were intended to cause offence, in objective circumstances which were unavoidable from the unwilling witnesses' view. Such visits to Arab villages constituted deliberate and wilful attempts to exacerbate the sensibilities of the Arab population. Kahane mapped specific target groups to whom he wanted to propagate his ideas of "separation" and "voluntary emigration for peace", and by going to their own places he forced them to be exposed to his racist statements and diatribes. A reflection on Feinberg's three standards may prove that there was reason for introducing the restriction.[10] The "seriousness of the offence" standard was satisfied: Kahane intended to inflict psychological offence, which was morally on a par with physical harm, upon the Arab communities. He clearly wanted maliciously to offend and stir up the Arab inhabitants, by expressing his avowedly anti-democratic views.[11] The "*Volenti* standard" was certainly satisfied, because the Arab inhabitants did not feel an obligation to attend the rallies simply out of curiosity. Finally, given Kahane's motives, avoiding the demonstrations would have amounted - from the Arab residents' viewpoint - to saying that "Kahanism may pass". Thus, the situation put the Arab citizens in such a position that either way they would be offended: if they attended the demonstrations, they would have to hear Kahane's preaching against them and his verbal insults; and if they did not, this would be interpreted as Kahane's victory. Therefore, there was no real choice for the Arabs but to attend the demonstrations and to suffer the pain caused by them. The

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9. Cf part I, chs. 7, 8.

10. Cf part I, ch. 7 (B).

11. In an interview made a few years later, Kahane was asked why he was engaged in activities such as visiting Taibe and Umm El-Fahm. He explicitly answered that his aim was to scare the inhabitants and to make them realize that time was not on their side, that they had to leave immediately (Mergui et al. Israel's Ayatollahs. 1987. p 50).

only way of stopping Kahane from continuing his campaign of hatred was to resort to legal measures and restrict his immunity.

It can also be argued that there were grounds for restricting Kahane's freedom of movement and expression under the Harm Principle. Given the fact that some of Kahane's men were armed, there was a possibility that one (or more) of these men might decide to take the law into his own hands and apply more persuasive methods to clarify the speech to the Arabs. There was a possibility of words being translated into physical harm.[12]

It was one thing to prevent Kahane from entering Arab communities, and quite another to refuse him access to any other places. While preventing the infliction of severe damage upon Arab citizens who could not avoid confronting Kahane in their own villages was justified, it was not justified to prevent him from preaching his ideas in predominantly Jewish places. There were many occasions on which Kahane wanted to hold rallies and assemblies in public places but his requests were denied. On some of these, only after appealing to the courts Kahane was allowed to hold the rallies.[13] I do not wish to consider all of these cases. Let me take one incident as an illustration.

On March 10, 1985 Kahane wished to enter Bar-Ilan University but was denied entry by the police. The official claim was that the measure was taken to prevent incitement towards Arab students.[14] This claim strikes me as peculiar. In the first place, the police

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12. Under the Harm Principle (*Argument number one*) any speech which incites the causing of physical harm to certain individuals or groups ought to be curtailed. Cf ch. 7 (A) *supra*.

13. On September 24, 1984 Kahane appealed to the Court against the Israeli police because it refused to give Kach a licence for holding an assembly in one of the parks in Jerusalem. Finally the licence was given and Kach withdrew its appeal. Kahane appealed again on the same grounds in November 1985, after his request to hold an assembly in a public place in the City of Beer-Sheba was denied. The appeal was withdrawn after the permission was granted.

14. Section 85 of the Police Ordinance permits the police to refuse a licence to hold a demonstration if, among other things, there is reasonable basis to suspect that it will involve criminal offences such as rioting (in contravention of sec. 152 of the Penal Law), incitement to rebellion (in contravention of sec. 133 of the same law), or incitement to any other offence (in contravention of sec. 34 of the same law).

could not have known what Kahane intended to say. Going to an Arab village, it was clear that Kahane was likely to address "the Arab issue". This was not necessarily the case when he went to address a Jewish-orthodox university. Second, the probability of instigation, of translating words into harmful conduct was not great. Third, the Arab students could have avoided the meeting: there is a difference between preaching racism in an Arab neighbourhood, and preaching racism in universities. In my opinion, restricting Kahane's right to exercise his freedom of expression at Bar-Ilan is similar to restricting a person's right to speak at Hyde Park Corner in London.[15] Lastly, the discrepancy between this incident and Kahane's appearance at the Hebrew University on February 28, 1985 is glaring. It is difficult to understand how the police who allowed Kahane to speak in Jerusalem, where there are no less Arab students than in Bar-Ilan, decided to deny his right to speak at Ramat-Gan.

The media opened another front in the struggle against Kahanism. Soon after the 1984 elections the media directors decided to introduce a ban on reviewing the activities of the movement. They spoke of an obligation to fight Kach's racist ideas. Kahane was not permitted to appear on programmes[16]; his statements were not reported; newspapers turned down his requests to respond to the attacks made on him; press conferences and events organized by Kach were not covered. The decision was not to supply Kahane with any means to disseminate his views. The frustrated Kahane sought the assistance of the Supreme Court.

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15. Cf ch. 7 *supra*.

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

B. The Ban on Kahane by the Media

The Broadcasting Authority in Israel is a national body whose power and influence is unique. I do not know of any other body in a liberal democratic society which possesses similar authority. Until not long ago it supervised three of the five radio networks and the sole television network.[17] Immediately after the elections to the eleventh Knesset took place, the "News Forum" of the Broadcasting Authority decided that in matters which concerned Kach and Kahane, only items of "clear newslike character" were to be broadcast. This was in order to ensure that the national media did not serve as a platform for incitement against citizens and for statements which contradicted the Declaration of Independence. Kahane appealed to the Court, arguing that the decision to ban him infringed his fundamental democratic rights, and that it was an act of "private censorship", contradictory to the principles of equal opportunity and fairness. The Court, *per* Barak J. (Bach and Netanyahu JJ. concurring) accepted the appeal.[18]

Barak J. postulated that freedom of expression is the freedom of a citizen to express his views and to hear what others have to say. The rights derived from freedom of expression create a comprehensive system of inter-related regulations, which crystallize - through their operation - the tradition of freedom of speech. This tradition is integrated in the constitutional framework and it constitutes a cornerstone of the democratic essence of the regime (at 268). Barak J. maintained that the right to disseminate views through

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17. Not long ago "Channel 2" was also established under the supervision of the broadcasting authority. Nowadays, a cable system has been set-up which is run by private initiators.

18. H.C. 399/1985. *Kahane v. Board of Directors of the Broadcasting Authority.* A summary of the case appears in 23 Israel L. Rev. 1989. pp 515-517.

the electronic media is part and parcel of the principle of free speech. Moreover, he quoted Barron who said:[19]

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

In the light of the unique nature of the electronic media, the duty of a broadcasting authority in a democratic society is to express the views of different sections of the population. Relying on a number of American decisions,[20] Barak J. argued that the public had the right to gain access to the media, as well as to receive information about unfamiliar ideas. There should be an unlimited market-place of ideas rather than a monopolized market. There are three major reasons for this: the search for truth; the desire to allow individuals to express themselves; and the need to sustain the democratic regime, based on tolerance and social stability.[21] Drawing on these reasons, freedom of expression was perceived to be a central right in Israeli constitutional law. Barak J. asserted that this freedom also included the freedom to express dangerous, irritating and unconventional opinions, which the public hated and detested.[22] It also included racist expressions.

Barak J. maintained that the way to deal with such ideas was not by silencing them but through explanation and education. The remedy for overcoming false views was not to put restrictions on speech but rather to increase its exposure. In this context, Barak J. repeated Holmes J.'s renowned opinion in *Abrams* (as he did in *Neiman*) that the best

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19. J.A. Barron. Freedom of the Press For Whom? 1973. p xiii.

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

21. These, among other arguments, were discussed in part I, ch. 5 (B).

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

test of truth is the power of the thought in question to win acceptance in the competition of the market.[23] Truth would out through the contest of ideas.

However, agreeing with Agranat's reasoning in *Kol Ha'am*, Barak J. conceded that the right of free speech is relative. A balance has to be struck between freedom of expression and other fundamental principles, such as the dignity of human beings or the public peace. The balancing process is done by the legislator; when there is a silence on its part, then the balancing becomes the work of the Court. Barak J. reiterated his reasoning in *Neiman*, saying that the appropriate test in deciding the balance between freedom of expression and other interests was the "probability" test rather than the "bad tendency" test (at 291). Accordingly, restrictions on speech may be introduced when it is probable that the expression in question will be followed by actions which substantially injure social order, the public peace, or the foundations of democracy.[24] Barak J. specified that not every probable danger to the public peace justified restrictions on speech. Rather, the injury had to be material and real, and consideration had to be given to the magnitude of the danger and to its chances of coming about.

From the general to the particular, the Broadcasting Authority could decide its priorities regarding what should be broadcast, but it could not discriminate against certain views and opinions. Barak J. argued that the Broadcasting Authority did not weigh the effect of Kahanist expressions on the public order and this was where it had acted wrongly. In each case it should consider the probability of substantial damage resulting from the airing of such opinions (at 308). Where no such probability arose, there was no justification for allowing prior restraint on freedom of expression.

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23. *Abrams v. U.S.* 250 U.S. 616 (1919), at 630.

24. Barak explains that the probability test comes to answer the question: what is the causal connection between the publication of speech and the harm to other values, which constitutes justification for restricting speech? The test does not determine what values, besides freedom of expression, should be protected (at 290).

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

Barak and Bach JJ. rightly concluded that the Broadcasting Authority had acted *ultra vires* in banning Kahane. In a free democratic society there is room for any idea to be expressed, unless there are decisive reasons to abridge speech. However, decisive reasons do not mean the probability that the expression "will be followed by actions which substantially injure social order, the public peace, or the foundations of democracy". The "probability test" is too blurred to serve as a decisive criterion. Instead the Harm Principle and the Offence Principle are offered as the only qualifications on freedom of expression. To recall, under the Harm Principle it is argued that some types of speech which inflict considerable harm ought, like any other harmful action, to be subject to restriction. And the Offence Principle supplies grounds for abridging expressions when they are intended to inflict psychological offence, which is morally on a par with physical harm, provided that the circumstances are such that the target group cannot avoid being exposed to it.

At this point it is important to dedicate some space to one specific point, made by Justice Bach in his judgment. He said that when the state media broadcasted racist ideas it did not affirm or support them, but it did help them gain legitimacy (p 316). The question of granting legitimacy to a list has been one of the main considerations presented in this thesis to argue that political lists which aim at bringing about the annihilation of the State and lists with the explicit anti-democratic platforms have no place in a democratic parliament. Now, it may be argued that the same reasoning should persuade us to outlaw racist expressions altogether.

In my discussion on Skokie I expressed reservations towards the view which makes racist speech a special case, distinguishing it from other forms of speech, and thus enabling it to be excluded from the entrenched protection usually granted to speech. Instead I have formulated the Offence and the Harm Principles. I still think that in a free democratic society there is room for every opinion to be heard, racist opinions included. If we reflect on Bach's argument, it appears that he did not mean that an idea gains legitimacy just from the fact of being heard. There are many extraordinary, peculiar ideas; being given the chance to compete in the market-place of ideas does not in itself accord them legitimacy.

It may be argued that Bach J. expressed this view because there was only one television network in Israel, controlled by the state; therefore any opinion that appeared on the air automatically received some sort of legitimization. This is a plausible argument. The fact that a person appears in the media several times does make him in a way "part of the place". Indeed, this consideration seems to have played some role in the decision of the Broadcasting Authority to ban Kahane. However, there is not necessarily a clear-cut connection between appearing on television and gaining legitimacy as a result of that exposure. Moreover, Bach J.'s reasoning does not provide grounds to infer from the legitimacy argument - with regard to restricting representation in parliament - to denying freedom of expression. For there is a great difference between appearances on television, and appearances in parliament. I agree with Barak and Bach JJ. that in a democracy we cannot allow the banning of ideas solely on the basis that they are associated with a certain party or a certain person. This is in spite of the fact

that their very appearance on state television may grant them some legitimacy. We can hope that educational efforts to counteract the influence will prove successful. But what democracy can afford in terms of freedom of expression is not necessarily what it can allow in terms of freedom of election. Television is not a democratic instrument. In many democratic countries television networks are controlled by wealthy people who decide what their viewers will see according to various interests, public as well as selfish. In other democracies, such as Israel, the government exerts a strong influence on what is broadcast. In either case, the decision as to what should be shown on the screen is not made in a democratic fashion. On the other hand, parliament is a democratic institution, an essential procedure without which democracy becomes an empty word. It is too much to expect democracy to allow those who aim at its destruction to enter parliament so as to further their aim by democratic means. I would hesitate to say the same about expressing anti-democratic ideas in the media. In the latter case we are dealing with competition in the market of ideas; while in the former we are dealing with the legal possibilities of translating ideas into deeds.

In addition, so far as the legitimacy factor is concerned, there is a difference between the legitimacy that may be accorded a person or a body of persons through appearance on television, and the legitimacy accorded a party through representation in parliament. In the case of a state- controlled television network, it can be said that both types of legitimacy are institutionalized. The first may be called media legitimacy, while the latter may be called governmental legitimacy. They are not one and the same, though one may affect the other. Those who gain media legitimacy may become celebrities; but they do not necessarily gain legitimacy as decision makers. Some of them, surely, have no claim but to be known. They may base their status in society - through the legitimacy accorded to them by the media - on merely sensational, or gossip material. On the other hand, those who enjoy governmental legitimacy or wish to gain it through election to the parliament have a different claim and a different position in society. They are, or they want to become people who will dictate the future of their society. They have authoritative claims. They do not only shape what we will eat for breakfast or how we

will dress next summer; they can determine whether or not we can say what we think, and to what an extent coercion will prevail in society.

The final section of this chapter reflects on the five appeals of Kahane against the Knesset Speaker, Hillel MK. Before discussing these appeals, however, an observation on the military involvement in the fight against Kahanism should be recorded. The official army radio, "Galei Tzahal", decided to devote one day of broadcasting in October 1985 to refuting Kahanism and to fighting against racist trends. The commander of the radio station explained that although it should not be involved in political matters, an exception had to be made in this case. Given the scale of the problem and the fact that the army was the people's army, it could not have ignored the racist ideas to which soldiers were exposed.[25] Colonel Shulamit Ligum, public relations officer for the manpower division of the IDF wrote:

> "We agree with the institutions of the state and with the vast majority of society that thinks that Kahane's messages are racist and they hurt us first because they carry within them the destruction of Israeli society and threaten the existence of the State of Israel".[26]

This statement followed the publication of a special instruction sheet to all officers, issued by the Chief Education Officer in March 1985, concerning Kahane. It said that "it is commonly accepted that at least some of Kahane's activities undermine the stability of society, and thus endanger the entire population". It maintained that Kahane's views contradicted the Zionist tradition and the "spirit of democracy". This was the first time that the IDF decided to take a stand against a Knesset member and to warn against his activities. The fact that the military decided to join the struggle against Kahanism speaks for itself. It shows the extent of the concern felt by the commanders regarding the phenomenon. They witnessed the growing popularity of Kahane's discriminatory

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25. One of the items presented in the broadcast was the result of research showing that 3% of the population wanted Kahane to become Prime-Minister and 26% demanded that he should take part in the leadership in accordance with his power in the Knesset. Still, 51% asserted that "the man and his movement should not take part in anything". Cf Ha'Aretz. 15.10.1985.

26. Quoted by Kahane in complaint about the persecution he suffered (Uncomfortable Question for Comfortable Jews. 1987. p 290).

ideas amongst soldiers and decided to fight this trend. This fact also indicates the repugnance aroused by Kahane and his views. The consensus was that Kahanism had to be excluded from society altogether, and that the importance of this issue outweighed the interest of maintaining a clear distinction between politics and the military. However, it is a matter for concern when the military becomes involved in politics and democracy. There is little doubt that this step has a significant effect on the relationship between parliament and the army, though no decisive conclusion can be reached at this stage regarding the full implications of that involvement.

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

1. The Right to Submit Motions of No-Confidence

In February 1985 the Knesset Speaker refused to accept a motion of no-confidence in the government submitted by Kach. The official excuse was that one member's political factions could not introduce such a motion. It was clear that the claim was specifically tailored against Kahane, who appealed to the Court.[27] Speaking for a unanimous Court,[28] Barak J. considered two separate issues: the definition of the term 'faction', and the issue of justiciability. He opened his judgment by reflecting on the term 'faction' as used in Section 36 of the Knesset Rules of Procedure.[29] Barak J. found nothing to imply that factions of one member were not included within this term. However, the appellee based his case on two decisions of the Knesset House Committee which said that "one-person factions are not allowed to submit no-confidence motions".[30] Barak J.

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

28. Shamgar P. and Goldberg J. concurred without explaining.

29. Section 36 (a) holds that "any faction is allowed to put on the agenda motions of non-confidence".

30. Resolutions from 20.3.1967, and from 30.7.1979.

responded that this argument could not stand because the Knesset Rules of Procedure could be only read to say that one-person factions were allowed to submit such motions, and the Knesset House Committee could not take contrary decisions (at 155). Barak J. proceeded by analyzing the delicate question of justiciability.

As ever, when confronted by such questions, Barak J.'s inclination was to take the balancing approach. He drew attention to the fact that in H.C. 652/1981 the Court tried (*per* Barak J.) to determine "the golden path". The Court advocated the need for striking a judicial balance based on a self-restraint on the part of the judiciary which nevertheless did not enforce an absolute restriction on itself.[31] There the decision was that the Court would not interfere in the internal affairs of the Knesset as long as there was no danger of offending the foundations of the constitutional framework. Applying this criterion to the case in question, the danger was considerable and the Court could not abstain from interfering; for a faction which was denied the power to submit motions of no-confidence was parliamentarily crippled. Moreover, the negation of this right endangered the entire framework of parliamentary life because one of the vital functions of the legislature was to supervise the actions of the executive; preventing one faction from submitting such motions reduced the parliamentary power of controlling the government. Barak J. obviously recognized that the chance of a one-person faction succeeding in submitting no-confidence motions was, indeed, very slim. But, in his opinion, the question here was not tactical; rather it was a matter of principle. Judgments should be formulated on the realistic assumption that parliamentary life was in a continuous state of flux, and thus the possibility that the entire opposition could be comprised of one-person factions should be considered.

This clear analytical judgment seems immune to criticism.[32] If the only grounds for

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

32. For further discussion of this case, see Kanafi. "A Digest of Selected Judgments of the Supreme Court of Israel". 22 Israel L. Rev. 1987. pp 219-224.

the decree is the size of the list in the Knesset, then this decree might lead to the slippery-slope syndrome. It might open the way for major parties initiating further restrictions against political opponents. However, the way in which Barak J. concluded his arguments is of interest. He said:

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

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

2. The Right to Submit Bills - Three Appeals

i) The first appeal

The Knesset Speaker Hillel refused to introduce two of Kahane's proposed laws, asserting that "I will not lend my signature to the contempt of the Knesset through Nuremberg laws". The first bill (the "authority law") suggested that only Jews could be citizens in Israel. Non-Jews would have the status of alien residents. Consequently (among other things) they would not be allowed to vote, to serve in public office, or to reside in Jerusalem. Those who refused to accept this status would have to emigrate from the country voluntarily or non-voluntarily. The second bill (the "separation law") called for the abolition of all governmental programmes involving meetings between Jews and non-Jews; separate beaches would be set up; a non-Jew would not be permitted to reside in a Jewish neighbourhood unless the majority of the Jews in that neighbourhood agreed, and intermarriage and sexual intercourse between Jews and non-

Jews would be banned. The presidium of the Knesset (the Speaker and the five deputy-speakers) said that "a black flag of disgrace rose over these bills in a conspicuous and unequivocal way".[33] Relying on the Knesset Rules of Procedure[34] they argued that their authority empowered them to use their discretion in refusing the introduction of bills which degraded the Knesset. Kahane, on his part, contended that nothing in the Knesset Rules of Procedure empowered the presidium to refuse the submitting of bills because of their content.

The High Court of Justice had to decide on two separate issues: once again there was the question of justiciability, whether or not the Court could intervene in the workings of the Knesset. And it had to consider the amount of discretion open to the Speaker of the Knesset and his deputies. Regarding the first question, there were a fair amount of precedents rendering the petition justiciable.[35] Barak J. (S. Levin and Ben-Dror JJ. concurring) said that when a decision substantially offended the constitutional framework as that one did, the Court had no other choice but to intervene (at 95). As for the question of the presidium's authority, Barak J. argued that every MK had the right to submit bills, and that the Speaker had to only supervise the technical aspects of the procedure. The authority of the presidium did not include the power not to confirm a bill on the grounds of objection to its political and social content. It did not have the right to refuse to register a bill even when that bill contained normative principles that violated the fundamental values of the State. Accordingly, although believing that the petitioner's two bills were an affront to basic principles of the Israeli constitutional system, arousing "horrifying memories" and serving "to damage the democratic character

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

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

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

of the State of Israel", Barak J. concluded that the first commitment of the Court was to strict observance of the Rule of Law, even when this entailed giving expression to abhorrent opinions (at 96). Once the petitioner was elected on the basis of this platform, the presidium was not empowered to prevent the introduction of bills whose sole purpose, in terms of their content, was to put into effect the platform of the list.

This reasoning is in line with the *Neiman* decision. If Kach was allowed to run for elections, and was elected, then we might expect it to try to further its political aims through the democratic procedures which had brought it to the Knesset. Since racism and objections to democratic values were part of its political platform, then it was entitled to use democratic measures to realize them. Any other ruling would have been inconsistent with the previous ruling. The implications were that in the absence of a restrictive legislative statute, the Court had to stay silent in the face of a party whose purpose was to practise discrimination and to destroy democracy. A racist list was entitled to carry its programme all the way, until it succeeds to implement it, unless a statute was introduced to put a stop to it;[36] or, more likely, unless the Court was convinced that there was a "reasonable possibility" of danger, or maybe "probability" or another such criterion to estimate the danger. No consideration was given by the Court to what I have called (following Dworkin) "normative constitutional principles", i.e., requirements of justice or fairness or similar measures of morality according to which the political structure may be interpreted. Thus the Court resorted to the formalistic view, preferring to throw the issue back to the legislature, rather than use its judicial discretion.

The reasons for which I argued that the *Neiman* decision was wrong suggest that this judgment was wrong as well. It is the role of the Court to set judicial standards in

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36. Klein (20 Israel L. Rev. 1985. p 417), who questions the logic of this decision, asks whether it means that the presidium would be able to reject the same bills if they were tabled by a list which did not originally present a policy containing racist and anti-democratic principles, and thus did not have any difficulty in being registered. He concludes: "Such a distinction would not make sense; nevertheless, it is the logical result of the [Court's] reasoning".

accordance with the normative principles on which the State is founded. Here the argument in favour of the anti-discrimination act, that the Arabs have equal rights, is an argument of principle that should be considered by the Court. Hence, there was scope to decide that bills which contradicted the democratic foundations of Israel and its character as a Jewish State (as depicted in the Declaration of Independence), should not have been regarded in the same manner as other bills. These bills opposed the notion of equal respect and concern which were in the foci of both conceptions: the conception of Israel as a liberal-democracy, and the conception of Israel as a Jewish State. Indeed it is difficult to understand why the Court decided to give judicial assistance to a list which was explicitly anti-democratic, and which exploited a twisted conception of Judaism to discriminate against others.

The Knesset reacted to this decision by amending (on November 13, 1985) the Rules of Procedure of the Knesset, empowering the Speaker and his deputies to refuse to submit bills that were, in their opinion, of a racist nature or that negated the existence of the State of Israel as the State of the Jewish people.[37] The latter part of the amendment, based on section 7A of the Basic law: The Knesset (to be discussed later on), was included to assure the political support required to pass the amendment. Kahane decided again to ask the assistance of the Court.

ii) The right to submit bills - second appeal

The appeal was based on the argument that the Court ruling took place before this amendment; therefore the refusal to submit these bills constituted contempt of the Court.[38] A unanimous Court rejected the appeal in a brief decision.[39] The judges

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

38. Under Section 6 of Court Ordinance.

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

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

After this ruling one might think that Kahane would have given up his attempts to submit bills. This, however, was not the case. He introduced five bills before the presidium: two of them were similar to the previous ones. The additional laws prohibited advocating religious conversion; forbade the selling of land to Arabs; and put a veto on meetings between Jewish and non-Jewish youth. The presidium, as expected, refused to place them on the floor for debate. Its decision was based on the recent amendment to the Rules of Procedure of the Knesset (Section 134 [C]). Kahane, for his part, stated that he had copied two of these laws, word for word, from the great Jewish law codifier, Maimonides, and the other from the Jewish National Fund.[40]

iii) The right to submit bills - third appeal

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

Speaking for a unanimous Court of five Justices, Shamgar P. argued that the Rules of Procedure themselves created the right of a Knesset member to initiate laws, and that

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

they established the confines of this right. Only in exceptional circumstances, where there was a substantial defect in an order of the Rules of Procedure, was there scope for judicial scrutiny (at 399-400). This was not the case here, and in any event the Court did not sit as an appeal instance regarding the decisions of the Knesset presidium. Therefore, Kahane's petition was denied.[41]

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

One of the criticisms that was voiced against Barak J. held that there was a discrepancy between his opinions in the first case which considered Kahane's right to introduce laws, and this one. Thus Kretzmer asserted that in H.C. 742/1984 Barak J. had said that the presidium could not refuse bills on the grounds of their contents, while here he based his decision on a Knesset amendment which made distinctions precisely on the basis of content.[42] However, this discrepancy was only an apparent discrepancy, not a real one, because of the introduction of the amendment. It seems that Kretzmer, among others, had high expectations of the future President of the Supreme Court. For my part, I have to admit that I too expected Barak J. to take a broader view of the issue, and not simply to concur with Shamgar P. without commenting on the Knesset's initiative in blocking Kahane's attempt to submit his bills. Barak could have said that

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41. H.C. 669/1985; 24/1986; 131/1986. *Kahane v. the Presidium of the Knesset.*

42. David Kretzmer. "Judicial Review of Knesset Decisions". 8 Tel-Aviv Studies in Law. 1988. p 137.

the Court had to follow the directives of the legislature and still express his reservations about this amendment, if he still had reservations.

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

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

Levin J.'s reasoning served as the basis for denying Kahane's last appeal against the Knesset Speaker, Hillel MK.[43] At first glance the case may seem peculiar: the adding of a sentence when an MK makes the Knesset oath. However, a closer look at the dispute reveals that it was of great significance because it put two contradictory conceptions one against the other: one democratic and the other theocratic. The main motivation was not the de-legitimization of Kahane, though the results of this dispute certainly contributed to that effect. Rather, Hillel seems to have thought that the Knesset should not allow anyone to make a mockery of its own rules, that it should not stay silent when attempts were made to lower the status of the Knesset in the constitutional framework and to introduce qualifications to the keeping of law and order.

3. The Right to Qualify the Knesset Oath

The crux of the case was the Knesset oath which every MK is required to declare when a new Knesset is convened. The oath reads:

> "I declare to be faithful to the State of Israel and to fulfil, in good faith, my mission in the Knesset".[44]

When making his Knesset oath, Kahane added a sentence from the Book of Psalms (chapter 119), saying: "I pledge to keep your [God's] law's always, forever and after". More than two years later, in January 1987, Kahane declared before a court in the United States that "I did not take the Knesset oath as prescribed". He explained that his reading from Psalms was intended to say that his first obligation was to the law of God, not to the laws of the State; that he would obey the laws of the Knesset as long as they did not disobey a higher law.[45] After the Speaker of the Knesset discovered Kahane's

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

44. Section 14 of Basic Law: The Knesset.

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

intention to stipulate his loyalty to the laws of the State only if they did not contradict the Laws of the *Torah*, he asked Kahane to declare his confidence once again, without any qualifications. Hillel warned Kahane that if he would not do that, all his rights as a member of the Knesset would be removed.[46] The Speaker, it can be assumed, regarded Kahane's stipulation as an attempt to de-legitimize law and order in Israel. Kahane appealed to the Court, seeking its assistance to free him from fulfilling this demand.

The Court unanimously rejected the appeal, following the precedent set in H.C. 669/1985. Ben-Porat DP. referred to the concluding part of Kahane's declaration in the American court, where he said:

> "My intention in taking such oath was to modify the Knesset oath to reflect that my first responsibility is to God's law".

In line with Levin J.'s judgment, Ben-Porat DP. said that the Court was designated to consider cases in which it found a need to observe that justice was done. She maintained that only clean-handed and honest people could enter through the gates of this Court.[47] In these circumstances, Kahane should not find any support in the Court, for his conduct was not honest, and was not suitable for a public representative (at 735). Ben-Porat DP. quoted Zilberg J. who said that "Israel is not a theocracy, for it is not religion which administers the life of the citizen, but the law".[48] Therefore, it was an insult to think an MK could put himself beyond the laws of the Knesset and still be considered loyal to his role in parliament, and to the State as such.

Elon and Vinoguard JJ. presented their judgments in a similar fashion. Elon J. referred to the first part of Kahane's confession, where he admitted that "I did not take

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

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

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

the Knesset oath as prescribed". Since Kahane did not mention this comment in his appeal, then the appeal seriously lacked honesty. It had to be denied immediately, without even consideration of the claims that Kahane was making (at 741). For his part, Vinoguard J. maintained that if the appellant wanted to safeguard his rights as an MK, he did not need to seek the assistance of that Court. All he had to do was to make the Knesset oath again, as prescribed by the legislator, and section 16 of the Basic Law: The Knesset (1958) would not be activated against him (at 743). There was no reason for the Court to intervene in the working of the Knesset in this case.

Thus we may read the Court's decision as saying that the taking of an oath provides a standard against which conduct can be measured, and legitimate grounds for ousting if that standard is not met. The State does not have to permit a person to sit in parliament when he has not, in good faith, taken the statutory oath, and has in fact said that he does not feel obliged to be loyal to its laws.[49]

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

Chapter 13

EPILOGUE

In August 1986 the Knesset passed a law which specifies "incitement to racism" as a criminal offence.[1] Anyone who publishes anything with the purpose of inciting to racism is liable to five years imprisonment (144B); and anyone who has racist publications in their possession for distribution is liable to imprisonment of one year (144D). The term 'racism' is defined as "persecution, humiliation, degradation, manifestation of enmity, hostility or violence, or causing strife toward a group of people or segments of the population - because of colour or affiliation with a race or a national-ethnic origin" (144A). Three points have to be made in this connection. Firstly, let us note the absence of the term 'religion' from this amendment.[2] This was the result of pressure being exerted by the religious parties.[3] A specific section (144C [b]) addresses this issue, declaring that publication of a quotation from religious books or the observance of a religious ritual should not be regarded as an offence, providing that it is not carried out with the purpose of bringing about racism. In other words, a violation of the law is committed if religious sources are used to bring about racism, and if evidence is provided that this was the intention in quoting such sources.

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1. Sections 144 (A-E) of Penal Law, Amendment No. 20 (1986).

2. Compare to, *e.g.* France, Canada, and Sweden, where specific laws speak of discrimination on religious grounds. Cf Law (No. 72-546 of 1972) on Combatting Racism in France; section 15(1) of the Canadian Charter of Rights and Freedoms (1982); and Chapter 16, section 8 of the Swedish Criminal Code (1982). See also the International Covenant on Civil and Political Rights of 1966, which provides in Article 20(2) that "any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law".

3. It may be of interest to note that the enactment was approved in a 57 to 22 decision, and that among its supporters was Kahane, against whom the law was aimed. Cf Divrei Haknesset. 4029. 11th Knesset. 5.8.1986.

Secondly, note that the law does not consider discrimination against individual persons. It speaks only of group discrimination.

Finally, we note that the prescription speaks of inciting to racism, not of racist conduct *per se*.[4] Accordingly, acts of racial discrimination are not punishable under this provision. In that sense the language of the law is more restrictive than that used in other countries, such as Sweden.[5] The implications of this amendment are that utterances falling short of incitement may not be punished. That is, if there is no danger here and now, then the advocacy of racism is permissible. This is in accordance with my argument (*number 1*) under the Harm Principle.[6] Freedom of speech may be only abridged when there is likelihood of harm to the target group.[7]

In 1987 the Knesset House Committee unanimously recommended that the plenum deprive Kahane of his franking privileges.[8] On this issue, political barriers did not prevent an agreement. The unanimous decision was reached after it was discovered that Kahane was abusing this privilege by addressing letters to Arab citizens urging them to

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4. Compare, e.g. to the French Law on Combatting Racism which speaks of inciting to racism, but it also speaks of discrimination against individuals.

5. Chapter 16, section 8 of the Swedish Criminal Code (amended in 1982) reads: "Anyone who publicly or otherwise in a declaration or other statement which is disseminated to the public threatens or expresses contempt for an ethnic group or some similar group of persons, with allusion to race, colour, national or ethnic origin or religious creed, shall be sentenced for agitation against ethnic groups by imprisonment of up to two years or, if the crime is petty, to a fine".

6. Cf part I, ch. 7 (A).

7. For further discussion of this amendment see Lederman et al. "Criminalization of Racial Incitement in Israel". 24 Stanford J. of International Law. 1987-8. pp 55-84. The authors express three main concerns with regard to it: first, they argue, the criminal law may not be the proper means for regulating racist behaviour. Second, limiting freedom of expression causes uneasiness, especially where the regulation takes the form of criminal sanctions. Third, some religious groups voiced reservations that the criminalization of racial incitement "might cast shadows on certain religious writings and prayers".

8. Section 11 (d) of the Knesset Members Law, 5711-1951 states that "any letter sent by member of the Knesset from the Knesset building to anywhere in the country is free of charge".

give up their civic rights, or to emigrate. Otherwise, Kahane wrote, they would have to face "the full power of the State of Israel". The then House Committee Chairman, Risser MK (Likud), postulated that franking privileges were not granted to intimidate or degrade citizens of the State, nor to stain the Knesset's name and to transform the mailing facilities into means of disseminating racist propaganda of the lowest kind.[9] In a 34 to 10 decision, the Knesset affirmed the recommendation of the House Committee.

Two years earlier the Basic Law: The Knesset (1958), was amended so as to include section 7A.[10] It is clear that this section was legislated under the influence of the Court rulings in *Yeredor* and *Neiman*. The section reads:

> "A list of candidates shall not participate in Knesset elections if any of the following is expressed or implied in its purposes or deeds:
> 1. Denial of the existence of the State of Israel as the state of the Jewish people;
> 2. Denial of the democratic character of the State;
> 3. Incitement to racism".

Section 7A came into existence after endless discussions between the government coalition parties. All the parties involved, Likud, Labour, and the religious parties, wanted a provision which would answer at least some of their demands. The result, given the various pressures, was bound to be problematic and so it proved. At first glance it appears that the amendment only supplies three specific grounds for disqualification. A closer reading, however, reveals that it opens the door wide to the slippery-slope syndrome. To begin with, it is not clear why the amendment speaks of "purposes or deeds". In my view, the language of the text needs to be more restrictive, speaking of "purposes and deeds". For, as the Court acknowledged in H.C. 742/1984, a list is expected to act according to the platform upon which it was elected. This is obvious, but the framers of the law opened the way to the exclusion of parties solely on the grounds of their expressed intentions. In my opinion, members of a party who merely voice their desires, doing nothing to further them and bring them about, should be subjected to the same restrictions of freedom of expression, postulated by this thesis,

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9. 107 Divrei Haknesset. 1987. pp 1920-1925.

10. Basic Law: The Knesset. Amendment No. 9. 1155 Sefer Hachukim. 1985.

as any other citizen. That is, they should enjoy the freedom to express their views so long as those views do not fall under the Harm and the Offence Principles. If Kahane were not involved in illegal, violent activities; if he only talked about discriminating against others and "emigration for peace" without actually doing something along these lines, then democracy should tolerate him, the way it tolerates someone who takes a stool in Hyde Park, praising Hitler and declaring himself his successor. To disqualify a list, there should have to be proof that the list in question actually incites to racism, or that certain acts were undertaken to bring about the end of Israel either as a Jewish State or as a democracy.

The provision is also problematic because it states that a list may be disqualified if any of the three grounds is "expressed or implied". The focus here lies on the word 'implied'. Intentions can be implied but activities speak for themselves. It is not entirely clear how any one of the three categories can be implied from attempts to bring it about. And if a list can be disqualified just because one of the three issues may be implied from its activities, or even from its purposes, then again the scope for curtailing this fundamental right is too broad, and the slippery slope syndrome becomes tangible. Thus, in fact, this provision brings us back to Witkon J.'s judgment in H.C. 253/1964, where he ruled that an association can be refused registration merely on its implied aims.[11]

On the other hand, what I have said about "incitement to racism" in my discussion on sections 144(A-E) of the Penal Law - which were formulated under the influence of 7A - is obviously applicable here. The language of the amendment is restrictive. It does not exclude racist platforms *per se*. I shall discuss this issue further in the analysis of President Shamgar's judgment in *Neiman II infra*.

Section 7A served as the basis for the disqualification of Kach in the 1988 elections. That year saw a boom in the number of requests to ban lists. Besides the "traditional"

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11. H.C. 253/1964. *Sabri Jeryis v. Haifa District Commissioner* (at 679).

requests regarding Kach and the PLP, there were nineteen (19!) additional requests. There were applications to review two ultra-orthodox lists - Degel Hatorah and Yishy - on the grounds that they negated the democratic character of Israel, and to disqualify two other ultra-orthodox lists: Shas and Agudat Israel. The PLP requested the disqualification of three right wing lists: Tchiya, Zomet, and Moledet. Kach, for its part, appealed to the CEC to disqualify twelve lists, though its representative contended that the party was against resorting to the disqualification measure in principle, and that he would therefore vote against his own proposal.[12] The rest of the Committee members quickly joined the same conclusion. They saw the petition as a nuisance and as a vexing attempt to settle political accounts with the parties that had voted for the disqualification of Kach. In the end, Kach was the only list to be disqualified.

In the next sections the CEC's decision regarding the PLP will be briefly considered. This reflection may be useful to complete the analysis. Then I shall go on to examine the CEC's decision not to confirm Kach and the affirmation of this decision by the High Court of Justice.

A. The Decision of the CEC Regarding the PLP

The request to disqualify the PLP was initiated by two parties: the Likud and the Tchiya. There were two main reasons for the request: one was a statement made by one of the PLP leaders which explicitly said that the necessary condition for real peace was to give up the idea of Israel as the State of the Jewish nation. The other reason was that the PLP identified with the PLO, and that it *de facto* represented this terrorist organization (Miari, the PLP leader, frequently appeared in PLO conferences). Thus, the PLP had to be disqualified in order to prevent the external enemies of Israel from using

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12. Protocol no. 19 of the CEC. 7.10.1988. pp 8-10.

its internal democratic methods to destroy it. The right and duty to defend the State of Israel as the State of the Jewish nation was superior to the right to be elected.[13]

In their appearance before the Committee, the PLP representatives stated that they did not identify with the PLO; rather, they called for negotiation with it. They maintained that the PLP was not against the existence of Israel as the State of the Jewish people, but was for the idea of two nations: one for the Jews, another for the Palestinians. General (reserves) and member of the Knesset Mati Peled explained: "We negotiate with the PLO not because we reject the idea of Israel as a Jewish State. On the contrary: because we accept this value and we want to safeguard it we have an interest in promoting discussion with the Palestinian people". He further asserted that "when I speak of the State of Israel I speak of it as declared in the Declaration of Independence".[14]

The Chairman of the Committee, Goldberg J., postulated the obvious, saying that the burden of proving the necessity for disqualification fell on those who requested it. They had to provide the Committee with conclusive evidence that the requirements for disqualification were fulfilled. Goldberg J. maintained that a list could be banned on the grounds of paragraph 7A (1) of the Basic Law: The Knesset (1958) only if there was proof of real or probable danger to the existence of Israel as a Jewish State. This was in line with Shamgar P.'s test in *Neiman*. The Chairman concluded that in the light of the evidence he did not find reasons to affirm the request.

The voting results reflected the political affiliations of the members. Nineteen members of the right and religious parties voted for the ban, and nineteen members from Labour and the parties of the left voted against it. Justice Goldberg's vote tipped the scales in favour of allowing the PLP to participate in the elections. The Likud party

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13. Protocol no. 18 of the CEC. 6.10.1988. pp 2-13.

14. Ibid. pp 38-39.

decided to use the newly supplemented section [64 (1)] to the Elections Law, which suspended the basis of the *Negbi* decision, to appeal to the Court to overrule the decision.[15] Their appeal was denied in a 3 to 2 decision.[16]

B. The Disqualification of Kach

The Committee members' reasons for disqualifying Kach were similar to those of 1984, so there is no point in repeating them. The significant difference between this case and the 1984 one was the introduction of section 7A into the Basic Law: The Knesset (1958). The voting results were conclusive. Almost all the representatives of the parties were in favour of the decision. Twenty-seven votes were counted in favour of the decision to ban Kach on the grounds of paragraph 7A (2), namely that the list was anti-democratic. Six members voted against the decision, and three members abstained. There was another vote, on whether to outlaw Kach on the grounds of 7A (3), namely that Kach was racist. The voting there was more decisive: twenty-eight members voted in favour of the decision on those grounds; five were against; and three abstained.[17]

Kach appealed to the Supreme Court, this time unsuccessfully.[18] Speaking for the

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15. This section makes it possible to appeal to the Court when a list is confirmed by the CEC. Such an appeal can be presented by the Attorney General, the Chairman of the CEC, or a quarter of the CEC members.

16. E.A. 2/1988. *Ben-Shalom and Others v. the Central Committee for the Elections to the 12th Knesset.*

17. After Kach had been banned by the CEC and was waiting for the decision of the High Court of Justice, Kahane was asked whether he would like to have one hour of public legitimacy. His answer was that he did have legitimacy, that he did not seek love but truth. On the question of whether he would accept any decision of the Court, whatever this might be, he answered positively, saying that he kept the law, "at least in order to get to a position of power. The leftists cannot use the claim of breaching the law against me". (Ronit Vardi. "Kahane is waiting in the corner". Yedioth Ahronoth. 14.10.1988. Pol. Supp. p 5.)

18. E.A. 1/1988. *Neiman and Kach v. Chairman of the Central Committee for the Elections to the 12th Knesset.*

Court, Shamgar P. explained that section 7A should not be viewed as a "technical" instruction, to be applied without interpretative guidelines. Rather, the essence of the case, i.e., limiting the basic right to be elected, carried with it the criterion that the interpretation of the section should be restrictive and narrow, and that it should only be applied in very extreme cases. Section 7A could only be used when the ideological goals in question were dominant characteristics of the list, for which the list existed. The conduct and aims in question had to reflect the essence of the list, and they had to be a natural result of its identity. In addition, the evidence had to be clear, unequivocal and convincing (para 8, at 187-188).

Shamgar P. dismissed the appellant's claim that there was a contradiction between paragraphs (1) and (2) of section 7A, i.e. that the democratic character of the State might be threatened by the desire for Israel to subsist as the State of the Jewish people. Shamgar P. contended that the democratic character of the State was deeply rooted in its foundations from the day of its establishment, as the Declaration of Independence explicitly postulated. He maintained that the existence of Israel as the State of the Jewish people did not negate its democratic character, just as "being French in France does not negate its democratic character" (at 189).

Shamgar P. went on to refute the second claim which held that the term 'racism' referred only to discrimination on biological grounds, and consequently it could not be employed against Kahane.[19] He argued that this claim was unfounded, since Section 144A of the Penal Law (1977) spoke of 'racism', *inter alia*, as "persecution, humiliation, degradation, manifestation of enmity, hostility or violence, or causing strife toward a group of people" on the grounds of their ethnic-national origins. The Court also referred to the International Convention on the Elimination of All Forms of Racial

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19. Kahane repeatedly said that it was impossible to accuse him of racism or to compare him with the "monster of Germany" since he recognized the absolute right of any Arab, through proper Jewish conversion, to become as good Jew as anyone so born; he agreed to the right of any non-Jew, including an Arab, who accepted a status of "alien resident", to remain in the land with full personal rights, and since he never remotely called for the deliberate, premeditated killing of Arabs.

Discrimination (1966), and to laws of various European countries which viewed persecution on the grounds of national affinity as a racist phenomenon.[20]

Finally, with regard to the appellant's claim that Kahane was discriminated against by the CEC, the Court refrained from delving into the philosophical issue of whether or not an anti-democratic, racist party had the right to make such a complaint.[21] The Court once again (as it had done in 1965 and in 1984) drew attention to the problem of giving the power of authorizing lists to a political body. Nevertheless, Shamgar P. maintained that no sufficient evidence had been brought before the Court to convince it that members of the Committee had acted from partisan political interests and not in a *bona fides* manner (at 194).

The main problem with the Court's decision lies in its interpretation of section 7A (3). Again it concerns the use of the term 'incitement'. The Court assumed that racist publications are made with the intention to incite. This may be true, but if the legislator's intention was to provide grounds for the disqualification of lists which propagated racist ideas, why not then simply phrase the provision so as to say "publication of racist utterances" instead of "incitement to racism"? The use of the term 'incitement' indicates a close connection between the publication and the attempt to act in accordance with it, and not that racial vilification *per se* may serve as a basis for disqualification of a list. Shamgar P. seem to have overlooked this point. He said that in formulating the basis of this section, the legislator said nothing regarding the imminence of the danger and the probability of translating the ideas into deeds (at 187). My interpretation of the law suggests that he did. As I have stated, my understanding of the term 'incitement' is in accordance with the Millian Harm Principle[22] and the use of this term in American jurisprudence. Racist incitement has to be distinguished, on general

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20. Penal Laws of Austria (Sections 283 and 302); Bulgaria (Section 196); Denmark (Section 266B); Finland (Chapter 13[5]); France (Section 72-545).

21. Cf part I, ch. 4 (B).

22. Cf part I, ch. 7.

free speech principles, from racial or racist advocacy or preaching. Here we may recall once again that in *Yates v U.S.* the Court reinterpreted the *Dennis* decision in a way similar to Mill's discussion of the corn dealer. That is, it emphasised the distinction between incitement (or instigation) and abstract teaching. The Court argued that "[T]he essential distinction is that those to whom the incitement is addressed must be urged to do something now or in the future, rather than to merely believe in something".[23] Going back to Shamgar's line of reasoning it can be said that **(1)** if incitement to a certain conduct is punishable, then **(2)** it may seem reasonable to punish that same conduct. But **(2)** does not necessarily follow from **(1)**. It is questionable, or at least open to interpretation, whether racist lists as such are to be prohibited under the current provision in law.

Shamgar P. refrained from commenting on the act of legislation which he opposed in *Neiman I.* Like others,[24] in 1984 he would probably have preferred to have his cake and eat it; i.e., that no limitations should be put on freedom of election, and that Kach would simply not pass the barring percentage. But the Israeli electors did not allow this luxury. Kahane entered the Knesset; his discriminatory ideas became wide-spread, and the Israeli system's attempts to curtail their influence proved unsuccessful. Thus, although Shamgar P. was reluctant to resort to legislation in order to solve specific problems, he seems to have recognized that there were no other effective means of stopping Kahanism. Conventional methods of fighting the discriminatory ideas propagated by Kahane and his followers through education, debates, and counter-arguments failed to make a serious impact in the way suggested by Mill and others, i.e., that evil ideas would be defeated by "truer", "just" ones. A number of research surveys showed that young people supported Kahane's ideas,[25] and that the decision to close the

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23. *Yates v. United States* 354 U.S. 298 (1957). See also *Gitlow v. N.Y.* (1925).

24. Cf Gavison. "Twenty Years to Yeredor Ruling". 1986. p 188.

25. The period after the election of Kahane to the Knesset was very good for the research institutes. The media, in its anxiety over Kahanism, closely followed the development of the phenomenon, with the effect that almost every month at least one

school gates against him did not reduce his influence. I have mentioned the "Van-Leer" research from September 1984 which showed that a third of the young people in the sample had anti-democratic attitudes.[26] Other studies showed that 50% of students (aged 13-18) were in favour of curtailing the basic rights of Arabs;[27] 10% of the young were ready to join Jewish terrorist organizations, and 40% supported their activities.[28] Another poll from April 1986 revealed that 23% of the adult population supported the opinions of Kach.[29]

Polls also showed that Kahane was likely to increase his power in the Knesset.[30] The Israeli establishment, which combined its resources to reduce the influence of Kach's racist ideas, faced a reality which was, and remains, conducive to their spreading and attracting more people. The Palestinians continued their terrorist attacks on individual Jews. After each such incident, Kahane made every effort to be invited to the funerals, preaching hatred towards Arabs and calling for acts of retaliation.[31] He himself admitted

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newspaper ordered a poll specifically about the society's reaction to Kahane, his ideas and activities.

26. Cf ch. 11 (B), fn 34 *supra*.

27. The study was conducted by Dr. Binyamini from the Hebrew University. Yedioth Ahronoth. 20.3.1985. A later study from June 1985 showed that 40% of the youth supported Kahane or opinions that Kahane advocated. Cf Ha'Aretz. 6.6.1985. p 1.

28. Ha'aretz. 12.6.1987. p 3. The research was conducted by "Dahaf".

29. Davar. 14.4.1986.

30. Polls that were held between January and June 1985 showed that if elections were to be held, Kach would receive five seats. In August-September 1985 the forecast was eleven (11!) mandates to Kach. In March 1986 the forecast went down to 3 mandates, and it was steady until September 1988, just before the elections to the 12th Knesset took place, when the forecast indicated at least 3 seats to Kach.

31. The months between July and October 1985 were saturated with terrorist incidents in Israel and abroad. In July two teachers were murdered and another citizen killed in Nablus. In August a citizen was murdered in Tul-Karem. In September Israelis were assassinated in Cyprus. In October seven Israeli tourists were killed by an Egyptian soldier in Sinai. After two days there was the Akila-Lauro incident (7.10.1985). Another day passed and a soldier opened fire on Jewish prayers in Tunis, and on October 9 two Israeli sailors were assassinated in Barcelona.

that "each and every victim builds our movement".[32] In addition, the polls conducted so frequently as a result of the obsession with Kahane became an influential factor rather than merely a source of information. People who were afraid of identifying themselves with Kahane found out, through the polls, that many members of society shared their views. Those who implicitly supported Kahanism saw that Kahanist views had established themselves as an integral part in the marketplace of ideas. As a result, more and more people were willing to admit that in their heart of hearts they thought Kahane was right, that his movement was part of society and deserved to be recognized as such, even if some people "in the establishment" did not like it. The process of building Kach up was intensified in December 1987, when the Palestinian uprising broke out. The *Intifada* has deepened the hatred between Arabs and Jews without changing the image of the Arab in the eyes of the Jew.[33] As a result of, and as a reaction to that *Intifada*, feelings of animosity and discrimination against Arabs have been strengthened. At the same time, the Israeli-Jewish population's support for democracy has lessened. More people express disappointment with the democratic regime, seeking a "strong leadership" that will create order without being dependent on elections. About forty-five per cent of the population expresses this view.[34] The majority of the Israeli-Jewish population (54%) think that Jews who are involved in illegal acts against Arabs should be treated more mercifully than Arabs who take the same actions against Jews. That is to say that Kahane and his followers have succeeded in spreading two of their anti-democratic ideas to the extent of convincing the majority of their "truth". These ideas are **(1)** that the law of the State is not binding when it conflicts with principles such as "an eye for an eye"

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32. Yedioth Ahronoth. 2.8.1985. p 11.

33. On the impact of the *Intifada* on Israel and the Palestinian population see my article "The *Intifada*: Causes, Consequences and Future Trends". Small Wars and Insurgencies. (Spring 1991).

34. In the last decade, a poll has been conducted every year to reflect on the extent to which democratic values are rooted in Israeli society. The results have repeatedly showed that some thirty per cent of the Jewish population hold anti-democratic views. The *intifada* led to a significant change, with the effect that in January 1990 45% expressed willingness to have "strong leadership that will not be dependent on elections".

and the concept of revenge,[35] and (2) that there is one law for the Jew and another for the Arab. In addition, it is important to report that 46.4% of the population think that newspapers enjoy too much freedom of expression, and 61.2% maintain that the freedom of speech enjoyed by newspapers threatens the security of the State.[36] These figures must be startling to anyone who holds the values of democracy dear. While Kach, the only blatantly anti-democratic party ever to appear in Israel, was disqualified from presenting itself in future elections, its discriminatory ideas increasingly gained legitimacy among the Jewish population. The banning of Kach paved the way for its authentic successor, Moledet ("Homeland" in Hebrew) whose leader Zeevi[37] is a native-born, ex-General, who propounds ideas similar to those of Kahane only without their religious facade. While Kahane as a leader was an alienated figure in Israeli society, Zeevi is "salt of its earth". He has probably received the support of different segments and classes of the society which elected two members of Moledet to the Knesset.[38] Nevertheless, Zeevi owes Kahane a considerable part of his success in making the idea of an Arab "transfer" from Israel not only a legitimate but also a very popular one.[39] In

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35. It has to be said that there are people from the left who explicitly advocate disobeying the law on conscientious grounds, when the demand is to serve in the occupied territories or in Lebanon. Members of this group, "Yesh Gvul" ("There Is A Limit"), do not resort to violence and certainly do not advocate discrimination. But, like rightist extremists, they argue that there are some values that stand beyond the law. By adhering to this claim, they help to undermine the rule of law and order in Israel. Cf Itzhak Zamir. "Boundaries of Obedience to Law", in Barak. Essays in Honour of Shimon Agranat. 1986. pp 119-128.

36. Dov Goldstein. "Democracy Goes Bankrupt". Maariv. 25.1.1990; and Itzhak Ben-Horin. "Democracy Goes Down: Maariv. 10.2.1990.

37. Interestingly enough, 'zeev' in Hebrew means wolf but his popular nickname is 'Gandhi'.

38. Kahane gained the support of the poor and deprived classes of society, while we can assume that the votes for 'Gandhi' came from people of the middle class. Cf Gershon Shafir and Yoav Peled. "'Thorns in Your Eyes...': Socio-Economic Characterizations of the Voting Sources for Rabbi Kahane". 25 State, Government, and International Relations. 1986. pp 115-129 (in Hebrew).

39. A study conducted by Maariv (13.1.1986) revealed that 42% of the population thought that the Arabs should be induced to leave Israel. Another piece of research from June 1988 showed that 41% of Jewish citizens supported the idea of transfer. The research also indicated that 27% of high school pupils declared their intention to

addition, it is also important to note the rise of the religious parties in the 1988 elections who are officially committed to the idea of a *halacha* state instead of the present democratic style of government. These parties - Shas, Agudat Israel, and Degel Hatorah - currently have 13 representatives in the Knesset.

Thus, although Kach was excluded from the political arena, Kahane's spirit and ideas have gained deep roots in society. The two new laws that were enacted (section 7A of Basic Law: The Knesset (1958), and sections 144 [A-E] of the Penal Law) in order to suppress racist sentiments do not contain a "magic power" to uproot them.[40] These laws can help reduce their prevalence, as well as their offensive effects; these laws can lessen the malignant spread of racial prejudice and reaffirm the democratic commitment of Israeli society to the value of respecting others; but they cannot eradicate racist notions. Such an endeavour requires a great deal of time, probably longer than was required to establish the notions in the first place. Racist ideas will continue to abound in Israel as long as Arabs are conceived as hewers of wood and drawers of water. Their popularity will effectively be reduced if Israel not only continues to resort to educational means at all levels, but also supports them by the implementation of political solutions which change the image, as well as the status, of the Arab. The goal is to convey the notion of equality of being and belonging. This comprehensive notion recognizes that inequality is often a fact which cannot be avoided in many aspects of society, but asserts that there are nevertheless certain sectors of life in which everyone should be treated the same way, so that the basic conditions of a common life are available to all. These are: legal equality, equal right of participation in political life, and equal right to those average material provisions necessary for living together in a decent way. As Dworkin contends,

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emigrate; and 45% thought that Israel was too democratic. (Keinan, Amos. "41%, 45%, 27%". Yedioth Ahronoth. 10.6.1988. Pol. supp. p 17). However, I should say that much depends on the phrasing of the question. Yedioth Ahronoth reported on 16.11.1990 that 20% supported the transfer (Pol. Supp. p 3).

40. Notice that the Penal Law deals with punishing individuals for deeds they have done, whereas section 7A deals with defending democracy by preventing future damage that the list in question might cause to the framework of Israel.

the government should treat all citizens as equals, that is, as entitled to equal concern and respect, and it should treat them equally in the distribution of some resource of opportunity, or should at least work to secure the state of affairs in which all are equal or more nearly equal in that respect. This notion of equality of being and belonging also stresses the greatest possible participation in and sharing of the common life and culture while striving to assure that no one shall determine or define the being of any other person.[41]

This is the desired situation. The present situation in Israel can be described by the distinction between formal citizenship and full citizenship. Citizenship is commonly perceived as an institutional status from within which a person can address governments and other citizens and make claims about human rights.[42] All who possess the status are equal with respect to the rights and duties with which the status is endowed. Israeli-Jews can be said to enjoy full citizenship, i.e., they enjoy equal respect as individuals, and they are entitled to equal treatment by law and in its administration. The situation is different with regard to the Israeli-Palestinians, who today constitute some eighteen per cent of the population.[43] Although they are formally considered to enjoy equal liberties with the Jewish community, in practice they do not share and enjoy the same rights and burdens. They are considered as "second rate" citizens, and have to live with limitations of their freedoms, limitations which the Jewish majority does not suffer.[44] For example,

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41. Dworkin. "What Rights Do We Have?", in Taking Rights Seriously. 1977. pp 272-273; and "Liberalism". op.cit. 1985. p 190. See also John H. Schaar. "Equality of Opportunity, and Beyond", in J.R. Pennock et al (eds.) Equality. 1967. pp 228-249; and "Equality of Opportunity and Beyond", in A. de-Crespigny et al (eds.) Contemporary Political Theory. 1970. pp 151-152.

42. Cf Herman van Gunsteren. "Admission to Citizenship". 98 Ethics. 1988. pp 731-741. See also T.H. Marshall's classical essay Citizenship and Social Class. 1950.

43. The vast majority of Arabs in Israel define themselves as Palestinians.

44. A research project in July 1987 showed that 50% of the Jewish population were not willing to regard the Israeli-Arabs as equal citizens (Eli Tavor. "Israel is too democratic". Yedioth Ahronoth. 20.3.1988. p 17). Another piece of research from June 1989 revealed that 45% of the Israeli-Arabs did not feel "at home" in Israel; 69% said that discrimination against Arabs occurred frequently. Only 35% of the Israeli-Jews

Israeli-Palestinians pay more income tax than Jews since they do not enjoy discounts given to those who serve in the army. Arabs find it more difficult than Jews to get licences for building extensions to their flats, or for building new ones. They also find it difficult to buy, or even to rent a flat in a Jewish neighbourhood. Furthermore, the budgets of Arab municipalities bear no comparison to those of Jewish municipalities. There are not enough classes in Arab towns and villages. Arabs who graduate find it difficult to get jobs in government offices.[45] In addition, being an Arab in many cases "guarantees" that a worker's salary will be lower than that of a Jew doing the same work. And, of course, there is the Palestinian population of the West Bank and the Gaza Strip who do not enjoy citizens' rights at all. Professor Yochanan Peres made the following comment about the relationships between Israelis and the population of the occupied territories:

> "We have a growing and developing zone which is absolutely anti-democratic, in which anti-democratic norms prevail. This zone is the occupied territories. There a person is told which books he is allowed to read and what trees are permitted to be grown in his garden. Not only that the population has no representation; no democratic characterizations exist at all. Some of us think that it is possible to live for a long time in a situation of Doctor Jackel in Israel, and Mr. Heid in the territories. The reality, however, is that Dr. Jackel becomes Mr. Heid although he does not want to."[46]

I wanted to close with this citation but the murder of Kahane on November 6, 1990 compelled me to change my plans and to conclude by making a personal note. It was early on Tuesday morning when the phone rang, notifying me of the murder of Kahane in New York. I was deeply shocked and disturbed. No matter what one may think about the man, his ideas and his political platform, I was disgusted by the way his life came to an end. I also felt deep sorrow, sorrow for the murder and for the likely consequences which were (and still are) to follow. One may resort to the cliche that "he who lives by the sword dies by the sword". But there have been many political

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thought the same.

45. Cf Zeev Sheef, and Ehud Yaari. Intifada. 1990. pp 215-217 (in Hebrew).

46. Itzhak Ben-Horin. "Democracy Goes Down". Maariv. 10.2.1990.

assassinations of peaceful leaders who did not live by the sword. Abraham Lincoln and Martin Luther King are two of the names that come to mind. Kahane's murder adds to the list of political assassinations that have taken place in the United States. Some have argued that it is somewhat better that Kahane was killed where his life began and not in Israel. Since the day of Israel's independence there have been no assassinations of political leaders in Israel and one hopes that this murder will not open a new phase in the political discourse between extremist movements and individuals. However, I am quite certain that the last word has not been said by Kahane's followers. Vengeance they promised and vengeance there was.[47] The question of how much blood will satisfy them is still unanswered. The political future of Kach is a further question that is yet to be answered. We know that Kahane intended to change Kach's political platform in a way which would allow him to run for office. His followers can probably find a legal way of overcoming section 7A. But the fact that Kahane was a "lone wolf" proves at this stage to be a two-edged sword. Kahane was Kach. Kach was Kahane. Kach would never been active in the political arena without the dominating figure of Kahane. After his death there is a seemingly unfillable vacuum in the Kach leadership. There are speculations that Kahane's son may become the leader. This would enable the term "Kahanism" to be maintained until a charismatic figure emerges and takes the leadership. It is too early to say whether this speculation is valid and whether Kach can retain its position in the Knesset. One thing is assured: racist ideas do prevail in Israeli society. Kahane deserves much of the credit (or rather, discredit) for making them as popular and as outspoken as they are today.

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47. A gunman shot dead an old Palestinian couple immediately after the news about Kahane's assassination was conveyed to his family and friends.

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