

## *The Israeli response to extremism: the parliamentary arena*

FROM THE START of the twentieth century, the political party became a pivotal institution in politics. The decline of the *elite party* model and the ascendance of the *mass party* model changed the structure of political procedure in many European countries; it afforded representation to groups previously deprived of political power and promoted the democratisation processes of many systems of contemporary governance.<sup>1</sup> However, along with the expansion of the mass party model, another type of political party took root. The effect on European politics of this new type, and especially on the processes of democratisation, turned out to be significantly less constructive. Political scientists called this a *devotee party*<sup>2</sup> and its main features included mobilisation around extremist ideologies, chiefly communism and fascism, and the unconditional commitment of party members to the partisan apparatus and often to the leader as well. By means of devotee parties, fascist and communist ideologies succeeded in changing human history in the first half of the twentieth century, often leading countries far astray from any democratic framework. In consequence, Western countries in the post-Second World War era became somewhat apprehensive of the party institution and tended to look upon these extremist parties as a substantial threat to democracy.<sup>3</sup> A review of the German Basic Law drafted in the wake of the war confirms this apprehensiveness over the potential threat of radical parties and the democracy's efforts to defend itself in the face of this threat. Section 21 of the Basic Law (Political Parties) states:

- 1 The political parties shall participate in the forming of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for the sources and use of their funds and for their assets.
- 2 Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence

of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

3 Details shall be regulated by federal laws.<sup>4</sup>

This section of the constitution does not leave much room for doubt that the German democracy chose to keep a close guard on political parties emerging in post-war Germany. Its intention was to prevent the recurrence or reappearance of anti-democratic parties that had abused the tools provided by the democratic system in order to undermine those very same foundations.

However, not only were constitutional restrictions imposed on parties – structural restraints were also used. The electoral system designed at the end of Second World War clearly indicates a preference for the principle of stability over that of representation. The likelihood of small parties being able to penetrate the German Parliament is minimal, due to the required 5 per cent minimum threshold vote of all the valid ballots cast, or, alternatively, a mandatory victory in at least three of the electorate's regions. A retrospective glance demonstrates that the combination of these stringent structural and constitutional barriers has helped Germany forestall representation of extremist parties at the federal Parliament level over the course of years and, in turn, has also helped stabilise the democratic system.

### **The socio-political underpinnings of the response to extremism in Israel**

Both prior to the establishment of the State of Israel and in the years following, the party institution constituted a pivotal factor in the political processes involved in the nation's construction. However, the role of the Israeli political party went far beyond the boundaries of Parliament. Political parties took part in policy-making and security, in school and youth movement education, religion and culture, agriculture and settlement, health and welfare,<sup>5</sup> and, in this fashion, in effect held sway over state institutions on the one hand and social institutions on the other. The significant power held by Israeli parties gave the State the name *parteienstaat* (party state).<sup>6</sup>

Unlike the countries of Western Europe, which were then searching for ways to defend themselves from certain types of political party, the situation in Israel in the 1950s and at the beginning of the 1960s was completely different. Despite the depth of the ideological cleavages dividing the various political factions, all parties, except *Maki* (the Communist Party) and the ultra-orthodox parties, were wholeheartedly committed to the Zionist and 'statist' ideal. Furthermore, the predominance of the *Mapai* (acronym in Hebrew for 'Party of the Workers of the Land of Israel', which eventually became the Labour Party) in

the first decades of the State's existence, which had control of Parliament as well as over the majority of state institutions, did not leave much room for any kind of genuine challenge by the opposition parties.

However, the Israeli political system was designed in a fashion that in fact emphasised the principle of representation, thus encouraging small parties to take part in elections to the Knesset. After the founding of the State, Israel promptly adopted the 'proportional' representation electoral system and placed the qualifying threshold of entrance to the Knesset (consisting of 120 members) at only 1 per cent of all the valid ballots.<sup>7</sup> As a result, no less than twelve parties gained representation in the first Knesset, and since then, throughout Israeli parliamentary history, the number of parties in the House of Legislature has never dropped below ten, and in certain instances even reached a high of fifteen.<sup>8</sup> The emergent electoral structure in Israel became one of the central issues on the State's agenda for a long while and in fact underwent a number of reforms. True, the fear of extremist parties was not the immediate concern guiding these reforms, yet some already saw in the emerging electoral conditions a potentially destabilising factor with regard to the democratic polity in Israel.<sup>9</sup>

In the view put forward by Doron and Maor, despite the low threshold required for becoming a member of the Knesset, there were during Israel's early years other barriers restricting admittance to Parliament which had a role in fortifying the polity's stability. These 'barriers of de-legitimation' prevented those parties remaining outside the *Mapai*-galvanised consensus from gaining access to positions of power. Prime Minister Ben-Gurion took advantage of his (and his party's) substantial power in order to dictate the political groundrules. He determined that all parties were entitled to take part in elections to the Knesset; however, not all of them were eligible to be partners in a coalition government. In this fashion, Ben-Gurion spearheaded a process of de-legitimation which prevented the rightist *Herut* movement led by Menachem Begin, on the one hand, and the Communist Party, on the other, from becoming coalition partners for many years.<sup>10</sup> Of course, this was an unofficial rule, which relied basically on Ben-Gurion's powerful role as the first prime minister of Israel; indeed, with the growing institutionalisation of the Israeli political system – a factor that steadily made inroads into the hegemony of the Labour Movement elite – the ability of that same movement to install such political barriers became increasingly undermined.<sup>11</sup> Subsequently, in 1965, and only seventeen years after its declaration of independence, the State of Israel was obliged to confront the question of depriving a political party of the right to run for office. The case in point was the rejection of the 'Socialist List's' candidacy for the sixth Knesset elections.

*Disqualifying the 'Socialist List': predominance of the 'militant route'*

The 'Socialist List', principally a left-wing Arab list, displayed a programme based on the premisses of its predecessor *Al-Ard*, which was dismantled according to Section 84 of the Defence Regulations (Emergency), 1945. Although it did not constitute a substantial threat to Israel's security, the 'Socialist List's' programme conveyed a message contesting the Jewish character of the State. This fact provided the chair of the Central Elections Committee, Justice Landau, with cause for disqualifying the party from running for Parliament, on the grounds that it seemed inappropriate for a democracy to provide its adversaries with the means to destroy it.<sup>12</sup> The significance of disqualification at that time was embedded in the fact that Israel had in effect adopted a severe 'militant' model which substantially impaired its democratic foundations. This argument is supported by two considerations.

First, in its decision to disqualify the 'Socialist List', Israel was not acting in the interests of democracy but rather against it: the 'Socialist List's' programme did not subscribe to the undermining of the country's democratic foundations. On the contrary, it petitioned against the Jewish character of the State, although its chances of being elected to parliament – not to speak of acquiring any political thrust – were altogether minimal. In spite of these extenuating circumstances, the State chose to block it from taking part in the elections and by this move essentially thwarted a basic democratic liberty.

The second factor is that the State at that time possessed neither the constitutional nor the legislative measures for the disqualification of political parties. Therefore, the Central Elections Committee (CEC) decision was based on an extension of the Elections Law and the Knesset Basic Law and mainly on the ground that these laws held an implied provision according to which an association already found to be illegal could be forbidden to stand for elections to the Knesset.

The CEC resolution on this matter was endorsed by the Supreme Court of Justice which, by a majority of two justices to one, weighed in favour of ratifying the List's disqualification. The grounds for this ruling, according to most of the justices, was that the character of the 'Socialist List' stood in stark contrast to election goals. An interesting point is that Justice Shimon Agranat, president of the Supreme Court at the time, ruled that the list contested the very existence of the State. The State's existence, its continuity and future, in his view, were closely linked to its Jewish character, thus implying that a list whose programme embraced a disputation of the State's *Jewish* character should not be allowed to stand for Parliament.<sup>13</sup>

Surprisingly, it was in fact during the Supreme Court debate on the disqualification of the 'Socialist List' that Justice Zusman chose to define the

State of Israel as a 'defending democracy', thus drawing a comparison with Germany's post-Second World War efforts at safeguarding itself from any party whose programme was in defiance of the democratic nature of the government.<sup>14</sup> This issue brings into sharper relief the problematic nature of the non-liberal character of the Israeli democracy and is an indication of how difficult it is to bridge between the ethno-nationalist and the democratic principles on which the polity was founded. That said, and despite the 'militant' step taken by Israel with regard to the 'Socialist List', a point meriting attention is that in the wake of this resolution, and even after the State in fact did possess the legislative means to disqualify parties challenging the Jewish character of the State, not one list has ever been disqualified on that basis.<sup>15</sup>

**Attitudes to far-right parties:  
between the 'militant' and the 'immunised' route**

Between the years 1965 and 1981, the State of Israel endured events that would leave very strong impressions and deep scars. This chain of events began with Israel's victory in the Six-Day War, carried on with the trauma of the *Yom Kippur* War and its ensuing social crises and eventually culminated in the 1977 parliamentary upset, when, for the first time in Israeli history, the *Likud* (an alliance of right-wing parties with the *Herut* at its forefront) was successful in superseding the Labour Party as the party in control of government. During the course of those years, the need for party disqualification did not arise. However, the profound changes that Israeli society went through prepared the ground for political extremism. In the long run, this led the country into confrontation with a racist and anti-democratic party that declared its intentions to essentially change the State's character by abolishing democracy, deporting its Arab citizens and establishing a Jewish theocracy. The advocate of such a programme was *Kach*, led by Rabbi Meir Kahane.

*Kach and Israeli politics – the early years*

Meir Kahane, leader of the militant Jewish Defence League in the United States, emigrated to Israel in September of 1971 and brought with him a new rhetoric and violent political style previously unknown to Israeli society or political life. Upon his arrival in Israel he declared that it was not his intention to become involved in Israeli politics, but rather that he would like to devote his time to education. However, one month later, a change in the rabbi's plans became evident.<sup>16</sup> Kahane rented an office in Jerusalem and initiated the formalities necessary to allow the Jewish Defence League to operate in Israel.<sup>17</sup>

At that time, the Israeli political establishment did not consider Kahane as a threat of any kind. In fact, the opposite was true: Kahane came over as a

warrior liberated from the 'Jewish ghetto mentality' image of Jews in the Diaspora. The violent actions for which he and his followers were noted in the US were carried out in the defence of and for the guardianship of Jews, as he vehemently declared. Most of the appreciation for his deeds came from Israeli right-wing and religious circles. However, once he began an attempt to enter the political system, neither rightist nor religious parties wanted to integrate him with one of the existing frameworks. This forced him to concentrate on launching an independent organisation much like the one he had led in the United States; indeed, the first period of Kahane's efforts in Israel appeared to be a direct sequel to the labours of the Jewish Defence League. At first, the rabbi-leader and his supporters mounted demonstrations against the Soviet government and began to wage war against Christian proselytism and the 'Black Hebrews' of Dimona. However, in August 1972, Kahane redirected the goals of his organisation to concentrate on the group which would eventually become the principal object of his 'attentions' – the Arabs. That same year, he launched an operation entitled 'The Arabs Don't Belong Here, They Must Go'. The goal of this operation was to encourage Arab emigration in exchange for property remuneration. According to Kahane, the deportation of Arabs was the only feasible course towards a genuine resolution for the future of the Jewish nation. In his view, two nations could not occupy the same land.<sup>18</sup>

In December 1972, his fledgling party decided to participate in the elections for the eighth Knesset. The timing was fairly on target, because Jewish ethnocentrism in Israel had surfaced sufficiently for *Kach* to chalk up 12,811 votes which constituted 0.81 per cent of all the valid ballots cast. However, it was not enough merely to cross the threshold. Kahane and membership in the Knesset were still separated by a small percentage.<sup>19</sup> In the 1977 elections, Kahane once again registered his List, but this time results were significantly weaker. He thereupon preferred to dedicate his time to writing and publishing his ideas and devising grandiose schemes on the subject of the salvation of Israel, while at the same time his followers took sporadic action against the Arabs.

The State of Israel, which reacted to Kahane's extra-parliamentary activities in those years with a variety of measures (elaborated on in chapter 2), ignored the fact that, concurrent with these repeated acts of provocation, a persistent political apparatus remained in operation and continued to run in every subsequent election year for the Knesset. A main reason for the country's lack of concern was perhaps due to the low percentage of support for Kahane in the ninth Knesset elections in 1977. In addition, Kahane was not successfully integrated with Israeli society, nor was he able to mobilise an adequate supporting public, and so, while he was assigned the image of a violent and dangerous political activist in terms of his extra-parliamentary exploits, it was still believed that he had no real chance of being elected to the Knesset.

The turning-point indicating the crucial change in the Israeli establishment's attitude toward *Kach* came during May 1981, following the party's publication of a full-page advertisement in the widely circulated daily paper *Maariv*. Beneath the caption 'She is a Daughter of Israel.<sup>20</sup> Perhaps Your Sister, Your Daughter or Granddaughter', the ad's text spelled out:

But are you sure that she will marry a Jew? Are you wondering? What a question! Well then, you are invited at nightfall to visit places such as Tiberias or Acre, Beit She'an or Nazareth Ilit, Haifa, Be'er Sheva or Dimona, Tel-Aviv or Jaffa and also the holy city of Jerusalem. You are invited to watch the Arabs roaming about the streets of Jewish cities in pursuit of the Daughters of Israel. Their pockets are overflowing with money because they do not serve in the IDF and while we are busy defending the homeland, they are intent upon making great profits. We have heard the wail of lamentation emitted from the hearts of Jewish parents whose daughters have fallen victim to Arab seductive wives. They live together with the Arabs, they marry with the Arabs. Was it for this reason that the Jews of Morocco emigrated to Israel, as well as the Jews of Algiers, Libya, Tunisia, Egypt, Yemen, Iraq, Kurdistan, Syria and all the other ethnicities? Was it in order to assimilate and be defiled in, of all places, the holy land, that these good, warm Jews left the Diaspora? And who feels the pain of this abomination? That same prime minister and those same leaders of the country who cry out to the very heavens against assimilation abroad, yet fear to raise their voices against the plague of Jewish-Arab relations here in Israel, because these are our 'goyim' (gentiles) and in a 'democratic' country, it is forbidden to object to assimilation and uncleanness . . . We, the Rabbi Meir Kahane and the Kach Movement, will avenge the honour of the Daughters of Israel. With the help of G-d, upon our election to Knesset, we will propose a law that will put an end to the disgrace of our Nation and the breaking of the hearts of thousands of families in Israel: Draft law: 1. In order to put an end to the plague of assimilation spreading throughout the Land, we propose that the Ministry of Education initiate compulsory courses in schools all over the country regarding the distinctiveness of the People of Israel and forbidding the abomination of assimilation and communion with goyim. 2. In order to deter those that come to entice the Daughters of Israel to consort and assimilate, we propose an unconditional and mandatory prison sentence of five years with no chance of commuting neither [*sic*] the verdict nor [*sic*] the term of imprisonment for every Arab who has sexual relations with a Jewish woman. 3. In order to reduce the possibility of commingling and assimilation, we propose that all members of the United Nation Forces who are not filling a direct order be restricted to their bases and be ordered by their commanders not to engage in any type of relations with the Jewish population. The same edict goes for the non-Jewish foreign workers residing in Israel . . . In order to prevent a perpetuation of the deterioration, we demand to put an end to all the Ministry of Education's plans encouraging social relations between non-Jews and Jews and to conduct studies only in separate schools for Jews and Arabs. And this is only the beginning. For, it is evident that the genuine solution is the Kach programme to compel the Arabs of

the Land of Israel to emigrate to their countries. Is there any other list running for Knesset which possesses the strength and courage to declare such words? If you wish for Jewish representatives in Knesset to propose such a bill – vote Kach. This time – Rabbi Kahane.<sup>21</sup>

This notice, which expressed severe racism, blatant anti-democratic views and populist rhetoric, had an immediate public effect. Political parties, ‘civil society’ organisations and individual citizens appealed to the Central Elections Committee demanding that the *Kach* list be disqualified from taking part in the elections to the tenth Knesset scheduled to take place that same year.

In the wake of the surge of appeals which flooded his office, the chairman of the CEC, Justice Dr Moshe Etzioni, decided to raise before the Committee the question of *Kach*’s qualification to take part in the elections. Dr Etzioni’s statements regarding this issue revealed open discomfort because there was no law giving the Committee the authority to disqualify a political party from running in the elections on the basis of its programme. Instead, he therefore had to rely on the precedent of the disqualification of the ‘Socialist List’, as well as the fact that *Kach* ideology stood in stark contradiction to the norms established by the State of Israel’s Proclamation of Independence, stipulating full and equal social and political rights for all its citizens without difference of religion, race or gender, and, finally, on Israel’s commitment to remain loyal to the principles of the United Nations Charter.<sup>22</sup>

Although shocked at how the guiding principles of the *Kach* Movement indeed violated the State of Israel’s Proclamation of Independence, Justice Etzioni was appalled, it seems, by the ‘Nazi’ style of *Kach* propaganda, as he himself described it. In his view, the advertisement implied that the Kach list wished to introduce the Nüremberg Laws to the State of Israel. Etzioni, who was well aware of the difficulty of disqualifying a political party in the absence of the explicit stipulations of a law, was required to use, according to Justice Vitkon’s precedent verdict which stated:

No free system of government will give a hand to, nor acknowledge, a movement seeking to undermine this same polity, for it happened not only once in the chronicles of certain countries headed by functioning democratic systems of governance, that various fascist and totalitarian movements rose against them – while using those same rights of freedom of speech, press and assembly granted by the state – in order to engage in destructive action under the patronage of these rights. Those who have witnessed such a thing in the days of the Weimar Republic will never forget the lesson.<sup>23</sup>

With these words, Etzioni tried to find historical as well as ethical justification for banning *Kach* from competing in the elections. However, in view of the constitutional implications resulting from a ruling which disqualifies a party from taking part in the elections in the absence of legislative substantiation, the

chairman of the CEC allowed *Kach* representatives enough time to prepare their defence, including submitting a plea to the Supreme Court of Justice. Members of *Kach*, who reported to the Committee in compliance with Etzioni's summons, were very surprised to hear that banning their list from the elections to Knesset had been proposed. CEC session protocols reveal that representatives of the *Kach* List had not realised that the danger of disqualification hovered over their movement and accordingly were unprepared for debate on this subject. Further evidence of *Kach*'s complacency in this regard can be found in the fact that Kahane himself did not attend the hearing, and in fact did not send any legal representative on his behalf.

The hearing itself focused principally on the notice published by the party in the newspapers and its election platform. Among the profusion of ideas presented there was a paragraph that advocated acts of terrorism against Arabs. The thrust of the *Kach* representative's efforts to defend their party platform was based on the argument that contrary to the *Al-Ard* group, which campaigned under the banner of the destruction of the State of Israel, their own party strove to sustain, defend and build up the Jewish land of Israel. As had Justice Etzioni, the *Kach* defence turned to the Proclamation of Independence in order to find justification for their ideology. The party advisor specifically referred to the section in the Proclamation establishing that the State of Israel was to be founded on the fundamentals of liberty, justice and peace, in reference to the visions of the Prophets of Israel. The *Kach* interpretation of the prophecies was that they emphasised the need to prevent assimilation and to build up a state which in essence was Jewish. However, the *Kach*'s members did not rest their case only on the Proclamation of Independence. They also turned to Israeli matrimonial law which, because it is anchored in *Halakhic* law, does not in effect acknowledge the legality of marriages between Jews and non-Jews, and that made the law a principle conforming to *Kach* tenets. Party representatives summed up their arguments by saying that if their list was to be labelled as racist then they were glad to accept this. However, in their view, the meaning of racism here did not indicate the Nüremberg Laws or South Africa's apartheid but rather guaranteed the Jewish essence as well as the protection of the Jewish people and the Jewish State.<sup>24</sup>

Ultimately, and mostly because the lack of a legal reference, members of the CEC chose to avoid disqualifying *Kach*, and with a majority of 14 to 5, the proposal was dropped from the agenda.<sup>25</sup> Even efforts by journalist Moshe Negbi to prevent *Kach* from taking part in the elections by appealing to the Supreme Court of Justice were unsuccessful. The Court refrained from conducting a hearing on the details of this affair on the technical ground that only a list which had been disqualified from running in the elections had the right to appeal against its disqualification, whereas, in this case, the *Kach* List had been

approved and therefore there was no basis for Court intervention in this matter.<sup>26</sup>

The State's moderate attitude toward the *Kach* Movement at that time was somewhat surprising due to the considerable importance attributed by the authorities to this party in comparison to its handling of the 'Socialist List'. However, a liberal attitude and adherence to the law were not the only factors which prompted members of the CEC to block Etzioni's attempt to disqualify *Kach*. Careful scrutiny of the protocols of the hearings leading to this decision shows that several CEC members in fact wrestled with issues such as the freedom of expression, the legal jurisdiction of the CEC, and even with the tension between the principle of representation and the democracy's stability. However, other members, mostly those from the religious and ultra-orthodox lists, rose up against Etzioni's disqualification proposal. This was because they identified, in varying degrees, with elements of Kahane's programme, particularly regarding the issue of assimilation, and feared that the identification of *Kach* publications as 'racist' would malign the ideas accepted by major parts of their electorate.

The *Mafdal's* representative on the Committee, Tzvi Bernstein, illustrated the stand taken by the religious lists in the most distinct fashion:

The *Kach* publication speaks of what they have to offer if they will be in the Knesset, if the law is passed by a Knesset majority . . . So, everything is kosher and nothing can be claimed against them and it does not go against the constitution. If the law is not passed then I haven't heard that if people want to pass a law through legal channels, they will be disqualified . . . The main motif is the issue of assimilation – mixed marriages. Although *Kach* is in competition with the *Mafdal*, we agree that the State should take steps to prevent assimilation . . . It is legitimate to want the expulsion of Arabs or the attempt to motivate them to emigrate from this country but [it must be done] in a way that does not worsen the relations between the two nations in this country.<sup>27</sup>

Despite what these words indicate, it is highly likely that the decision allowing *Kach* to compete in the elections was based on reasons which do not all come from the desire to empower the democratic foundations of the State of Israel. Still, consequences prove that, to a significant degree, the State decided on a very restrained response with regard to this party and avoided 'militant' steps which might have led to the erosion of democratic principles.

However, as elections to the eleventh Knesset in 1984 approached, the situation changed completely. Kahane, who utterly failed in the tenth Knesset elections and won only 5,128 votes, which constituted 0.3 per cent of the valid votes, was much better prepared in 1984 and public empathy with him was on the rise. For the first time in the history of this country, a genuine possibility existed that a racist party would penetrate the halls of the House of Legislatures.

Justice Gabriel Bach, chairman of the eleventh Knesset CEC, whose desk was flooded with requests for the disqualification of *Kach* and other parties as well – especially the ‘Progressive List for Peace’, a nationalist Arab party headed by Mohammed Miari – knew, like his predecessors, that a sensitive and highly explosive state of affairs awaited him. Already in his opening statements before the CEC, he spoke of the great difficulties encountered by the democratic polity in seeking to limit the rights of its citizens in elections to political office. Furthermore, the problem was aggravated many times over when there was no clear legal provision in regard to the procedure for disqualification of political parties.

Nevertheless, and despite the constitutional and moral complexities with which he had to contend, Bach explained to the members of the CEC that, in view of the gravity of the evidence found against Kahane and his movement, it seemed, even in the absence of a specific law detailing the proscription of certain parties from taking part in the elections, that the essence of Israeli law and the fact that there were substantial restrictions on various forms of assembly in fact indicated that Israeli democracy did not tolerate undemocratic organisations whether they are extra-parliamentary or political parties.<sup>28</sup>

Quite unlike the session that was conducted in the CEC plenum for the tenth Knesset, the meeting that took place this time was more comprehensive and profound. This was to a large degree due to the fact that during the years since the previous session, a great deal of evidence had been gathered regarding *Kach*’s programme and its leader’s declarations. Kahane’s own provocative appearance in front of members of the Committee did not help him gain their support. Kahane reiterated his racist teachings and his views challenging the democratic nature of the State, and in this fashion provoked the anger of many of those present. As in the previous circumstances, in this session, too, it appeared that the position of members of the Committee toward Kahane was based ultimately on their political persuasion. While representatives of left-wing parties sharply rebuked *Kach* and urged its immediate disqualification, the right-wing and *Haredi* factions tried to moderate the tone of the stance taken against Rabbi Kahane.

One of the more compelling issues raised during the session addressed the very heart and core of the notion of the ‘Jewish ethnic democracy’. Contrary to liberal democracies that take care to sidestep issues pertaining to the private domain, such as matrimonial matters, the State of Israel not only defines how a Jew is to marry and to whom, it actually exhorts against intermarriage between Jews and non-Jews. The strong words of persuasion delivered by many CEC members about how assimilation is forbidden and dangerous were successful in dampening, to a certain extent, the earlier perceptions of the ‘racist’

character of *Kach's* political programme. Committee member Yehuda Elinson, of the *Mafdal*, expressed his sentiments most explicitly:

I would not have believed that during my lifetime in the State of Israel there would be talk in favour of assimilation. The Israeli people spend billions against assimilation all over the world and here we are presented with an advertisement, what does it say here, that a Jew should not marry an Arab. What are we talking about here? So this is called fascist . . . Is this racism? The Jewish Nation loses on a daily basis hundreds and thousands of the people of Israel because of assimilation. Do you want this also here in Israel? What are you rising up against? Is this fascism? Is this Nazism?<sup>29</sup>

These words are once again evidence of the underlying values contributed by the non-liberal democracy to the growth of ethnocentrism and racism, and also of how difficult it is to confront these phenomena in the context of a country whose liberal components are weaker than its nationalist components.

The appearance of Rabbi Kahane himself was the provocative event that forestalled discussion of the key principles of the affinity between the State of Israel and the ways of the Jewish people and brought the debate back to the future of his party. Kahane did not spare the members of the Committee and, for the most part, candidly displayed for them the principles of his political doctrine. First, he declared that if elected to the Knesset, he would act quickly to pass a law the goal of which would be to deprive the Arabs of their Israeli citizenship and then embark upon the immediate expulsion of those who would resist giving up their citizenship, all of this in order to preserve the Jewish character of the State.<sup>30</sup> Second, with regard to the accusations made against his racist propaganda, Kahane attempted to mobilise the support of the traditional and religious members of the Committee and therefore argued that his position on the issue was rooted in the Jewish scriptures, and the Jewish scriptures alone, which stressed the importance of maintaining the unique essence of the Jewish people.<sup>31</sup>

Several members of the Committee presented tough and trying deliberations regarding the question of whether it was fitting to deny Kahane the opportunity to express his views in the Knesset – particularly providing for the situation in which they were not at all sure if they were authorised to prevent his candidacy. Yet it appears that Kahane's appearance before the CEC had a sobering effect on most of the members. Thus, in contrast to the position taken by members of the CEC for the tenth Knesset, which established that the *Kach* List should not be disqualified from running in the elections, members of the CEC for the eleventh Knesset agreed to the disqualification by a majority of 18 to 10, with 7 abstentions.<sup>32</sup>

The letter written by the CEC chairman to Moshe Neiman, the *Kach* representative, included the following:

I hereby inform you that in the session which took place on 17.6.1984, the Central Committee for the Elections to the 11th Knesset refused, by a clear majority, to approve your list, the Kach list, on the grounds that this list espouses racist and anti-democratic principles which stand in contradiction to the Proclamation of the Independence of the State of Israel, openly supports acts of terror, attempts to stir up hatred and hostility among different sectors of the population in Israel, intends to cause offence to the feelings and religious values of a part of the country's citizens, and whose goals include the negation of the core foundation of the democratic system of governance in Israel. Implementation of the principles of this list would constitute a threat both to the democratic polity in Israel and is also liable to give cause to the breakdown of public order.<sup>33</sup>

However, the hard evidence associated with *Kach's* activities which had served as the occasion for the CEC to take the 'militant' step of denying a political party its right to participate in the elections was not enough to persuade the justices of the Supreme Court. There, in response to *Kach's* appeal against its disqualification, a unanimous majority determined that the list must be allowed to take part in the elections. Four out of the five justices who sat in court called attention to the fact that the principal impediment in disqualifying *Kach* was the lack of a formal law authorising such a measure. The fifth justice, today's president of the Supreme Court, Aharon Barak – who was inclined to agree with the idea that the Court is qualified to adopt a creative approach under the special circumstances of the absence of a formal legislative provision – declared, in the same vein as his colleagues, that in such a decision it is preferable that there be a formal legislative basis.<sup>34</sup>

It can therefore be concluded that while the CEC opted for a 'militant' line of action, that is, it preferred to uphold Israeli democracy even if that meant executing measures whose legality was questionable, the Supreme Court favoured, in this case, the fundamental liberties imparted by the democracy to its citizens despite the fact that this move essentially condoned the parliamentary representation of a man who advocated racist and anti-democratic notions. Notwithstanding, the justices intimated to legislators that if there had been a law defining the limits of the tolerance of the Israeli democracy towards those intent on causing it harm, the Supreme Court would have seriously considered restricting Kahane's party from running in the elections.

And so, following an exceptionally provocative propaganda campaign, Meir Kahane was able to realise his dream and become a member of the Israeli Parliament. The number of voters casting their ballot for his party reached 25,907, thus granting him 1.2 per cent of the valid votes and enabling him to easily cross the minimum threshold of representation of the Israeli political system. Upon hearing the results of the elections, Kahane announced that he would not conform with the Knesset rules and that he would use his parliamentary immunity and the public platform now made available to him in order to champion

the tenets of his party, his highest priority being the deportation of the Arabs from Israel.

The day after the elections, Kahane and his supporters launched their victory rally. They marched to the Western Wall in Jerusalem, purposely parading through the crowded market of the Moslem Quarter in the Old City and celebrating their triumph in the violent fashion typical of their mentor and rabbi. Brutally, they made their way through market alleys, upending vegetable stands, striking passing pedestrians and promising local residents that the programme intended to bring about their final removal from the holy land had indeed begun.<sup>35</sup>

*Kahane in the Knesset*

Much like the CEC and the Supreme Court, the Knesset was at a loss for democratic tools which would help it deal with the new and not exactly routine Member of Parliament. Therefore, the Israeli response to Kahane the MP in his first years inside the Knesset halls could be classified in terms of democratic criteria as 'militant', improvised and problematic, to say the least. Although elected according to the rules of law and he was now the representative of a political list in the legislature, the Knesset and other governmental authorities executed a number of actions against Kahane which had significantly limited his basic rights as a citizen and member of Knesset.

In the first stage, and as a consequence of the provocative actions instigated by Kahane in the Arab towns he visited shortly after his election, the Knesset, on the grounds of paragraph 9(a) of the Immunity of Knesset Members Act, had decided to restrict Kahane's immunity and prevent him from accessing certain places, primarily areas of Arab inhabitation. The decision handed down against Kahane won a majority both in the House Committee and in the House Plenum. In this case, unlike the examples presented later, Kahane did not appear before the Supreme Court of Justice and therefore the resolutions passed by the Knesset institutions did not undergo judicial review. However, apart from the restriction on Kahane's freedom of movement, results show that the decision was also problematic regarding the goals it had set for itself.

The Israeli Police, who were ordered to clamp down on Kahane's movements, prevented him from delivering a talk on 10 March 1985 at the University of Bar Ilan, an institution associated with the ideological school of religious Zionists. The explanation was that such a lecture would be very provocative and incite the Arab students. However, two weeks earlier, Kahane had been given the opportunity to lecture at the Hebrew University in Jerusalem where the percentage of Arabs was considerably higher.<sup>36</sup> In general, the *modus operandi* preferred by Kahane was one of soapbox sermonising and, as far as he was concerned, giving up his provocative excursions to Arab towns was no great loss

as long as he was able to speak in the peripheral Jewish towns where he enjoyed notable popularity. In fact, since first achieving parliamentary office and then later having his immunity restrained, the number of demonstrations organized by *Kach* had actually begun to grow and, by the same token, so did support for the leader and his party. In many cases, these rallies served as fertile ground for severe acts of incitement against Arabs and assisted in the sanctioning of terror against them. In a lecture given in Haifa, a city with a large resident Arab population, Kahane stated: 'No one can comprehend the soul of these animals [the Arabs], these cockroaches. We must slash their throats or throw them out.'<sup>37</sup> In consequence, we can easily classify the lifting of Kahane's immunity as a step corresponding to the 'militant' route of action. Yet, contrary to what would be expected from a decision to employ this course of action, and despite the State's forceful response to Kahane, its results were minor. For, this measure had little effect on his patterns of activity, on the incitement and violence aimed at the Arabs and on the swelling support for him and his views among the Israeli public.

Another illustration of the considerable restriction placed on Kahane's liberties was the Israeli Broadcast Authority's decision to censor his speeches and activities. The IBA 'News Forum' resolution, which was later authorised by the Authority's managing committee,<sup>38</sup> determined that television broadcasts relating to Kahane would be limited to news items alone. The motive behind this decision was the inclination of the IBA – which at the time was a monopolistic state-run body encompassing all of the Israeli electronic media – to prevent Kahane from expressing his views and taking advantage of state-run media in order to recruit support for his views. The News Forum's closing statement established that the

screen and the microphone are not supposed to become a type of confrontation between the radical fringes. The new political scene imposes a great responsibility upon us . . . [We believe] that everything should be caught on film and recorded; [but] not everything must go on the air. The standards of what ought to be broadcast should meet the criteria of the factual items printed on the front page of a newspaper.<sup>39</sup>

This decision carried the potential to cause fatal harm to Kahane's objectives. He, like other politicians, communicated a great deal about his activities to the public via the media. Kahane realised the implications of this threat to his public campaigning and so put this 'improvised' ruling of the IBA's managing committee to the test of a Supreme Court appeal, and won. In this case, Justice Aharon Barak adopted an approach which safeguarded the freedom of expression and which essentially tried to stretch the boundaries of this freedom of expression as far as possible while restricting them only when there was evidence of the risk of genuine and grave harm to the public's safety. In his words:

'The petitioners' views and opinions make me shudder with repulsion, but I insist on their right to be made public. This does not imply an endorsement of their opinions. In my view, they are anathema, but my ruling does give license to the petitioners' right to make these anathemas be heard provided they do not pose a threat to the public order.'<sup>40</sup> Justice Gabriel Bach took a more rigid position regarding the criteria for establishing freedom of expression, but at the same time agreed with his colleague that the IBA had exceeded its authority when it boycotted Kahane.<sup>41</sup>

In the months that followed, Kahane continued to test the boundaries of Israeli democracy and in doing so actually contributed to their demarcation. In practice, this meant a consistent and recurring process in which Kahane would first present a provocation to the Knesset institutions, to which the Knesset would in turn respond with 'improvised' measures. As a result, Kahane would appeal to the Court's legal judgment, and the Court would then evaluate the Knesset's authority to limit his liberties.

As he had pledged upon being elected to Knesset, Kahane attempted to exploit the advantages of his new position to the full in order to promote the interests of his party. That he became one of the most active Members of Parliament, as indicated by, *inter alia*, the number of speeches he delivered at the podium, his proposals for no-confidence motions against the government and the bills he sponsored which were loyal to his party's programme. As a parliamentary member Kahane's first truly significant clash with the Knesset's speaker came when the latter refused to allow him to submit no-confidence motions against the government on the grounds that Knesset members representing single-member factions were not at liberty to do so.

In the verdict handed down by the Supreme Court, Kahane's petition against the Knesset's speaker's decision was accepted in full. The court's ruling attests to the considerable complications involved in the type of procedure proposed by the speaker. Speaker Shlomo Hillel of the Labour Party did not attempt to remove Kahane's rights as an MP on the basis of his actions or views. Instead, he ventured to establish a general ruling regarding all single-member factions, because at that time Kahane represented such a faction.<sup>42</sup> Apart from the fact that Knesset Regulations did not provide a basis for this kind of decision, had the ruling in fact been accepted, it would have turned out to be a problematic step in terms of democratic principles. The denial to smaller factions of the right to submit no-confidence motions essentially harms the legislature's ability to contain the executive's authority. As with the other measures mentioned above, this step also is evidence of the panic felt by those in Israel's political system over Kahane's election. It also shows the Knesset's speaker's readiness to violate basic democratic principles in the attempt to suppress Kahane's activities.

Another step taken by the speaker to restrain Kahane was the decision to prevent him from placing individually sponsored bills on the Knesset's speaker's

desk. This decision was a direct outcome of Kahane's persistent efforts to advance bills which aimed at stripping Arab Israelis of their citizenship and promoting racial segregation between Jews and Arabs. In effect, the parliamentary speaker and his deputies were working to spare the Israeli Knesset from the great embarrassment which could follow a publicised parliamentary discussion on proposed laws of this type. The absence of clear-cut regulations defining the measures necessary to prevent an MP from proposing certain laws left the House Presidium with a solitary option, i.e. to appeal to an extended interpretation of the authorities vested in the speaker by Knesset Regulations.

Once again, the Supreme Court of Justice was faced with a democracy struggling to resist the most blatant form of racism and anti-democratic sentiment the country had known until then. However, the democracy attempted to protect itself with methods which greatly overstepped limitations that were specified and anchored in the law. Therefore, in this case as well, Kahane once again benefited from the Supreme Court's decree, which rebuked the extended authority that the Knesset Presidium had appropriated to itself. This position in effect proved to be a sequel to the 1984 verdict which allowed Kach to take part in the eleventh Knesset elections. The Supreme Court ruling stipulated that as long as a political party was deemed legal and qualified to run in the elections, then, by the same token by which it gained representation, it was thereby vested with the rights of a parliamentary faction, including the right to propose laws in accordance with its party platform. In the same way as in the question of the participation of a political party of this type, so too regarding its parliamentary activity, the Court ceded responsibility to the legislature. It established that in order to contend with parties in the judicial realm the Court should be able to rely on a legal framework appertaining to this issue. The legislature, which at this point was well aware of the potency of the Kahanist phenomenon and its implications, did not delay in adopting the Court's recommendation to modify Knesset Regulations in order to support the speaker in his struggle with Rabbi Kahane, MP. Accordingly, a large majority passed Article 134 of the Knesset's Regulations which stated that the Knesset's Presidium<sup>43</sup> was authorised to rescind bills that included incitement to racism or an undermining of the democratic and Jewish principles of the country.<sup>44</sup>

Kahane opposed the Knesset's ruling and once again filed an appeal for assistance. He petitioned the Court to instruct the House Presidium to allow him to proceed with his law proposals. His argument this time was basically technical and focused on the fact that the new amendment to Knesset Regulations was introduced *after* the Supreme Court's earlier verdict requiring the speaker to allow Kahane to submit his bills to the House. However, in this particular event, the Court declined Kahane's plea and determined that in its earlier verdict it had not instructed the Knesset's speaker to allow Kahane's bills to reach the floor of the House. Rather it had cited the instance of the existing law and the fact that

it was unfeasible to infer from that law the authority to prevent Kahane's proposals.<sup>45</sup>

This Supreme Court judgment reflected the change the judicial system had undergone in relation to Kahane's pleas as soon as it was vested with the lawful authority to limit his actions. Kahane did not acknowledge that change and continued to pursue Court assistance. In his third and final petition to the Supreme Court, he argued that the restrictions imposed on his actions as a Member of Parliament had to be anchored in the law and not only in Knesset Regulations. The president of the Supreme Court ruled in his verdict that the Regulations and the procedures were the very same rules that gave rise to a Knesset member's right to initiate new laws, and they also defined the boundaries of that right. The Court, as the words of the ruling disclose, can intervene only in exceptional cases where an essential flaw has been uncovered in the Regulations' provision – and those were not the present circumstances.<sup>46</sup>

In conclusion, despite the fact that its intention was to essentially restrict Kahane's freedom of expression and freedom of action, the modification of the Knesset's Regulations nevertheless prevented the general imposition of arbitrary restrictions on a Knesset member. Kahane's right to submit bills was not indiscriminately restricted but rather was placed under the review of the Knesset's Presidium, a body that largely represents the consensus of the legislature. Furthermore, Kahane still retained the right of appeal to the Supreme Court of Justice, to request that it determine the degree of lawfulness of each and every one of the Knesset Presidium's decisions. Therefore, the renunciation of 'improvised barriers' raised in response to a specific incident, and the eventual adoption of 'regulatory barriers' or 'legal barriers' which would help devise a framework and define clear-cut criteria regarding the response to extremist phenomena – all this can be seen as an important step in the State of Israel's movement in the direction of a more 'immunised' route.

#### *The amendment to the Basic Law: The Knesset*

A few months prior to the modification of the Knesset's Regulations, the House passed an even more fundamental resolution. This was the amendment to the Basic Law – The Knesset, where the aim was to prevent a recurrence of the Kahanist phenomenon in the Israeli Parliament. Kahane's conduct as a parliamentarian was a warning to Knesset members that the use of various 'improvised barriers' provided at most an isolated and ineffective treatment for a much more profound problem. Therefore, MPs were required to address the Supreme Court's distinct bidding to create a legal infrastructure that would provide a basis for Israeli judicial procedure with regard to racist and anti-democratic phenomena.

The Knesset chose two principal legislative courses in order to deal with the

issue. The first, at the criminal level, was the amendment to the Penal Code dealing with incitement and its extension to include incitement to racism.<sup>47</sup> The second and more fundamental course was the amendment to the Basic Law – The Knesset, restricting political parties from running for office.

The decision to institute a legal basis for the struggle against extremist parties was not an easy one for the majority of MPs, some of them Holocaust survivors. They found it difficult to deal with Kahane's actions – and with the notion that burgeoning within the Israeli legislature was a phenomenon that many tended to link to the darkest of political events of the twentieth century. The soul-searching shared by many members of the Israeli Parliament prior to the consolidation of the bill can be detected in the following statement, delivered by Moshe Nissim, the minister of justice:

We introduce this law symbolically, educationally, and not in order to solve a problem. The solid foundations of the struggle against such phenomena can be first of all found in education; through education, it is necessary to fight against any phenomena alien to the Israeli heritage. But, gentlemen, there is also a constitutional foundation. The importance of the constitutional foundation is basic to the democratic system of governance. When we prepared the bill called Basic Law – The Knesset (amendment no. 12), we found ourselves accountable and took upon ourselves a weighty responsibility knowing that this kind of law is designed to deny people their basic right to submit a list to Knesset in order to take part in democratic elections and to be elected, and after all this is one of the mainstays of human rights in Israel. However, we nevertheless take upon ourselves the responsibility, knowingly and fully aware, because, despite the gravity of this law, its necessity prevails over its gravity. And as I have already noted, with open eyes we hold the view that there is cause for a number of constitutional dictates in the law books which will determine who will not be allowed to enter the House of Legislature in Israel.<sup>48</sup>

Nissim's statement articulates an orientation which strives to strike a balance between the liberties guaranteed by the democracy on one hand and the safety of its existence on the other. His words reflect a holistic approach in the struggle against extremism and feature, for the first time, an Israeli parliamentary effort to choose a novel and more measured and balanced route in the war against extremism.

The law draft – as it was passed by the Knesset – also reflects the same standpoint: 'A list of candidates will not take part in the elections to the Knesset if their goals or actions include, explicitly or implicitly, one of the following: 1. The negation of the existence of the State of Israel as the state of the Jewish People; 2. The negation of the democratic character of the State; 3. Incitement to racism.'<sup>49</sup> One of the prominent indications attesting to the restraint exercised in the legal amendment is its full subjection to judicial review. The justice minister's speech, prior to the passing of the law, sought to placate those who feared

that the legal feasibility of disqualifying political parties would be exploited in the interest of certain elements. He therefore notified the Knesset that there were no grounds whatsoever to the fear of general arbitrariness, or the permeation of CEC decisions by partisan sentiment or politics on account of the provision included in the law enabling an immediate appeal to the Supreme Court concerning the Committee's decisions, and which in effect empowered the Supreme Court to overturn the disqualification procedure instated by the CEC.<sup>50</sup>

However, despite the overall cautiousness and the numerous checks and balances found in the legal wording, after the law's approval by the Knesset, a number of fundamental arguments were raised against it on different levels. The first criticism, stemming from an ethical perspective, was put forward by Peled, stating that the law clearly reflects the ethnic character of the Israeli democracy. Indeed, the phrasing of the law indicates that while attempting to defend democracy from its adversaries, at the same time it perpetuates the secondary status of the Arab minority in Israel and in fact entails restrictions of their basic liberties (article 1).<sup>51</sup> Further reproach was issued by Barzilai, who argued that, in procedural terms, the broad scope for manoeuvre accorded to the CEC and the Supreme Court does not necessarily imply the empowerment or 'immunisation' of the democracy in Israel. In his opinion, the sweeping phrasing of article 7a enables, in principle, the disqualification of almost all political parties in Israel, and that decision can rest on each of the three provisions made by the law.<sup>52</sup> Similar reservations were raised by Cohen-Almagor as well as Bendor, who stated that it was inappropriate that the first legal instance of the disqualification of political parties be conducted by the CEC, which is itself a political body and could turn out to be an arena for partisan attacks by one party on another.<sup>53</sup>

Although these reservations are understandable, even thought-provoking, a retrospective glance at the exercise of the law since its inauguration indicates that the gloomy forecasts about the amendment have, at least for the time being, been unfounded. First, and despite the fact that it appears to have indeed confirmed the ethnic character of the democracy in Israel, article 1 of the law, concerning goals or actions involving the negation of the existence of Israel as the State of the Jewish People – which could be applied to all of the Arab parties in Israel – has not once been enforced. Furthermore, the appeal submitted by the *Likud* faction against the CEC's ruling authorising the 'Progressive List for Peace' to take part in the twelfth elections to the Knesset in 1988 was rejected out of hand by the Court.

Second, actions taken by the State of Israel against the 'Socialist List' and *Kach* prior to the acceptance of the law's amendment were distinguished by 'militant'-type responses which embodied a very liberal conception of the 'rule of law', sufficient in fact, often to undermine it. Since 1985, a legal barrier has existed in Israel, reflecting a fairly broad consensus among the parliamentary

factions, which defines the qualifications for the participation of a political party in an election campaign and also provides for continuous judicial accountability. Indeed, what goes for Arab parties goes also for Jewish extremist parties for, since the passing of the law, the rulings of the CEC as well as the Supreme Court have featured balanced and in-depth deliberations with a preference for democratic principles instead of entrenching parliament against extremist parties. The four elections to the Knesset that took place after the publication of article 1 demonstrate this more balanced approach while only the parties for which the law was designed, i.e. *Kach* and its derivative, *Kahane Hai* ('Kahane is Alive') were disqualified from competing, in accordance with the legislative directive. The conclusion to be drawn, therefore, is that despite the justified reservations voiced by those critical of the law, the events described in what follows show that the State of Israel and its various institutions have tended to make prudent use of this law, exercising restraint and deliberation. In effect, from the moment the law was passed, the State's tendency towards impromptu improvisation in its response to political parties turned into a thing of the past, another fact attesting to its process of 'immunisation'.

As a footnote to the discussion regarding article 7a of the Basic Law – The Knesset, it should be mentioned that during the debate preceding the legislation of the Basic Law amendment, a number of Knesset members offered to impose restrictions on extremist factions, not by dint of legal barriers but rather by structural changes in the parliamentary elections' process, and also by raising the threshold of representation that stood at a low 1 per cent of the sum of the valid votes. However, this issue was quickly struck from the agenda due to the fact that in the multi-party system typifying the Knesset the smaller factions, which possessed significant leverage because the coalition would often count on their support for its stability, adamantly refused any substantial change in the threshold percentage.<sup>54</sup>

#### *Elections to the twelfth Knesset: 1988*

Rabbi Kahane, who before the ratification of the amendment submitted provocative bills and gave troubling speeches before the Knesset and the public, did not change his tune even after the amendment's approval. Among the racist and belligerent law proposals that he placed on the Knesset's desk after the summer of 1985, note should be made of the 'three tolls bill' (1985) which rejected the civil status of Israeli Arabs and supported the forcible expulsion of those not willing to concede their civil rights.<sup>55</sup> Also noteworthy is the death penalty for terrorists' bill (1987) which called for an immediate death sentence, without judicial deliberation, for every person who *de facto* murders, or attempts to murder, or is implicated in an act of murder or in an attempt to murder a resident of the State of Israel, or a Jew even if he or she is not a resident.<sup>56</sup>

The persistent *Kach* propaganda, the Party's proposed bills, Kahane's declarations to the media and from the Knesset's podium and the fact that public opinion polls at the time confirmed that the party was going to augment its parliamentary power by a few hundred per cent – according to some estimates, close to five seats in the Knesset<sup>57</sup> – all of these in effect ruined *Kach's* chances of persuading the twelfth Knesset's CEC that it would be possible to usher in Kahane's party past the new-founded legislative filtering mechanism.

The party's efforts to bring before the CEC compelling arguments against the numerous appeals for its disqualification were futile. In reply to the allegation that it was undermining the State of Israel's democratic character, Kahane stated that 'democracy' was a broad concept and subject to many interpretations, and therefore his party must be regarded as a political body which in fact fully endorsed the notion of democracy. However, in this case what he was speaking of was a Judaistic democracy with a structural preference for members of that religion over those of other religions. In support of this claim, *Kach's* attorney provided several illustrations from other democratic countries which restricted citizenship rights for immigrants. Similar arguments were raised by the party with regard to their imputed racism. As *Kach* saw it, its position with regard to the Arab population was based on both a security imperative and a central Jewish *halakhic* premiss. *Kach* attempted to prove that its justifications for discriminating against another ethnic group had absolutely nothing in common with racist attitudes.<sup>58</sup>

The debate conducted by the CEC this time was significantly different from all its precedents. The only members who remained loyal to *Kach* at this stage were representatives of the two religious factions, *Mafdal* and *Morasha*, whereas other right-wing parties such as *Likud* and *Tehiyah* either joined the proponents of disqualification or refrained from voting. Ironically, the position of the CEC chairman, Justice Eliezer Goldberg, merits additional attention. The gist of Goldberg's remarks reveals a genuine trepidation regarding the harm to basic democratic liberties on account of the unwarranted use of article 7a.

Goldberg repeatedly warned CEC members of the extreme cautiousness they must exercise before voting in favour of the disqualification of a list. He urged members to avoid an inclusive interpretation of the authority imparted to them by power of law and to consider each case independently, based on judicial principles and free from political interests. Furthermore, the CEC chair placed the onus of proof of the party's ineligibility on the petitioners for its disqualification, and added that any doubts that may arise must work in favour of the list under consideration.<sup>59</sup> Goldberg's final request from Committee members was to include in their list of deliberations an additional, probabilistic test. He asked them to consider the question of whether there was in fact a genuine and immediate or foreseen danger to the democracy if the party were to be allowed to run for office.<sup>60</sup>

Despite the numerous reservations listed by the CEC chair, the results of the CEC members' vote reflected the attitude towards *Kach* of the majority of the represented parliamentary factions. Twenty-seven members voted in favour of the party's disqualification on the grounds that it undermined the basic principles of democracy, 6 members objected and 3 abstained. With regard to its status as a racist party, 28 supported its disqualification, 5 objected and 3 abstained.<sup>61</sup>

The legal dictate authorising the CEC to bar a party from running made it possible this time for the Supreme Court of Justice to reject *Kach's* petition objecting to its disqualification. The Court recognised the CEC's authority to disqualify *Kach*; it justified the grounds leading to its disqualification and in fact argued that there was no evidence that the CEC's decision was influenced by non-germane deliberations.<sup>62</sup>

The commentary issued by the former president of the Supreme Court of Justice, Meir Shamgar, with regard to article 7a during the discussion of *Kach's* petition is evidence of the degree to which this amendment to the Knesset's Basic Law contributed to the 'immunising' of the democracy in Israel. In his words:

Article 7a – whose exclusive interest is the goals and actions and their features – is not therefore a 'technical' provision, *prima facie*, enforced under given factual circumstances in absence of an interpretative guiding line. The essence of the issue at hand, that is, the constriction of a constitutional basic right, carries with it by the same token, both the standard according to which the interpretation of the law would be duly precise, narrow and limited and, in view of it, the provisions of article 7a will not be exercised except for in the most extreme cases. This interpretative approach does not in any way contradict that which is written in the written law; it is a corollary of our understanding of the original legislative objective, which did not intend to diminish from the protection of liberties but rather protect them in the face of a genuine danger.<sup>63</sup>

Elsewhere, he explained:

In devising the fundamentals of article 7a, the legislator did not include the stipulation of the existence of a clear and immediate danger or the probabilistic eventuality of the danger as a result of the actions of this list, or any other similar test examining the connection of the condemned act to the possibility of its realisation. These are therefore the guiding principles for the purpose of implementing the aforementioned article 7a:

- The goals or actions of a list of candidates, including one of the fundamentals introduced in paragraphs (1), (2) or (3) [of the law].
- The alleged goal amounts to a central and dominant goal and is not an insignificant and marginal subject. It is a definitive expression of the list's nature; the same applies to any of the modifications upon the matter, when speaking

of an action as distinct from a goal. Here, too, the alleged action must amount to a prominent, serious and dominant expression of the identity and essence of the list.

- The list operates on behalf of the realisation of its goals and in order to convert them from ideas into actions.
- Taking part in the elections is a means towards the realisation of the goal or the intensification of the action.
- The negative elements – as specified in paragraphs (1), (2) and (3) [of the law] are manifested in a grave and extreme fashion.

The evidence for the existence of all the above must be compelling, lucid and unequivocal.

Throughout the verification, whose principal stipulations are listed above, one must always remember that the safeguarding of liberties is preferred to their restriction.<sup>64</sup>

Shamgar's conclusions indicate that in the commentary to the new article of the law provided by the Court, the scales were clearly tipped in favour of the freedom of political action over its restriction. The stringent criteria for enforcing the article established by Justice Shamgar confirm the view that the State of Israel elected to adopt the most effective tools in its struggle against extremist parties, as long as these accorded with the most rigid framework of democratic acceptability. Shamgar's position also conveys, once again, sentiments that strive to offset criticism of the law, particularly regarding the concern that the CEC might make decisions on the basis of political considerations. The fact that each ruling is subject to rigorous judicial review, grounded in clear-cut criteria of an explicitly democratic nature, forestalls the argument warning against the politicisation of the disqualification process.

Evidence of the robustness of the disqualification process as prescribed in article 7a and the attrition of the political option of capitalising on the instruments provided by this article, can be found in the fact that, with the passage of years, there has been a significant reduction in the number of parties seeking to exploit the article for 'vindictive' purposes. Immediately following its passage into law, and prior to the twelfth elections to the Knesset, seventeen requests were submitted in pursuance of the disqualification of seven parties, in addition to Kach's appeal to disqualify twelve parties. In contrast, prior to the fifteenth Knesset elections, only one request for disqualification was submitted – against the *Balad*, a party headed by Azmi Bishara, and this request as well was rejected outright.<sup>65</sup> Further support for the assessment that the legislation of article 7a of the Basic Law – The Knesset did not harm the strength of the Israeli democracy, but rather reinforced it, can be found in a comparison of the case of *Kach* with that of *Moledet*.

*Moledet*, a far-right party, was conceived shortly before the elections to the twelfth Knesset by Major-General (res.) Rechav'am Ze'evi, a revered war hero,

who in the years following his retirement from the military became concerned about the national security of Israel and principally the demographic balance between the Israelis and the Palestinians.<sup>66</sup> Ze'evi considered the demographic scales to be tipped in favour of the Palestinians to be a peacetime threat to the existence of the State of Israel. In time he came to the conclusion that the only solution to this danger was to effect a policy of 'transfer' against the Palestinians living in Judea, Samaria and Gaza. Therefore, on 28 June 1988, he announced the founding of a new party to carry the flag of the 'transfer' of the Arabs living in the territories.<sup>67</sup> As anticipated, the appearance of *Moledet* on the political arena elicited extreme attitudes and spurred numerous bodies to appeal to the CEC seeking to disqualify this new party from running in the elections on the grounds that the notion of 'transfer' was essentially racist and anti-democratic. The representative of the *Ratz* faction, Yossi Sarid, MP, was emphatic when pronouncing the same judgement for *Moledet* as for *Kach*, arguing that, in effect, one was speaking of identical lists.<sup>68</sup>

Early in the debate before the CEC, it was obvious that Ze'evi would do everything in his power in order to distance his party's tenets from the standard conditions for disqualification according to article 7a. Indeed, while putting forward his arguments, the leader of *Moledet* succeeded in instilling doubt among members of the Committee regarding the justifications for the disqualification of his party. He did this by employing two key strategies. First, he diffused the acrimony of the idea of the 'transfer'. As Ze'evi put it, his party was speaking of a humane principle of dividing two nations in order to bring an end to the Israeli–Arab conflict. Furthermore, the use of the word 'transfer' does not imply expulsion but rather an agreement among countries concerning the exchange of populations.<sup>69</sup> Second, Ze'evi succeeded in creating an affinity between the *Moledet* ideology and the consensual origins of Zionist thought, and principally the history of the Labour Movement. He argued that in the early period of the State's establishment, the 'transfer' idea was accepted by leaders of the Labour Movement and was in fact carried out by them.<sup>70</sup>

Whether Ze'evi was successful in persuading members of the CEC by the weight of his arguments, or whether the members took upon themselves the full brunt of the responsibility dictated by article 7a, it appeared that their position regarding the *Moledet* List was different from their attitude to *Kach*. Haim Ramon, Labour Party representative, argued that, despite his objection in principle to Ze'evi's standpoint, there was no legal justification to enforce the disqualification procedure against him. Hillel Ashkenazi, left-wing *Mapam* member, went a step further as he expounded:

It appears to me that in the balance of interests between the necessity of maintaining a democratic polity where everybody is equal before the law on one hand

and the need to defend the country from incitement to racism and causing harm to the democracy on the other, one must always consider the circumstances in which use should be made of the radical enforcement of the legal – albeit, in fact, undemocratic – process of disqualifying the list. I must say that I have not been convinced that the requests calling for the disqualification of the Tsomet, Tehiya [two other rightist factions whose bids for disqualification were discussed at the same hearings] and now Moledet lists justify the radical enforcement of disqualification, as I have already mentioned. For, in my opinion, and despite the evidence . . . the Kach verdict does not apply to these movements as well as in this particular case of the Moledet movement. I reiterate; employing the process of disqualification has to be carried out with the utmost precaution and with minimal legal interpretation.<sup>71</sup>

The position of the clear majority of CEC members regarding *Moledet*, and the overwhelming decision not to disqualify its list, signify an internalisation of the desired balance between the defence of democracy and the protection of its boundaries – and, by the same token, are further proof of the rejection of the argument that article 7a was intended to be used for the purpose of political sparring.

A retrospective glance at *Moledet*'s actions over the ten years of its existence as an independent party and later as a member of the *Ha'ichud Ha'leumi* ('National Unity') alliance reinforces the feeling that the CEC's ruling on this party indeed reflects the golden path bridging between the protection of fundamental liberties on the one hand and upholding the democratic system, on the other. From its very first day in the Knesset, *Moledet* indeed turned out to be an extreme right-wing measuring stick on anything relating to the borders of the land of Israel and the peace process with the Palestinians. Still, a review of the proceedings of the twelfth–fifteenth Knessets reveals that neither *Moledet*'s actions nor its statements included straightforward racist messages or a genuine challenge to the democratic system, such as was the case with Rabbi Kahane in his term as an MP.

#### *Elections to the thirteenth Knesset: 1992*

The policy of the CEC of the thirteenth Knesset, which included the disqualification of the *Kach* and the *Kahane Hai* Lists and once again allowed *Moledet* to compete in the elections, demonstrates that the 'immunised' route of the Israeli democracy, which began with the legislation of article 7a, had been upheld also on the second occasion that it had been put to the test.

The prohibition of *Kach* from running in the 1988 elections proved to be a strong blow to Kahane and his activists who – ironically during the years 1988–1990, when there was a genuine potential for a broadening of support

for their party in reaction to the Palestinian *intifada* in the Judea, Samaria and Gaza territories – were thus fated to limit their activities to the extra-parliamentary sphere. On 5 November 1990, approximately a year-and-a-half prior to the elections to the thirteenth Knesset, the party suffered the worst setback it could have conceived of when its leader and the figure most identified with the movement, Rabbi Meir Kahane, was murdered in New York. In the wake of his death, bitter dissension broke out between Rabbi Kahane's devotees and his son Binyamin regarding the question of the party's prospective leadership and the title to its assets. These differences eventually led to the splitting of *Kach* and, as a result, it submitted candidacy for the thirteenth Knesset presented two descendants – *Kach* and *Kahane Hai*. The new-founded version of *Kach* was led by Kahane's underlings Baruch Marzel and Noam Federman, whereas *Kahane Hai* was headed by his son Binyamin, who was supported by a number of activists from the settlement of Kfar Tapuach in Samaria.

Despite their ideological kinship, the arguments of these two parties before the CEC were very different. *Kach*, wiser from the lessons of the past, refrained from mentioning the Arabs in its election campaign. In effect, the party's central counterclaim to the requests for its disqualification was that, despite its disagreement with the substance of article 7a, it took it upon itself to adhere to the dictum of the law and therefore forfeited from its programme any clause which may have been construed as at variance with it.<sup>72</sup> However, most members of the CEC saw this as a fairly transparent attempt by the party to gain the CEC's stamp of legitimacy and approval to take part in the elections while, basically, the true intention of the party leadership was to return to its original platform if and when the party achieved parliamentary representation. The profusion of evidence indicates that concurrent with the so-called transformation undergone by the party its leadership, in practice, continued its traditional course of provocative activities. This did not make it easy for the *Kach* representative to persuade members of the CEC of the integrity of the party's intentions, and consequently the list was disqualified by a considerable majority.<sup>73</sup>

*Kahane Hai*, on the other hand, in fact chose to address the Arab issue and defended itself armed with the argument that, unlike *Kach*, its members were speaking of a new list, one which should not be judged according to the 'past sins' of *Kach*.<sup>74</sup> An additional explanation submitted by the party's representatives was that they did not wish to conceal their intentions regarding the Israeli Arab population, for the simple reason that their position towards this population had originated in Jewish *Halakha*, which constituted the base for the party's platform. With this reasoning, representatives of *Kahane Hai* hoped that the CEC would stumble and fall into the polemics of the existing tension between the 'Jewish' and the democratic principles of the State of Israel.<sup>75</sup> However, these efforts to sow seeds of doubt among CEC members did not fare well at all and

the list's disqualification was passed by an even larger majority than in the case of *Kach*.<sup>76</sup>

Immediately after the disqualification ruling was passed, both lists petitioned the Supreme Court of Justice in their appeals that it rescind the CEC's decisions. However, in contrast to the discussions of principle on the subject that were conducted in the previous elections, this time the judicial discussion was relatively simple and the Court ratified the rulings issued by the CEC. In *Kach*'s case, and in view of the abundant evidence presented before the judges, it was decided to reject the appellant's claim that since it had been disqualified from running in the twelfth Knesset several years earlier the party had undergone substantial transformation.<sup>77</sup> As for *Kahane Hai*, the Supreme Court refrained from entering the arena of the party's *Halakhic* arguments and elected instead to focus on the question of whether this party's tenets clashed with article 7a of the Knesset's Basic Law. According to the Court, the answer to this question was affirmative.<sup>78</sup>

Another point worthy of mention is that appeals for the disqualification of the *Moledet* List were also submitted to the thirteenth Knesset's CEC. The chair of the CEC, Justice Halima, stressed before the CEC that the utmost caution must be observed while discussing article 7a and by this step adopted the tactic of his predecessor, Justice Goldberg, as well as that of the Supreme Court of Justice President, Justice Shamgar, in the verdict regarding *Kach*'s petition against the twelfth Knesset CEC's ruling.<sup>79</sup> The majority of Committee members accepted the chair's position and in the absence of evidence indicating a deviation in principle on the part of *Moledet* from the strict interpretation of article 7a, they permitted its participation in the elections by a large majority.<sup>80</sup>

The disqualification of *Kach* and *Kahane Hai*, on the one hand, and the granting to *Moledet* of a license to run in the elections, on the other, both conform, in my view, to the principles of the 'immunised route'. In the 1992 Knesset elections, also, negotiation regarding the qualification of all lists was conducted according to a stringent interpretation of article 7a, while at the same time the arbitrating or judicial bodies exhibited a clear preference for partisan participation over any temptation to rid the Israeli political arena of radical notions. Moreover, it appeared that many Committee members wholly disapproved of the *Moledet* position, yet most of them did not exercise partisan political considerations but rather addressed the essentials. The same applies to their position regarding *Kach* and *Kahane Hai*. Despite *Kach*'s attempts to try to change its image and *Kahane Hai*'s efforts to argue before the Court that its political programme was in effect a derivative of the Jewish *Halakha*, it was obvious to members of the CEC that these were stratagems and nothing more. The network of evidence presented before the CEC persuaded its members that these parties sought to undermine the foundations of democracy and therefore their camouflage tactics were to no avail.

*The parties law*

A significant additional step forward in the 'immunising' process of the Israeli democracy was taken on 10 April 1993, when the Parties Law (1992) came into effect. Apart from the fact that, for the first time, this law defined the status of political parties in Israel, it also included a circumscription of the goals and actions of registered parties. Article 5 of the law determined that

A party will not be registered if its goals or actions include, explicitly or implicitly, one of the following: 1. negation of the existence of the State of Israel as a Jewish and democratic state; 2. incitement to racism; 3. reasonable grounds for the inference that the party is going to be used as a front for illegal activities.<sup>81</sup>

Contrary to the position put forward in this book, according to which article 5 constitutes a significant component in the 'immunising' process of the democracy, the article was subject to severe criticism by other social scientists, including Barzilai, Avnon and Cohen-Almagor. In their view, the restrictions imposed by this article were excessive and encroached upon basic liberties even more than did article 7a. First, it authorised the party registrar to disqualify a party even before it had begun to function. Second, this article confers a permanent disqualification, unlike article 7a which enables parties to return and approach the CEC prior to each election. Hence, as they saw it, this article entailed grave restrictions on the fundamental democratic right of freedom of assembly.<sup>82</sup>

The most effective way to assess to what degree the Law has in fact adversely affected basic liberties is to once again make use of the test of consequences. The first party that was most liable to encounter difficulties subsequent to the Parties Law's approval was *Moledet*. Like all other parties in Israel, *Moledet* was requested to enlist with party registrar and to present the registrar with, among other things, a list of its principles. In order to avoid a judicial tangle on account of article 5, the party's leader, Rechavam Ze'evi, decided to omit the 'transfer' scheme from the clause outlining the party's goals.<sup>83</sup> Despite the fact that its principles were well known, *Moledet* encountered no great difficulties and was given the registrar's stamp of approval. However, it is important to note that its qualification, granted twice before by the CEC, undoubtedly helped pave the way for the registrar's present authorisation. Therefore, it seems appropriate to proceed to the discussion of a more problematic example, specifically that of *Yemin Yisrael*.

*Yemin Yisrael* was an extreme right-wing list led by Professor Shaul Guttman. Its members had left *Moledet* subsequent to personal disputes and ideological differences of opinion. The most prominent divergence from *Moledet*'s way of thinking was related to Ze'evi's readiness to drop the idea of 'transfer' from the list of the party's main premisses in order to avoid conflict

with article 5 of the Parties Law.<sup>84</sup> With the elections for the fourteenth Knesset approaching, Guttman and his colleagues sought to present the Israeli voter with a right-wing alternative more radical than *Moledet*. Directly following *Yemin Yisrael's* request to be registered as a party, the party registrar received three lawsuits, all intent on preventing its registration on the grounds that the party was racist and anti-democratic. Furthermore, appellants intimated that this list was distinguished by an affiliation with the *Kach* movement which, at that time, had already been defined by the State as a terrorist organisation. Because of the grave misgivings associated with article 5, the party registrar elected to approach this list along the lines of Justice Shamgar's interpretation of article 7a from the second Neiman verdict, meaning an interpretation which was as sparing as possible and which stressed democratic liberties.<sup>85</sup>

Following an evaluation of all the requests, and having subjected them to the rigour of the provisions of the law and the principle of freedom of assembly, the party registrar chose to affirm *Yemin Yisrael's* registration.<sup>86</sup> Even the appeals served by two of the petitioners to the Supreme Court of Justice enjoining the Court to revoke the qualification of *Yemin Yisrael* were rejected by the verdict of the three judges who sat in trial. The ruling issued by the Supreme Court President Aharon Barak stated that if the interpretation of article 7a provided the State with a very narrow range of action when considering the prevention of a list from participating in the elections, then the non-registration of a party was even more restrictive for, *inter alia*, the hearing which decided the party's registration took place prior to the party's actual establishment and therefore before its actions could even be evaluated. The fact that the non-registration of a party is at the authority of the party registrar – a conventional administrative body as opposed to the CEC, which is a kind of 'Knesset in miniature' and chaired by a justice of the Supreme Court – also invites extra caution.<sup>87</sup> These deliberations, and others, led the Court to assume an approach that was as liberal as possible with regard to the registration of this party. The *Ratz* faction's appeal to the CEC with the intention of preventing *Yemin Yisrael* from taking part in the Knesset elections also did not fare well. However, in this specific case, the appeal was rejected on procedural grounds.<sup>88</sup>

Hence, the conclusion to be drawn is that despite the serious concerns regarding the substantial restrictions of freedom inherent to the Parties Law, in the first real test to which the State was subject regarding that law it did not display a rigid and problematic position in democratic terms.<sup>89</sup> In fact, quite the opposite is true. The Israeli political organisation most closely affiliated to *Kach* was fortunate to be registered as a party, and even tried its luck, albeit with little success, in running for Parliament. This illustration represents a prominent example of the restraint exercised by the State of Israel in relation to the restriction of the liberties of political parties and demonstrates a clear preference for liberal principles over the restriction of political liberties.

## Conclusions

This extensive account of the Israeli response to extremist challenges in the parliamentary arena indicates an evolving tendency in the State's political and judicial policy towards extremist parties. In its early years, the State of Israel lacked structural or legal barriers which could have limited the participation and representation of extremist parties, a fact made prominent in the case of the 'Socialist List' in which the CEC as well as the Supreme Court were impelled to take extreme and highly problematic measures in democratic terms. However, the decision to disqualify the 'Socialist List' from running in the elections did not lead the Knesset to firmly establish the Israeli response to radical parties in a legal framework. Consequently, with Meir Kahane's appearance in the political arena in Israel, the State's authorities found themselves in a similar situation. However, in Kahane's case, despite the repugnance he evoked and the strong desire of CEC members, and later of the Knesset's speaker and the managing committee of the IBA, to clamp down on his activities, the Supreme Court chose to uphold his liberties as a citizen and an elected representative. At the same time, it gave the legislature a clear sign regarding the need for statutory measures which would make it easier for them to deal with the Kahanist phenomenon. Thus, in the years prior to the amendment of the Knesset's Basic Law, this phenomenon led to strain between representatives of the legislature who sought to restrict Kahane – even if that involved an abuse of democratic principles – and representatives of the judiciary who endeavoured to protect democratic principles even when the cost was the protection of Kahane's freedom of action.

The first productive joint-enterprise between the legislative and judicial authorities in this regard was passing the amendment to the Knesset's Basic Law. This amendment defined the qualifications and limitations necessary for a party competing in the elections, and opened a window of opportunity for an extensive legislative system on this issue. A short while after the amendment to the Knesset's Basic Law, new clauses were added to Knesset Regulations with regard to the limitations on the legislature's forbearance regarding racist and anti-democratic expressions; and seven years later the Parties Law was passed as well. The 'immunising' process of the Israeli democracy with regard to extremist political parties was completed in 1998 with the approval of article 28 of the Law of the Local Authorities (Elections). Article 39a of that amendment in effect applies the qualifications which appear in article 7a of the Knesset's Basic Law also to parties running for office in the local authorities, and accordingly, following the November 1998 elections to the local authorities, a list that denies the democratic character of the State or incites to racism cannot take part in the elections.<sup>90</sup>

Evidence of the link between the creation of the new legal structure and

the 'immunising' of the Israeli democracy can be found in the fact that even the gloomy forecasts regarding the political use of this legal framework were proven wrong. The CEC's members and the party registrar have so far displayed a balanced and responsible approach in their legal interpretation, an evaluation validated by the Supreme Court which established highly stringent criteria whenever it was necessary to restrict any of the liberties of political parties.

However, the simplest way to estimate the quality of the change in Israeli policy regarding radical political parties is by conducting a retrospective survey of the debates and rulings issued in respect of the various political parties. Such a review once again pulls the rug out from under the pessimists who predicted the erosion of the democratic foundations of the State. In contrast to the projection arguing that the existence of legal barriers, placed at the State's disposal, would inevitably lead to their exploitation, consequently raising many difficulties for political parties seeking to register or compete in the elections, a reality check in fact proves otherwise. Only two parties were prevented from taking part in the elections: *Kach* and *Kahane Hai*. This fact becomes the more significant when it is juxtaposed with the increasing radicalism that has developed among the diverse walks of life comprising Israeli society. This radicalism finds expression in the elongated boundaries of the discourse conducted in the Israeli Parliament and in the increasing representation of radical and militant political parties in this institution.

Subsequent to the elections to the fifteenth Knesset in 1999, the parliamentary system in Israel could be defined as a form of 'polarised pluralism'. In that Knesset, certain Jewish political parties gained representation which did not hesitate to challenge the democratic government, and its various institutions, and to preach against ethnic groups. Side by side, there were Arab parties, including the Islamic Movement, which openly objected to the existence of Israel as the State of the Jewish people. Of course, anti-democratic or ethnocentric expressions in Parliament are not auspicious phenomena in themselves, but the very fact that these parties gained representation in the context of a sustained democratic framework gives an indication of an ability to strike a balance between the imperative of affording representation to the whole complex of currents and ideas found in Israeli society at large and the necessity to safeguard democratic values and structures.

At this juncture, I wish to differ with Cohen-Almagor who argues that a state must take on the obligation of restricting anti-democratic parties, no matter what their shade or colour, for the reason that, in the absence of any such action, the administration in effect becomes an accessory to the consolidation of anti-democratic notions. In his view, there is no need for incriminating proof that a particular party indeed constitutes a genuine threat to the democratic polity – the very fact that it practises violence and that its beliefs

undermine the democratic character of the state is reason enough for its disqualification.<sup>91</sup>

My critique of Cohen-Almagor's approach focuses on two main points. First, including the element of violence while deliberating the disqualification of a political party seems needless in this era of the third millennium. To wit, in the first half of the twentieth century, the preponderance of anti-democratic parties in Europe featured prominent violent distinctions, whereas a glance at the Western political theatre today demonstrates that even the most extreme of parties appears to refrain from involvement in violent action – a fact which does not necessarily attest to an empathic relationship with democracy but more likely indicates an instrumental volition to avoid conflict with the authorities. Second, the non-liberal context of the Israeli democracy and the divisive cut of its society create by inference a fertile ground for the growth of extremist parties. Furthermore, Israel's character as a Jewish and democratic state engenders fundamental complications at all stages in the disqualification process of political parties. The majority of religious and ultra-orthodox parties would prefer Israel to be a Jewish state while foregoing its democratic principles, and most Arab parties would rather see Israel as a democratic state while relinquishing its 'Jewish' component. Subsequently, if disqualification were to have been determined on the basis of party programmes and statements made by their leaders, then the sword of disqualification would have come down on the heads of *many* parties. Therefore, in my opinion, a democracy which chooses the 'immunised route' is obliged also to consider the question of the real threat a party poses because, without that measure, the right of representation would be denied to many social groups in Israel.

Although, in view of the above developments, it would seem that the Israeli democracy is fairly close to the 'immunised' polarity of response in terms of its attitude towards extremist parties, one question remains unanswered: to what degree is there an underlying base of public support for these changes in the State's policy towards extremist parties? This question is particularly important due to the growing tension over recent years between judicial elites in Israel who, by the disposition of their verdicts, are leading the Israeli democracy in liberal directions, and large parts of the population who object to this inclination.

In a survey conducted for the purposes of this study, participants were presented with three statements appertaining to the policy the State must adopt in its attitude towards extremist political parties. Almost 60 per cent (59.8) of the respondents agreed with the first statement: 'It is the democratic polity's duty to disqualify extremist parties even if there is no law which defines how to go about it'. The second statement, 'The Israeli law which enables the disqualification of political parties is not sufficiently enforced in this country', was supported by 55.5 per cent, while 56.2 per cent expressed their support for the

notion that 'It is appropriate to enforce the idea of the disqualification of political parties on other levels, for example, elections for local authorities'.

From these findings we can draw the following conclusion: while the State's authorities and, in particular, the Supreme Court tend towards moderation of the restrictions imposed on political parties and appear to confine the range of response to particularly narrow boundaries, the public, oddly enough, displays tendencies of a more 'militant' nature. At the base of this tendency, there is a desire to impose a more expansive system of control over political parties and to reduce the range of representation. These findings point to a fairly wide gap between the public's attitudes and those of the State. This fact may increase the apprehension that, despite the 'immunised' tendency spearheaded by political and judicial elites, a broad public under-structure in support of this tendency is lacking. In chapter 3, which deals within the State's efforts to 'immunise' Israeli society in terms of its basic values, findings are submitted to help assess whether Israeli society is inclined in the immediate future in more liberal directions or whether it will remain deeply implanted, firm in the non-liberal tradition.

#### NOTES

- 1 Kay Lawson, 'When Linkage Fails', in Kay Lawson and Peter Merkl (eds), *When Parties Fail: Emerging Alternative Organisations* (Princeton, New Jersey: Princeton University Press, 1988), pp. 13–38.
- 2 Maurice Duverger, *Political Parties: Their Organisation and Activity in the Modern State* (London: Methuen, 1964), p. 50.
- 3 It is worth mentioning that during the time of the Weimar Republic steps were taken to drive extremist parties out of Parliament; however, such means were not enforced against the National Socialist Party. In the Israeli context, see Talia Einhorn's, booklet *Statutory Proscription of Political Parties that Have Racist Platforms: Article 7a of the Basic Law: Ha-Knesset* (Jerusalem: Israeli Association for Parliamentary Issues, 1993), p. 15 (Hebrew).
- 4 Elmar M. Hucko (ed.), *The Democratic Tradition: Four German Constitutions* (Leamington Spa: Berg, 1987), p. 202.
- 5 Benyamin Neuberger, *Political Parties in Israel* (Tel-Aviv: Open University, 1997), p. 32 (Hebrew).
- 6 Benjamin Akzin, 'The Role of Parties in Israel Democracy', *Journal of Politics*, 17:4 (1995), p. 114.
- 7 Just prior to the thirteenth Knesset elections in 1992, the minimum percentage was raised to 1.5 of the valid votes. *Prima facie*, this was in order to reduce the number of represented factions, and in the 1992 elections only ten parties were in fact elected. However, the electoral reform Israel underwent prior to the fourteenth Knesset in 1996 – based upon the new method of splitting the vote between the prime minister and the Knesset – led to a renewed growth in the number of represented parties and, even more so, to the growth in the power of the smaller parties in relation to the large parties. This also led to a change from a dual-*bloc* parliament to a form of polarised pluralism.
- 8 This number does not include factions which split off from parties after their election to Parliament. See Avraham Brichta, *Democracy and Elections – On Changing the Electoral and Nomination Systems in Israel* (Tel-Aviv: Am-Oved Tarbut Vechinuch, 1977), pp. 43–54

- (Hebrew); Gideon Doron and Moshe Maor, *Barriers to Entry into Israeli Politics* (Tel-Aviv: Papyrus Tel-Aviv University, 1989), pp. 76–93 (Hebrew); Benyamin Neuberger, 'The Stabilization of Democracy in Western Germany – Lessons to the State of Israel', in Bernard Susser (ed.), *The Political System in Israel Proposals for Change*, unpublished report (1987), pp. 43–61 (Hebrew).
- 9 Avraham Brichta, *Political Reform in Israel: The Quest for Stable and Effective Government* (Brighton, East Sussex: Sussex Academic Press, 2001).
  - 10 Doron and Maor, *Barriers to Entry into Israeli Politics*, pp. 83–4.
  - 11 In this context, it is worth mentioning that despite the fact that over the years the *Herut* party (subsequently *Likud*) became a coalition partner and later, in fact, the ruling party among the Jewish parties in Israel, the custom excluding Arab parties from the coalition became entrenched.
  - 12 Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance: The Struggle against Kahanism in Israel* (Gainesville: University of Florida Press, 1994), pp. 206–7.
  - 13 Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, pp. 181–3.
  - 14 For a critical discussion of the comparison between the Socialist List and the case of the Weimar Republic, see Ruth Gavison, 'Twenty Years Since Yardur's Ruling – the Right to Be Elected and the Lessons of History', in Aharon Barak, Ruth Gavison and Mordechai Kremnizer (eds), *Shimon Agranat Reaching the Age of 80* (Jerusalem: Hebrew University, 1986), pp. 145–213 (Hebrew).
  - 15 In 1984, the left-wing Jewish–Arab party the Progressive List for Peace, led by Mohammed Miari and Mati Peled, was disqualified; however, the Supreme Court of Justice rescinded the ruling and gave the list permission to run in the elections. In 1988, the party surmounted the barrier posed by the Central Elections Committee as well as the Supreme Court's ruling. In 1996, the Supreme Court authorised another list, the Arab Movement for Change, headed by Dr Ahmad Tibi, to take part in the elections. See: Raphael Cohen-Almagor, *Speech, Media and Ethics* (Basingstoke, Hampshire: Palgrave, 2001), pp. 60–4. In 1999, *Balad* (abbreviation for Democratic National Alliance), led by Dr Azmi Bishara, was successful in hurdling the Central Elections Committee barrier, whereas, in the present case, the request for disqualification of this party did not pertain directly to its effort to gain parliamentary representation, but rather to Dr Bishara's intention to run for prime minister (from an interview with Tamar Edri, director of the Central Elections Committee, the Knesset, 16 April 2001).
  - 16 Robert I. Friedman, 'The Sayings of Rabbi Kahane', *New York Review of Books*, 23:2 (1986).
  - 17 Yair Kotler, *Heil Kahane* (New York: Adama Books, 1986), p. 122.
  - 18 Ehud Sprinzak, *The Ascendance of Israel's Radical Right* (New York: Oxford University Press, 1991), pp. 52–5.
  - 19 Raphael Mergui and Philippe Simonnot, *Israel's Ayatollahs: Meir Kahane and the Far Right in Israel* (London: Saqi Books, 1987), pp. 29f.
  - 20 'Daughter of Israel' is the literal English translation of the biblical Hebrew idiom meaning 'Jewish woman'.
  - 21 Advertisement: 'She Is a Daughter of Israel. Perhaps Your Sister, Your Daughter or Granddaughter', *Ma'ariv*, 29 May 1981.
  - 22 Protocol no. 18, from the plenary session of the Central Elections Committee (4.6.1981), p. 5.
  - 23 Protocol no. 18, from the plenary session of the Central Elections Committee (4.6.1981), p. 5.
  - 24 Protocol no. 18, from the plenary session of the Central Elections Committee (4.6.1981), pp. 6–8.

## The parliamentary arena

- 25 Protocol no. 18, from the plenary session of the Central Elections Committee (4.6.1981), p. 21.
- 26 *Moshe Negbi v. Central Elections Committee*. Verdict 344/81 of the Israeli Supreme Court.
- 27 Protocol no. 18, from the plenary session of the Central Elections Committee (4.6.1981), p. 9.
- 28 Protocol no. 14, from the plenary session of the Central Elections Committee (17.6.1984), pp. 4–15.
- 29 Protocol no. 14, from the plenary session of the Central Elections Committee (17.6.1984), p. 34.
- 30 Protocol no. 14, from the plenary session of the Central Elections Committee (17.6.1984), pp. 38–9.
- 31 Protocol no. 14, from the plenary session of the Central Elections Committee (17.6.1984), p. 40.
- 32 Protocol no. 14, from the plenary session of the Central Elections Committee (17.6.1984), p. 48.
- 33 Letter from Gabriel Bach, Supreme Court justice and chair of the Central Committee for the elections to the eleventh Knesset, to Mr Moshe Neiman, *Kach* representative (17.6.1984).
- 34 Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, pp. 210–11.
- 35 Ehud Sprinzak, *Political Violence in Israel* (Jerusalem: Jerusalem Institute for Israel Studies, 1995), p. 92 (Hebrew).
- 36 Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, pp. 219–23.
- 37 Robert I. Friedman. 'The Sayings of Rabbi Kahane', *New York Review of Books*, 23:2 (1986).
- 38 Entry no. 18 from proceedings of the IBA managing committee session (1.8.1984).
- 39 Proceedings of the News Forum (29.7.1984).
- 40 *Hadashot* (daily Israeli newspaper), 28 July 1987.
- 41 Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, pp. 223–9.
- 42 Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, pp. 229–30.
- 43 An office including the Knesset's speaker and his or her deputies, which represented many of the House factions.
- 44 Protocol of the 137th session of the eleventh Knesset (13.11.1985). Amendment of article 134 of Knesset Regulations. The full protocol is available at: [www.knesset.gov.il/knesset/hebframe.htm](http://www.knesset.gov.il/knesset/hebframe.htm)
- 45 Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, pp. 233–4.
- 46 *Kahane v. Knesset Speaker and his Deputies*. Supreme Court of Justice appeal 669/85, 24/84 (13.1.1986), pp. 399–400.
- 47 Penal Code, 1977–86 amendment, clause 144.
- 48 This passage is taken from the protocol of the 108th session of the eleventh Knesset on Tuesday 9 July 1985, Jerusalem, the Knesset; Basic Law Proposal: The Knesset (amendment no. 12), Penal Code Proposal (amendment no. 24), 1985 (first preliminary reading). These proceedings can be found at 'Knesset Proceedings': [www.knesset.gov.il/knesset/hebframe.htm](http://www.knesset.gov.il/knesset/hebframe.htm)
- 49 Basic Law: The Knesset, amendment no. 9, *Book of Laws* (Dr R. Gideon, publisher, 1985), vol. 14, 66770.
- 50 From the protocol of the 108th session of the eleventh Knesset on Tuesday 9 July 1985, Jerusalem; Basic Law Proposal: The Knesset (amendment no. 12), Penal Code Proposal (amendment no. 24), 1985 (first preliminary reading). These proceedings can be found at 'Knesset Proceedings': <http://www.knesset.gov.il/knesset/hebframe.htm>

- 51 Yoav Peled, 'Ethnic Democracy and Legal Construction of Citizenship: Arab Citizens of the Jewish State', *American Political Science Review*, 86:2 (1992), pp. 432–43.
- 52 Gad Barzilai, 'The Decline of the Parties and Judicial System', in Dani Korn (ed.), *The Demise of Parties in Israel* (Tel-Aviv: Hakibbutz Hameuchad, 1998).
- 53 Raphael Cohen-Almagor, 'Israeli Democracy During the 1980s: A Critical Review', *Democratic Culture*, 2 (1999), pp. 79–100 (Hebrew); Ariel Bendor, 'The Right of Candidacy to Knesset Elections', *Mishpatim*, 18 (1988), pp. 269–96.
- 54 In the mid-1980s and the early 1990s, the Knesset was distinguished by a closely matched dual-*bloc* structure. According to the law, the faction leader with the best chances of raising a coalition was assigned the role of doing so, a stipulation which turned the smaller parties – often those representing single-member factions – into players wielding great manipulative leverage due to the fact that the governmental structure was often dependent upon their decision to support this or that coalition.
- 55 Draft law (21.12.1987).
- 56 Draft law (19.10.1987).
- 57 Surveys conducted by the daily newspaper *Yedioth Aharonoth* on 7 and 21 October predicted 3–4 mandates. The daily *Ma'ariv*, on 7, 14 and 21 October, expected 3–5 mandates.
- 58 Protocol no. 17, from the sessions of the CEC (5.10.1988).
- 59 Protocol no. 17, from the plenary session of the CEC for the Knesset for the disqualification of the *Kach* List (5.10.1988), p. 48.
- 60 Protocol no. 17, from the plenary session of the CEC for the Knesset for the disqualification of the *Kach* List (5.10.1988), p. 51.
- 61 Protocol number 17, from the plenary session of the CEC for the Knesset for the disqualification of the *Kach* List (5.10.1988), p. 57.
- 62 *Neiman and Kach List v. Chair of the CEC* for the twelfth Knesset, Supreme Court Ruling EA 2/88.
- 63 *Neiman et al. v. Chair of the CEC* for the twelfth Knesset, Supreme Court Ruling 1/88, verdict 42 (4) 187c.
- 64 *Neiman et al. v. Chair of the CEC* for the twelfth Knesset, Supreme Court Ruling 1/88, verdict 42 (4) 177, 187, 196; *Ben Shalom et al. v. CEC* for the twelfth Knesset *et al.*, Supreme Court Ruling 2/88, verdict 43 (4) 221.
- 65 From an interview with Tamar Edri, director of the CEC, the Knesset (16.4.2001).
- 66 In October 2001, the Minister for Tourism Mr Rehavam Ze'evi was assassinated at the Hyatt Hotel in Jerusalem by Arab terrorists.
- 67 *Ha'arets*, 29 June 1988.
- 68 Protocol no. 20, from the plenary session of the Central Elections Committee (9.10.1988), p. 28.
- 69 Protocol no. 20, from the plenary session of the Central Elections Committee (9.10.1988), pp. 36–7.
- 70 Protocol no. 20, from the plenary session of the Central Elections Committee (9.10.1988), p. 33.
- 71 Protocol no. 20, from the plenary session of the Central Elections Committee (9.10.1988), p. 57.
- 72 Protocol no. 17, from the plenary session of the Central Elections Committee (28.5.1992), pp. 53–60.
- 73 Protocol no. 17, from the plenary session of the Central Elections Committee (28.5.1992), p. 81.
- 74 Protocol no. 17, from the plenary session of the Central Elections Committee (28.5.1992), pp. 83–5.

## The parliamentary arena

- 75 Protocol no. 17, from the plenary session of the Central Elections Committee (28.5.1992), pp. 86–92.
- 76 Protocol no. 18, from the plenary session of the Central Elections Committee (3.6.1992), p. 6.
- 77 *Kach v. Chairperson of the CEC* to the 13th Knesset, EA 2805/92, paragraph 6.
- 78 *Kahane Is Alive Movement v. Chairperson of the CEC* to the 13th Knesset, EA 2858/92, paragraph 4.
- 79 Protocol no. 17, from the plenary session of the Central Elections Committee, 28.5.1992, pp. 24–8.
- 80 Protocol No. 17, from the plenary session of the Central Elections Committee, 28.5.1992, pp. 40–1.
- 81 Parties Law, *Book of Laws* (Dr. R. Gideon, 1992) vol. 22, 11185.
- 82 An elaboration of the critique regarding article 5 of the Parties Law can be found in: Barzilai, 'The Decline of the Parties and Judicial System', pp. 122–4; and in Dan Avnon, 'Law and Democracy in the Parties Law', in Dan Avnon (ed.) *The Parties Law in Israel: Between a Legal Framework and Democratic Norms* (Tel Aviv: Israeli Democratic Institute, Kibbutz Hameuchad Publishing, 1993), pp. 37–63. In addition, a reference to the restrictions arising from the law can be found in Raphael Cohen-Almagor, 'Disqualification of Political Parties in Israel: 1988–1996', *Emory International Law Review*, 11:1 (1997) pp. 67–109.
- 83 From an interview with Professor Shaul Guttman, formerly Member of Parliament on behalf of *Moledet* and one of the founders of *Yamin Yisrael* (Israel's Right) (4.5.1997).
- 84 From an interview with Professor Shaul Guttman (4.5.1997).
- 85 Office of the party registrar (14.11.1995). Request for the registration of *Yamin Yisrael* in the parties' ledger and three objections to it, pp. 9–11.
- 86 Office of the party registrar (14.11.1995). Request for the registration of *Yamin Yisrael* in the parties' ledger and three objections to it, p. 23.
- 87 The Supreme Court of Justice in Jerusalem (7.3.1996). Request for permission to appeal against the party registrar's ruling, N452 7504/95 (14.11.1995). Ghanem Yasin, party registrar, pp. 70–1.
- 88 Protocol no. 15, from the plenary session of the Central Elections Committee (30.4.1996).
- 89 Mention should be made of the fact that both the party registrar and the Supreme Court arrived at a similar conclusion regarding the Arab Movement for Change, and gave their consent for its registration.
- 90 Local Authorities Law (Elections), amendment no. 28. Proceedings, *Book of Laws*, p. 1682.
- 91 Raphael Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* (Basingstoke, Hampshire: Palgrave, 2001), pp. 64–5.