EDA 1806/19
EA 1866/19
EA 1867/19
EA 1876/19

In re: Central Elections Committee for the 21st Knesset

Plaintiffs in EDA 1806/19:

1. MK Avigdor Lieberman
2. MK Oded Forer
3. Yisrael Beiteinu Faction

Appellants in EA 1866/19:

1. Issawi Frej
2. Ofer Kornfeld
3. Atara Litvak
4. Debbie Ben Ami
5. Sonia Cohen
6. Richard Peres
7. Eran Yarak
8. Gil Segal
9. Shifrit Cohen Hayou Shavit
10. Osama Saadi
11. Wiam Shabita
12. Yousouf Fadila
13. Meretz Faction
14. MK Stav Shaffir
15. Reform Movement for Religion and State – Israel Movement for Progressive Judaism
16. Tag Meir Forum

Appellants in EA 1867/19:	1.	Dr. Michael Ben Ari
	2.	Itamar Ben Gvir, Adv.
	3.	Hoshaya Harari
	4.	Yochai Revivo
	5.	MK David Bitan
	6.	Elidor Cohen
	7.	Yaakov (Kobi) Matza
	8.	Yigal Harari
	9.	Yaakov Dekel
	10.	Shimon Boker
	11.	Yossi Shalom Haim Rozenboim
Appellant in EA 1876/19:		Ra'am List
		v.
Respondents in EDA 1806/19:	1.	Dr. Ofer Cassif
	2.	Attorney General
Respondents in EA 1866/19:	1.	Dr. Michael Ben Ari
	2.	Itamar Ben Gvir, Adv.
	3.	Central Elections Committee for the 21st Knesset
	4.	Attorney General
Respondents in EA 1867/19:	1.	Hadash-Ta'al List
	2.	Central Elections Committee for the 21st Knesset
	3.	Attorney General
Respondents in EA 1876/19:	1.	Central Elections Committee for the 21st Knesset

2. Likud Faction et al.

3. Dr. Michael Ben Ari et al.

4. Attorney General

5. The Knesset

EDA 1806/19: Approval procedure under sec. 7A(b) of Basic Law: The Knesset and sec. 63A(b) of the Knesset Elections Law [Consolidated Version], 5729-1969

EA 1866/19: Appeal under sec. 63A(d) and sec. 65(A1) of the Knesset Elections Law [Consolidated Version], 5729-1969

EA 1867/19: Appeal under sec. 64(a1) of the Knesset Elections Law [Consolidated Version], 5729-1969

EA 1876/19: Appeal under sec. 64(a) of the Knesset Elections Law [Consolidated Version], 5729-1969

The Supreme Court

Before: President E. Hayut, Justice N. Hendel, Justice U. Vogelman, Justice I. Amit, Justice N. Sohlberg, Justice M. Mazuz, Justice A. Baron, Justice G. Karra, Justice D. Mintz

Supreme Court cases cited:

1. EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. MK Ahmad Tibi*, IsrSC 57 (4) 1 (2003)

2. EA 561/09 *Balad – National Democratic Alliance v. Central Elections Committee for the 18th Knesset* (Jan. 21, 2009)

3. EDA 9255/12 *Central Election Committee for the 19th Knesset v. MK Hanin Zoabi* (Feb. 18, 2015)

4. EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*, IsrSC 39(2) 225 (1985) [https://versa.cardozo.yu.edu/opinions/neiman-v-chairman-elections-committee]

5. EA 1/88 *Neiman v. Chairman of the Central Elections Committee for the 12th Knesset*, IsrSC 42(4), 177 (1988) [https://versa.cardozo.yu.edu/opinions/kach-v-central-election-committee-twelfth-knesset]

6. EDA 1095/15 *Central Election Committee for the 20th Knesset v. Hanin Zoabi*, (Dec. 10, 2015)

7. LCA 7504/95 *Yassin v. Registrar of Parties*, IsrSC 50(2) 45 (1996)

8. EA 1/65 *Yaakov Yeredor v. Chairman of the Central Elections Committee for the 6th Knesset*, IsrSC 19(3) 365 (1964) [https://versa.cardozo.yu.edu/opinions/yeredor-v-chairman-central-elections-committee-sixth-knesset]

9. EA 2/88 *Ben Shalom v. Central Elections Committee for the 12th Knesset*, IsrSC 43(4) 221 (1989)

10. EA 2805/92 *Kach List v. Chairman of the Central Elections Committee for the 13th Knesset* (unpublished)

11. EA 2858/92 *Movshovich v. Chairman of the Central Elections Committee for the 13th Knesset*, IsrSC 46(3) 541 (1992)

12. HCJ 5744/16 *Ben Meir v. Knesset*, (May 27, 2018)

13. HCJ 11225/03 *Azmi Bishara v. Attorney General*, IsrSC 60(4) 287 (2006)

14. HCJ 2684/12 *Movement to Strengthen Tolerance in Religious Education et. al. v. Attorney General*, (Dec. 9, 2015)

15. HCJ 392/72 *Berger v. District Planning and Building Council, Haifa District*, IsrSC 27(2) 764 (1973)

16. HCJ 547/98 *Federman v. Government of Israel*, IsrSC 53(5) 520 (1999)

17. AAA 8342/02 *Ben Gvir v. Commissioner of Police*, IsrSC 57(1) 61 (2002)

18. LCA 6709/98 *Attorney General v. Moledet Gesher-Tzomet List for the Nazereth Illit Local Council Elections*, IsrSC 53(1) 351

19. HCJ 4552/18 *Zahalka v. Speaker of the Knesset*, (Dec. 30, 2018)

20. EA 2600/99 *Erlich v. Chair of the Central Elections Committee*, IsrSC 53(3) 38 (1999)

21. HCJ 5364/94 *Wilner v. Chair of the Israel Labor Party*, IsrSC 49(1) 758 (1995)

22. HCJ 14/86 *Laor v. Theater and Film Review Board*, IsrSC 41(1) 421 (1987)

23. HCJ 399/85 *MK Rabbi Meir Kahane v. Broadcasting Authority Directorate*, IsrSC 41(3) 255 (1987)

24. HCJ 7754/14 *Tzalul Environmental Association v. Petroleum Commissioner*, (Dec/ 28, 2016)

25. HCJ 2257/04 *Hadash-Ta'al Faction v. Chair of the Central Elections Committee for the 17th Knesset*, IsrSC 58 (6) 685 (2004)

26. CA 4096/18 *Chacham and Or-Zach Advocates v. Assessment Officer – Akko*, (May 25, 2019)

27. CrimA 7007/15 *Shmil v. State of Israel*, (Sept. 5, 2018)

28. CA 8742/15 *Astrolog Publishers Ltd., v. Ron*, (Dec. 3, 2017)

29. CrimA 961/16 *Alharoush v. State of Israel*, (Nov. 25, 2018)

30. AAA 3326/18 *A. v. Director of Firearm Licensing, Southern District – Ministry of Public Security*, (Feb. 26, 2019)

31. HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Interior*, IsrSC 61(2) 202 (2006) [https://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior]

32. HCJ 7625/06 *Martina Rogachova v. Ministry of Interior*, (March 31, 2016) [https://versa.cardozo.yu.edu/opinions/rogachova-v-ministry-interior]

33. EA 2600/99 *Ehrlich v. Chair of the Central Elections Committee*, IsrSC 53(3) 38 (1999)

34. CrimA 6833/14 *Naffaa v. State of Israel*, (Aug. 31, 2015)

35. EDA 50/03 *Central Elections Committee for the 16th Knesset v. Tibi*, IsrSC 57(4) 1 (2003)

Judgment (Reasoning)

(July 18, 2019)

President E. Hayut:

Introduction

1. On March 6, 2019, the Central Elections Committee for the 21st Knesset (hereinafter: the Elections Committee or the Committee) approved a request for the disqualification of Dr. Ofer Cassif (hereinafter: Cassif) from running as a candidate for the Knesset on the list of "Hadash –

headed by Ayman Odeh, Ta'al – headed by Ahmed Tibi" (hereinafter: Hadash-Ta'al) but rejected a request to disqualify the Hadash-Ta'al list in its entirety. The Committee further accepted two requests to disqualify the Ra'am-Balad list (hereinafter: Ra'am-Balad) and to bar Advocate Itamar Ben Gvir from standing for election.

These decisions were the focus of the appeal and approval proceedings before us.

The three appeals – EA 1866/19, EA 1867/19 and EA 1876/19 – which will be presented below, were filed on March 12, 2019, in accordance with sec. 63A(d) of the Knesset Elections Law [Consolidated Version], 5729-1969 (hereinafter: the Elections Law) (in regard to the disqualification of a candidate) and secs. 64(a) and 64(a1) of that Law (in regard to the disqualification of lists). The approval proceeding – EDA 1806/19 – was filed on March 10, 2019 by the Elections Committee, in accordance with the provisions of sec. 63A(b) of the Elections Law and sec. 7A(b) of Basic Law: The Knesset (hereinafter: Basic Law: The Knesset or the Basic Law).

2. Sections 63A(e) and 64(b) of the Elections Law require that the Court issue a judgment in appeal and approval proceedings "no later than the 23rd day prior to Election Day". In regard to the elections for the 21st Knesset, which took place on April 9, 2019, we were therefore required to render judgment in the appeal and approval proceedings no later than March 17, 2019. Under the time constraint from the time of the filing of the proceedings – March 10, 2019, and March 12, 2019 – to the date upon which we were required to render judgment – March 17, 2019 – we allowed the Respondents in each of the proceedings to file written pleadings, and we heard supplementary oral arguments before a nine-judge panel, as required by the Law. The hearings took place on Wednesday, March 13, 2019, and Thursday, March 14, 2019, and the judgment was duly handed down on Sunday, March 17, 2019, without stating reasons in view of the statutory time constraints detailed above, and as has been usual in such proceedings over the years (see, for example: EDA 11280/02 *Central Elections v. Tibi*, [1]; EA 561/09 *Balad – National Democratic Alliance v. Central Elections Committee for the 18th Knesset* [2]; EDA 9255/12 *Central Election Committee v. Zoabi* [3]). In the judgment, a majority of eight justices, against the dissenting opinion of Justice D. Mintz, decided not to approve the decision of the Elections Committee in the matter of the disqualification of Cassif. The Court unanimously decided to reject the appeal in regard to the Elections Committee's decision not to disqualify the Hadash-Ta'al list. The Court also decided,

by a majority of eight justices, against the dissenting opinion of Justice D. Mintz, to grant the appeal in regard to the Ra'am-Balad list, and to order that the list is not barred from participating in the Knesset elections. The Court further unanimously rejected the appeal in regard to the decision not to disqualify Ben Gvir, and decided by a majority, against the dissenting opinion of Justice N. Sohlberg, to grant the appeal in the matter of Ben Ari and order his disqualification as a candidate for the 21st Knesset. Four days later, on March 21, 2019, we published a summary of the reasoning grounding the judgment, and we now present the full reasoning.

General Background and Normative Framework

3. The right to vote and be elected is the life breath of every democratic regime, and the conceptual foundation of this right is grounded in the fundamental principles of equality and freedom of political expression (EA 2/84 *Neiman v Central Elections Committee* [4], 262-264 (hereinafter: the first *Neiman* case); EA 1/88 *Neiman v Central Elections Committee* [5], 185 (hereinafter: the second *Neiman* case); EA 561/09 *Balad v. Central Elections Committee* [2], para. 2 (hereinafter: the *Balad* case); EDA 9255/12 *Central Election Committee v. Zoabi* [3], para. 7 (hereinafter: the first *Zoabi* case); EDA 1095/15 *Central Elections Committee v. Zoabi* [6], para. 5 (hereinafter: the second *Zoabi* case); *cf.* LCA 7504/95 *Yassin v. Registrar of Parties* [7], 58-60 & 71 (hereinafter: the *Yassin* case); Ruth Gavison, *Twenty Years since the Yeredor Ruling – The Right to be Elected and the Lessons of History*, in A. Barak (ed.), ESSAYS IN HONOR OF SHIMON AGRANAT, (1986), 145, 151-152 (in Hebrew) (hereinafter: Gavison)).

Nevertheless, equality and freedom of political expression are not unrestricted rights, and it has already been held that "it is the right of a democracy to deny the participation in the democratic process of lists that reject democracy itself […] one who does not accept the fundamental principles of democracy and seeks to change them cannot ask to participate in democracy in the name of those principles" (EDA 11280/02 *Central Elections Committee v. Tibi* [1], 14 (hereinafter: the *Tibi* case); and further see the *Yassin* case, p. 62, the first *Zoabi* case, para. 8; the second *Zoabi* case, para. 6). Therefore, along with the formal capacity conditions that must be met in order to realize the right to vote and be elected, which concern, inter alia, age and citizenship (see: sec. 5 of Basic Law: The Knesset in regard to the right to vote, and secs. 6, 6A

and 7 of that Law in regard to the right be elected), there is a need for material restrictions intended to prevent participation in the elections by lists and candidates that seek to use the tools of democracy in order to deny the very existence of the state or infringe its fundamental principles.

4. As will be explained in the brief survey below, such material restrictions have been developed over the years in Israeli law, as well. At its inception, the State of Israel adopted a democratic regime characterized, inter alia, by the values of equality and freedom of political expression mentioned above. Alongside those values, and without any necessary contradiction, the sovereign State of Israel was established as a Jewish state, in recognition of the right of the Jewish people to national rebirth in its land. This important fundamental principle, which Justice M. Cheshin defined as an "axiom" when he served as chair of the Central Elections Committee for the 16th Knesset, must also be protected. President A. Barak addressed this in the *Tibi* case, stating:

> There are many democratic states. Only one of them is a Jewish state. Indeed, the reason for the existence of the State of Israel is its being a Jewish state. This character is central to its existence, and it is – as Justice M. Cheshin stated before the Central Elections Committee – an "axiom" of the state. It should be seen as a "fundamental principle of our law and system" (emphasis original; *ibid*., p. 21).

President D. Beinisch addressed the uniqueness of Israeli democracy in this regard in the *Balad* case, noting:

> The State of Israel's being the only state that serves as a home for the Jewish people, and therefore preserves unique characteristics worthy of protection, is the starting point for every discussion of the character of the state (*ibid*., para. 3).

In this regard, it would not be superfluous to note that there are those who hold the opinion that there is a "significant moral tension that requires a process of reconciliation between opposing values (Justice I. Englard in the *Tibi* case, p. 64. For a detailed discussion of this subject, see: ADI GAL & MORDECHAI KREMNITZER, DISQUALIFICATION OF PARTY LISTS AND CANDIDATES – DOES IT STRENGTHEN DEMOCRACY OR WEAKEN IT? (Israel Democracy Institute, 2019) 22-26 (Hebrew)). As opposed to this, there are those who are of the opinion that there is no contradiction between democratic values and Jewish values, but rather they derive from one another (the second *Neiman* case, pp. 189-190; Justice Y. Amit in the second *Zoabi* case, para. 3; Elyakim Rubinstein, *On the*

Equality of Arabs in Israel, 1 KIRYAT MISHPAT 17, 26 (20021) (Hebrew)). Below, we will address the material restrictions established in regard to the right to vote and be elected in Israeli law. As will be seen, these restrictions define Israel as a Jewish and democratic state without distinction between these two frameworks, in the spirit of the principles we addressed above.

5. Since 1985, the material constitutional restrictions upon the right to vote have been grounded in sec. 7A of Basic Law: The Knesset. This section, in its current form, establishes:

> 7A(a). A candidates list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset, if the goals or actions of the list or the actions of the person, expressly or by implication, include 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) support for armed struggle by a hostile state or a terrorist organization against the State of Israel.

6. As already noted, these restrictions developed in Israeli law over the course of years. Basic Law: The Knesset, which was enacted in 1958, did not originally comprise a material provision – as opposed to a formal provision in regard to competence – that restricted the right to be elected. The absence of such a provision notwithstanding, in EA 1/65 *Yeredor v. Chairman of the Central Elections Committee* [8] (hereinafter: the *Yeredor* case), the Court recognized the authority of the Elections Committee not to approve the participation of the Socialists list in the elections for the 6th Knesset because the list, and the El Ard organization with which it identified, "deny the integrity of the State of Israel and its very existence". Some twenty years later, the Court again addressed the disqualification of a list from standing for election. The Central Elections Committee for the elections for 11th Knesset in 1984 disqualified the Kach list and the Progressive List for Peace from standing for election. The Kach list was disqualified by the Committee for the racist and anti-democratic principles that it espoused, its open support for terrorism, and incitement of hatred and hostility between different sectors of the Israeli populace. The Progressive List for Peace was disqualified due to the Committee's determination that the list comprised subversive foundations and tendencies and that central members of the list acted in a manner that identified with the state's enemies. The disqualification of the two lists was brought before the Court in the first *Neiman* case, which held, by majority, that in the absence of an express provision of law, the

doctrine established in the *Yeredor* case should be limited to the causes for disqualification set out there, i.e., denial of the very existence of the state – which must be proven by clear, unequivocal, and persuasive evidence (for a critique, see Gavison, at pp. 184-195).

7. Following the judgment in the first *Neiman* case, the legislature amended Basic Law: The Knesset and added sec. 7A. This section, in its original form, comprised three causes for disqualifying a list of candidates whose purposes or actions expressly or impliedly amounted to (1) negation of the existence of the state as the state of the Jewish people; (2) negation of the democratic character of the state; (3) incitement to racism.

When the Kach list again sought to stand for election for the 12th Knesset in 1988, the list was disqualified by the Elections Committee for the reasons set out in subsecs. (2) and (3) of sec. 7A. The appeal of the decision was denied by the Court (see: the second *Neiman* case), which held that the list indeed negated the democratic character of the state and that its activities constituted incitement to racism. In its decision, the Court emphasized that given the importance of the freedoms that the rights to vote and to be elected are intended to realize, affirming those rights is preferable to denying them, and the disqualification of a list must be reserved for the most extreme cases. That year, the Court also adjudicated another proceeding related to the elections for the 12th Knesset. The Court majority denied an appeal of a decision by the Central Elections Committee not to disqualify The Progressive List for Peace from standing for election (EA 2/88 *Ben Shalom v. Central Elections Committee* [9]). In 1992, after the murder of the founder of the Kach movement, Rabbi Meir Kahane (hereinafter: Rabbi Kahane), in 1990, the Central Elections Committee disqualified two lists that viewed themselves as the heirs to Rabbi Kahane from participating in the elections for the 13th Knesset. A unanimous Court denied the appeals of the disqualifications, adopting the criteria established in the second *Neiman* case (EA 2805/92 *Kach List v. Chairman of the Central Elections Committee* [10] (hereinafter: the *Kach* case)); EA 2858/92 *Movshovich v. Chairman of the Central Elections Committee* [11] (hereinafter: the *Movshovich* case)).

8. In 2002, sec. 7A of the Basic Law was amended. The amendment comprised three primary changes: (1) the separate causes for disqualification in regard to negating the existence of the State of Israel as a Jewish state and as a democratic state were unified as one cause; (2) an additional

cause was added under which a list could be disqualified from participation in elections if it supported armed struggle by a hostile state or a terrorist organization against the State of Israel; (3) it was established that not only could an entire list be disqualified, but also a *candidate* could be disqualified from standing for election, but that as opposed to the disqualification of a list, the disqualification of a candidate required the approval of the Supreme Court.

9. In the *Tibi* case, the Court addressed a number of decisions given by the Central Elections Committee for the 16th Knesset in regard to the elections in January 2003, among them the first decisions of their kind pursuant to the aforementioned amendment to sec. 7A of the Basic Law. The Elections Committee decided to disqualify Knesset members Ahmed Tibi of the Hadash-Ta'al list (hereinafter: Tibi) and Azmi Bishara of the Balad list (hereinafter: Bishara). The Committee further decided that Baruch Marzel of the Herut list (hereinafter: Marzel) should not be disqualified. In addition, the Committee decided to disqualify the Balad list from standing for election. In the *Tibi* case, the Court focused upon and outlined the criteria for each of the causes in sec. 7A of the Basic Law. On that basis, the Court decided not to approve the Election Committee's decision to disqualify Knesset members Tibi and Bishara from standing for election. The decision in regard to Tibi was unanimous, whereas the decision in regard to Bishara was by a majority. A majority further dismissed the appeal of the Committee's decision to permit Marzel's candidacy, and the appeal against the disqualification of the Balad list was granted by a majority, and it was held that the list could stand for election.

10. Another amendment to sec. 7A of the Basic Law was adopted in 2008, adding sec. (a1) that established: "In connection with this article, a candidate who was illegally present in an enemy state in the seven years that preceded the deadline for submitted lists of candidates shall be considered someone whose actions constitute support for an armed conflict against the State of Israel, unless he has proven otherwise". About a year after that amendment, prior to the elections for the 18th Knesset, the Court addressed an appeal of the Elections Committee's decision to disqualify the Balad and Ra'am-Ta'al list for the causes enumerated in secs. 7A(a) and (3) of the Basic Law. A majority of the Court granted the appeal, and the participation of those lists was permitted. In 2012 and 2015, the Court was again called upon to address the disqualification of candidates. In the first *Zoabi* case, the Court unanimously overturned the Central Election Committee's decision to disqualify Knesset member Hanin Zoabi (hereinafter: Zoabi) from

running in the elections for the 19th Knesset for the causes enumerated in secs. 7A(a)(1) and (3) of the Basic Law. In the second *Zoabi* case, two approval proceedings were addressed jointly after the Central Elections Committee disqualified Zoabi's participation in the elections for the 20th Knesset for the causes enumerated in sec. 7A(a)(1) and (3) of the Basic Law, and also disqualified Marzel from participating in those same elections for the causes enumerated in secs. 7A(a)(1) and (2). A majority of the Court decided not to approve the Elections Committee's decisions in regard to both Zaobi and Marzel, and both stood as candidates in those elections.

11. The judgment in the second *Zoabi* case was rendered in 2015. In 2017, section 7A of the Basic Law was amended again to add the words "including his expressions" after the words "the actions of the person". It is important to emphasize that, as opposed to various arguments raised before us in these proceedings, this amendment – as stated in its Explanatory Notes – "was not intended to change the case law of the Court according to which sec. 7A of the Basic Law should be used sparingly and strictly in order to protect the most vital interests of the state". In other words, the strict evidentiary threshold outlined in the case law over the years for proving the existence of the causes for disqualification remains as it was, given the purpose of the section and the balance between the values it is intended to protect.

To complete the picture, we would note that in 2016, the Knesset approved an amendment to the Basic Law in regard to the *termination of the tenure of a member of the Knesset* for incitement to racism or support of armed struggle by an enemy state or of a terrorist organization against the State of Israel, as stated in secs. 7A(a)(2) or 7A(a)(3) of the Basic Law. We would further note for the sake of completing the picture that two petitions filed against the constitutionality of the said amendment were denied (HCJ 5744/16 *Ben Meir v. Knesset* [12]) (hereinafter: the *Ben Meir* case).

The Causes for Disqualification established in Section 7A

12. Having surveyed the proceedings and legislative amendments relevant to the disqualification of lists and candidates seeking to stand for election to the Knesset and the development of the case law and the Basic Law in this regard, it would now be appropriate to

address the interpretive principles and the criteria outlined and applied in all that regards the various causes for disqualification. I would preface by stating that the prevailing trend in this Court's case law is that a cautious, restrained approach should be adopted in all that relates to the disqualification of lists and candidates participating in Knesset elections. Indeed, in view of the magnitude of the rights to vote and be elected, this Court has repeatedly held that the starting point is that the causes for disqualification should be interpreted narrowly and should be applied in the most extreme cases (see, for example, the second *Neiman* case, at p. 187; the *Tibi* case, at pp. 17-18). From this starting point, the case law derived the answer to the question of what must be proved in order to ground the presence of any of the causes for disqualification, as well as the criteria in regard to the required evidentiary threshold. We will first examine the case-law interpretation of what is required to prove each of the causes for disqualification, and then examine the criteria established in regard to the required evidentiary threshold.

(1) *Negation of the existence of the State of Israel as a Jewish and democratic state*

13. The first cause established under sec. 7A(a)(1) of Basic Law: The Knesset concerns preventing participation of candidate lists or candidates in the elections if the purposes or actions of the list or the actions of the candidate, including his statements, constitute a negation of the existence of the State of Israel as a Jewish and democratic state. The "nuclear-minimal" characteristics of the State of Israel as a Jewish state and its "nuclear-minimal" characteristics as a democratic state were established in the *Tibi* case, which held that it is the infringement of these characteristics that may give rise to a cause for disqualification under sec. 7A(a)(1) of the Basic Law. In the matter of the "nuclear" characteristics that define the State of Israel as a *Jewish state*, it was held that these include the right of every Jew to immigrate to the State of Israel, in which there will be a Jewish majority; that Hebrew is the primary official language of the state; that the symbols and holidays of the state primarily reflect Jewish tradition, and that the Jewish heritage is a central element of the religious and cultural heritage of the state (the *Tibi* case, p. 22; and compare the view of Justice Y. Turkel in that case at p. 101; and see the second *Zoabi* case, para. 66, and the first *Zoabi* case, para. 20; the *Balad* case, para. 6; and compare the *Yassin* case, p. 66; the opinion of Justice S. Levin in the *Ben Shalom* case, p. 248; and see: AMNON RUBINSTEIN & RAANAN HAR-ZAHAV, BASIC LAW: THE KNESSET, 64 (1993) (Hebrew)).

As for the "nuclear" characteristics of the State of Israel as a *democratic state*, it was held that "these characteristics are based […] upon recognition of the sovereignty of the people, as expressed in free, equal elections; recognition of the core human rights, among them human dignity, respect and equality, maintaining the separation of powers, the rule of law and an independent judiciary" (the *Tibi* case, p. 23; and see the second *Zoabi* case, para 29; and compare the *Yassin* case, p. 66). It was further noted in the *Tibi* case that a list that negates the right to vote for the Knesset on ethnic-national grounds, or a list seeks to change the regime by violent means will not be permitted to stand for election, as it essentially negates the democratic foundations of the Israeli regime (*ibid*., p. 24; and see the second *Neiman* case, p. 190, and the second *Zoabi* case, para. 30).

(2) *Incitement to racism*

14. The second cause for disqualification, established in sec. 7A(a)(2), is incitement to racism. We will address the grounds of this cause and its underlying rationales, particularly in a Jewish state, at greater length below. At this stage, we would note that already in the second *Neiman* case, in which, for the first time following the enactment of sec. 7A of the Basic Law, the Kach list was disqualified on the grounds of incitement to racism, the Court held, *per* President M. Shamgar, that the "objectives and conduct [of the list] are also clearly racist: systematically fanning the flames of ethnic and national hate, which causes divisiveness and animosity; calling for the forceful deprivation of rights; systematic and intentional degradation directed towards a specific part of the population selected because of their national origin and ethnicity; [calling] for their humiliation in ways very similar to the terrible experiences of the Jewish nation" (*ibid*., p. 197).

(3) *Support for armed struggle by a hostile state or a terrorist organization against the State of Israel*

15. The third cause for disqualification, established in sec. 7A(a)(3) of the Basic Law, concerns support for armed struggle by a hostile state or a terrorist organization against the State of Israel. This cause is premised upon the primary conceptual justification for the disqualification of candidates and lists – *viz.*, defense against those who would seek to negate the very existence of the state or undermine the foundations of its existence and its democratic nature by means of armed struggle (the first *Zoabi* case, para. 29). In the *Tibi* case, President A. Barak noted in regard to this

cause that: “Democracy is allowed to prevent the participation of candidate lists that employ violence or support violence as a tool for changing the nature of the regime” (*ibid*., p. 26; and also see the second *Zoabi* case, para. 69). Preventing participation by virtue of this cause will, of course, be possible where a candidate or a list personally takes active part in an armed struggle of a terrorist organization or an enemy state, as well as where they encourage such a struggle or provide material, political or other support (*ibid*., para. 69; and see the *Tibi* case, p. 27; the *Balad* case, para. 7; the first *Zoabi* case, para. 29). Disqualification of a list or candidate by virtue of this cause would be possible only if the support is of an armed struggle by an *enemy state* or a *terrorist organization* (the *Tibi* case, p. 27; and see the second *Zoabi* case, para. 69; for a detailed discussion of this cause, see: GAL & KREMNITZER, 16-19).

The Criteria in regard to the Required Evidentiary Threshold

16. Alongside the narrow interpretation of the causes for disqualification established under sec. 7A of the Basic Law, over the years, the case law further added a series of strict criteria in regard to the required evidentiary threshold for the crystallizing of any of the causes. These criteria limit the possibility of disqualifying a list or candidate from standing for election to the Knesset only to clear, extreme cases due to the intense caution that the Court adopts as the starting point in this regard (the *Balad* case, para. 3; and see the opinion of Justice S. Levin in the *Ben Shalom* case, p. 248; the *Kach* case, p. 2). Below, we will summarize the criteria outlined in the case law in regard to the evidentiary threshold required for the existence of the disqualifying causes. These criteria were, for the most part, first applied in regard to the disqualification of lists, and after the amendment of the Basic Law in 2002, they were respectively adopted in regard to the disqualification of an *individual candidate*, as well (see the *Tibi* case, the first *Zoabi* case and the second *Zoabi* case). These are the criteria:

(-) *First*, in order to decide whether one of the elements set forth in sec. 7A is present in the objectives or actions of a list or a candidate, it must be shown that the objective is one of the dominant characteristics of the list’s or the candidate’s aspirations or activities, and that they seek to participate in the elections in order to advance them (see the second *Neiman* case, p. 187; the *Balad* case, para. 4; the first *Zoabi* case, para. 14).

(-) *Second*, it must be shown that these central, dominant purposes can be learned from express declarations and direct statements or reasonable conclusions of clear, unequivocal significance (the second *Neiman* case, p. 188; the *Tibi* case, p. 18, the *Balad* case, para. 4; the first *Zoabi* case, para 14).

(-) *Third*, it must be shown that the list or the candidate actively works for the realization of the said objectives, and that there was non-sporadic activity for their realization. It was held that objectives of a theoretical nature are insufficient, and that there must be a showing of systematic, repeated activity whose "intensity must be given severe, extreme expression" (the second *Neiman* case, p. 196; the *Tibi* case, p. 18; the *Balad* case, para. 4; the first *Zoabi* case, para. 14).

(-) *Fourth*, the evidence grounding the actions or objectives sufficient to prevent standing for election to the Knesset must be "clear, unambiguous and persuasive" (the second *Neiman* case, p. 188; the *Tibi* case, p. 18; the second *Zoabi* case, para. 34; compare: the first *Neiman* case, p. 250), and a "critical mass" of highly credible evidence is required to justify the disqualification (the *Tibi* case, p. 43; the first *Zoabi* case, para. 14). The burden of proof in this regard rests upon the party arguing for disqualification of the list or candidate, and a doubt arising as to the sufficiency of the evidence must weigh against the disqualification (the second *Neiman* case, pp. 248-249; the *Kach* case, p. 3).

17. A complex question concerning the evidentiary threshold for proving the causes for disqualification under sec. 7A of the Basic Law is that of whether to apply probability tests for the realization of the dangers that the causes for disqualification are intended to prevent. There is a difference of opinion in the case law, and the matter has been left for further consideration and has yet to be decided. The spectrum of opinions expressed on this matter range from an approach that rejects the application of the probability test (see the position of Justice M. Elon in the first *Neiman* case, p. 297; President M. Shamgar following the enactment of sec. 7A of Basic Law: The Knesset in the second *Neiman* case, p. 187; Justice S. Levin in the *Ben Shalom* case, p. 248; and Justices S. Levin. E. Mazza, and D. Dorner in the *Tibi* case, pp. 81, 96-97, and 99), to the opposite approach that is of the view that this test should be applied to each and every one of the disqualification causes in sec. 1A of the Basic Law (Justice E. Rivlin in the *Tibi* case, p. 106, and see Barak Medina,

Forty Years to the Yeredor Decision: The Right to Political Participation, 22 MEKHKAREI MISHPAT 327, 376-381 (2006) (Hebrew)). As noted, the matter has been left for further consideration and has not yet been decided in the case law (see President A. Barak and Justices A. Procaccia and D. Beinisch in the *Tibi* case, pp. 21, 88, 90; President D. Beinisch in the *Balad* case; President A. Grunis in the first *Zoabi* case, para. 34; President M. Naor in the second *Zoabi* case, para. 36).

A middle position between these two opposing views on the application of the probability test has also been expressed, according to which a distinction can be drawn between the causes under sec. 7A(a)(1) and (3) and the cause concerning incitement to racism under sec. 7A(a) (2). Thus, for example, in the *Tibi* case, Justice Procaccia noted that "condemnation of incitement to racism and its removal from the political election process are values unto themselves, independent and unqualified even when unaccompanied by any probability of the realization of the potential danger. There is no need to seek manifest or hidden elements of danger in order to deny the entry of inciters to racism into the political arena […] incitement to racism is condemned as a value of the universal and national heritage, and it stands beyond the test for the probability of its foreseeable danger under any particular criterion. The contradiction between racism and the fundamental values of the state is so extreme that anyone who holds it as part of one's political doctrine should be disqualified out of hand" (*ibid*., p. 90; GAL & KREMNITZER, 62-63). Another opinion that distinguishes the cause related to incitement to racism and the other causes in regard to the probability test, and which proposes applying a very low-level probability test to it, was expressed by Justice D. Beinisch in that matter, in stating: "If I were of the opinion that we should adopt the approach that applies 'probability tests' for the disqualification of lists or candidates, then in all that regards racism, I would hold that 'racism' in its 'nuclear' sense comprises, by its very nature, a potential for danger whose probability is a real possibility. Racism, by its very nature, may spread like a disease even when it appears that the scope of the political activity surrounding it is small, and the political prospects of the list or candidate are not serious. Racism is a type of disease for which isolation and removal from the political and social arena are conditions for preventing its spread" (p. 88). We will address this subject below, and examine whether there is, indeed, a place for a different approach to the cause of incitement to racism as opposed to the other causes in relation to probability tests.

Another question that derives to some extent from the probability test and that concerns the necessary evidentiary threshold for proving the existence of the causes for disqualification is whether and to what extent there is a connection between the causes for disqualification and the criminal offenses intended to protect those values. In this regard, it would appear that the approach adopted in the case law holds that the Penal Law can assist in identifying the presence of the elements of causes for disqualification, while emphasizing that we are concerned with different methods for the prevention of the phenomena and that the tests applicable in each of the areas are not the same (see President M. Shamgar in the second *Neiman* case, p. 191; President A. Grunis in the first *Zoabi* case, para. 32; and see Gavison, p. 166; and *cf*. the *Ben Meir* case, para. 28; and HCJ 11225/03 *Bishara v. Attorney General* [13]).

An Elections Appeal and Approval of an Elections Committee Decision – What is the Difference?

18. Basic Law: The Knesset distinguishes two types of decisions by the Central Elections Committee. *The first* is Elections Committee decisions to prevent or not prevent a *candidate list* from standing for election. Such decisions can be challenged in an *appeal* to the Supreme Court, under secs. 64(a) and 64(a1) of the Elections Law. *The second* is Election Committee decisions declaring that a particular *candidate* is *barred* from participating in the elections. Such a decision requires the *approval* of the Supreme Court, under sec. 7A(b) of Basic Law: The Knesset and sec. 63A(b) of the Elections Law, whereas an Elections Committee decision to *deny* a request to bar a *candidate* from standing for election is of the first type of decisions in the sense that it does not require approval but can be appealed to the Supreme Court, under sec. 63A(d) of the Elections Law.

The procedure for approving an Elections Committee decision is not one of "regular" judicial review in the sense that decision is not consummated until approval is granted. In this, it differs from appeal proceedings in regard to Election Committee decisions, which come into force when given. The scope of the Court's authority in an approval proceeding is not identical to that granted it in an appeal proceeding. It has been held in this regard that the Court must refrain from nullifying a decision under appeal even if it would have decided differently, as long as it is lawful and does not deviate from the margin of reasonableness. As opposed to this, in an approval

proceeding, the Court is granted authority to examine whether it, itself, approves the disqualification of the candidate from standing for election (the *Tibi* case, pp. 28-31; the first *Zoabi* case, para 15; the second *Zoabi* case, paras. 12-13). It is interesting to note that there are different approaches in the case law in regard to the scope of the Court's intervention in the decisions of the Elections Committee due to the fact that it is primarily a political body that weighs political considerations. Thus, there are those who take the view that this fact justifies narrowing the scope of intervention in the Committee's decisions (Justice E. Rivlin in the *Tibi* case, p. 109, and Justice S. Levin in the *Ben Shalom* case, p. 251). As opposed to this, there are those of the opinion that "this fact of the political composition of the Committee, with the exception of its chair, requires an examination of the merits of the Committee's decision by the this Court in order to prevent political considerations from outweighing an objective legal examination" (Deputy President M. Elon in the *Ben Shalom* case, p. 279; for a similar view, see Justice D. Beinisch in the *Tibi* case, p. 86 and the *Balad* case, para. 16).

This feature of the Central Elections Committee as a primarily political body that makes decisions influenced by political considerations, with no obligation to explain those decisions, indeed justifies examination and consideration by the legislature (see the comment of President Naor in the second *Zoabi* case, para. 78, and GAL & KREMNITZER, 61-62). At present, the Court is responsible for both types of proceedings brought before it in accordance with the provisions of Basic Law; The Knesset and the Elections Law, and the distinctions between them as presented above. In this regard, it would not be superfluous to further note what we held in this regard in another context – that of the *Ben Meir* case – in which it was argued that there is constitutional significance to the distinction between the two proceedings. In rejecting that argument, we held: "There is, indeed, a difference in the scope of authority granted to the Court in the framework of an elections appeal as opposed to an approval of a decision […] however, at the end of the day, this Court has the authority [even in an appeals proceeding – E.H.] to review the decision on the merits, and to oversee its lawfulness and reasonableness, including all that relates to the factual foundation" (*ibid*., para. 34).

19. Having presented the general normative framework for the proceedings before us, I will now turn to an examination of each of the four proceedings and decide upon them.

20. Three requests for the disqualification of Ben Ari and Ben Gvir were submitted to the Central Elections Committee. Two of the requests – that submitted by the Israel Religious Action Center - Israel Movement for Progressive Judaism and the Tag Meir Forum, and that submitted by MK Stav Shaffir – relied upon two causes for disqualification: negation of the existence of the State of Israel as a Jewish and democratic state under sec. 7A(a)(1) of Basic Law: The Knesset, and incitement to racism under sec. 7A(a)(2) of the Basic Law. The third request – submitted by members of the Meretz faction – relied upon the single cause of incitement to racism. After considering those requests, the Elections Committee decided, as noted, to reject all three requests, and thus the appeal before us, which was filed jointly by all the parties requesting disqualification.

Arguments of the parties

21. The Appellants argue that Ben Ari and Ben Gvir have consistently acted for years to realize the racist doctrine of Rabbi Meir Kahane and the Kach list, which was disqualified from running for election, and act in an extreme manner to humiliate Israeli Arabs, including by calling for their expulsion from the country. According to the Appellants, Ben Ari and Ben Gvir support a racist ideology that seeks to undermine the principles of equality and human dignity in regard to anyone who is not Jewish. It was argued that the judgments that addressed the Kach list clearly established that its ideology is racist and infringes the fundamental principles of the democratic regime. The Appellants are of the opinion that the primary characteristic of the conduct of Ben Ari and Ben Gvir is ongoing incitement to racism, and that this is also expressed in the platform of the Otzma Yehudit party, which opposes democratic values. It was argued that the declarations of the two were consistently and continuously translated into severe actions that were, in part, also carried out by other elements of the Otzma Yehudit party.

22. Ben Ari and Ben Gvir relied upon the Election Committee's decision and argued that the appeal should be denied. According to them, the evidence presented by the Appellants does not justify their disqualification. Their primary argument was that the platform and their public activity over the years apply to those who are "an enemy of Israel", who are not loyal to the state, and does

not apply generally to all "the Arabs" as such, and supports and encourages the emigration of anyone who is not loyal "and who is an enemy of the state". According to them, the fact that this Court did not disqualify Marzel from participating in the elections shows that they, too, should not be disqualified.

23. The Attorney General was of the opinion that Ben Ari should be barred from participating in the elections on the grounds of incitement to racism. He argues that the Appellants presented persuasive, clear, unequivocal, recent evidence, particularly since May 2018, in which Ben Ari is heard speaking in various films, some of which were uploaded to his Facebook page. According to the Attorney General, we are concerned with ongoing, consistent expressions over a significant period of time that are at the hard core of incitement to racism. It was argued that these statements show that Ben Ari refers to the Arab population in its entirety while calling for a violent denial of the rights of the Arab population of the State of Israel and for their systematic, targeted humiliation on the basis of their ethno-national identity.

As for Ben Gvir, the Attorney General was of the opinion that despite the fact that the collection of evidence in his regard is very troubling, and that some of his statements come "dangerously close to the line that would bar a person from standing for election to the Knesset", he should not be disqualified. According to the Attorney General, as opposed to the evidence presented against Ben Ari, the evidence in regard to Ben Gvir is insufficient to constitute the persuasive, clear, unequivocal evidentiary foundation required for disqualification. This, because most of the evidence is not from the recent past, and in view of Ben Gvir's declarations and explanations in the current disqualification hearings.

24. As stated in the judgment we issued without the reasoning on March 17, 2019, we decided by majority, against the dissenting view of Justice N. Sohlberg, to adopt the position of the Attorney General and grant the appeal in EA 1866/19 in all that regards Ben Ari, and to order his disqualification form standing as a candidate in the elections for the 21st Knesset, while we unanimously decided to deny the appeal in the matter of Ben Gvir.

Disqualification of a Candidate on the grounds of Incitement to Racism

25. Racism is a well-known societal disease from which the human race has suffered since time immemorial. Racism shows its ugly face in hatred and incitement to hatred of the other, simply by reason of inborn traits or communal, religious, ethnic, or national affiliation. It strips people of their humanity on the basis of those affiliations and violates the basic right to human dignity and equality granted to all who are created in God's image (HCJ 2684/12 *Movement to Strengthen Tolerance in Religious Education et. al. v. Attorney General* [14], para. 26 of the opinion of Justice S. Joubran) (hereinafter: the *Torat Hamelech* case)). The democratic State of Israel was established as the state of the Jewish people, which has experienced unparalleled racial persecution and suffering throughout the ages. Racism stands in absolute contradiction to the fundamental values upon which the state was established, and we, as Jews, have a special obligation to fight it uncompromisingly. Justice Z. Berenson addressed this in 1973 in HCJ 392/72 *Berger v. District Planning and Building Council* [15], 771, stating:

> When we were exiled from our land and removed far from our country, we became victims of the nations amongst whom we lived, and in every generation, we tasted the bitterness of persecution, malice and discrimination only for being Jews "whose laws are different from those of any other people" [Esther 3:8]. With this bitter, miserable experience that seeped deep into our national and human consciousness, it might be expected that we would not walk in the corrupt path of the nations, and that with the renaissance of our independence in the State of Israel, we would be cautious and be wary of any hint of discrimination and unequal treatment against any law-abiding non-Jewish person [..] Hatred of foreigners is a double curse: it corrupts the image of God of the hater and inflicts evil upon the blameless hated. We must show humanity and tolerance to everyone created in God's image (HCJ 392/72 *Berger v. District Planning and Building Council*, IsrSC 27(2) 764, 771 (1973); and see and compare: the *Tibi* case, p. 89; the opinion of Deputy President E. Rubinstein in the *Torat Hamelech* case, para. 38 and in the second *Zoabi* case (dissenting in regard to the result), para. 116).

26. The Israeli legislature took up this mission following the elections for the 11th Knesset, which took place in 1984, and in the course of which, as noted, the disqualification of the Kach party was requested due to incitement to racism (the first *Neiman* case). Thus, Amendment no. 9 to Basic Law: The Knesset added sec. 7A, which sets out the causes permitting the disqualification of a list from standing for election, among them that of incitement to racism. The Explanatory

Notes the bill explain in this regard that this cause is premised upon the recognition of the severity and danger of the phenomenon of racism" (Basic Law: The Knesset (Amendment no, 9) Bill), and in the plenary session for the second and third readings of the bill, the chair of the Constitution, Law and Justice Committee, MK Eliezer Kulas stated:

> Democracy is the "credo" of the people and their way of life. One must be educated to democracy and democracy must be defended. In a democracy, there is no place for incitement to racism, no place for racism, no place for harming any person on the basis of race, religion, nationality, or sex. Racism and discrimination are contrary to the character of a democratic regime and the character of the Jewish people, which experienced what racism is on its own flesh (Transcript of the 118th session of the 11th Knesset, p. 3898 (July 31, 1985) (hereinafter: Transcript of Session 118 of the Knesset)).

In regard to our special, historical duty as Jews to fight against racism, Prof. Gavison noted in her 1986 article (cited above):

> The Israeli legislature added this cause for disqualification for various historical reasons. I view incitement to racism as a particular (severe) instance of value inconsistency. Incitement to racism is an extreme rejection of the obligation to the equal value of the person. On the basis of the lessons of history of the last century, in which Jews were innocent victims of such incitement, there is complete justification for designating incitement to racism as an express form of incompatibility with the fundamental values of the state (*ibid.*, p. 161).

27. In parallel to Amendment no. 9 of Basic Law: The Knesset, the Penal Law, 5737-1977 (hereinafter: the Penal Law) was also amended to add the offense of incitement to racism. "Racism" was defined in sec. 144A of the Law as "persecution, humiliation, degradation, a display of enmity, hostility or violence, or causing violence against a public or parts of the population, all because of their color, racial affiliation or national ethnic origin". Then Minister of Justice Moshe Nissim addressed the relationship between these two amendments in stating: "We must view both of these bills as of a piece, […] for the fundamental, proper, considered, and balanced treatment […] of phenomena with which the State of Israel cannot be reconciled" (Transcript of Session 118 of the Knesset, p. 3361), while it was noted in the Explanatory Notes of the amendment to the Penal Law that "the Hebrew heritage deems the dignity and value of the person, created in God's image, and making peace among people as exalted values. […] Jewish heritage views the

demeaning of human dignity as a serious offense" (Explanatory Notes to the Penal Law (Amendment no. 24) Bill, 5745-1985, p. 195).

In the second *Neiman* case, President M. Shamgar addressed, inter alia, the definition of the term "racism" in the Penal Law and held that for the purpose of interpreting sec. 7A of the Law, there is no need to achieve a definitive definition of the term "incitement to racism". President Shamgar also rejected the argument of counsel for the Kach list according to which "racism" refers only to biological distinctions, holding: "Different forms of persecution based on nationality are widely accepted today as a form of racism" (the second *Neiman* case, p. 192; for a discussion of the relationship between the offense of incitement to racism under sec. 144B of the Penal Law and sec. 7A, see: the first *Zoabi* case, para. 32; and compare Gavison, pp. 170-171). Denunciation of incitement to racism, and the struggle against it in the legal field also found expression in other legislative acts (see, for example, sec. 1(a1) of the Knesset Members Immunity, Rights and Duties Law, 5711-1951; sec. 5 of the Political Parties Law, 5752-1992; sec. 42A of Basic Law: The Knesset; and sec. 39A(3) of the Municipal Authorities (Elections) Law, 5725-1965).

28. Combatting incitement to racism and provisions banning political activity of various groups on that basis can also be found abroad. Thus, for example, the President of France is authorized to order the disbanding of political parties for various reasons, among them incitement to racism or other group discrimination. The President's decision can be appealed to the French Supreme Administrative Court (Conseil d'Etat) (GAL & KREMINITZER, 43-45; Gregory H. Fox & George Nolte, *Intolerant Democracies*, 36 HARV. INT. L. J. 1, 27-29 (1995); European Commission for Democracy through Law (Venice Commission), GUIDELINES ON PROHIBITION AND DISSOLUTION OF POLITICAL PARTIES AND ANALOGOUS MEASURES, 16 (1999) (hereinafter: the Venice Commission Report)). Spanish law allows for declaring a political party unlawful if it systematically infringes fundamental freedoms and rights by encouraging or justifying the assault, exclusion or persecution of people on the basis of ideology, belief, faith, nationality, race, sex or sexual orientation (Knesset Research and Information Center, *International Parallels to sec. 7A of Basic Law: The Knesset and their Possible Consequences for the Termination of the Tenure of Members of Parliament*, pp. 8-9 (2006) (hereinafter: the RIC Report); ERIK BLEICH, THE FREEDOM TO BE RACIST?: HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE AND COMBAT RACISM, p. 103 (2011); Gur Bligh, *Defending Democracy: A New Understanding of the Party-*

Banning Phenomenon, 46 VNTJL 1321, 1338 (2013); Venice Commission Report, p. 16). The Czech Republic's Political Party Law of 1991 prohibits the registration of parties whose activities endanger the rights and freedoms of citizens, and in 2010, the Czech Workers' Party was banned, inter alia, because of incitement to racism (Miroslav Mareš, *Czech Militant Democracy in Action: Dissolution of the Workers' Party and the Wider Context of this Act*, 26(1) EAST EUROPEAN POLITICS & SOCIETIES 33, 43-44 (2010); *Mapping "Militant Democracy": Variation in Party Ban Practices in European Democracies (1945–2015)*, 13(2) EUCONST. 221, 238-239 (2017) (hereinafter: *Mapping Militant Democracy*); RIC Report, p. 17; Venice Commission Report, p. 16). There are similar restrictions in Poland, Portugal, Belarus, Ukraine, Bulgaria, and Romania (Venice Commission Report, pp. 16-17; RIC Report, pp. 10-12). The Penal Code of the Netherlands allows for the disbanding of organizations that endanger public safety, and by virtue of this law, it was held that the Centre Party '86 encouraged discriminatory propaganda against foreigners and was a danger to the public. It was, therefore, disbanded in 1998 (*Defending Democracy*, p. 1339; Paul Lucardie, *Right-Wing Extremism in the Netherlands: Why it is Still a Marginal Phenomenon*, presented at Symposium, Right-Wing Extremism in Europe, 4-5 (2000); *Mapping Militant Democracy*, p. 238; for a comprehensive survey of the existing arrangements in various countries in regard to the disqualification of political parties and candidates in general, see, e.g., the *Tibi* case, pp. 14-15; the first *Zoabi* case, paras. 10-11; TALIA EINHORN, PROSCRIPTION OF PARTIES THAT HAVE A RACIST PLATFORM UNDER ART. 7A OF THE BASIC LAW: THE KNESSET (1993)).

29. The ban upon organizations that incite to racism is also grounded in international human rights law, which includes provisions treating of the prohibition of organized racist propaganda activities. For example, sec. 4(b) of the International Convention on the Elimination of All Forms of Racial Discrimination (ratified by Israel in 1979) establishes, inter alia, that the signatory states "Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination […]". Based, in part, on that convention, in 2018, the European Parliament passed a resolution in regard to the growing violence by European political groups and parties with a neo-fascist, neo-Nazi, racist or xenophobic agenda, and called upon the EU member states to adopt a number of concrete measures for effectively combatting the activities of those groups (see: European Parliament Resolution of 25 October 2018 on the rise of neo-fascist violence in Europe (2018/2869(RSP)).

30. In Israel, in 2016, the State Comptroller, Judge (emer.) Yosef Haim Shapira, published a report that examined the activities of the Ministry of Education to promote education for living in common and for preventing racism, and found that not enough had been done in this area over the last years, given the differences among sections of the Israeli population that lead to discord and strife. The report further noted that "in this complex reality, we have experienced serious phenomena of hatred, racism, violence, divisiveness, sectarianism, and intolerance over the last few years" and "racist and violent statements, discrimination, persecution and even shocking hate crimes have become not so infrequent occurrences […] while the social networks serve as a fertile ground for disseminating hatred of the other" (State Comptroller, *Education to Common Life and for the Prevention of Racism – Special Comptroller's Report*, p. 8 (2016)).

31. Indeed, the fundamental values of the State of Israel as a Jewish and democratic state instruct us to act decisively and uncompromisingly to eradicate racism in our midst. This message also sheds light on the danger that must be determined in this regard for the purpose of the probability test, if it be found that it should be applied to the causes for disqualification under sec. 7A of the Basic Law. In my view, the inherent danger of racist discourse derives from the fact that such discourse feeds and sets the stage for actions intended to realize the racist ideology, which in turn motivate and reinforce continued racist discourse. As Justice D. Beinisch stated in the *Tibi* case: "'Racism' in its 'nuclear' sense, comprises, by its very nature, a potential for danger whose probability is a real possibility" (*ibid*., p. 88). Indeed, racist discourse, particularly if it is systematic, significant, and prolonged, causes this societal disease to infiltrate, take root and spread. Therefore, it is necessary to send a clear, unambiguous message that inciteful racist discourse is illegitimate, particularly when expressed by a candidate for public office who shouts it from the rooftops. Such discourse must be left "outside the camp" in every civilized state, and all the more so in the Jewish state.

32. The French-Jewish author and intellectual Albert Memmi, who was born in the Tunis ghetto in 1920, writes in the introduction to the Hebrew edition of his book RACISM:

> The Jewish people is always a minority, and therefore, like most of the world's minorities, historically and socially exposed, and is therefore a very convenient target. (This is, incidentally, one of the justifications for Zionism: The need for Jews to cease to be a minority, at least in one place).

> Perhaps today, things have already begun to change somewhat. The declarations of some statesmen and religious leaders […] have aroused the political conscience of the nations. All of these may cause us to believe that the hell that was the lot of the Jews in almost every place in the world will come to an end […] thanks to the existence of the State of Israel. However, we should not yet rejoice. Already at the end of the last World War, it was claimed that the horrors of the war made people allergic to racism; racist philosophies would completely perish. But our hope was too rash. Nowadays, there are people who once again dare to be racist, and yet again we see the writings on the wall that call for the expulsion of the Jews, whose citizenship again is put in question, and the stage is once more set for their humiliation. We must tirelessly return to the struggle and not stop, perhaps forever (ALBERT MEMMI, RACISM, 8 (1988) (hereinafter: MEMMI).

If, as Memmi states, we Jews are obligated to spearhead the ongoing, uncompromising struggle against racism – of which antisemitism is one of the oldest and most severe examples – we must be worthy of leading that fight, and we must expunge the dangerous disease of racism from our midst in the sovereign State of Israel. This is a long fight that requires perseverance, and as Memmi warns: "We are all fertile ground for absorbing and germinating the seeds of racism if we let down our guard even for a moment" (*ibid.*, p. 41).

And now from the general to the specific.

The background for addressing the matters of Ben Ari and Ben Gvir

33. The main claim against Ben Ari and Ben Gvir is, as noted, that they view themselves as the successors of Rabbi Meir Khane and of the ideology of the Kach list that he headed. As may be recalled, that list was disqualified from standing for election to the Knesset (see the second *Neiman* case), and other lists that presented themselves as its successors have also been barred from running for the Knesset in the past (see: the *Kach* case; the *Movshovich* case). It should also be noted that already in 1984, prior to the constitutional grounding of the causes for disqualification in sec. 7A of the Basic Law, the Court noted in the first *Neiman* case that the Kach list "propounds racist and anti-democratic principles that contradict the Declaration of Independence of the State of Israel". It should also be noted that in 1994, the Israeli Government decided to declare the Kach movement, the Kahana Chai movement, and associates and derivatives of those movements, as

terrorist organizations under the Prevention of Terror Ordinance, and proceedings instituted in that regard were dismissed (see: HCJ 547/98 *Federman v. Government of Israel* [16]; and see: AAA 8342/02 *Ben Gvir v. Commissioner of Police* [17]).

34. The *Tibi* case examined, inter alia, the question of barring Marzel from standing for election on the Herut list after the Committee decided to reject a request for his disqualification. It was argued that he supported the ideology of the Kach movement, and the Court was willing to assume that the evidentiary foundation presented did, indeed, ground Marzel's involvement in the activities of that movement prior to the elections. However, in dismissing the appeal, the Court majority saw fit to grant significant weight to the fact that Marzel had declared that he had changed his views, and in the words of the judgment: "Mr. Marzel himself declares that he has recanted his prior views, and that he now seeks to act only in accordance with the law. He accepts the principals of democracy. He disavows the path expressed in the broad statements of Kach. He does not support violent actions" (the *Tibi* case, p. 60). Against that background, the Court dismissed the appeal in the *Tib*i case in regard to the disqualification of Marzel, although it had reservations as to the sincerity of his declarations.

35. Ben Ari served in the 18th Knesset as a member of the Ihud Leumi faction, and Ben Ari and Ben Gvir ran on the Otzma LeYisrael list in the elections for the 19th Knesset in 2013. A request to bar the list from the elections was denied by the Central Elections Committee, but the list did not meet the electoral threshold. In the list's election campaign for the 19th Knesset, posters were used that displayed the word "loyalty" in Arabic, and beneath it the phrase: "There are no rights without obligations". The campaign was barred by the chair of the Elections Committee Justice E. Rubinstein, who ruled that it bore a racist message that was intended to portray the Arab community as disloyal to Israel. Prior to the elections for the 20th Knesset in 2015, the list changed its name from to Otzma Yehudit, and ran as part of the Yahad list, led by MK Eli Yishai. Leading up to the elections, the question of Marzel's participation in that list arose again, after the Elections Committee decided to disqualify him. In a majority decision, the Court ruled that the disqualification decision should not be approved. It was noted that while Marzel came very close to the point of disqualification from participation in the elections, nevertheless, the claims by those who requested his disqualification were largely based upon newspaper reports and information obtained from the internet of low probative value, which were met by Marzel's denial. The Court

noted that Marzel "explained a significant part of the evidence submitted in his regard, and special weight should be given to his declarations in this matter […] These explanations cast doubt upon incitement to racism being a *primary objective* of Marzel's activity" (emphasis original; *ibid*., para. 34). Marzel, Ben Ari and Ben Gvir did not serve in the 20th Knesset, as the Yahad list did not pass the electoral threshold.

36. Did the Appellants succeed in presenting evidence in the matter of Ben Ari and Ben Gvir that establishes a cause for disqualification against either of them from running as candidates for the 20th Knesset by reason of incitement to racism? Given our approach that particular care should be taken, and that ordering that a list or candidate be barred from participating in the elections should be reserved only for extreme cases, we found that the evidence presented in the matter of Ben Gvir is insufficient for establishing a cause for disqualification, as noted, even under sec. 7A(a)(1) as argued by the Appellants. As opposed to this, the majority of the Court was of the opinion that the evidence presented justifies the disqualification of Ben Ari on the grounds of incitement to racism under sec. 7A(a)(2) of Basic Law: The Knesset.

Ben Ari

37. In his arguments, the Attorney General referred to a very long list of evidence, focusing upon evidence from the period since the beginning of 2017, and emphasizing statements and actions by Ben Ari over the course of the year preceding the elections. This evidence includes statements by Ben Ari, in his own voice, in various film clips, that, as the Attorney General argues, present an unambiguous, clear and persuasive picture of incitement to racism against the Arab population in its entirety. We are concerned with a very detailed evidentiary foundation that comprises some 40 items in regard to statements and actions by Ben Ari. After reviewing that evidence and examining Ben Ari's affidavit and statements before the Elections Committee, as well as his response to the appeal, his oral arguments before us, and the supplementary pleadings that he submitted, we are of the opinion that the arguments presented on Ben Ari's behalf do not provide an explanation that would remove his actions and statements from the scope of incitement to racism that raises a cause of disqualification under sec. 7A(A)(2) of the Basic Law.

38. Below, we will address the main elements of the evidentiary foundation presented:

In November 2017, Ben Ari spoke at the annual memorial ceremony for Rabbi Kahane, while wearing a sticker on his jacket lapel that read: "Rabbi Kahane was right". In the course of his speech, Ben Ari was heard saying the following:

> There are enemies, *there is a Jew, there is a knife, so they slaughter*. Because they are given an opportunity, they slaughter […] We'll give them another hundred thousand dunams, and affirmative action, perhaps they will love us. In the end, yes, *they love us, slaughtered* […] Rabbi Kahane taught us – there is no coexistence with them. There is no coexistence with them! (emphasis added).

Further on, Ben Ari was heard referring to Bedouin citizens, stating:

> We of Otzma Yehudit came out with a plan called Immigration and Building, Emigration and Peace […] After immigration and building, we will fulfil what God said […] *Cast out that slave-woman*, because whoever wants money will get money, whoever wants a bus will get a bus […] We will say and initiate here what has to be done so that we will wake up in the morning to a Jewish state […] *The Bedouins have to be dealt with, but in the countries of origin.* Return the land of the Negev to the Jewish people (emphasis added).

Another piece of evidence presented by the Appellants is a video that Ben Ari posted on the Facebook page "Otzma Yehudit with Michael Ben Ari" (hereinafter: the Facebook page) on May 20, 2018. In the film, Ben Ari is seen giving a speech and saying the following:

> *The Arabs in Haifa are in no way different from the Arabs in Gaza* […] *In what are they different? In that here they are enemies from within* […] here they carry out a war against us within the state […] *it's called a "fifth column"* […] *this dog should be called* by its name, they are our enemies, they want to destroy us, *there are, of course, loyal Arabs, but they can be counted as something like a percent or less than a percent, to our great despair, the overwhelming majority are full partners with their brothers in Gaza* […] The Arab enemy has to be told that it's one or the other, either you are loyal to the state or you should go to Syria […] There is no coexistence with them, they want to destroy us, that is their objective, that is their goal […] This is the fifth column here (emphasis added).

According to Ben Ari, this was said following demonstrations in Haifa in support of the residents of Gaza "against the background of the balloon terror in the south of the country". An

examination of the Facebook page on April 17, 2019, shows that the video garnered 21,000 views, hundreds of "likes", and additional hundreds of comments and shares.

39. In July 2018, Ben Ari posted another video on his Facebook page, in which he is heard saying the following:

> Do you know that the Bedouin marry Arab women from Gaza, from Hebron, who all come here. They get national insurance, they give birth in hospitals at our expense, their children later get every benefit at our expense […] they even serve in the army! *These enemies the Bedouin* serve in the army, let me repeat what I am saying – *the enemy Bedouin serve in the army!* They are seduced by money. I know from firsthand sources, from those who serve with them – they don't trust them for a minute. *There is an agenda that if they serve in the army, they will be loyal to us. No, they are not loyal to us!* (emphasis added).

This video received some 4,800 views and many comments.

About a month later, Ben Ari posted another video on the Facebook page "Otzma Yehudit with Michael Ben Ari", in which he appears saying, among other things:

> First, we have to change the equation that *anyone who dares to speak against a Jew doesn't live. He doesn't live! We don't expel him, don't take away his citizenship. He doesn't live! A firing squad kills him, he is done away with, the way Arabs understand. That's their language* [...] Tell me racism, racist? Whoever says that they are loyal underestimates them. "What? An Arab just wants to eat, just wants to make a living" – that's not true, […] An Arab has nationalistic ambitions, he screams them, he shouts about them, he is ready to die for them (emphasis added).

Ben Ari explained that this was said "against the background of the conduct in regard to Gaza and the solution that should be implemented against it". This clip also received 9,300 views and hundreds of "likes", comments and shares.

In another video from the same month, Ben Ari is heard saying, among other things:

> Over the last hours, in Tel Aviv, in the center of Tel Aviv […] our staunchest enemy has been arriving, and that is the internal enemy, *the internal enemy, the enemy that we want to ignore, the enemy we want to hide our heads in the sand and not see, the enemy of Israeli Arabs* (emphasis added).

Ben Ari explained that this was said against the background of a demonstration by Arabs and Jews against what is called the "Nation-State Law" (Basic Law: Israel – the Nation State of the Jewish People) (hereinafter: The Nation-State Law)) in which PLO flags were waved and in which there were calls for the liberation of Palestine. He further explained that he was referring to Arabs who are not loyal to the State of Israel and who want to eradicate its Jewish character.

40. After about a month, on Sept. 16, 2018, immediately following the stabbing attack at the Gush Etzion junction in which the late Ari Fuld was murdered, Ben Ari uploaded another video clip to his Facebook page, in which he states, among other things, the following:

> […] They murder because they have work. They murder because they want to inherit this land […] If there are infiltrators, it is the Arab enemy […] You need Shlomo Neeman [head of the Gush Etzion regional council] to ask all the business owners to fire today the terrorist of tomorrow. It is your responsibility, stop employing the murderers! Don't employ these murderers! They get money from us and also come to murder us […] They murder us whenever they have the chance. The conclusion is that there is no coexistence. *Look at the Arabs! Do they coexist amongst themselves? Every day in the news, murder in Rahat, murder in Reineh, murder in Umm al Fahm, attempted murder in Lod, murder in Jaffa. First of all, when speaking of coexistence, Rabbi Kahane would always say, let's see the Arabs coexist amongst themselves* (emphasis added).

The clip received some 7,300 views, and hundreds of "likes", comments and shares.

At the end of November 2018, Ben Ari referred to the Arabs of the city of Lod in another video, this time on his Twitter account, accompanied by the caption: "The Arab conqueror of Lod continues to rage even today: The State of Israel is being conquered from within, Israel needs Otzma Yehudit!" In another video clip published on his Facebook page shortly after, Ben Ari referred to the members of the Lod municipal council as the "Arab enemy". At the end of December 2018, Ben Ari published a clip on his Facebook page titled "Now in Afula Illit, a meeting with Otzma Yehudit loyalists". In the clip, Ben Ari is seen conversing with a group of residents and stating as follows:

> They wanted to bring you a *clan of enemies* into your neighborhood […] The State of Israel is being conquered from within, they are determined to conquer us from within […] By means of the word equality, the enemy will destroy us […] What is happening here is happening in Dimona, is

> happening in Lod. Lod is already a completely conquered city. But Afula? This criminal who opened the center for the enemy in the name of equal rights […] If, with the help of God, we enter the coalition, the first thing that we will do is the complete revocation of this thing called affirmative action. Do you understand that you are second class citizens because you are not Arabs? […] *Most of them are willing to give up everything as long as they slaughter us. And what I am saying is not racism because, to my regret, it is the reality* (emphasis added).

Further on in the clip, Ben Ari is heard referring to the murder of the late Sheli Dadon, which occurred in 2014, saying as follows:

> Did anyone ever hold a discussion of their character? On *their treasonous character?* […] The moment you give here, you give him affirmative action, you give him more work, he will raise a family here. His children will also be here, his children, fewer of my children will be here, and so […] *I need a work plan. I need a work plan now a work a plan.* […] *This is not racism, it is fact, Arabs are the most migrant people in the world, they aren't tied to any land* […] That's why they came here. Because there is work. […] One of the first things, our first condition for any discussions about a coalition, with the help of God, that they will discuss with us, is – revoking affirmative action (emphasis added).

41. Some two months prior to the elections for the 21st Knesset, on Feb. 8, 2019, shortly after the murder of the late Ori Ansbacher by a Palestinian terrorist, Ben Ari uploaded another video clip to his Facebook page in which he stated, among other things, the following:

> *There is a murderous people here, a murderous nation. We owe the revenge, and the revenge is Otzma Yehudit* […] Only the revenge of Otzma Yehudit in the Knesset […] *They want to destroy us, they are looking for our neck.* […] *They want to slaughter us* […] The revenge will come when Otzma Yehudit will be in the Knesset with twenty mandates. When we will be there, they will see that we are not playing with them like Lieberman. They will find themselves in their countries of origin, and the village they came from will become an airport. To fly them to their countries of origin (emphasis added).

An examination of the Facebook page shows that the clip received some 20,000 views. In another video clip that Ben Ari posted the same day, he is heard saying, among other things,: "*They are looking for our neck, looking for our daughters* […] anyone who talks to you about coexistence is inviting the next murder […] we have to send our enemies back to where they came from […]

our enemies, these murderers, we will send them to murder in Syria, in Lebanon, in Iran in Turkey" (emphasis added). This clip, which was, as noted, published close to the elections, received some 32,000 views, and hundreds of "likes", comments and shares.

42. The evidence presented, the main part of which we described above, indeed paints a clear, unambiguous, persuasive picture in which Ben Ari systematically inflames feelings of hatred toward the Arab public in its entirety, while continually demeaning that public. We are concerned with significant evidence that comprises disparaging expressions of extreme severity that continued over a period of some two years until very close to the elections for the 21st Knesset, and Ben Ari is heard saying these things in his own voice. This fact is of high probative value (the second *Zoabi* case). Ben Ari attributes negative characteristics to practically all of the Israeli Arab public, and calls them "murderers", a "fifth column", "enemies", and of "treasonous character". We are not concerned with a "slip of the tongue" in a moment of anger, but rather with a continuous, consistent series of statements that express hatred and scorn for the Arab population in its entirety as one that appears to understand only violence, with which one cannot coexist, and which must, therefore, be expelled, and as one that receives various social benefits "at our expense". As noted in the Appellants' response to Ben Ari's supplementary pleadings, these publications were not removed. Ben Ari surpassed himself in comparing the Israeli Arab citizens of Haifa to dogs, stating that "the dog should be called by its name". The use of dehumanization and attributing animalistic traits to people is known to be one of the most degrading propaganda mechanisms employed by racist regimes in order to mark a population as "inferior" and "sub-human", and it endangers and seriously harms the dignity of the individuals who are members of that group as human beings.

Ben Ari's statements, and the not insignificant exposure they receive on social media, reflect the racist political program he espouses and which he intends to realize as a member of the Knesset. Certain statements that expressly call for violence are of particular severity (see, in this regard, his statements in the video clip published in August 2018, according to which "anyone who dares to speak against a Jew doesn't live. He doesn't live […] A firing squad kills him, he is done away with, the way Arabs understand. That's their language"). It is important to note that publications on the social media platforms that Ben Ari chose to use by uploading recordings in which he is heard speaking in his own voice have great influential potential, as the social networks

provide candidates for the Knesset quick channels of communication to many communities without any journalistic mediation. In this manner, the social networks have, to a significant extent, replaced the historic "town square", and serve as a platform for exchanging views, disseminating ideas, and garnering support among broad, diverse communities. The great accessibility of social networks, as well as the quick and effective dissemination of opinions and ideas by means of the digital platforms, can serve as a very effective means for spreading racist ideas and expedite the dissemination of those ideas (see, in this regard, in general: Yotam Rosner, *The Role of Social Media in the Radicalization of Young People in the West*, NATIONAL SECURITY IN A "LIQUID" WORLD, 131, 135-137 (Institute for National Security Studies, 2019) (Hebrew)).

43. In addition to the specific explanations that Ben Ari gave for the above publications, he further explained that he is not a racist, and that what he said was directed only at that defined segment of the population that is "enemy", which includes anyone who is not loyal to the state, and in his own words: "The definition of the enemy is not made on a purely ethno-national basis, but on a political one. Anyone who identifies with the political objectives of the Arab national movement identifies himself as an enemy". According to him, he does not refer to the Arab public as a whole, and any Arab who is "loyal to Israel" has a right to be a citizen. As opposed to that, whoever "is not loyal to the State of Israel as the nation state of the Jewish people […] should find his place outside of the state". Ben Ari further clarified that the distinguishing characteristic, according to his approach, is "the relationship to the Zionist enterprise and to the State of Israel as the state of the Jewish people". He further argued that the quotes attributed to him were fragmented and tendentious and explained that in saying that the Arab population of Israel is not loyal, he meant that he has not met "*many* loyal Arabs" (emphasis added). In the hearing before us, Ben Ari's attorney noted: "In my estimation, there is an absolute majority that is not loyal" (Transcript of the hearing, p. 22, line 14), and in this regard, Ben Ari clarified in his supplementary pleadings that his statement that there is an absolute identity between ethno-national origin and loyalty was made in opposition to a statement that he attributed to former minister Naftali Bennet according to which 99% of Israeli Arabs are loyal to the state.

Ben Ari apologized for his statements in regard to Bedouin soldiers. He pointed out that he "apologizes for them before those loyal soldiers who may have been hurt" and explained that his intention was "unequivocally only to those sons of women who came from the areas of the

Palestinian Authority and Gaza", and that he does not think that "all of the Bedouin population is disloyal" (paras. 32-33 of his affidavit). In the hearing before us, Ben Ari even emphasized that "if it sounds as if I am against the Bedouin, God forbid. If there is loyalty, there is loyalty, and I respect and honor that (hearing transcript, p. 29, lines 16-17). Ben Ari asked to clarify that his statement of Sept. 16, 2018, following the murder of Ori Fuld, in which he called to "stop employing the murderers" as referring only to terrorists, the words do not, of course, refer to all Arabs […] [only] to the security measures that should be adopted in regard to employing Arabs from the Palestinian Authority". In his response to the appeal, Ben Ari explained that his statements in the Afula meeting were made "against the background of the murder of a resident of my community Dadon", and in his supplemental pleadings, Ben Ari added that even if what was said in that meeting "grate upon the ear, they do not rise to the level of a 'critical mass'". In his affidavit, Ben Ari emphasized that "I am not saying that all Arabs are like that [of a murderous, treasonous character], or that this character derives from ethno-national origins. But this murderous violence is characteristic of the national struggle of the Arab national movement since the beginning of the 20th century" (para. 47 of his affidavit). In the hearing before us, Ben Ari added another reason for his statements, noting that his words in regard to the sale of apartments to Arabs in Afula should not be understood as racial discrimination, and he referred in this regard to Amendment no. 8 of 2011 to the Cooperative Societies Ordinance in the matter of the considerations that may be taken into account by an admissions committee of a residential community (hereinafter: the Admissions Committee Law). Ben Ari explained what he said after the murder of Ori Ansbacher in a supplementary notice in which he explained that he "referred to the murder, and that was its only context". In his affidavit, he added that his words might sound inclusive in regard to people on the basis of ethno-national origin, but that his intention was "to those who, from an Arab national position, seek to murder Jews against a nationalistic background, and as part of what they see as a national struggle, and who support and identify with those acts (para. 50 of the affidavit). In the hearing before us, Ben Ari's attorney added that "there is never any justification for harming individuals on the basis of the nationality" (Transcript, p. 15, line 6), and that Ben Ari's statements about the Arab public were always made in the context of a specific event" (*ibid*., line 12).

Lastly, Ben Ari sought to emphasize that presenting broad positions is not exclusive to him but is rather a common practice of candidates for the Knesset, and even of serving members of the Knesset.

44. I examined Ben Ari's arguments and explanations and I do not see them as sufficient to change my conclusion. While Ben Ari repeatedly states that he is not a racist, unfortunately, his actions and statements, which I have summarized above, are diametrically opposed to that declaration. The question I pondered was what positive weight should be afforded to the fact that Ben Ari already served as a member of the Knesset (in 2009 - 2013). This fact does, indeed, constitute a consideration in his favor, but it is of limited weight inasmuch as Ben Ari worked toward the advancement of his racist ideology even in that period, and tearing the New Testament to shreds and throwing it in the waste basket in the Knesset was just one example of that (for other actions and expressions, see paras. 79-91 of the notice of appeal). In any case, as the Attorney General emphasized in presenting his position, the evidentiary foundation from the recent past, and primarily from the year preceding the elections, shows that a "critical mass" of evidence has amassed that unambiguously, clearly, and persuasively testifies to systematic incitement to racism by Ben Ari. The summary of the case law presented above shows that the Court has attributed significance and weight to explanations and clarifications presented by the candidate, to which the decisions in the matter of Marzel testify (the opinion of President A. Barak in the *Tibi* case, p. 60, and that of Justice I. Englard at p. 66; the second *Zoabi* case, para. 34, and as opposed to that, see the dissenting opinion of Deputy President E. Rubinstein at para. 103). However, in the instant case, the explanations provided by Ben Ari are not persuasive and pale before the enormity of the racist statements that he repeated again and again in his own voice, and which he preached in public at rallies in which he participated and on social networks. Other than an apology, that was only partial, in the matter of Bedouin soldiers, Ben Ari did not apologize for his statements and did not retract them. He tried to give his words a post facto interpretation, but that, as stated, was not persuasive because it is not consistent with the meaning and natural context of what was said. Thus, for example, Ben Ari tried to explain that he does not speak about the Israeli Arab public in general but only of those who are "enemies", but the recordings repeatedly show that the reference is to the entire Arab public, or at the very least, to its overwhelming majority – 99% of that public – as disloyal to the state. Ben Ari himself notes in one of those recordings that he has not met Arabs who are loyal to the state (see, for example, the video clip of Ben Ari from Nov. 7, 2017,

from 6:30). Another explanation proposed by Ben Ari in regard to some of his statements was that they were made immediately after terrorist incidents and attacks against Israelis. The pain, the anger, and even the will for revenge aroused at such times is understandable. However, it is important to bear in mind that fear and a sense of threat have always been the fuel that fires racist ideologies, and one must, therefore, take care not to harness understandably harsh feelings that arise at times of distress and pain and exploit them to advance such ideologies. The explanations that Ben Ari presented in an attempt to equate the Admissions Committee Law – with all the clear limitations it establishes – and the things he said in regard to the sale of apartments to Arabs in Afula have no place here inasmuch as the two cannot be compared (and compare: LCA 6709/98 *Attorney General v. Moledet* [18]) (hereinafter: the *Moledet* case)).

45. In summation, this chapter states that the Court's approach that the causes for disqualification under sec. 7A of Basic Law: The Knesset are to be narrowly construed and exercised in the most extreme cases, was and remains the starting point for every discussion of these causes. However, we are persuaded that the broad, up-to-date evidentiary foundation presented in the instant case gives rise to a cause that disqualifies Ben Ari from standing as a candidate in the elections for the 21st Knesset due to incitement to racism under sec. 7A(a)(2) of the Basic Law. Given this conclusion, there is no need to examine the additional cause for disqualification under sec. 7A(a)(1) of the Basic Law.

Indeed, it is not always easy to draw the line separating racial incitement from the expression of an opinion – as severe and harsh as it may be – that is entitled to protection under the fundamental right to freedom of expression in general, and to freedom of political speech in particular. This is particularly the case when the former also concerns the right to vote and to be elected. Nevertheless, in the instant case, and given the evidentiary foundation we presented, it is absolutely clear that Ben Ari's statements crossed the line, and thus the conclusion reached. It would be appropriate to conclude this chapter with another quote from Memmi's book RACISM:

> One cannot be indulgent toward racism; one must not even let the monster in the house, especially not in a mask […] To accept the racist universe to the slightest degree is to endorse fear, injustice, and violence. It is to accept the persistence of the dark history in which we still largely live. It is to agree that the outsider will always be a possible victim (and which man is not himself an outsider relative to someone else?) […] The anti-racist struggle,

> difficult though it is, and always in question, is nevertheless one of the prologues to the ultimate passage from animality to humanity (*ibid*., p. 116).

Ben Gvir

46. In the matter of Ben Gvir, the Appellants presented a line of evidence, including evidence concerning criminal proceedings against him that, in part, concerned racist publications and support for the Kach movement that was declared a terrorist organization. However, the overwhelming majority of the evidence presented concerned acts and statements form many years ago, part from as long ago as the 1990s, and only a small part concerned the last few years. After examining the arguments raised by the Appellants and those of Ben Gvir, we concluded, as noted, that the evidence presented is not sufficient to ground a cause for disqualification from standing as a candidate in the elections for the 21st Knesset, given the rule that we addressed above in regard to the strict evidentiary threshold required to substantiate disqualification under sec. 7A of the Basic Law.

47. The up-to-date evidence to which the Appellants and the Attorney General referred in regard to Ben Gvir should not be taken lightly. It includes statements he made in November 2017 at a memorial service for Rabbi Kahane, whose praises he also enumerated in an interview on Feb. 21, 2019. Ben Gvir made similar statements in a television interview in Nov. 2018 that he published on his Facebook page at that time. Those statements there were certainly very harsh and troubling, and there is substance to the Attorney General's opinion that they come dangerously close to the line that would bar him from running in the Knesset elections. In this regard, it would not be superfluous to return to the words of Justice M. Elon in the second *Neiman* case, in 1989, in regard to the Kach list and Rabbi Kahane's ideology:

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

> concern among the people who dwell in Zion. This court is charged with the preservation of the law and its interpretation, and the duty of inculcating the values of Judaism and civilization, of the dignity of man and the equality of all who are created in the divine image, rests primarily upon those whom the legislature and the executive branch have chosen for the task. When, however, such a seriously dangerous phenomenon is brought to our attention, we may not refrain from sounding the alarm against the ruinous effects of its possible spread upon the character, image, and future of the Jewish State. The remedy lies, in the first place, in a reassessment of the ways of educators and pupils alike, in all walks of our society (*ibid*., p. 302).

These trenchant remarks are applicable here, as well. However, Ben Gvir, who was admitted to the bar in 2012, took pains to emphasize and explain that while he is in favor of "fighting against the enemies and against any who seek to erase the state, harm its Jewish character, and destroy it (*whether* such actor is Jewish or *whether* Arab)", he "opposes acting in any violent or unlawful manner" (para. 43 of Ben Gvir's affidavit). He further noted that over the last years, he has changed his ways and he acts by legal means and initiates legal proceedings where he deems appropriate. These explanations bear weight and should be granted significance, and this, together with the current evidentiary foundation presented in his matter, which, as noted, does not rise to the level of a "critical mass" under the strict criteria established in this regard in the case law, led us to the conclusion that the appeal in the matter of Ben Gvir, on both heads, should be dismissed.

EA 1876/19 Ra'am-Balad List v. Central Elections Committee for the 21st Knesset

48. The Ra'am-Balad list is composed of two parties – Ra'am and Balad – and two requests for its disqualification were filed by the Likud and MK David Biton, and by Ben Ari and Ben Gvir. The disqualification requests were based upon the cause in sec. 7A(a)(1) of the Basic Law – negation of the existence of the State of Israel as a Jewish state, and sec. 7A(a)(3) of the Basic Law – support for an armed struggle by an enemy state or of a terrorist organization against the State of Israel. The requesting parties focused primarily on the activities of members of Balad, and it was argued that they oppose the Jewish people's right to self-determination in the State of Israel and act to negate the core characteristics of Israel as a Jewish state. It was further argued that members of the list support the Hezbollah and Hamas terrorist organizations and violent acts

against the police and IDF soldiers. The Elections Committee decided by a majority of 17 for and 10 against to disqualify the Ra'am-Balad list from participating in the elections for the 21st Knesset, and thus the current appeal.

Arguments of the Parties

49. Ra'am-Balad argued that the Elections Committee's decision should be annulled, and emphasized that most of the evidence presented in its regard was already adjudged and examined in prior proceedings against the Balad list or its members, including the evidence concerning their support for the idea of "a state of all its citizens", and the Court held that the evidence did not substantiate a cause for disqualification. It was further argued that the Committee's decision leads to a problematic result that also disqualifies the members of the Ra'am party on the list from standing for election even though no significant evidence was produced against them that would justify their disqualification. According to Ra'am-Balad, the Committee reached its decision without any material debate, and it ignored the decisions of this Court and the opinion of the Attorney General; the evidence against it does not relate to actions or activity that substantiate a cause for disqualification; and the evidentiary foundation rests upon articles form the internet of low probative weight and whose content was denied by the members of the list. Ra'am-Balad further argued that due to its political composition, the Elections Committee is not authorized to rule upon the causes for disqualification under sec. 7A of the Basic Law, and that the legal arrangement that grants it that authority is disproportionate and infringes the principle of equality of the elections as established in sec. 4 of the Basic Law, and the right to vote and to be elected.

50. The Attorney General was of the opinion that the appeal of Ra'am-Balad should be granted and noted that the disqualification requests were indeed largely founded upon evidence from prior to the elections for the 20th Knesset, and part of it had already been examined in prior proceedings before this Court. Whereas, it is argued, the new evidence submitted relies largely upon articles form the internet that were denied by the members of the list and that are of low probative value. It was further emphasized that most of the evidence pertains to persons who are no longer on the list, among them: Basel Ghattas (hereinafter: Ghattas) and Said Naffaa, or who are in a unrealistic slot on the list, like Hanin Zoabi and Jamal Zahalka (hereinafter: Zahalka), and are not relevant to

the members of the list and its new candidates who are in realistic slots. In all that relates to the cause of support for armed struggle of a terrorist organization, the Attorney General was of the opinion that significant weight should be accorded to the affidavits submitted by the representatives of the list which note that they reject violence and that they never called for its use. As for the cause of negation of the existence of the State of Israel as a Jewish state, the Attorney General noted that the consistent position of the case law of this Court in regard to Balad and its members is that there is no cause for disqualifying them from participating in the election for the claims have been raised once again in this proceeding. However, the Attorney General, without deciding the issue, explained that were the Balad party running independently for the 21st Knesset, there would be reason to carefully consider its disqualification in view of the Basic Law: A State of all its Citizens Bill submitted to the 20th Knesset by members of Knesset from the Balad party, and due to the content of that bill. But the Attorney General added that since the requests refer to the disqualification of the Ra'am-Balad list, and because the law does not allow for disqualifying half of a list, there is some difficulty in disqualifying the entire list due to the actions of members of the Balad list, who for the most part are not, as noted, candidates in realistic slots on the list, while no significant arguments were raised in regard to the Ra'am party and its members. On the constitutional level, in regard to the matter of the Elections Committee's authority to address the causes for disqualification under sec. 7A of the Basic Law, the Attorney General argued, inter alia, that given the time constraints established in the Elections Law for deciding upon an appeal, the issues should not be taken up in the framework of the current proceedings.

51. Respondents 2-3, who submitted the requests for disqualification, relied upon the decision of the Elections Committee and argued for dismissal of the appeal. In their view, the fact that the Ra'am-Balad list includes new candidates does not alter the fact that the ideology of the members of the Balad list negates the character of the State of Israel as a Jewish state and the fact that members of the party support terrorist groups like Hezbollah and Hamas. The Knesset, which was joined as a Respondent to the appeal due to the constitutional arguments, was of the opinion that these arguments should be dismissed. It emphasized that the claim of lack of authority was not raised before the Elections Committee, that it is being raised long after the said authority was bestowed upon the Committee by law, and like the Attorney General, the Knesset added that the elections proceedings are not appropriate for examining this issue.

Negation of the Existence of the State of Israel as a Jewish State

52. The starting point for examining the evidentiary foundations presented by the Plaintiffs in regard to the disqualification of Ra'am-Balad on the cause of negation of the existence of the State of Israel as a Jewish state is grounded in the criteria established in the case law, which we surveyed at length above. These criteria were addressed and even applied in the past in regard to the Balad list and its platform (see the *Tibi* case and the *Balad* case), and those cases addressed, inter alia, the question whether a party that calls for the realization of the principle of "a state of all its citizens" is disqualified from standing for election to the Knesset. In the *Tibi* case, the Court answered in the negative, and held that calling for the realization of that principle does not necessarily imply the negation of the State of Israel as a Jewish state. The Court held that as long as that call is intended to guarantee equality among citizens, it should not be interpreted to be a call that negates the existence of the State of Israel as a Jewish state. As opposed to that, "if the purpose of Israel being a 'state of all its citizens' is intended to mean more than that, and it seeks to undermine the rationale for the creation of the state and its character as the State of Israel as the state of the Jewish *people*, then that undercuts the nuclear, minimal characteristics that characterize the State of Israel as a Jewish State" (the *Tibi* case, pp. 22-23, 41).

53. In the *Tibi* case, the Court concluded that, despite the fact that Balad's platform expressly called for realizing the principle of "a state of all its citizens", and despite the additional evidence presented in open court and *in camera*, taken in its entirety, what was presented did not ground a "critical mass" of persuasive, clear and unambiguous evidence that would justify the disqualification of Balad for the cause argued, nor the disqualification of Bishara – then head of the list – whose disqualification was requested in that same proceeding. It would not be superfluous to note that most of the evidence presented in that matter in regard to Balad concerned actions and statements by Bishara. It was argued in regard to Bishara that, inter alia, in various events and party conferences he expressed himself in a manner that reflected a view according to which Jews do not have a right to self-determination. It was further argued that Bishara supported the approach that recognized the right of return of Arabs to Israel and a struggle against Zionism, and that he even tabled a bill for the abolition of the status of various Zionist institutions.

54. After examining all of that evidence, the Court concluded in the *Tibi* case that even though Bishara's objectives are a dominant objective of his activity and not merely a theoretical concept but rather an objective with political potential that he had put into practice, his actions did not negate the minimal, nuclear definition of the State of Israel as a Jewish state. It was held that the Court was not presented with persuasive, clear and unambiguous evidence against Bishara in regard to the cause for disqualification under sec. 7A(a)(1) of the Basic Law, and consequently, not against the Balad list. That was so inasmuch as Bishara recognized the right of every Jew to immigrate to Israel and did not argue that the Law of Return, 5710-1950 (hereinafter: The Law of Return) should be revoked, did not deny the centrality of Hebrew as the language of the state, along with Arabic as an official language, and did not oppose Israel's holidays and symbols, as long as the cultural and religious rights of the Arab minority are recognized.

55. As noted, the *Tibi* case concerned the elections for the 16th Knesset, and some eight years later, in the *Balad* case, the Court addressed disqualification proceedings filed against the Balad party in anticipation of the elections for the 18th Knesset. That matter concerned the decisions of the Elections Committee to disqualify the Balad list, as well as the Ra'am-Ta'al list that also sought to contend in those elections. The causes for which the Elections Committee decided to disqualify the Balad list were, as in the present case, the causes under secs. 7A(a)(1) and (3) of the Basic Law. At that point, Bishara no longer headed the list. He had fled the country, and it was claimed that the reason was that a criminal investigation was being conducted against him for suspected involvement in security offenses (the *Balad* case, para. 9). Inter alia, the evidence presented in that matter to ground the cause of negation of the existence of the State of Israel as a Jewish state included Balad's platform, which was published on its internet site, and an article by Zahalka, who was then the party leader, which described the party's vision as striving for a State of Israel as "a state of all its citizens". In addition, public statements of party members made in various situations, as well as articles from which, it was argued, one could discern an expression of support of the Balad members for its founder Bishara even after his flight from Israel, were presented. The Court granted Balad's appeal and held that there was no cause for disqualification from contending in the elections for the 18th Knesset. The Court's decision rested, inter alia, upon the opinion of the Attorney General at the time, who noted that the evidence presented against Balad, taken in its entirety, was inferior to the entirety of the evidence presented against that party in the *Tibi* case. The Court held:

> After examining all of the evidence presented to us, and bearing in mind the criteria and principles outlined in the matter of Balad [the *Tibi* case], the entirety of the evidence presented to this Court in that matter and its concrete findings there in regard to them, we did not find that the disqualification requests that are the subject of this appeal in regard to Balad rest upon a sufficient evidentiary foundation to give rise to a cause for disqualifying the list from contending in the elections for the Israeli Knesset (*ibid*., para. 22).

This conclusion reached by the Court in the *Balad* case concerns the two causes for disqualification advanced there. We will further address the additional cause under sec. 7A(a)(3) below.

56. Another disqualification proceeding concerning the members of the Balad party was addressed in 2012 in the first *Zoabi* case, which examined the issue of the disqualification of Zoabi from standing for election for the 19th Knesset on the Balad list. In that proceeding, the Court examined the evidence regarding Zoabi's support for the principle of "a state of all its citizens", and was of the opinion that the evidence presented no materially new or different grounds from what had been presented in the *Tibi* case and the *Balad* case that would justify a different conclusion. The Court arrived at a similar result some three years later in the second *Zoabi* case. In that matter, the Court examined, inter alia, whether statements in which Zoabi was heard saying "there was no justification for the establishing of the State of Israel from the start. Now that there are generations of Jews who were born in it, I want to live with them but not in a Jewish and racist state". The Court also examined an article that reported on a demonstration in which Zoabi participate, entitled "Demonstration against the Crimes of the Occupation", and a recording in which Zoabi is heard shouting insults at the police. The Court held that there were no grounds for disqualifying Zoabi's candidacy in the elections. That was so because the desire for the establishment of a state of all its citizens and "striving for an end to the occupation does not necessarily mean a negation of the Jewish foundations of the State of Israel."

57. The current proceeding, in which the Ra'am-Balad list is appealing its disqualification by the Elections Committee from contending in the elections for the 21st Knesset, is another link in the chain of similar proceedings on the same matter. In all that concerns the cause for disqualification under sec. 7A(a)(1) of the Basic Law, the evidence presented by the petitioners

for disqualification includes various statement by members of Balad form the past and present, among them a quote from an interview conducted by Dr. Mtanes Shehadeh, chair of the Balad list, and number two on the Ra'am-Balad list (hereinafter: Shehadeh), in which he says, among other things, that Bishara was "an important activist in Balad's leadership at the time, and contributed greatly to political discourse […] in Israel", and is later quoted in that interview as saying that "the flag and national anthem do not represent us". A report from the YNET website was also presented according to which MK Talab Abu Arar, who is a member of the list, and others met with the president of Turkey. Additional evidence presented concerns an interview with the former general secretary of Balad in which he called upon Israeli Arabs not to vote in the Knesset elections and to act for the realization of the principle of "a state of all its citizens", as well as evidence concerning past activities of members of Balad, including statements by Zoabi from 2009 and past activities of Bishara.

This evidence is not materially different from the evidence presented in the previous proceedings that we surveyed, which concerned proceedings for the disqualification of Balad and members of its list, as far as the cause of negation of the State of Israel as a Jewish state is concerned. Moreover, not only has most of the evidence presented in this proceeding been examined in previous proceedings and found insufficient in accordance with the criteria outlined for the said cause, but as noted, a not insignificant part of that evidence concerns persons who are no longer candidates on the Ra'am-Balad list for the elections for the 21st Knesset, or are not candidates in realistic slots on that list. That being the case, we cannot accept the argument that the Ra'am-Balad list should be disqualified from running in the elections for the 21st Knesset due to actions and statements attributed to Zoabi when she herself was not disqualified at the time in the first *Zoabi* case and the second *Zoabi* case for the same actions and statements, especially when she is located in the 118th slot on the current list. The argument in regard to ongoing connections of some kind or another between members of the list and Bishara was argued in a general manner and does not suffice for changing the conclusion as to the insufficiency of the evidence presented. As for the majority of the candidates on the Ra'am-Balad list for the 21st Knesset who hold realistic slots, with the exception of Shehadeh, no evidence at all was presented to ground the cause for disqualification, and as explained above, the evidence presented in regard to Shehadeh is based upon quotes from media interviews and reports on various internet websites whose probatory weight has already been held to be low (the second *Zoabi* case, para. 34), and Shehadeh has

declared that his words were presented in a "distorted, misleading manner, and was accompanied by incorrect analysis" (para. 9 of the affidavit submitted by Shehadeh to the Elections Committee).

58. The primary up-to-date evidence presented to us in this proceeding in regard to the cause for disqualification under sec. 7A(a)(1) of the Basic Law is the Basic Law: A State of all its Citizens Bill, which members of Knesset from the Balad party sought to lay on the table in the 20th Knesset. At the end of the day, that bill was not presented due to a decision by the Knesset presidium of June 4, 2018 not to approve its introduction, based upon the opinion of the Knesset's legal advisor. A petition filed in this regard was rendered moot and dismissed *in limine* when it was decided to dissolve the 20th Knesset (HCJ 4552/18 *Zahalka v. Speaker of the Knesset* [19]). The purpose clause of the bill established that it was intended to ground "the principle of the equal citizenship of every citizen, while recognizing the existence and the rights of the two national groups, Jewish and Arab, living within the borders of the state that are recognized by international law" in a Basic Law. The bill also redrafted the conditions for obtaining Israeli citizenship, such that obtaining citizenship by virtue of the principle of return would be annulled (see sec. 5 of the opinion of the Legal Advisor of the Knesset of June 3, 2018). In addition, new state symbols and a new anthem should be established in accordance with the principles set forth in the bill (on the significance of this provision as negating the principle according to which the "primary symbols" of the state should reflect the national rebirth of the Jewish people, see sec. 5 of the opinion of the Legal Advisor of the Knesset, and see what was stated in this regard in sec. 6 of the bill in regard to the status of the Hebrew language as the primary language of the state). If that were not enough, the petition filed by the members of Bald in the 20th Knesset against the decision of the presidium to prevent laying the bill on the Knesset table explicitly stated that the said bill accorded with Balad's party platform.

It would seem undeniable that the said bill, in all its parts, expresses a negation of the most minimal, nuclear characteristics of the State of Israel as a Jewish state as the Court explained in the *Tibi* case. The fact that the step taken by the members of Balad in this regard was democratic – tabling a bill – does not lead to a different conclusion. This was indeed a significant action by the members of Knesset representing Balad in the 20th Knesset attempting to realize – by means of a legislative bill – a political program and worldview that negates the existence of the State of Israel as a Jewish state. It would appear that Ra'am-Balad was aware of the significance of this

evidence, but argued that it should not be given decisive weight in the current proceeding, inter alia, given the fact that it is only one piece of evidence (or at most two, if the petition constitutes a separate piece of evidence in this regard), and given the background for submitting the bill and that it was submitted in response to the legislative proceedings on the Nation State Law. These arguments attempt to minimize the significant weight of this evidence, and I agree with the position of the Attorney General that had Balad run as an independent list comprising members of Knesset who had served in the 20th Knesset and who presented the bill, and who now sought to stand for re-election to the 21st Knesset, there would be grounds for seriously considering whether these two pieces of evidence show that Balad had crossed the divide delineated in the *Tibi* case that separates between espousing the principle of "a state of all its citizens" in order to achieve equality and seeking to negate the minimal, nuclear characteristics of the State of Israel as a Jewish state. If we were standing at that junction, we would also likely be required to consider the issue of the applicability of the probability test in applying the cause for disqualification under sec. 7A(a)(1) of the Basic Law, which was left for further consideration in the *Tibi* case and in the ensuing decisions. However, the list whose disqualification was requested is a joint list of Ra'am-Balad and we agree with the opinion of the Attorney General that his fact is significant for examining the causes for disqualification. In addition, it must be borne in mind in regard to the representatives of Balad on the list that none of those placed in realistic slots were among those who submitted the bill on Balad's behalf. Moreover, in the affidavit he submitted to the Elections Committee, Shehadeh declared that he himself and all of Balad's candidates for Knesset are committed to the principle of "a state of all its citizens" that is presented in the party's platform as examined and approved in the *Tibi* case, the *Balad* case, and in the first and second *Zoabi* case (para. 2 of the affidavit). Given all of the above, and given the strict criteria outlined in the case law for the disqualification of a list from standing for election to the Knesset, we have concluded that there are no grounds for disqualifying the Ra'am-Balad list on the cause of negation of the existence of the State of Israel as a Jewish state.

Support for armed struggle by a hostile state or a terrorist organization against the State of Israel

59. The Election Committee's decision that "the Ra'am-Balad list is barred from participating in the elections for the 21st Knesset" does not state whether the list's disqualification is based upon both of the two causes in secs. 1A(a)1 and (3) of the Basic Law or only upon one of them. In the future, even if the Committee does not state the reasons for its decision, it may be appropriate that it at least note what cause grounded its decision on disqualification. In any event, for the purposes of this appeal, I will assume, as did the parties, that the disqualification rested upon both causes.

The prevailing rule established that in order to prove that a list or a candidate seeking to stand for election supports armed struggle by an enemy state or a terrorist group, it must be shown that it is the primary objective of the list and that it actually works toward realizing it. In all of the past proceedings in the matter of both Balad and Ra'am, it was held that the evidence presented in this regard does not amount to a "critical mass" that would justify disqualifying either of the lists or any of candidates on those lists on the basis of the cause grounded in sec. 7A(a)(3) of the Basic law (EA 2600/99 *Erlich v. Chair of the Central Elections Committee* [20] (hereinafter: the *Erlich* case); the *Tibi* case; the first *Zoabi* case; the second *Zoabi* case). Those holdings bear consequences for the matter before us inasmuch as the evidence presented to ground the cause of support for armed struggle is immeasurably less than that presented in the above cases. The Petitioners for disqualification primarily based their arguments upon pictures of Shehadeh visiting a former security prisoner and upon quotes from an interview in which it is alleged that he refused to refer to Hamas as a terrorist organization and added that "any struggle against the occupation is a legitimate struggle", and that he "is for a struggle against the occupation. People have a right to fight against the occupation. If there are people who are oppressed, they have a right to fight". In addition, an interview with MK Abd Al Hakeem Haj Yahya, who holds the second slot in the Ra'am party, was presented in which he referred to an attack on the Temple Mount in July 2017 in which Israeli police were murdered. According to the petitioners for disqualification, other statements by members of the list in 2009 and 2011 demonstrate a support for terrorism. The petitioners for disqualification further added the fact that former Knesset members of Balad met with the families of terrorists who were killed while carrying out terrorist attacks; Zoabi's participation in the "Mavi Marmara" flotilla; the meeting held by former Balad Knesset members with Bishara in 2014; and the conviction of former Balad Knesset member Ghattas for security offenses.

60. We reviewed the above evidence, and we are not of the opinion that it constitutes a body of persuasive, clear and unambiguous evidence that shows that support for an armed struggle by a terrorist organization is a central, dominant purpose of the Ra'am-Balad list or of any of the parties that compose it. In addition, we do not think that evidence was presented that meets the evidentiary threshold for proving that this list acts for the realization of such an armed struggle in a real and consistent manner. This is an *a fortiori* conclusion given that the evidence presented in the prior proceedings addressed by this Court was far more significant than that presented before us, and it was nevertheless held that it was insufficient to ground a cause for disqualification under sec. 7A(a)(3) of the Basic Law. Moreover, a significant part of the evidence presented to us refers to persons who do not appear on the Ra'am-Balad list for the 21st Knesset, and some of it was already examined in the previously noted cases. The petitioners for disqualification presented various statements by Shehadeh from which one might infer support for violent activity, but that is not the only possible interpretation and the doubt acts to the benefit of the conclusion that would permit the list to participate in the elections (the second *Zoabi* case, para. 73). In addition, weight should be given in this regard to the fact that Shehadeh made it explicitly clear in his affidavit that he does not support violent activity and that Balad's approach is "democratic and employs legal means. We have never called for the use of violence, and none of the candidates on our current list have ever been convicted of any criminal offence". It was further noted that statements expressing opposition to the Israeli policy in Judea and Samaria were examined by this Court in the past, and it was held that they do not, in and of themselves, give rise to a cause for disqualification (the second *Zoabi* case, para. 67).

61. In conclusion, for the reasons stated above, I was of the opinion that we should grant the appeal in EA 1876/19, that the disqualification decision by the Elections Committee should be overturned, and we should order that the Ra'am-Balad list is not barred from participating in the elections for the 21st Knesset. I did not find reason to address the arguments raised by the Ra'am-Balad list in regard to the authority of the Elections Committee to rule upon the causes for disqualification. The conclusion that we reached in this appeal renders those arguments moot, but in my view, the fact that those arguments were never raised before the Elections Committee suffices to dismiss them *in limine*.

EDA 1806/19 Lieberman v. Cassif

62. At the request of the Yisrael Beiteinu faction and Knesset members Avigdor Lieberman and Oded Forer, the Elections Committee decided to disqualify Cassif from participating in the elections for the 21st Knesset as a candidate on the Ra'am-Balad list. The Committee presented that decision for the Court's approval in accordance with sec. 63A(b) of the Elections Law and sec. 7A(b) of Basic Law: The Knesset.

Arguments of the Parties

63. The request for Cassif's disqualification rests upon two causes: negation of the existence of the State of Israel as a Jewish and democratic state under sec. 7A(a)(1) of Basic Law: The Knesset, and support for armed struggle by a hostile state or a terrorist organization against the State of Israel under sec. 7A(a)(3) of the Basic Law. The evidence adduced in support of the request consisted primarily of four publications and newspaper articles – mostly from the internet – that show, according to those requesting disqualification, that in his statements, Cassif rejects the Jewish character of the State of Israel and calls for the changing of the state's symbols and anthem, and for revoking the Law of Return. It is also argued that the evidence presented shows that Cassif supports the armed struggle of the Hamas terrorist organization against the state. This, inter alia, because he compared senior government leaders to Nazi war criminals, and because other statements testify, in their opinion, that Cassif believes that attacking soldiers does not constitute terrorism and that Israel should be fought because of its serious crimes against the Palestinian population.

64. Cassif argued on his behalf that the evidence presented by those requesting the disqualification does not justify his disqualification from running in the Knesset elections. That is particularly so given that the request for disqualification is based, so he argues, upon distorted and tendentious quotes and relies primarily upon one interview with him in which he primarily presented academic ideas and not his political philosophy. As for the arguments that portray him as rejecting the Jewish character of the State of Israel, Cassif emphasized that he recognizes the right of the Jewish people to self-determination alongside an independent Palestinian state, while

ensuring full equal rights to all residents of Israel. As for the arguments portraying him as supporting the armed struggle of Hamas against Israel, Cassif claimed that the various comparisons that he made between the State of Israel and Nazi Germany are not relevant to grounding a cause for disqualification, and that he opposes all forms of violence against any person. Similar to the arguments raised by the Ra'am-Balad list, Cassif also raised constitutional arguments in regard to the authority of the Elections Committee to examine and rule upon the disqualification of lists and candidates under the causes grounded in sec. 7A of the Basic Law, and I will already state that for the reasons mentioned in the previous chapter concerning the appeal of Ra'am-Balad, I have not found it necessary to address these arguments in the approval proceedings in regard to Cassif.

65. The Attorney General was of the opinion that there is no cause for barring Cassif from running in the elections for the 21st Knesset because no "critical evidentiary mass" was presented that would justify it, noting that the evidentiary grounds adduced in support of disqualification was meager in both amount and quality.

Negation of the Existence of the State of Israel as a Jewish State

66. The evidence in the matter of Cassif on this cause relies upon two newspaper publications. The first is an article on the internet site of Makor Rishon from Feb. 7, 2019, according to which Cassif stated in an interview some two years earlier on the subject of the evacuation of Israeli settlements in Judea and Samaria that he viewed this as a first step towards a Palestinian state, and that the State of Israel cannot be and must not be a Jewish state. Cassif expressly refutes these words attributed to him (para. 10 of the affidavit submitted by Cassif to the Elections Committee). As already noted, the probative weight that can be ascribed to such articles, and all the more so to "second hand" articles is low.

67. The second and more significant piece of evidence presented by those requesting Cassif's disqualification is an interview with Cassif in the Ha'aretz newspaper in February 2019. According to the petitioners for disqualification, certain statements by Cassif in that interview can be understood as a call for the negation of some of the core characteristics of the State of Israel as a Jewish state. Thus, for example, in response to the interviewer's question about the character of

the Israeli public space, Cassif said: "The public space has to change, to belong to all the residents of the state. I disagree with the concept of a Jewish public space", adding that this would be expressed "for example, by changing the symbols, changing the anthem […]". Cassif was also asked in that interview whether he supported the revocation of the Law of Return and answered "Yes. Absolutely". As for the question of the Palestinian right of return to Israel, he replied: "There is no comparison. There is no symmetry here at all […]". These worrying statements, which Cassif did not deny, certainly bear significant weight in examining the cause for disqualification in his regard under sec. 7A(a)(1) of the Basic Law. However, we are concerned with a newspaper interview and a single statement made in it, and I therefore agree with the Attorney General's view that this piece of evidence alone is not sufficient to meet the strict criteria established by the case law for disqualifying a candidate from standing for election to the Knesset. Indeed, as presented in detail above, in order to ground a cause for disqualification, it is necessary to present statements that unambiguously, clearly and persuasively testify to the negation of the core characteristics of the State of Israel as a Jewish state. One must also show that this is the dominant purpose motivating the candidate's activity and that he vigorously and consistently acts for its realization as part of a concrete political program. To this we should add that in his statements before the Elections Committee and before this Court, Cassif noted that he sees himself as obligated to the platform of the Hadash party, whose representatives have served in the Knesset for many years, and stated in the hearing before the Elections Committee: "The party of which I am a member and which I represent, […] made it its motto and has always said that we view the State of Israel as a state in which the Jewish people in the land is entitled to define itself. I do not deny that, I have never denied that, and I have no intention of denying that" (Transcript 10/21, p. 37).

Support for armed struggle by a hostile state or a terrorist organization against the State of Israel

68. Has it been shown, as the petitioners for disqualification claim, that Cassif supports armed struggle by the Hamas terror organization against the State of Israel? A large part of the disqualification request in this regard rests upon statements attributed to Cassif that imply a comparison between the State of Israel and senior members of the government of Nazi Germany and Nazi war criminals. Thus, for example, in the article on the Makor Rishon website mentioned

above, it was claimed that "Cassif called Lieberman 'a descendant of Adolph', and explained: 'A conceptual descendent, not an actual one", and called former Justice Minister Ayelet Shaked "neo-Nazi scum". In another article on the website of Channel 20 from March 2016, a Facebook post by Cassif was quoted in which he wrote about the Israeli government, among other things, that "this is a fascist government *par excellence*, with real Nazi motives […] and at its head, above all others: an incompetent scoundrel who has destroyed every good thing there ever was here […] an outstanding student of Göring's doctrine". In another article published on the Channel 20 website in April 2018, there was a recording of Cassif from a class that he gave in which he is heard saying that "in the Israeli discourse created by the current government, it is legitimate to kill Arabs. This is how one slides into the abyss of what happened in Germany 80 years ago".

69. Those statements, which Cassif did not deny, are very harsh, and the evident comparison between the State of Israel and government ministers to Nazi Germany is outrageous and were better never said, and having been said, I reject them in the most severe terms. The weak explanations provided by Cassif, according to which the statements were only made as metaphors in order to arouse critical public debate and to warn against dangerous deterioration, do not blunt their severity. Cassif also took the trouble to explain that in his publicist writings he emphasized that "any comparison between the Nazi annihilation and Israeli policy in the territories would make a mockery of the Holocaust", of which it may be said that he did not practice as he preached. However, we must admit that as outrageous and enraging as these statements may be, they do not ground a cause of support for armed struggle by a hostile state or a terrorist organization against the State of Israel, and they cannot, in and of themselves, lead to the disqualification of his candidacy in the elections (and compare: the *Kach* case, p. 3). In any case, Cassif made it clear that he does not intend to repeat such things as an elected representative (para. 13 of the affidavit submitted by Cassif to the Elections Committee), and it is to be hoped that he will act accordingly.

70. The additional evidence presented in support of Cassif's disqualification on the cause of support for the armed struggle of Hamas against Israel also does ground a cause for his disqualification. In this regard, the plaintiffs directed our attention, inter alia, to a post by Cassif that was mentioned earlier, which, they argue, shows that he supports a violent struggle against the fascism and racism that have, in his opinion, spread in Israeli society. They also referred to an article on the website of Channel 20, also mentioned above, that includes a recording of Cassif

from 2018 in which he is heard saying that "Hamas is a political party". Lastly, the plaintiffs refer to Cassif's statements in the interview in Ha'aretz in which he stated:

> Cassif: "Harming soldiers is not terrorism. Even in Netanyahu's book on terrorism, he expressly defines harming soldiers or members of the security forces as guerilla warfare. This is absolutely legitimate according to every moral criterion, and incidentally, in international law as well. Nevertheless, I do not say that this is something wonderful, delighting, or desirable […] Wherever there was a struggle for liberation from oppression there are national heroes who, in 90% of the cases, did things that were, in part, terrible. Nelson Mandela, who is now regarded as a hero, a Nobel Peace Prize laureate, was a terrorist according to the accepted definition […]".
> Interviewer: "In other words, the Hamas commanders today, who initiate actions against soldiers will be heroes of the Palestinian state that will be established?"
> Cassif: "Certainly".

Cassif asked to explain what he said, and told the Elections Committee and the Court that he opposes the use of violence *against any person*. He did not deny his opposition to the Israeli policy in Judea and Samaria and said that in his vision for the future he sees an end of the military regime there and that his activity is intended, among other things, to change the situation of the Palestinian people in Gaza and in general. However, as already noted, expressing this opinion alone does not give rise to a cause for disqualification (see para. 56), and Cassif declared unambiguously that he does not support opposition by means of armed struggle, but rather political, non-violent opposition (compare: the *Tibi* case, p. 50; the second *Zoabi* case, para. 71), and in his words: "I never supported violence, I always expressed opposition to violence, I belong to a party that has always rejected violence, this was also expressly stated in the interviews with me and in every other framework […] I rejected, and I reject, and I will reject, and I never even hinted at support for armed struggle or violent struggle at all" (Transcript 10/21, p. 34). Cassif also expressed a similar position in that interview in Ha'aretz that was presented by the plaintiffs, a part of which was quoted above, in stating: "We have always opposed harming innocent civilians. Always. In all of our demonstrations, one of our leading slogans was: In Gaza and Sderot, children want to live. With all of my criticism of the settlers, going into a house to slaughter children, as in the case of the Fogel family, is something that is intolerable. You have to be a human being and reject this".

As for Cassif's statement in regard to harming soldiers, we are concerned with a severe, enraging statement that could be interpreted as legitimizing the harming of IDF soldiers by the Hamas terror organization. While Cassif tried to create a distinction in this regard between his theoretical, academic views and his political views, in my view, it is an artificial and unpersuasive distinction that is hard to accept. Nevertheless, at the end of the day, the evidentiary foundation presented by the plaintiffs relies upon those aforementioned publications, and I agree with the position of the Attorney General that this evidentiary foundation is meager and insufficient to ground the cause for disqualification under sec. 7A(a)(3) of the Basic Law in accordance with the criteria set out in the case law, which I discussed above.

EA 1867/19 Ben Ari v. Hadash-Ta'al List

71. The request to disqualify the Hadash-Ta'al list from standing for election to the 21st Knesset was filed by Ben Ari and Ben Gvir upon two causes: negation of the existence of the State of Israel as a Jewish state under sec. 7A(a)(1) of the Basic Law, and support for armed struggle by a hostile state or a terrorist organization against the State of Israel under sec. 7A(a)(3) of the Basic Law. The Elections Committee decided by a majority of 15 for and 12 against to dismiss the request, and thus the present appeal.

Arguments of the Parties

72. The appellants who seek the disqualification, and a few members of the Elections Committee who joined them as appellants, argued that the statements and actions of members of the list are intended to negate the character of the State of Israel as a Jewish state, and that its members support the Hezbollah and Hamas terror organizations while legitimizing harming Israeli citizens residing in the Judea and Samaria area and IDF soldiers.

73. For its part, the Hadash-Ta'al list relied upon the decision of the Elections Committee and argued that the requesters of disqualification did not present an appropriate evidentiary foundation that could ground the claimed causes for disqualification. It was explained that the request was

partly based upon old evidence that had been examined by the Elections Committee in previous elections, and that many of the statements attributed to members of the list were distorted and presented in a tendentious manner. It was further noted that most of the evidence was based upon reports taken from internet sites and newspaper clippings of low probative value, and that part are not even relevant to grounding the causes for disqualification.

74. The Attorney General was of the opinion that the entirety of the evidence presented in regard to that request does not justify its acceptance inasmuch as it did not amount to the "critical evidentiary mass" required for disqualifying a list from participating in the elections for the Knesset. This is particularly so given that the evidentiary material presented in the matter of Hadash-Ta'al is significantly more limited than that presented in previous proceedings in which the said causes for disqualification were addressed. The Attorney General also added that the request was based largely on newspaper reports and parts of speeches that are of low probative value, and in particular, given the fact that we are not concerned with up-to-date evidence, and that part relates to the period preceding the elections for the 20th Knesset.

75. The appellants based their argument in regard to the cause of disqualification concerning the negation of the existence of the State of Israel as a Jewish state on a few statements by members of the list that are insufficient– both quantitatively and qualitatively – for meeting the necessary evidentiary threshold to ground the argument that Hadash-Ta'al negates the core characteristics of the State of Israel as a Jewish state. The primary piece of evidence presented by the appellants in this regard was an interview with Knesset member Tibi in the Ha'aretz newspaper in March 2017, in which he was asked to provide a hypothetical description of the situation in which the vision of two states was abandoned and instead, a single state was established in which the Arab minority became the majority. In that interview, Tibi is quoted as saying that such a state would be substantially different from the State of Israel today, and that the Declaration of Independence would be replaced by a civil declaration in which equality would be a supreme value, the Law of Return would be revoked, and the state's symbols would be changed. However, Tibi expressly stated in that interview that his vision is a vision of two states – a fact that the appellants refrained from mentioning in their arguments. The appellants further referred to a short segment of a television interview with Tibi in 2011 in which he said that he cannot recognize the State of Israel as a Jewish state. These two pieces of evidence, which are not from the recent past, are not

sufficient to show clearly, persuasively and unambiguously that Tibi acts for the negation of the existence of the State of Israel as a Jewish state. It should be borne in mind that we are concerned with a member of Knesset who has served for some two decades, and that no argument was presented in regard to his parliamentary activity that would support the claimed cause for disqualification (compare the *Ben Shalom* case, p. 251). The additional evidence presented consists of quotes regarding which there is doubt as to whether they could ground the cause of negation of the existence of the State of Israel as a Jewish state, and in any case, they are attributed to Raja Zaatra, who is not a member of the Hadash-Ta'al list for the 21st Knesset and who claimed that the quotes were untrue. The appellants further referred to statements by Cassif, who is a member of the Hadash-Ta'al list, but as noted above, we did not find them sufficient to lead to disqualifying Cassif himself, and thus they cannot lead to the disqualification of the entire list (see and compare: the *Tibi* case, p. 44; the *Balad* case, para. 20).

76. The evidence adduced by the appellants in all that regards the cause for disqualification concerning support for armed struggle by a hostile state or a terrorist organization against the State of Israel comprises, inter alia: a public address by Tibi in 2011 in Arabic in which, it is argued, he expressed praise for martyrs, and a report from 2007 on his participation in a march marking five years since Operation Defensive Shield in Jenin, among a crowd in which people dressed up as suicide bombers were present. In addition, the appellants referred to statements by a member of the Hadash party, Aida Touma Suleiman (hereinafter: Suleiman) in which she called the conduct of IDF forces in violent events on the Gaza border "premeditated murder", refused to call the Hamas a terrorist organization, and argued that "an intifada by the people against the occupation is legitimate". The appellants further referred to Suleiman's participation in a demonstration in support of those who refuse to serve in the IDF, and to her refusal to hold a debate on women soldiers in the IDF when she served as chair of the Knesset committee for the advancement of the status of women. In addition, statements by a member of the Ta'al party, Osama Saadi, were presented expressing support for a popular struggle and who, it is claimed, refused to denounce harming Israeli citizens who reside in Judea and Samaria. The appellants also referred to statements by the chair of the Hadash faction, Ayman Odeh (hereinafter: Odeh), who refused to denounce harming IDF soldiers and thanked a Palestinian television station that praised the parliamentary activity of the Joint List in the 20th Knesset. The appellants further referred to a report that Odeh had clashed with police in a conference of the Popular Front and Democratic

Front organizations, reports on meetings of members of the list with security prisoners in prison, reports of discussions held with Palestinian leaders, and to the Hadash party's condemnation of the decision of the Persian Gulf states and the Arab League to declare the Hezbollah a terrorist organization.

77. I examined the said assembled evidence and arrived at the conclusion that it is insufficient under the strict criteria outlined in the case law for establishing a cause for disqualification under sec. 7A(a)(3) of the Basic Law. As the Attorney General noted, part of the evidence presented in this matter does not show – even prima facie – direct or indirect support for terrorist activity. To that one should add that some of the evidence adduced is old and even precedes the elections for the 20th Knesset, and the Elections Committee to which that evidence was presented in the past did not find that it grounds the cause for disqualification. Indeed, some of the material attributed to the representatives of Hadash-Ta'al as detailed above can be interpreted as supporting an armed struggle against the State of Israel by a terrorist organization, but given the fact that in those very same publications to which the appellants refer there are also statements by members of the list according to which they do not support violence as a political approach, the resulting doubt weighs against that interpretation. Moreover, those requesting disqualification did not present the official platform of the list, which is a primary source depicting its purposes (the second *Neiman* case, p. 186; the *Moledet* case, p. 362), and for this reason, as well, it is difficult to conclude that the list supports armed struggle against the State of Israel by a terrorist organization and that this is the central, dominant purpose of Hadash-Ta'al for the realization of which it acts in a real and consistent manner.

Conclusion

78. For the reasons detailed above, I have, as stated, arrived at the conclusion that the appeal in EA 1866/19 should be granted in part, and to hold that Ben Ari is banned from contending in the elections for the 21st Knesset, which does not apply to Ben Gvir; to overturn the Elections Committee's decision in EA 1876/19 and hold that the Ra'am-Balad list is not barred from participating in those elections; to overturn the Elections Committee's decision in EA 1806/19 and hold that Cassif may participate in the elections for the 21st Knesset; and to deny the appeal in EA

1867/19 and hold that the Hadash-Ta'al list is not barred from contending in the elections for the 21st Knesset.

Justice I. Amit:

I concur in the decision of President E. Hayut, and I will add a few words of my own.

1. Every election season, as a kind of ritual, the Supreme Court is called upon to address the disqualification of lists or candidates on the basis of the Knesset Elections Law [Consolidated Version], 5729-1969. Knesset elections are a purely political matter, and the Elections Committee reflects the relative political power in the Knesset like a mini-Knesset. As opposed to this, sec. 7A of Basic Law: The Knesset was originally enacted to reflect timeless constitutional criteria of causes for qualification that are not judged on the basis of prevailing sentiment. In view of the fundamental right to vote and to be elected, the Supreme Court established strict criteria for the disqualification of a list or a candidate, which were reviewed in para. 16 of the President's opinion: dominant purpose; express declarations or unambiguous conclusions; non-sporadic conduct; and persuasive evidence.

In putting those principles into practice, we examine each disqualification independently on its own merits, in accordance with the relevant cause for disqualification and the evidence referring to it, while not seeking any kind of political "symmetry" or "balance". As I had the opportunity to say: "the voting in the Elections Committee is political, and thus the great caution that this Court must exercise as a party to the decision so as not to be infected by the political game" (EDA 1095/15 *Central Election Committee for the 20th Knesset v. Hanin Zoabi* [6], para. 1 of my opinion) (hereinafter: the second *Zoabi* case)).

And now to the matter on the merits.

2. Sec. 7A(a)(2) of Basic Law: The Knesset – "*Incitement to Racism*":

The legislature stated its opinion loudly and clearly. Incitement to racism is politically out of bounds. Incitement to racism is contrary to universalist democratic values. Incitement to racism is incompatible with the values of the State of Israel as a Jewish state. Incitement to racism – not

in this house and not in the Knesset. For this reason, the Kach movement was denounced and expelled from the community and placed beyond the bounds of law. Racially inciting discourse is harmful by its very nature, and as such, I am of the opinion that it should not be subject to the probability test.

3. In the "last round", Baruch Marzel's candidacy was confirmed, but in his dissent, Justice Rubinstein expressed his opinion that we were concerned with "the sheerest of sheer costumes" (the second *Zoabi* case, para. 118 of his opinion). As the President so aptly demonstrated, the candidate Ben Ari did not even bother to put on a disguise. According to him, the logic is as follows: Whoever is not a Zionist is an enemy, the overwhelming majority of Israeli Arabs are not Zionists, therefore the conclusion is that the overwhelming majority of Israeli Arabs are to be viewed as enemies. The Attorney General was rightly of the opinion that Ben Ari should be disqualified, and we agree.

4. Sec. 7A(a)(1) of Basic Law: The Knesset – "*Negation of the existence of the State of Israel as a Jewish and Democratic State*".

In the second *Zoabi* case, I noted that "the Jewish public must be sensitive to the dilemma of the Arab minority, but similarly, elected Arab representatives must conduct themselves with wisdom and sensitivity in regard to the state of which they are citizens and understand the sensitivities of the majority". In the fascinating hearing before us, it could be inferred from the statements of those requesting the disqualification of Ra'am-Balad that a party that is not Zionist should be deemed as one that entirely rejects the existence of the State of Israel as a Jewish state and must, therefore, be disqualified. In my opinion, this argument insensitively pigeonholes a considerable part of the Arab population that, while not Zionist, identifies with the State of Israel and sees itself as an integral part of it. It is hard to accept that the State of Israel would make an outcast of anyone who is not a Zionist, or anyone who ideologically rejects the Zionist idea. Disqualifying a list or a candidate for "incitement to racism" reinforces both characteristics of the State of Israel as "Jewish and democratic". Disqualifying a list or a candidate for discourse and speech that is not Zionist in accordance with the approach of those seeking disqualification in the present case constitutes somewhat of a lessening of the democratic element. Therefore, and for the purposes of the cause for disqualification under sec. 7A(a)(1) of Basic Law: The Knesset, the two

components of "Jewish and democratic" must be balanced wisely and sensitively so that accusers will not say that our state is "democratic" for the Jewish majority and "Jewish" for the Arab minority.

And note: we sing [in the National Anthem – trans.] "the soul of a Jew still yearns" with misty eyes, and the Law of Return, 5710-1950 is, indeed, the "Foundation Stone" of the State of Israel and a Jewish state. The Law of Return is the alpha and omega for the very existence of the State of Israel, and it is what ensures the existence of a Jewish majority in the State of Israel. But not every passing thought, notion, or expression that casts doubt about the Law of Return will inherently lead to disqualification given the strict tests for disqualification noted above (such as dominance), and perhaps the probability test as well. However, a bill to rescind the Law of Return, or a party platform that openly calls for the rescission of the Law of Return might move a list across the boundary of disqualification, and it would seem that Balad, almost as a habit, not infrequently walks on the boundary. It would not be superfluous to note that in the *Tibi* case (*Central Elections Committee for the Sixteenth Knesset v. Tibi* [1], p. 40), President Barak was ready to accept the statement of MK Bishara that he did not demand the revocation of the Law of Return. From this we can infer the result had it been otherwise claimed. This brings us to the central piece of evidence presented to us in regard to Balad, which is the Basic Law: A State of all its Citizens Bill that it presented to the Knesset, and which in effect, expresses a desire to undermine the Jewish character of the state.

5. A number of reasons led me to the conclusion that the Balad list should not be disqualified for that bill, even without addressing the question of the probability test.

First, most of the Balad Knesset members in the prior Knesset are not on the current list, which changes its character. Second, that bill should be seen as a sporadic act of protest following the enactment of Basic Law: Israel – The Nation State of the Jewish People. The bill is not included in Balad's platform, it is not claimed that it was part of its platform in the past, and no systematic, consistent activity in that direction was proven. The bill should, therefore, be viewed as a one-time act that does not, in and of itself, give rise to a cause for disqualification.

6. These are the main reasons why I am of the opinion that that the Balad party walked on the margin but did not cross it, even though the bill brought it but a step away. For my part, I will

leave the grounds for the Attorney General's opinion – that Balad did not stand alone but rather as part of a joint list of Ra'am-Balad – for further consideration. One could, on the other hand, argue that the very fact of that partnership with another party placed Balad under a higher duty of care lest crossing the boundaries might harm the other party. The other side of the coin is that the unification of parties does not grant immunity from disqualification, such that parties that may join with Balad in the future will have to take that into account. I will, therefore, leave the matter for further consideration.

Justice U. Vogelman:

1. I concur in the conclusions and the comprehensive opinion of my colleague the President, and with the main points of her reasoning.

2. The principles applicable to appeal and approval proceedings with which we are concerned are grounded in a broad range of case law, which is appropriately detailed in the opinion of my colleague the President.

3. My colleague the President addresses the difference between an elections appeal and an elections approval, and on the various approaches in our case law in regard to the scope of the Court's review in the different proceedings. My colleague Justice I. Amit, for his part, addresses the caution that the Court must adopt, in his view, in proceedings such as these due to the fact that the vote in the Elections Committee if political.

4. I see no need to set in stone the proper approach among those enumerated by my colleagues (inasmuch as each of them leads to the same result in the instant case). However, I would like to emphasize that, in my view, given the nature of the rights and balances involved, the "political" considerations cannot be given weight in terms of the constitutionality of the decisions, and that the political nature of the proceeding in the Central Elections Committee is not meant to influence the form of judicial examination and its scope.

5. On the matter of disqualification for incitement to racism.

The first matter I wish to address in this regard concerns the application of probability tests for the realization of the dangers that the causes for disqualification are intended to prevent (a question that has not yet been resolved in our case law). In the context of the said cause, I would like to point out that, in my view, there is no place for a "probability test" inasmuch as racist expression is not worthy of protection. In the words of Justice D. Beinisch: "Racism is the kind of affliction whose isolation and removal from the political and social arena is an essential condition for preventing its spread" (EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi* [1], p. 88) (hereinafter: the *Tibi* case)).

The words of Justice Procaccia in the same matter are apt:

> The phenomenon of racism in the chronicles of history and the annals of the Jewish people is special and unique. Nothing compares to its rejection and the defense against it even among the many protections of the fundamental human rights that the constitutions of western states diligently labor to ground. The moral, ethical taint of incitement to racism, against the background of its deep opposition to the universal concept of human rights, and in view of the atrocities of the Holocaust of European Jewry that was annihilated due to racial theory, does not tolerate its inclusion on the podium of ideas and opinions of political discourse. That is so, even if there is no foreseeable danger whatsoever of the realization of the inciter's dogma, and even if his words are like "a voice crying out in the wilderness" without echo and without being heard.
>
> Racism is condemned, and it must be eliminated by virtue of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966, of which Israel is a signatory. The parties to it pledged not to sponsor racial discrimination and to adopt immediate measures in order to uproot every phenomenon of racism (arts. 2, 4, and 5 of the Convention).
>
> The condemnation of racism takes on a special dimension in Jewish tradition in view of the blood-soaked history of a nation that was a victim of the manifestations of this phenomenon over generations. Racism stands in contradiction to the fundamental values of the State of Israel as expressed in the Declaration of Independence, according to which full social and political equality must be ensured for all citizens regardless of religion, race, and sex. The depth and force of the condemnation of racism as a social phenomenon do not accord with granting of an opportunity to a candidate

> to run for office on the basis of racist ideas among the range of opinions and perspectives expressed in political discourse. Standing for election on the basis of racist ideas flies in the face of the educational, moral purpose of inculcating the principles of equality and tolerance in Israeli society. These ideas cross the bounds of the red line that guarantees tolerance even for expressing deviant ideas and views. Casting them out beyond the pale is necessary so that expressing them will not be interpreted, even by inference, as granting approval and legitimacy to those who hold them to participate in the life of the state (and compare: R. Gavison, *Twenty Years since the Yeredor Ruling – The Right to be Elected and the Lessons of History*, p. 173).
>
> […]
>
> In this spirit, the condemnation of incitement to racism and its removal from the framework of political contest is a value unto itself, unconditional and unrestricted even where there is no attendant probability whatsoever of the realization of its potential danger. There is no need to seek manifest or hidden elements of danger in order to deny the entrance of inciters to racism into the political arena (compare the words of Justice E. Goldberg in the meeting of the Knesset Elections Committee in the matter of the disqualification of the Kach party, Oct. 5, 1988, p. 47*ff.*). Incitement to racism is condemned as a value of universal and national heritage, and it stands above and beyond the probability test of its foreseeable danger on the basis of some criterion or another. The contradiction between racism and the fundamental values of the stare is so deep that anyone who embraces it in his political thought should be disqualified from the outset (the *Tibi* case, pp. 89-90).

I agree with every jot and tittle of these true words.

6. Moving from the general to the specific – my colleague well described the factual grounds upon which we decided that the cause of incitement to racism is met in the case of Ben Ari, and it would be superfluous to reiterate the well-grounded presentation of the evidentiary foundations. Ben Ari's incitement extends to a broad range of subjects, among them a call for excluding Arab citizens from residing within the limits of an Israeli city, recall dark periods in the history of nations. The addition of the cause for disqualification with which we are concerned to the Basic Law by the constituent authority of the State of Israel was intended for a war against such phenomena, and it is our role to interpret the Constitution and maintain its boundaries.

7. The matter of Ben Gvir is different. I concur with my colleague's conclusion – which ascribed weight to his declarations concerning changing his manner – that the foundation amassed in his regard does not amount to a "critical mass" that grounds a cause for disqualification.

8. As for the Ra'am-Balad list – as my colleague notes, the entirety of the evidence adduced is not qualitatively different from what was presented to this Court in previous proceedings that concerned the question of the disqualification of Balad and members of the list in which it was held that it did not constitute a sufficient foundation for disqualification. I see no need to address the Basic Law bill that Balad presented, to which my colleagues referred, given that the Balad Knesset members who served in the last Knesset are not included in the current list, and given the clarification by the list's attorney that the bill is not part of Balad's platform.

9. In the matters of Ofer Cassif and the Hadash-Ta'al list, as well, I concur with the conclusion that the evidentiary foundation is insufficient to ground the claimed causes for disqualification.

Justice M. Mazuz:

I concur in the main points of the reasons and conclusions of President E. Hayut, and I wish to add two comments. Because they are not necessary for the decision, I will state then in brief:

1. The cause of "*negation of the existence of the State of Israel as a Jewish state*":

As we know, the cause of "negation of the existence of the State of Israel as a Jewish and democratic state" under sec. 7A(a)(1) of Basic Law: The Knesset formerly comprised two separate causes: "Negation of the existence of the State of Israel as the state of the Jewish people", and "negation of the democratic character of the state" (secs. 7A(1)-(2)). The two causes were unified in the framework of a 2002 amendment to Basic Law: The Knesset that added the authority to disqualify a candidate (not just a list) and the cause of support for armed struggle by a hostile state or a terrorist organization against the State of Israel. As explained in the Explanatory Notes, this unification derived from the desire for uniformity between the wording of sec. 7A and sec. 5 of the Parties Law, 5752-1992 ("and this because the two sections are interrelated"), and was not intended to introduce a change in the content of these causes by virtue of their unification.

In practice, the unification of the causes, which involved a certain change in the wording of the cause, was the basis for an interpretation of this cause that was both different in content and broader in scope. While under the prior wording, the cause of "*negating the existence of the State of Israel as the state of the Jewish people*" addressed the negation of the view that the State of Israel is the state of the Jewish people in the sense of the place in which it realizes its right to self-determination, under the unified wording, the term "Jewish state" was interpreted as referring to the *internal* content of the state's identity and the elements of the Jewish identity of the state from within ("the primary symbols" of the state and the "nuclear characteristics" of its Jewish identity).

In my opinion, the proper interpretation of the cause for disqualification of "*negating the existence of the State of Israel*", like the separate cause under the prior wording, refers to the identity of the State of Israel as the state of the Jewish people in the *national* sense, as the place in which it realizes its right to self-determination, and not as referring to *internal* features of the state that characterize it as a Jewish state. This position has consequences, inter alia, in regard to how to view the Basic Law: A State of all its Citizens Bill introduced at the time by Knesset members of Balad, however, in view of the President's conclusions in this regard (para. 58), I see no need to expand upon my approach to the bill and I will only note that I agree in principle with the comments of Justice I. Amit in paras. 4-5 of his opinion.

2. *A Probability Test and Incitement to Racism*:

This issue has been addressed on several occasions in previous case law, beginning with the first *Neiman* case, and various opinions – mostly rejecting it in general, or at least in regard to the cause of incitement to racism – but it has been left for further consideration and remains undecided.

I am of the opinion that there is no place for a probability test in applying the causes for disqualification under sec. 7A of Basic Law: The Knesset. The probability test has no grounding in the language of the law, and it raises many – theoretical and practical – difficulties in its application. I will not presume to exhaust all the reasons for this position, but will suffice with a few words: *first*, in terms of the interpretation of the law. As we know, the interpretation of a

statute begins with its language and is limited by it. There are no grounds for requiring a probability test in the language of sec. 7A. Section 7A refers to objectives and actions, including statements, by a list or candidate. We are concerned with causes of "conduct" not "results". *Second*, the Court, called upon to approve or review a decision by the Central Elections Committee to disqualify a candidate or list, lacks the tools for applying a probability test for the purpose of approving or rejecting the probability evaluation of the Elections Committee. A probability estimate in the public-political context is inherently speculative, and the Court would do well to refrain from it. *Third*, and this is the main point, sec. 7A treats of the lack of legitimacy of a list or candidate who meets the disqualification criteria to participate in the "democratic game". The theoretical basis for disqualifying lists or candidates, as stated, does not suffice by preventing a real, concrete threat, but primarily concerns *not granting legitimacy* to lists of candidates whose objectives and actions are beyond the legitimate democratic boundaries for participating in the democratic elections.

It would appear that the cause of "incitement to racism" under sec. 7A(a)(2) well demonstrates this. Incitement to racism and racist acts are unacceptable *per se*, as they are contrary to the most basic values of a democratic society, which is founded upon the idea of the equality of human beings. We are concerned with universal values accepted in the law of nations. Under the International Convention on the Elimination of All Forms of Racial Discrimination, known as the CERD Convention – signed by the State of Israel on March 7, 1966, ratified on Jan. 3, 1979, and entering into effect on Feb. 2, 1979 – the State of Israel assumed, like the other signatory nations, inter alia, the obligation to prohibit racial and other discrimination and to adopt all means, including legislation, to bring about its end (art. 2(1)(d) of the Convention). In 1985, together with the amendment of Basic Law: The Knesset and the addition of sec. 7A, the Penal Code was also amended with the addition of Article 1A: Incitement to Racism, which established various offences of incitement to racism (both amendments were included in the same pamphlet of bills – *H.H.* 5745 193). The offences of incitement to racism are conduct crimes, not result crimes, and do not comprise an element of probability ("it does not matter whether the publication did cause racism" – sec. 144B(b)).

Incitement to racism is, therefore, prohibited and unacceptable without regard for the probability of the realization of its objectives. It is an illegitimate form of discourse in a democratic society. Incitement to racism does not represent any protected value that requires a balancing of

interests. The value of freedom of expression, which is the life breath of democracy, was intended to protect non-violent public debate and to permit a conceptual contest among legitimate values in a democratic society. Racist discourse "pollutes" the democratic discourse and undermines the purpose of conceptual inquiry among the members of society and the free establishment of views on the basis of democratic values. Therefore, the reason for preventing the participation of a list or candidate that incites racism in the elections is not restricted to a fear of the realization of the objectives of the incitement, but is primarily concerned with the public value of not granting legitimacy to racist speech as part of the democratic discourse. In this sense, the cause for disqualification for incitement to racism is a special case of the cause relating to the negation of the democratic character of the state.

Lastly, I would emphasize that I do not believe that the probability test is necessary for mitigating the causes for disqualification or for granting flexible tools for their application. To that end, the case law established a strict, narrow interpretive approach to the causes of disqualification. Strict criteria were also established that are implemented in judicial review of this matter, among them the demand that the objectives attributed to a list or candidate constitute a central, dominant objective and not a secondary, marginal issue, and the requirement of active, consistent, and systematic action for the realization of those objectives. It was further held that the evidence for disqualification must be persuasive, clear and unambiguous. All of these provide the Court with effective tools to ensure that the disqualification authority, which is an exceptional and intrusive authority, be exercised only in extreme, clear cases, without the need for the problematic means of a probability test.

Justice N. Sohlberg:

1. If we were to interpret and implement the causes for disqualification in sec. 7A of Basic Law: The Knesset as written, as they would be understood by the average person, then not only would Dr. Michael Cassif be barred from candidacy for the Knesset elections. A plain reading of the section would, in all probability, lead us to conclude that additional lists and candidates whose matters have been examined by this Court over the years would also be granted this dubious honor.

2. However, that is not the case. From the very outset, this Court adopted a strict approach to the legal interpretation of sec. 7 and to its application in practice. This approach reflects a value-based decision that democracy grants special – almost supreme – importance to the constitutional right to vote and be elected. Disqualifying a list or a candidate from standing for election to the Knesset must be the very last resort; one that is reserved for manifestly extreme case in which there is no room for doubt: "The essence of such a matter, the limitation of a basic constitutional right, inherently carries a standard of interpretation that must be strict and narrow, and section 7A should be reserved for only the *most extreme cases*. This interpretive approach does not conflict with the statute but is rather a result of a proper understanding of the purpose of the statute, which does not seek to limit freedoms, but to protect them against *actual danger*" (the second *Neiman* case, p. 187; emphasis here and below added – N.S.). This approach has become firmly rooted in the case law of this Court: "Preventing the participation of a party in the elections is *a most extreme step*. The right to vote and to be elected is a right of the highest constitutional level" (HCJ 5364/94 *Wilner v. Chair of the Israel Labor Party* [21], p. 802, *per* Deputy President A. Barak); "Preventing a party from participating in the elections is an *extreme and exceptional* step that in many ways directly contradicts the fundamental principles upon which democracy rests" (the *Balad* case, para. 3 of the opinion of President Beinisch); "Preventing participation in Knesset elections is *an extreme step that is reserved for the most exceptional cases* for which the normal democratic tools are insufficient" (the second *Zoabi* case, para. 75 of the opinion of President M. Naor).

I will briefly summarize the guiding criteria as expressed in the case law: Barring participation in Knesset elections will only be done as *when all else has failed*.

3. Recently, in the Basic Law: The Knesset (Amendment no. 47) (Prevention of Participation in Elections due to a Candidate's Statements) Bill, the constituent authority expressed the view that it accepts the narrow path taken by the Court in applying sec. 7A. The bill expressly established that a person's actions also include his statements. The Explanatory Notes clarify as follows: "The proposed amendment expressly anchors the approach accepted in the case law in this matter, according to which "actions" under sec. 7A of the Basic Law also include statements. *Thus, the amendment is not intended to alter the Court's case law according to which the application of sec. 7A of the Basic law will performed narrowly and strictly in order to protect the state's most vital interests*" (*H.H.* 675, p. 52). However, there was also some criticism of the

direction of the case law, on the need to take care not to adopt an overly restrictive interpretation of the causes for disqualification in sec. 7A, while unduly expanding the boundaries (see, e.g., the second *Zoabi* case, para. 8 of the opinion of Deputy President E. Rubinstein).

4. The criteria developed in the case law for the application of sec. 7A, which reflect the narrow interpretive approach, were set out in para. 16 of the opinion of my colleague the President. Primarily, in brief, one must show that the cause for disqualification can be found in the objectives or the actions of the list or candidate; those objectives or actions must form part of the dominant characteristics of the actions of the party or candidate; they can be learned from express declarations or from unambiguously probable conclusions; theoretical objectives are insufficient, but rather one must show systematic "activity in the field" that must constitute severe, extreme expression in terms of its intensity; and lastly, the evidence based upon the above must be "persuasive, clear, and unambiguous".

5. On the basis of those criteria, my colleague the President found, and my colleagues concur, that the evidentiary foundation in the matter before us paints an unambiguous and persuasive picture according to which Ben Ari "systematically inflames feelings of hatred toward the Arab public in its entirety, while continually demeaning that public" (para. 42 of the President's opinion). Therefore, she held that he must be disqualified.

6. I considered and reconsidered the matter. I carefully read the various statements, watched and listened. I considered the various clarifications and explanations over and over again, and the dilemma was difficult and weighed heavily. I did not easily decide to disagree with my colleague's conclusion. The source of my dilemma was the substantial gap between the image of Ben Ari as reflected in the virtual arena – in the social networks – and that shown us in the Elections Committee's hearings and in the Court. Thus, in his affidavit in the instant proceeding, Ben Ari rejected the claims about his racist views, and declared, inter alia, as follows:

> I do not think that people are of different value due to their ethnic, national or religious origin. All human beings were created in the Divine image, and all human beings were granted free choice. Your own deeds will cause you to be near, and your own deeds will cause you to be far[1] […] In my view,

[1] Mishna Eduyot 5:7 – ed.

> the Arab National Movement, whose purpose is to destroy Jewish sovereignty through the use of violence and terror is the enemy of the State of Israel, of the Jewish people and of Zionism. I would like to emphasize that what makes it an enemy of the state, the people and of Zionism is not the ethno-national origin of its members and supporters, and not their religious belief. What turns the members and supporters of the Arab National Movement into enemies are the political objectives that this movement established and the ways in which it acts for the realization of those objectives since the beginning of the 20th century and to this day […] Anyone who accepts that the State of Israel is the state of the Jewish people and agrees that Israel is a Jewish and democratic state is a desirable citizen who is worthy of all the civil, social and political rights without regard for religions, race, sex, ethnic origin or skin color. In addition, I am of the opinion that basic human rights are granted to every person as such, and that the state must act justly and fairly toward every person without regard for religion, race, sex, ethnic origin, or skin color (paras. 9, 16-17 of the affidavit).

7. Further on in the affidavit, Ben Ari addresses all the statements quoted in his regard (as opposed to in the hearing before the Elections Committee, in which he addressed only a part of them) and explained that "all of my arrows are directed against those who are not loyal to the State of Israel and hostile to the Zionist enterprise. Even if, at times, my words may sound or be apprehended as general, that absolutely does not reflect an intention to generalize, and in no way reflects my true, consistent opinion" (para. 22 of the affidavit). Like the cases adjudicated by this Court in the past, real doubt arises in regard to the sincerity of Ben Ari's declarations.

8. Three examples from the past: (a) Baruch Marzel declared, at the time, that he had recanted his prior views, that he sought to act only in accordance with the law, accepts the principles of democracy, and had withdrawn from the path of generalized statements of the Kach movement. A long line of evidence led the Court to a conclusion in regard to "a real doubt as to the sincerity of Mr. Marzel's declarations, according to which he had disavowed his approach and his former racist, undemocratic ideology" (the *Tibi* case, para. 81 of the opinion of President A. Barak). Later, prior to another election, President M. Naor stated: "I, too, do not believe that Marzel has changed his views and thoughts" (the second *Zoabi* case, para. 33). (b) Hanin Zoabi declared, at the time, her opposition to violence, and nevertheless "it was difficult for me to be persuaded that MK Zoabi does not support armed struggle" (*ibid*., para. 7 of the opinion of my colleague Justice I. Amit).

(c) MK Azmi Bishara argued, at the time, that he opposed violence and armed struggle, and he, too, did not earn much trust: "There is doubt in our hearts. But the doubt must act – in a democratic state that believes in freedom and liberty – in favor of the freedom to vote and to be elected" (the *Tibi* case, para. 46 of the opinion of President A. Barak).

As may be recalled, Hanin Zoabi and Azmi Bishara served honorably as members of the Israeli Knesset. Marzel's candidacy was also approved, twice, although he was not elected. And what of the case of Ben Ari? In the end, his statements "in real time" speak for themselves, and clearly to his detriment. I will not belabor the point and repeat what has already been presented at length in the opinion of my colleague the President. I will suffice by referring there, and the reader will not be pleased. The statements are not at all consistent with the tolerant, placating tone that arises from the above affidavit presented in these proceedings. Which Ben Ari should we therefore believe?

9. Ultimately, I inclined to the view that there is no justification for ordering Ben Ari's disqualification. I have not arrived at this conclusion because I take incitement to racism lightly, but because I am strict in regard to the fundamental constitutional right to vote and to be elected. Given the strict criteria applied in the case law of this Court over the years, and in view of Ben Ari's explanations and clarifications, there is doubt as to whether the statements amount to incitement to racism or a negation of the democratic character of the State of Israel to the point that would justify barring Ben Ari from running in the Knesset elections. Indeed, the fundamental right to vote and to be elected is not absolute. In appropriate circumstances, it is proper to limit it, but that is not the situation in his regard. While the evidentiary foundation in the matter of Ben Ari is broad in scope, it is not more exceptional, extreme and severe in "quality" and intensity than matters brought before this Court in similar cases (both in the *Tibi* case and the second *Zoabi* case). While Israeli democracy requires protection, it is still strong enough to comprise even Ben Ari as a member of Knesset (as we may recall, Ben Ari already served in the position in the recent past, in the years 2009-2013).

10. This result is required for two additional considerations that are of a practical nature: *First*, the procedural framework in which we act. As we know, sec. 7A was presented to the Knesset together with the Penal Law (Amendment no. 24) Bill, 5745-1985, which established an express

criminal prohibition upon incitement to racism. "We are determined to combat the phenomenon of incitement to racism with full force. To that end, we decided to act on two planes – on the constitutional plane, by including incitement to racism as a cause for the disqualification of a list of candidates from participating in Knesset elections, and on the penal plane – establishing an offense of incitement to racism in the Penal Law" (from the statement of the Minister of Justice, MK Moshe Nissim, in presenting the bills for a first reading; Knesset Record (5745), p. 2381). As opposed to the criminal process, which is conducted in accordance with a clearly defined framework of procedure, which includes, inter alia, an evidentiary proceeding in which it is possible to question and interrogate carefully, in the constitutional proceeding before this Court, the factual examination is far more limited. This requires us to be especially careful in drawing conclusions and establishing facts on the basis of the evidentiary foundation presented before us. Second, lest we forget: Even after a candidate has cleared the hurdle of sec. 7A, Israel is not bereft:[2] "The very fact that a candidate is permitted to contend in the Knesset elections does not mean that from the moment he is elected he may do whatever he pleases. There is still the possibility of rescinding the immunity of a member of Knesset in certain situations, placing him on trial if it be found that he committed a criminal offense, and terminating his tenure in the Knesset if he is found guilty of an offense of moral turpitude" (the first *Zoabi* case, para. 35 of the opinion of President A. Grunis).

11. It cannot be denied that Ben Ari's statements – at least in large part – are hard to digest. I was, indeed, very annoyed by his callous style, the racist tone, and the coarse generalities. It does not do honor to him or to those who listen to his teachings. We can and should protest against evil, and against those who seek our harm and our lives – foreign and domestic. But we are obliged – particularly as public servants – to do so responsibly and carefully. Nevertheless, *even when common sense protests and the soul recoils from Ben Ari's statements, there is still no justification for placing him beyond the pale.* The strength of freedom of expression, the strength of democracy "is not the recognition of the right to speak pleasantries that are soothing to my ears. Its strength is in the recognition of the right of the other to say things that are grating upon my ear and that pierce my heart" (HCJ 14/86 *Laor v. Theater and Film Review Board* [22], p. 441). That is true of freedom of expression in general, and of political speech in particular, when what is at stake – we

[2] Jeremiah 51:5 – ed.

will not refrain from repeating – is a mortal blow to the fundamental constitutional right to vote and to be elected.

12. I wholeheartedly concur with my colleague the President on our obligation to combat racism uncompromisingly. As a son of my people and a descendant of my family, I am well aware of where the terrifying harm of hate of the stranger and the different leads. But make no mistake, the two are not comparable, and not even close. And note: the struggle against racism is not only on the legal plane, but also – and primarily – on the educational plane, "in a reassessment of the ways of educators and pupils alike, in all walks of our society" (the first *Neiman* case, p. 302). In this regard, it would be proper to quote what Rabbi Zvi Yehuda Kook wrote in the month of Nissan 1947 in a letter to the principals and teachers of a Jerusalem school. The Minister of Justice, MK Moshe Nissim, quoted part of the letter, titled "Embarrassing and Sad Conduct of Children", in presenting the bill in regard to sec. 7A to the Knesset plenum for a first reading, as follows:

> To the Principal and Teachers of a school here in our Holy City, may it be rebuilt and reestablished!
>
> I must bring the following matter to your honorable attention, as follows: This morning, while passing by the school on the way to Yaffo-Ben Yehuda Street, I saw some from among a group of children from the school repeatedly hitting and coarsely taunting Arab peddlers who passed there. Twice together – at the two Arabs, one young and one old, who were apparently partners, beginning with the younger one and continuing with the older one with particular coarseness. This occurred a short distance from the gate to the schoolyard. Then again at a youngster on the sidewalk of Jaffa Road, at the corner of Ben Yehuda Street.
>
> I was saddened and very ashamed by what I saw. Due to their running and mischief, I was unable to catch them and rebuke them for this. I do not know who these children are, or who are their parents and teachers. I know only that they were from the school. Not all of them, not all of the group of children from the school, took part in that despicable harm and taunting, but some of them. And I believe that some of them protested.
>
> Nevertheless, the very existence of this fact, which pained and insulted me, as noted, requires that I bring to your awareness the need for greater and special educational attention to bringing an end to such possibilities, both in and of itself as a matter of Jewish law and morality, and in terms of the

> practical community and political value of preserving peace and good neighborliness.
>
> With all due respect and in the hope of the glorification of God and the salvation of his people and heritage.

Here we see plain, clear, resolute, human Jewish morality. We must walk in its light.

13. For the same reasons for which I was of the opinion that we should not order the disqualification of Ben Ari, I arrived at the conclusion that the Election Committee's decisions in the matters of the Ra'am-Balad list and of Dr. Ofer Cassif should be overturned and that the appeal in regard to the Hadash-Ta'al list should be denied, and that we should hold that they are not barred from participating in the Knesset elections. As in regard to the decision is the matter of Ben Ari, this decision, as well, was not at all easy. Some of the statements presented to us – both those attributed to Cassif and those attributed to other members of the Hadash-Ta'al list – are not pleasant to the ear, to put it very mildly. But just as we are enjoined and stand ready to defend against those who would incite to racism and thereby undermine the democratic character of the State of Israel, so we must defend against those who would undermine its Jewish character and who express support – express or implied, publicly or privately – terrorist attacks and murder. In the course of the debate on sec. 7A, prior to its first reading, MK Michael Eitan rightly stated in this regard:

> The State of Israel has a political need to provide an answer to a long list of families of Jewish victims who were harmed solely because they are Jews here in the State of Israel on the question of whether the purpose of defensive democracy, that has been and is employed, is to protect them, as well. Can Jews in the State of Israel who are harmed by the agents of the PLO also find an answer in such legislation that is intended to defend democracy to the fact that there are people in the State of Israel who identify with the PLO and see themselves as its agents? And there is also a Knesset faction that once sent a telegram expressing solidarity to the Palestine National Council in Amman, which identifies with the PLO. Where is defensive democracy in their regard? Where is the symmetry? Should democracy defend itself only against insane Jewish fanaticism?
>
> […]
>
> When we discuss the issue of defensive democracy, we have to provide an answer to the Bromberg family, the Tamam family, the Ohana family, and

> a long list of families that daily ask the simple question: Is the purpose of defensive democracy to defend us as well, or is the only answer that marginal group to which we all take exception? And when I ask that question, I understand that we are treading a delicate, sensitive line because we are concerned with a democratic regime, we are not interested in silencing debate, we are not interested in outlawing lists. But in any event, we must ask ourselves the question what is the boundary line?

14. Indeed, the question of where the boundary lies is difficult. It would seem that thirty years after the constituting of sec. 7A of Basic Law: The Knesset, there is no clear, unambiguous answer to this. In any case, as presented above, the special importance of the fundamental constitutional right to vote and to be elected obligates us to strict criteria whose bottom line is that when there is doubt, there is no doubt. Therefore, and for the reasons stated in the opinion of my colleague the President, I am of the opinion that what has been adduced before us is insufficient for ordering the disqualification of the candidacy of Cassif, the Hadash-Ta'al list, and the Ra'am-Balad list.

15. One parenthetical objection: In the matter of the Balad party, the Attorney General noted that "were the Balad party running independently … there would be reason to carefully consider its disqualification". However, "in view of the fact that under the prevailing legal situation, there is no possibility of disqualifying only half of a list (as opposed to disqualifying an entire list or disqualifying specific candidates on the basis of evidence relating to them personally), and in view of the fact that there are almost no arguments against the Ra'am list, it is necessary to examine whether the existing evidence suffices to justify disqualifying the joint list, in view of the case law of the honorable Court in regard to the need to severely limit such a disqualification". My colleague the President did not expand upon that matter, having found other reasons for not ordering the disqualification of Balad (although she attributed weight to the fact that we are concerned with a joint list). For my part, I find the present legal situation very problematic, when a party that prima facie meets the requirements of one of the causes for disqualification can join with another party such that the joint list provides it with a "city of refuge". This should be given consideration when and if the need to address this question arises in the future.

16. In conclusion, where my opinion accepted, we would overturn the Election Committee's decision in EDA 1806/19; deny the appeals in EA 1866/19 and EA 1867/19, and grant the appeal in EA 1876/19, and hold that Dr. Ofer Cassif, Dr. Michael Ben Ari, Advocate Itamar Ben Gvir,

the Hadash-Ta'al list and the Ra'am-Balad list are not barred from standing for election to the Knesset.

Justice A. Baron:

I concur in the comprehensive opinion of President E. Hayut, both in the conclusion she reached in each of the proceedings before us and in her reasoning. I will briefly add my view of the disqualification of the candidacy of Dr. Michael Ben Ari (hereinafter: Ben Ari) for election to the 21st Knesset, in which we are concerned with an exceptionally extreme step, akin to a "doomsday weapon".

The racist statements in the warp and weave of all of the recorded statements of Ben Ari cry out from the page and scorch the ears. Words are not "just" words. There are times when words are also acts, and in the case of Ben Ari's statements they constitute a clear act of incitement to racism. Ben Ari makes improper use of words to arouse hatred against the Arab public, while portraying all Arabs as murderers and bitter enemies. His statements delegitimize an entire community, instigate conflict and strife, and even call for actual violence against Israeli Arabs. Moreover, we were presented with a solid evidentiary foundation that clearly shows that we are concerned with a severe, extreme case of incitement to racism. The racist statements are explicit, systematic (some 40 instances since 2017 alone), constitute a dominant characteristic of Ben Ari's statements, and gain wide exposure in the media and on the social networks.

The principle of freedom of expression, and particularly freedom of political expression, is a cornerstone of a democratic regime. According to this principle, "freedom of expression is not just the right to say or hear what is generally acceptable. Freedom of expression is also the freedom to express dangerous, irritating, deviant ideas that the public reviles and despises" (HCJ 399/85 *Kahane v. Broadcasting Authority* [23], p. 280). Words and statements can thus find refuge under the aegis of freedom of expression even when they express marginal ideas, and even when they arouse disgust, but given their "critical mass", as noted above, Ben Ari's words constitute incitement to racism and therefore undermine fundamental principles of democracy. As the case law of this Court has already made clear, "one who does not accept the fundamental principles of

democracy and seeks to change them cannot ask to participate in democracy in the name of those principles" (EDA 11280/02 *Central Elections Committee v. Tibi* [1], 14). In this regard, I would note that in my opinion, as well, incitement to racism does not merit any protection, and therefore there is no place for applying a "probability test" as a condition for the application of the cause under sec. 7A(a)(2) of Basic Law: The Knesset.

Ben Ari did not apologize for his statements and did not retract them. And if that were not enough, even his explanations continue to reflect a racist attitude toward the Arab public. According to Ben Ari, his recorded statements are not directed against the entire Arab public, but only toward those among it who are not "loyal" to the State of Israel. However, the recordings deliver a clear message that any Arab is disloyal, a traitor, and enemy, and dangerous *by definition*. We are, therefore, concerned with an extreme case that requires Ben Ari's disqualification from participating in the elections for the Knesset.

Justice D. Mintz:

I concur in the opinion of my colleague the President in regard to the partial granting of the appeal in EA 1866/99 and with the holding that Ben Ari is barred from participating in the elections for the 21st Knesset, which is not the case in regard to Ben Gvir. I also agree that the appeal in EA 1867/19 should be denied, and that it should be held that the Hadash-Ta'al list is not barred from contending in the elections for the 21st Knesset. However, I cannot agree with the position in the matter of overturning the Election Committee's decision in EA 1876/19 in the matter of the Ra'am-Balad list and in EDA 1806/19 in the matter of MK Ofer Cassif. In my view, those decisions should be left standing, and we should hold that the Ra'am-Ta'al list and MK Cassif are barred from participating in the elections for the Knesset, as I shall explain.

Foreword

1. The starting point for this discussion is that the restrictions upon the constitutional right to vote and to be elected to the Knesset must be minimal, and they must protect the most vital interests of the state (HCJ 5364/94 *Wilner v. Chair of the Israel Labor Party* [21], pp. 802-803). This Court has recognized the justification for limiting those rights even before an express provision was

enacted to permit the disqualification of a candidate or list from participating in the elections for the Knesset when it was long ago held that the right to vote and to be elected can be limited in order to protect the very existence of the state (EA 1/65 *Yeredor v. Chairman of the Central Elections Committee for the 6th Knesset* [8], p. 387) (hereinafter: the *Yeredor* case); EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset* [4]) (hereinafter: the first *Neiman* case)). And as Justice J. Sussman stated: "Just as one need not consent to be killed, so a state need not agree to be annihilated and wiped off the map." (the *Yeredor* case, p. 390). The restriction of rights is justified in the name of the right of a democracy to defend itself against those who would seek to employ democratic tools for the purpose of negating the very existence of the state, harm its fundamental principles or advance anti-democratic objectives (EDA 9255/12 *Central Election Committee v. Zoabi* [3], para. 8 of the opinion of President A. Grunis); EDA 1095/15 *Central Election Committee for the 20th Knesset v. Hanin Zoabi* [6], para. 7 of the opinion of President M. Naor) (hereinafter: the *Zoabi* case).

2. The desire to prevent the use of democratic tools to advance anti-democratic objectives that undermine the existence of the state stood at the basis of the enactment of sec. 7A of Basic Law: The Knesset (hereinafter also: the Basic Law), to which various amendments were made over the years. The last, in 2017 (Basic Law: The Knesset (Amendment no. 46), 5777-2017 (hereinafter: Amendment no. 46)) clarified that a candidate could be disqualified if his objectives or actions, "including his expressions", included the negation of the existence of the State of Israel as a Jewish and democratic state, incitement to racism or support for an armed struggle by an enemy state or of a terrorist organization against the State of Israel. The legislature had its say and defined the boundaries of the right to vote and to be elected in light of the basic and most vital principles for the existence of the state.

3. It should be noted that sec. 7A of the Basic Law is not the only legal provision that restricts the use of a right granted by democracy in order to prevent harm to the basic, most vital principles for the existence of the state in general, and its existence as a Jewish and democratic state in particular. This purpose is also expressed in the framework of sec. 5 of the Parties Law, 5752-1992, which denies the possibility of registering a party, inter alia, for the causes enumerated in sec. 7A of the Basic Law. Section 1(a1) of the Knesset Members Immunity, Rights and Duties Law, 5711-1951 defines the limits of the material immunity granted to an elected official by virtue

of his office in a manner similar to that in sec. 7A (HCJ 11225/03 *Bishara v. Attorney General* [13], pp. 306-307). As the President also noted, the Basic Law was amended in 2016 to include a provision authorizing the Knesset to end the tenure of a member of the Knesset for incitement to racism or for supporting armed struggle against the State of Israel (the cause of negating the existence of the State of Israel as Jewish and democratic was not included in the framework of that provision in view of its being general and more ambiguous, and upon the presumption that the Knesset plenum would have difficulty applying it (see: HCJ 5744/16 *Ben Meir v. Knesset* [12], para. 29 of the opinion of President E. Hayut).

4. These supplementary provisions define a clear boundary beyond which actions, objectives and expressions *are not legitimate* for elected representatives and for a party or list of elected representatives. The gates of the house of representatives are not open to those who seek to harm the character of the State of Israel as Jewish and democratic (including the cause of "incitement to racism", which constitutes a special case of harm to the democratic foundations of the state) or to support an armed struggle against it and thus to support a threat to its very existence. What is concerned are actions that do not afford material immunity for those who succeeded in being elected to the house of representatives. Some of those causes also permit the termination of the tenure of those who seek the state's harm. The underlying premise is that a person who seeks to take an active part in Israeli democracy and its institutions must accept the principles of its existence and the democratic "rules of the game" (see, for example: EDA 11280/02 *Central Elections Committee v. Tibi* [1], p. 23 (hereinafter: the *Tibi* case)). This, even though such actions or expressions may sometimes fall within the bounds of freedom of expression granted to every person in the state. In other words, what is permitted to every person is not necessarily granted to a person who seeks to be elected to the legislature. The reason for this is clear: the principle of freedom of expression grants every person the freedom to express himself even in a manner that contradicts the principles of the Jewish and democratic regime of the State of Israel (within the bounds of the law). However, permitting a person who voices such ideas to be elected to the legislature may lead to a situation where he will "import" his ideas into the legislature and thus undermine the foundations of the regime upon which the state rests by implementing or realizing his ideas. In this regard, Justice T. Strasburg-Cohen nicely distinguished the two (in the *Tibi* case, p. 70):

> It would be appropriate to note that Israeli democracy does not prevent Knesset Member Bishara from expressing his views, which he terms "theoretical", "philosophical", or "historical", from any platform, in accordance with the law. However, as far as membership in the Knesset is concerned, those views that are part of his political views, and he seeks to implement and realize them, inter alia, by means of his membership in the Knesset. Therefore, those views greatly deviate from theory, philosophy, and history and cross into the area of political activity.

The Causes for Disqualification and Amendment no. 40 of the Basic Law

5. The criteria established in the case law in regard to the implementation of the provisions of sec. 7A of the Basic Law were clarified at length by the President, and I do not intend to dwell upon the matter. I will only say a few words about the distinction in the framework of this provision between disqualifying a *candidate* and disqualifying a *list* from participating in the Knesset elections. Thus, while the section establishes that "a list of candidates shall not participate in elections to the Knesset … should there be explicitly or implicitly in the *goals* or *actions* of the list …" (emphasis added – D.M.) one of the causes enumerated therein. The wording in regard to the disqualification of a candidate is somewhat different. As it reads at present, after Amendment no. 46, the disqualification of a candidate shall be possible "should there be in the actions of the person, including his *expressions*" one of the causes enumerated in the section. This difference is no trifling matter.

6. As we know, a law is interpreted in accordance with its language and purpose. First, the starting point of interpretation is the language of the law, where the written text should be given the meaning that its language can carry (AHARON BARAK, INTERPRETATION IN LAW – INTERPRETATION OF STATUTES 81 (1993) (Hebrew) (hereinafter: INTERPRETATION IN LAW); HCJ 7754/14 *Tzalul Environmental Association v. Petroleum Commissioner* [24], para 9). The language is the framework for the work of the interpreter, and he may not breach it (HCJ 2257/04 *Hadash-Ta'al Faction v. Chair of the Central Elections Committee for the 17th Knesset* [5], p. 702). When the text tolerates different meanings, the interpretation that realizes its purpose should be chosen (INTERPRETATION IN LAW, 85). In the present matter, as noted, Amendment no. 46 added the words "including his expressions" to sec. 7A of the Basic Law in regard to a candidate. According to the

plain meaning, statements that can undermine the existence and fundamental principles of the state are sufficient to lead to the disqualification of a candidate from being elected to the Knesset, and there is no need for acts. That is also the interpretation that is consistent with the purpose of the section, which is intended to contend with those who seek to employ democratic tools in order to further anti-democratic objectives.

7. Indeed, as the President noted, the Explanatory Notes to the bill state that the amendment was not intended to change the case law of the Court "according to which sec. 7A of the Basic Law should be used sparingly and strictly in order to protect the most vital interests of the state" (*H.H. Knesset*, 675). It is also important to explore the legislative history of legislation, through which it is possible to ascertain the legislative intent and purpose (INTERPRETATION IN LAW, 161; CA 4096/18 *Chacham and Or-Zach v. Assessment Officer* [26], para. 20). However, I cannot concur with the position that the language of the amended provision is meaningless and that what has been is what will be. As has been said: "The legislative purpose, and certainly the legislative history, cannot give the law legal meaning that it cannot bear" (INTERPRETATION IN LAW, 353). Indeed, there is nothing in Amendment no. 46 that would violate the principle that the provisions of sec. 7A of the Basic Law be interpreted narrowly. I also accept that the words of a candidate or the Knesset, as well as his deeds, be examined meticulously, inasmuch as disqualification remains an extreme act that should be employed only in exceptional circumstances, as has been held in the past (see, e.g., EA 561/09 *Balad – National Democratic Alliance v. Central Elections Committee for the 18th Knesset* [2], para. 3 (hereinafter: the *Balad* case)). Nevertheless, that does not mean that the amendment does not affect the causes for disqualification established under sec. 7A of the Basic Law as we knew them in the past.

8. First, one cannot ignore that in the past, the view was expressed in the case law of this Court that "expressions", as opposed to "actions" do not fully fall within the compass of sec. 7A of the Basic Law. Thus, for example, in the *Zoabi* case, Justice H. Melcer noted: "An action in Israel's sub-constitutional law does not generally include expression, and therefore, when the legislature sought to treat of expressing an opinion orally or in writing, it did so separately, alongside the action, or defined: "an action including an expression" (para. 2b of his opinion; and compare para. 121 of the opinion of Deputy President Rubinstein in the same matter). If, at the time, there was any doubt whether "expressions", as distinct from "actions", could be included

under the provisions of sec. 7A of the Basic Law, then since the enactment of Amendment no. 46 of the Law, it has been expressly clarified. The legislature made itself unambiguously clear that the power of a word is as good as the power of an action. As was said: "Death and life are in the hand of the tongue" (Proverbs 18:21), "Does the tongue have a hand? This comes to teach us that just as the hand can kill, so the tongue can kill…" (BABYLONIAN TALMUD, Arakhin 15b).

9. Second, although the line separating "expression" and "action" is not always clear, we cannot ignore that the interpretive principles outlined in the past in regard to the causes for the disqualification of a candidate placed emphasis on the *candidate's actions* as against his expressions. Thus, for example, "actions" that must be given severe, extreme expression was spoken of (the *Tibi* case, p. 17). As for the third cause, which concerns support for armed struggle by a hostile state or a terrorist organization against the State of Israel, it was held that such "support" can be "material" or "political" (the *Tibi* case, p. 26; the *Balad* case, para. 7). Thus, Amendment no. 46 has the potential to change the criteria that were developed for the disqualification of a candidate, which have, until now, been based upon those established for the disqualification of lists.

The Probability Test

10. Another matter that requires examination, and which should be addressed prior to diving into the appeals before us, is the question of the applicability of "the probability test" noted by the President, that is, whether the participation of a party or a candidate can be prevented from participating in the elections where it has not been proven that there is a *probability* that they may actually realize one of the causes established under sec. 7A of the Basic Law. This question already arose in the first *Neiman* case, which was adjudicated prior to the enactment of sec. 7A of the Basic Law, in regard to the disqualification of a list. In that matter, Justice A. Barak expressed his view that although the matter was not expressed in either the majority or minority opinions in the *Yeredor* case, the disqualification of a list is possible only when there is a "reasonable possibility" that the party's platform will be realized in practice. However, after the enactment of sec. 7A of the Basic Law, it was clearly established in EA 1/88 *Neiman v. Chairman of the Central Elections Committee for the 12th Knesset* [5], 188 (hereinafter: the second *Neiman* case) that:

> In setting forth the principles of sec. 7A, the legislature did not require the existence of a clear and present danger, the probability of danger arising from the objectives and conduct of the party in question, or any similar test that looks to the connection between the condemned action and the possible results. Through this, the legislature changed the legal status until the enactment of Basic Law: The Knesset (Amendment no. 9).

Thus, in enacting sec. 7A of Basic Law: The Knesset, the legislature abandoned the possibility of "the probability test". In this regard, I join in the comments of my colleague Justice M. Mazuz. The provisions of the Basic Law contain no requirement for a reasonable possibility of the actual realization of the threat arising from the actions or platform of the list or its objectives (or from the actions of a candidate or his objectives, under the current wording of the section). There is firm support for the view that the matter was decided long ago in the second *Neiman* case, despite the questions that later arose in the *Tibi* case. In brief, I would note that I also find great substance in the view of Justice E. Mazza in the *Tibi* case (pp. 98-99) that making disqualification contingent upon the probability test could render sec. 7A devoid of all content, inasmuch as the more extreme, severe and outrageous the message, the less the probability of its actually being realized.

"*Critical Mass*"

11. The case law of this Court has established that in order to approve a disqualification decision, the Court must have before it evidence that is "persuasive, clear and unambiguous" (the first *Neiman* case, pp. 250-251; the second *Neiman* case, p. 197). When the Court is convinced that such evidence has been laid before it, then the material thus constitutes the critical evidentiary "mass" required in this regard (see: the *Tibi* case, p. 42). This evidence can satisfy the Court as long as it is convinced of its truth, as the Court does in every matter given to its decision.

This is not a quantitative but a qualitative test. If, for example, the Court is convinced by a single piece of evidence (and unlike this case in which there is a compendium of evidence) that can decide the matter in a certain direction, then it can base its decision thereupon. Only then will that single piece of evidence constitute a "critical mass". As opposed to this, sometimes there is an accrual of many pieces of evidence whose force does not tip the scales and it will not constitute

a "critical mass". There is nothing actually new in this (see, for example, in the various proceedings: CrimA 7007/15 *Shmil v. State of Israel* [27], para. 22; CA 8742/15 *Astrolog Publishers Ltd., v. Ron* [28], para. 44; YAAKOV KEDMI, ON EVIDENCE, Part IV, 1761*ff.* (2009) (Hebrew)). Indeed, the force of the evidence required for a decision changes in accordance with the category of the matter given to the Court's decision. Sometimes, evidence that banishes all reasonable doubt is required. Sometimes, evidence that tips the scale of probability is required. Sometimes, "administrative" evidence of varying degrees is required. This, too, is not new (see, for example: CrimA 961/16 *Alharoush v. State of Israel* [28], para. 15; AAA 3326/18 *A. v. Director of Firearm Licensing* [30], para. 20). The present matter requires highly persuasive administrative evidence, and not necessarily a large amount of evidence. It is not the quantity that is decisive, but the quality.

And now to the matter before us in the proceedings in which I disagree with my colleagues.

EA 1806/19 In the Matter of Cassif

12. As noted, my colleagues decided not to disqualify Cassif's candidacy for the Knesset elections, and I cannot concur. In my view, an examination of the material presented to us reveals that there is no room for doubting that Cassif's statements clearly cross the legitimate boundaries defined in the framework of sec. 7A of the Basic Law. Thus, inter alia, Cassif published the following:

> Uniting the democratic forces for a struggle against the Judeo-Nazism that is taking over our society is not enough, although it is certainly needed, there is a necessity for changing the methods, you don't sing songs against fascism, you fight (report on Channel 20, May 22, 2016, quoting Cassif).

In another report, he is heard saying that "in the Israeli discourse that the current Israeli government has created, killing Arabs is legitimate. This is how one descends into the abyss of what happened in Germany 80 years ago" (report of Channel 20 of April 12, 2018). Similarly, in regard to the Hamas, which is known to be a terrorist organization that is waging a murderous war of terror against Israel (and see: HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Interior* [31], para. 10 of the opinion of Deputy President M. Cheshin), Cassif

is quoted as saying that the organization is a "political party" (report on Channel 20 of April 11, 2018). In addition, in an article on the Makor Rishon website from Feb. 7, 2019, it is reported that in the course of an interview with him, he stated that the State of Israel must not be a Jewish state. In addition to those statements, his clear, unambiguous statements expressed in a personal interview in the Ha'aretz supplement of Feb. 8, 2019, entirely fall within the scope of two of the causes for disqualification under sec. 7A: negation of the existence of the State of Israel as a Jewish and democratic state, and support for armed struggle by a terrorist organization against the State of Israel. Thus, Cassif presented an unadorned statement of his worldview, which includes the revocation of the Law of Return, 5710-1950 (hereinafter: The Law of Return) (p. 28 of the interview) and changing the symbols and anthem of the state (p. 26 of the interview).

One cannot ignore that it is his position that The Law of Return should be revoked, as if it were a stumbling block rather than a law that expresses a supra-constitutional principle grounded in the Declaration of Independence, the Jewish people's right to self-determination, and its connection to its homeland (see, for example: HCJ 7625/06 *Rogachova v. Ministry of Interior* [31], para. 28 of the opinion of President M. Naor; Ariel Bendor & Elichai Shilo, *Israel as a Jewish State: Constitutional Significance*, in STRASBURG-COHEN VOLUME 160 (2017) (Hebrew)). Cassif's clear statements fall completely within the bounds of statements that express the negation of the most nuclear foundations of the State of Israel as a Jewish and democratic state, as defined long ago in the *Tibi* case.

13. However, these statements are dwarfed in their intensity in view of what Cassif stated about harming IDF soldiers. This is what he said:

> Harming soldiers is not terrorism. Even in Netanyahu's book on terrorism, he expressly defines harming soldiers or members of the security forces as guerilla warfare. This is absolutely legitimate according to every moral criterion, and incidentally, in international law as well. Nevertheless, I do not say that this is something wonderful, delighting, or desirable (p. 26 of his interview with Ha'aretz).

We are concerned with matters that are most explicitly included in the cause for disqualification for support for armed struggle against the State of Israel. The fact that harming soldiers, in certain circumstances, is viewed differently from harming civilians under international

law, or that it can be defined, according to Cassif, as "guerilla warfare", does not change the fact that his statements explicitly express granting legitimacy and support for armed struggle against the State of Israel in accordance with the cause of disqualification under sec. 7A of the Basic Law. We are concerned with clear, unambiguous statements that cannot otherwise be interpreted or explained. There is "cold comfort" in that Cassif does not see such harm as "something wonderful, delighting, or desirable".

14. I do not find any real repudiation of these strong statements in Cassif's statements before the Central Elections Committee or in the affidavit he submitted to the Committee, other than a denial of things attributed to him in the Makor Rishon newspaper (sec. 10 of the affidavit submitted to the Elections Committee), which, in any case, can be given only minimal weight in view of their being "second hand". Cassif tried to place his extreme statements in a "political" context (pp. 29-30 of the transcript of the Elections Committee hearing of March 6, 2019), but this does not constitute a retraction of his harsh statements. In view of the severity and clarity of the statements, a general declaration alone, as Cassif expressed in para. 9 of his affidavit to the Elections Committee, is insufficient: "The request to disqualify my candidacy is a factual distortion and misleading interpretation of my words, and I therefore completely deny what is cited there". It might have been expected that Cassif would clarify what that "factual distortion" was, and what misleading interpretation was given to the words. But other than this general, vague statement, what Cassif declared is insufficient to refute the existence of the solid evidence grounding the causes for disqualification.

Cassif indeed notes, in a general way, in his affidavit that he "opposes all forms of violence against any person" (Cassif's affidavit of March 3, 2019, para. 11). However, he in no way retracted the things he said in that interview – and not what he said in regard to harming *IDF soldiers*, in particular. On the contrary, in his affidavit, Cassif emphasized that in that interview in the Ha'aretz supplement he noted that he opposes harm to *innocent civilians* (*ibid*.). And as for harming IDF soldiers? Cassif's silence is deafening.

15. In his affidavit, Cassif reiterates his explanation that the statements attributed to him are, at most, "isolated" statements that "were made in order to sharpen a particular idea", that the style of expression that included the term "Nazi" is not "characteristic" of him in general, that the

statements were made in the heat of political debate, and that we are merely concerned with metaphor (para. 13 of the affidavit to the Elections Committee of March 3, 2019). However, it cannot be said that Cassif denies those expressions, retracts or denounces them, but at most, he explains them with various excuses. In the hearing before the Elections Committee, as well, Cassif did not express a clear, concrete disclaimer as to what he said, and in particular, I did not find any clear disclaimer of the statement that there is *legitimate* and *moral* justification for harming IDF soldiers. In the end, Cassif was kind enough to tell the Committee that he opposes violence (p. 34 of the transcript of the Elections Committee hearing of March 6, 2019). But that, as noted, is not enough. General statements according to which he rejects and opposes violence are insufficient in view of his sharp, clear statements in regard to harming IDF soldiers. According to Cassif's approach, harming soldiers is not a form of "violence". Moreover, when he was expressly asked in the Elections Committee hearing: "When you justify terrorist attacks upon IDF soldiers, is that not violence?" (*ibid*.), he did not provide a pertinent answer. In response to the question, he diverted to the causes for disqualification: "We are speaking here the language of the law, and we are talking about whether there are causes for my disqualification in light of Basic Law: The Knesset…", while he repeated his general position that "I never even hinted at support for armed struggle or violent struggle at all. That is one cause that I do not meet".

16. Even Cassif's repeated excuse that he made the statements as a "regular citizen" and not as a public representative, and that he would "not necessarily" use those expressions if he were elected to the Knesset (para. 13 of the affidavit submitted to the Elections Committee), do not work to his benefit. Cassif is currently being examined in regard to what he has already said, and upon opinions he has already expressed as a citizen. I would note in this regard that it is clear that the provisions of the law look to the future and do not seek to "punish" a candidate for his conduct in the past, but rather to contend with the fear of an elected official exploiting his status to perform improper acts (see: the *Tibi* case, p. 64). However, in order to answer the question whether the actions of the list or a candidate meet one of the causes for disqualification listed in sec. 7A of the Basic Law, the evidence that has accumulated in regard to that list or candidate must be examined, and this, naturally, often means before they were elected to the legislature. How can one accept the argument that Cassif should not be held accountable merely because we are concerned with statements that he made as a private individual? Every statement and action of a candidate (who has not served as a member of the Knesset in the past) is examined with consideration for the fact

that the person concerned is a private individual seeking that the gates of the legislature be opened before him. Every such candidate is examined with consideration for things that he said before being elected as a public representative, while the accumulated material will always be from the period prior to his candidacy.

17. Moreover, the argument by Cassif's attorney that only "ideas on an intellectual basis" were concerned, cannot be of help. Statements supporting armed struggle against Israel and the negation of the existence of the State of Israel as a Jewish state cannot be explained away by saying that they concerned an "intellectual" debate (see, for example, the *Tibi* case, p. 70, which was quoted above in para. 4). This is all the more so in view of Amendment no. 40 to Basic Law: The Knesset of 2017, which made it clear, as noted, in accordance with the interpretive rules set out, that a candidate will be disqualified if his objectives or actions, "*including his expressions*", constitute a negation of the existence of the State of Israel as Jewish and democratic, incitement to racism or support for armed struggle by a hostile state or terrorist organization against the State of Israel.

18. As noted (in para. 4, above), the provisions of sec. 7A of the Basic Law create a distinction between the legitimate right of every person to express "ideas on an intellectual basis", whatever they may be, from every platform (subject to very limited constitutional restrictions) and the statements of a candidate for election to the Knesset, where such a person seeks to move to the area of political activity. In accordance with the dictate of the legislature, theoretical ideas are examined from a different perspective when a person seeks to realize them by means of membership in the Knesset. Were Cassif's statements examined as of an ordinary citizen, one might say that they are infuriating and enraging or that one should forcefully take exception to them, but they are protected as free speech. However, once Cassif sought to be elected to the Knesset, we must examine whether we are concerned with statements that express support for armed struggle by a terrorist organization against the state of Israel or whether they negate the existence of the State of Israel as a Jewish state, in the sense of denying its core foundations as established in the *Tibi* case. If the answer is positive – and as noted, I find it difficult to think otherwise – the candidate cannot rely upon the argument that the statements were made by him as "a private person" and that he is, therefore, exempt from answering for them. That is so in view of the purpose of sec. 7A, which, as noted, limits the use of the right granted by democracy, and in

the present matter, the right to vote and to be elected, in order to prevent harm to the most basic, essential principles of its existence.

In any case, once Cassif chose to clarify in his affidavit that he would "not necessarily" use the same expressions once elected to the Knesset (para. 13 of his affidavit), the excuse that the statements were made by him as a private individual cannot be maintained. Cassif is even unwilling to declare that those severe statements will no longer leave his lips as a public representative. Cassif himself made it clear that even after being elected, *it is not necessarily the case* that he will not repeat those things. In so doing, Cassif also declares that he *refuses* to accept the rules of the game – even if ultimately elected to the legislature (which actually occurred while these lines were being written).

19. Indeed, not infrequently, a candidate will seek to "fix up" the positions that he publicly flaunted after he is threatened with disqualification, and in the framework of disqualification proceedings he will seek to explain that things are not what they seem. However, as a rule, a candidate's request to deny his public statements – statements that often are those that paved his way to election to the Knesset and upon which the public trust in him was based – should be taken with a grain of salt. Dissociating from such statements in the disqualification proceedings may show those "corrected" positions to be stated solely to evade the verdict, as lip service, and not reflecting an authentic position (see: the opinion of Justice E. Rubinstein in the *Zoabi* case, para. 48). Cassif's statements should be measured by the same criterion by which Ben Ari's statements were measured. The two should not be distinguished. In a certain sense, Amendment n. 46 closed the gap between the evidentiary requirement for proving the causes for disqualification in regard to negation of the existence of the State of Israel as Jewish and democratic and support for armed conflict against the State of Israel and that of the cause of incitement to racism. Just as incitement to racism generally disqualifies by means of verbal statements (as also noted in para. 47 of the position of the Attorney general in EDA 1866/19), so too, the other causes disqualify through expression. If not identical, the evidentiary level of all the causes for disqualification should be similar.

Just as Ben Ari's statements disqualify him from running for the Knesset – despite his claim that he "is not a racist", so Cassif's words should disqualify him – despite his general claim that he "opposes violence" of any kind. The result should be identical for both.

20. However, in certain circumstances, the gates can be opened to a candidate who retracts his statements. This, for example, if the candidate convinces that the evidence presented refers to old events, while declaring that he has changed his ways (that is the situation in the matter of Ben Gvir). A candidate who changes his ways is like a "penitent", of whom the sages said: "In the place where penitents stand, even the wholly righteous cannot stand, as it is stated: Peace, peace upon him who is far and him who is near" (BABYLONIAN TALMUD, Berakhot 34b). Such a person is unlike one who "confesses but does not repent" who is likened to one who "immerses himself with a reptile in his hand":

> R. Adda b. Ahava said: To what can one compare a person who has sinned and confesses his sin but does not repent? To a man holding a reptile in his hand, for even if he immerses himself in all the waters of the world his immersion is useless for him. But if he throws it away, then as soon as he immerses himself in forty se'ahs of water, his immersion is immediately effective, as it is said: "He who confesses and gives them up will find mercy" (BABYLONIAN TALMUD, Ta'anit, 16a).

A fortiori in the case of Cassif, who does not even confess his expressions. Even before the Elections Committee, and in his affidavit as well, there is no retraction of his words, nor a declaration that he has changed his path. The paltry statements that Cassif uttered do not come close to the vitriolic statements that he uttered from a public platform. On this it has been said: "He who covers up his faults will not succeed," as opposed to "He who confesses and gives them up will find mercy" (Proverbs 28:13).

21. The State of Israel, as a Jewish and democratic state, is obligated to defend itself and to act against those who oppose it. My colleagues defend Cassif, and it has, indeed, been said, "Judge your neighbor justly" (Leviticus 19:15). Relying upon the *Gemara* in tractate Sanhedrin, Rashi explains: "Judge your neighbor favorably". However, the *Siftei Chachamim* [Shabbethai ben Joseph Bass (1641–1718)] adds: "That is to say, specifically when he is your neighbor judge him favorably". In other words, when he behaves like your neighbor. In my opinion, there is no doubt

that the terrible things said by Cassif do not allow us to judge him favorably, and they clearly and unambiguously meet the causes for disqualification that seek to protect the state against its destroyers and block their path to being counted among its legislators.

22. To summarize this section, as noted, Cassif presented the core of his social and political approach in the interview with him and before the Committee, and his extreme, severe and unambiguous statements express dominant, central, core characteristics of his approach. We are concerned with persuasive, clear evidence that constitutes a "critical mass" that indicates support for armed conflict and terror against Israel, and negation of the existence of the State of Israel as a Jewish state. The force of the evidence is bolstered by the absence of clear, concrete repudiation of his statements by Cassif.

In my opinion, all of the above unequivocally suffices to ground the causes for disqualification in sec. 7A in accordance with the criteria and proper interpretation as delineated above and that are long established by this Court.

EA 1876/19 In the matter of Balad

23. Here too, as opposed to the view of my colleagues, I am of the opinion that that there is no room for doubt that the Balad list openly undermines the State of Israel's existence as a Jewish and democratic state and openly supports armed struggle by a terrorist organization against the State of Israel.

24. The evidence presented includes various statements and actions by members of Balad, some from the immediate past. Additionally, the petitioners requesting Balad's disqualification referred to Balad's activity in the past, and to the statements and actions of it former head – MK Azmi Bishara – and to the relationship between its activity and its current Knesset members to Balad's former leader. In addition to all of that, it was argued that the "State of all its Citizens" bill (hereinafter: the bill) that the Balad Knesset members sought to present before the 20th Knesset last June makes it unequivocally clear that Balad expressly denies the existence of the State of Israel as a Jewish State.

In this regard, and even were I of the opinion that no significant weight should be accorded to the other evidence to which I will refer later, I am of the opinion – like position taken by the President in para. 58 of her opinion, with which I fully concur – that no one can deny that the bill expresses a negation of "nuclear characteristics" of the State of Israel as a Jewish state. Presenting the bill crossed the line sharpened in the *Tibi* case, which distinguished between one who supports a "state of all its citizens" in the sense of achieving civil equality and one who seeks to negate the minimal, core characteristics of the State of Israel as a Jewish state. Moreover, after reviewing the opinion of my colleague Justice Mazuz, I would add that, in my opinion, not only does the bill express a negation of "the nuclear characteristics" of the State of Israel, as noted, but even denies the existence of the State of Israel as "the State of the Jewish people in the national sense". This, in reference to the identity of the state as a place where the Jewish people realizes its right to self-determination, as my colleague so well expressed in his opinion.

In order to understand the consequences of presenting this bill in regard to examining the disqualification of the list, I will expand somewhat on the prior proceedings in the matter of Balad.

25. The matter of Balad was addressed in the elections for the 15th Knesset (EA 2600/99 *Ehrlich v. Chair of the Central Elections Committee* [33] (hereinafter: the *Ehrlich* case)), and in the elections for the 16th Knesset (the *Tibi* case), as well as in the elections for the 18th Knesset (the *Balad* case). Already in the *Ehrlich* case in 1999 – which addressed the matter of MK Azmi Bishara, who led Balad, along with the matter of the list (when the provisions of the law permitted only the disqualification of a list and not a candidate) – it was made clear that, on their face, Bishara's statements at the time, declaring that the Jewish people does not have a "right to self-determination", constituted a denial of the existence of the State of Israel as the state of the Jewish people. Indeed, it was ultimately found that Balad's candidacy should not be disqualified despite coming "dangerously close" to the line that cannot be crossed that is defined in sec. 7A of the Basic Law.

26. In the *Tibi* case (in the framework of which the matter of the party was examined in a manner identical to that of Bishara, given the "powerful" connection between them), it was found that the actions attributed to Bishara in regard to the negation of existence of the State of Israel as a Jewish state and in regard to support for armed struggle were at the heart of its purposes and

constitute a dominant objective of its activity that constituted a political potential that was realized in repeated activity and with great force. However, persuasive, clear and unambiguous evidence against Bishara was not found, and thus not against the Balad list, when it was held that Bishara's approach as to the State of Israel as a "state of all its citizens" "comes dangerously close to the possibility of negating the existence of the State of Israel as a Jewish state", but it was not found that the "border had been crossed" (the *Tibi* case, p. 42). In addition. It was not found that there was sufficient evidence in regard to support of armed struggle, although there was some "doubt" in that regard (*ibid*.).

27. Some clarification is required in this regard. In the *Tibi* case there was a difference of opinion as to the meaning of the phrase "a state of all its citizens" that appears in Balad's platform. It was held that the principle of "a state of all its citizens" can take various forms, and that a purpose that sees Israel as "a state of all its citizens" does not inherently negate the existence of the State of Israel as a Jewish state. Thus, a person who acts to achieve the purpose of "a state of all its citizens" in the sense of guaranteeing equality among citizens is not the same as a person who employs that principle in order to infringe the rationale grounding the establishment of the state and thereby negates the character of the State of Israel as the state of the Jewish people (the *Tibi* case, p. 22).

28. The minority was of the opinion that the evidence, taken in its entirety, showed that the expression "a state of all its citizens" served as a codeword for "abolishing Zionism, abolishing the State of Israel as the national home of the Jewish people, and abolishing the state as a Jewish state and replacing it with another state, if not more than that" (para. 2(b) of the opinion of Deputy President (emer.) S. Levin), and that striving for "a state of all its citizens" was intended to strip the State of Israel of Zionism and of its Jewish national character (para. D of the opinion of Justice E.E. Levi).

29. As opposed to that, the majority, as noted, did not find that the meaning of "a state of all its citizens" in regard to Bishara "crosses the line" in regard to the negation of the existence of the State of Israel as a Jewish state. This, after finding that Bishara recognized the right of every Jew to immigrate to Israel, did not argue for the repeal of the Law of Return, did not deny the centrality

of the Hebrew language as the language of the state, and did not oppose the holidays and symbols of Israel (also see: para. 54 of the opinion of President E. Hayut).

In other words, in the *Tibi* case, as well, where it was found that striving for the objective of "a state of all its citizens" in regard to Bishara and Balad was close to the disqualifying boundary, a remedy was found in the form of *non-negation* of the core principles of the State of Israel as a Jewish state. The Court reiterated this position that the principle of "a state of all its citizens" in Balad's platform does not ground a cause for disqualification in the *Balad* case. There, too, Justice E.E. Levy, dissenting, noted that in his opinion, the vision of Balad in regard to "a state of all its citizens" was nothing but a guise for the establishment of an Arab national state in all the territory of the Land of Israel.

30. Thus, when examining the expression "a state of all its citizens" in the framework of Balad's platform in the past, this Court was forced to cast about in order to discover what inhered in the concept and what meaning to give it. Where a doubt was found, the doubt worked in favor of approving the list, in view of the criteria established in regard to disqualifying a list. However, *now* that Balad has clarified – in the framework of dominant, significant, public and clear political activity – the significance of the expression "a state of all its citizens" for it, and the steps that it is willing to take in order to realize that vision, it can no longer be said that we are concerned with an ambiguous term. Now, following the presentation of the bill, it has been made absolutely, unambiguously clear that for this list "a state of all its citizens" means annulling the principle of return, denying the principle by which the state's primary symbols reflect the national revival of the Jewish people, and denying the Hebrew language as the primary language of the state. It cannot *now* be said, by any criterion, that we are not concerned with the negation of minimal, nuclear elements of the State of Israel as a Jewish state, as held in the *Tibi* case.

31. The fact that the bill was ultimately not brought before the plenum – only because on June 4, 2018 the Knesset presidium decided upon the drastic step of not approving its presentation to the Knesset – cannot be accounted to the list's benefit, which argues that it is being retaliated against merely because it raised a theoretical "idea". We are not concerned with just an "idea", but rather with a concrete act – submitting a bill that sought to ground principles that undermine the existence of the State of Israel as a Jewish state (and also see in regard to expression by means of

submitting a bill: the second *Neiman* case, p. 196). In view of this bill, I also find problematic the claim by the Balad list in its appeal that the requests for disqualification were not based upon a clear, direct statement, its publications, or official notices. What is a bill if not a "clear, direct statement" that expresses the values of the list and the principles that it pursues in the most simple, "clean" manner? What need do I have in looking for publications, official notices and so forth given the submission of a bill that seeks to undermine the most nuclear foundations of the state as a Jewish state? MK Mtanes Shehadeh's "excuse" in his affidavit (affidavit of March 3, 2019 that was presented to the Elections Committee) that the bill was submitted only to "challenge the Nation State Basic Law and to hold a public debate on the issue" changes nothing in this regard or "kosher" this clear public step. On the contrary, even if the bill was submitted out of a sense of anger and grievance, I do not see how that could act in the list's favor. Even if the members of the list presented the bill in a moment of rage, the saying goes: "By three things may a person's character be determined: By his cup, by his purse, and by his anger" (BABYLONIAN TALMUD, Eiruvin 68b). Rashi explains there: "In his anger – that he is not too hot tempered". It is precisely when one is roiled and angry that a person is judged, and not when he is calm and at ease.

32. Under these circumstances, no weight can even be given to what is stated in the affidavit that Shehadeh submitted to the Elections Committee that he and the members of Balad are committed to the principle of "as state of all its citizens" as reflected in the in Balad's platform that was *examined and approved long ago* by this Court. Balad itself clarified – in its own voice and not in the framework of quotes from newspaper articles that may be given to different interpretations – in the petition that it submitted to the Court (HCJ 4552/18) that the bill was *consistent with its platform*. In this sense, the claim that Balad now adheres to the platform that was examined and approved long ago – before the true nature of its vision of "a state of all its citizens", which was recently publicly clarified and expressed as noted by Balad – cannot be accepted.

33. That being the case, and in view of the background detailed above, I am of the view that there is no alternative but to say that by presenting the bill, and certainly in filing the petition (HCJ 4552/18) by members of Balad in which it was made clear that the bill was consistent with Balad's platform, the Balad party crossed the line to which it had come "dangerously close" more than once in the past. In this context I would note that presenting the bill was an expression of real,

substantial, clear parliamentary activity that, in my view, cannot be dismissed as a one-time or sporadic matter, as is the opinion of my colleague Justice Amit.

The argument presented by Balad's attorney that the matter of the bill was not raised before the Elections Committee but first and unexpectedly in the position of the Attorney General submitted to this Court, and that he is therefore unprepared to address it, cannot be accepted. Not only was this matter expressly raised in the framework of the disqualification request presented to the Elections Committee (paras. 17-24 of the Likud faction's request to disqualify Ra'am-Balad), and not only was it raised in the hearing before the Elections Committee (p. 4 of the transcript of the hearing of the Elections Committee of March 6, 2019), but it was also addressed on the merits by Balad's attorney, who raised the same claim made in that hearing that he raised before us that this is retribution merely for raising an "idea" (p. 35 of the transcript off the hearing before the Elections Committee of March 6, 2019). Moreover, the Ra'am-Balad list also expressly referred to the matter of the bill in the appeal that it submitted to this Court (paras. 23-25 of the appeal in EA 1876/19).

34. In any case, beyond the fact that submitting the bill (together with what was stated in the petition) significantly and unambiguously grounds the said cause for disqualification, this bill does not exist in a vacuum. The bill is not the only evidence under consideration, although it would appear to be decisive evidence in and of itself. Additional evidence was presented that when added together points to a collection of evidence and a "critical mass" that demonstrates that we are concerned with a list that has raised the banner of open struggle against the foundations of the State of Israel.

35. In this framework I would note that I do not believe that the fact that Balad's activity and members were examined in the past renders addressing them now superfluous. Are we not required to examine the matter of Balad in accordance with the up-to-date material presented to us, which also casts light upon what was presented in the past? When the matter of Balad was examined in the past, the Court had before it the material that had accrued up to that date. Given that additional evidence has accrued in the interim, which might have led the Court to a different conclusion at that time, we cannot continue to rely upon conclusions drawn in the past from the material presented then while ignoring the updated material.

36. Given the above, an examination of the entirety of the evidence in the matter of Balad and its members shows that this time it has gone too far. Even if in the past, the material presented in regard to it and its members came close to the bounds defined in the Basic Law but did not cross them, today the situation is different. Indeed, this Court found that MK Zoabi's participation in the Marmara flotilla did not disqualify her from standing for election to the Knesset (the *Zoabi* case). However, I believe that weight should be accorded to her actions in examining the disqualification of the *list* of which she is a member (even if not in a "realistic" place), and in view of the additional evidence that has accrued in regard to that list since the *Zoabi* case. This is also true in regard to the Bishara matter, which was addressed in the past in the *Ehrlich* case and the *Tibi* case. Only later, as was also noted in the matter of Balad (in which the matter of Bishara was not addressed as he had left the country), it became clear that Bishara was suspected of serious security offenses pursuant to which he was forced to flee the country. Therefore, in examining the current evidentiary foundation in regard to the *list* in its entirety, weight should also be given to this matter (even though Bishara no longer stands at the head of the party). In view of the above, can one imagine that if the matter of Bishara were examined after new material came to light that pointed to serious suspicions of committing offenses, this Court would rely upon its findings in the *Ehrlich* case and the *Tibi* case without examining whether the new evidence added to the material that was examined and remained in "doubt"?

The actions of those has since been compounded by the criminal-security related activity of MK Basel Ghattas, a member of the party who was convicted in 2017 of smuggling cellphones and other items into a prison in which security prisoners were held, as well as the conviction of another MK who was a member of the party, Said Naffaa, for the offense of contact with a foreign agent in 2014, after meeting with the deputy secretary general of the Popular Front (see the denial of his appeal in CrimA 6833/14 *Naffaa v. State of Israel* [34]), which was not considered in the past in the matter of the entire party.

37. Added to all of that was the connection affirmed by Balad to its erstwhile leader Azmi Bishara in the course of the annual convention of the Ra'am-Balad party in Nazereth, when it deemed it appropriate to send him a "blessing". And note that it was made clear to the Elections Committee that this matter was not denied (pp. 29-32 of the transcript of the Elections Committee hearing of March 6, 2019). By that, the present Balad list also declared that it is the successor of

the person who led it in the past. It should be emphasized that we are not concerned only with a relationship with Bishara that justifies disqualifying the list (compare: the *Balad* case, para. 20), and I am not unaware that of the list's argument that it cannot be held responsible for the actions of MK Naffaa, who has not been a member of the Balad party since 2010, or the actions of Zoabi, who is in an "unrealistic" place on the list. We are concerned with an aggregation of additional, compounded evidence over the course of years that indicates a significant, persuasive, and unambiguous tapestry in regard to meeting the causes of disqualification. An additional connection to Bishara was also presented in the article in the Ha'aretz newspaper of Aug. 18, 2014, according to which then members of the list – Jamal Zahalka, Hanin Zoabi, and Basel Ghattas – met with Bishara in Qatar, which was not denied by Shehadeh (pare. 8 of Shehadeh's affidavit to the Elections Committee). To all of this is added the *current* conduct of the members of the list in the form of giving unambiguous, blunt support for terrorist actors who were convicted and incarcerated, whom the current head of the list, MK Shehadeh, refers to as "political prisoners" (article in the Makor Rishon newspaper of Jan. 13, 2019). This is compounded by unambiguous statements in a recorded interview (on Galei Yisrael radio) in the course of which Shehadeh stated in his own words that "every struggle against the occupation is legitimate" and that "we support every popular struggle".

Thus, the entirety of the clear, unambiguous evidence – together with the most significant piece of evidence concerning the submission of the bill – shows that the dominant characteristics at the center of the list's parliamentary and extra-parliamentary action are directed at infringing protected values. The list vigorously acts to realize its objectives through actions and verbal statements.

38. Under these circumstances, the list's argument that part of the evidence concerns persons who are no longer candidates of the Ra'am-Balad list for the elections to the 21st Knesset can be of no assistance. The candidates of the 21st Knesset sought, of their own initiative, to join a list that has a "rich" past as detailed above. We are concerned with people who seek to join an *existing* list based upon the "reputation" that it has acquired, the ideology that is its banner, its purposes and actions that were expressed on various public platforms, and of course, its supporters. The candidates' distancing themselves from the action of that list – at least in regard to the matter of the bill that was submitted during the term of the *20th Knesset* – cannot be accepted. Beyond the

fact that evidence was presented that indicates a real connection to its erstwhile leader Bishara, we cannot countenance the argument that the current members of Balad do not stand behind Balad's platform that Balad itself declared in the 20th Knesset was *consistent* with what was stated in *the bill that was submitted.* The claim that we are concerned with "a new generation" cannot be accepted when it concerns the disqualification of a *list* regarding which clear, unambiguous evidence was presented regarding the meeting of a cause for disqualification.

39. According to the position of the Attorney General as expressed before us (in sec. 44 of his written position as well as in the oral arguments – despite the fact that he said absolutely nothing on this matter in the written position presented to the Elections Committee), there is nothing in the bill that would lead to the disqualification of the entire list because we are concerned with a joint list of Ra'am-Balad and not of Balad alone. In my opinion, the Ra'am-Balad list cannot be approved for this reason alone. It is difficult to accept the argument that the existence of a cause for disqualification can be "healed" by joining one list to another in a joint list. In view of the purposes of sec. 7A of the Basic Law, the combining of lists cannot confer "immunity" or a defense to a party that has deviated from the path. This, while undermining the fundamental principles defined in the framework of the Basic Law, is not repaired by adding a party. The Sages taught us the principle: "Woe to the wicked person and woe to his neighbor," and "Blessed is the righteous person and blessed are his neighbors," which is derived from the arrangement of the Israelite encampment in the desert. Thus, the tribe of Reuben, which encamped beside the members of Kehat, was punished with them in the dispute with Korach and his followers, while the tribes of Judah, Issachar, and Zebulon, which encamped beside Moses, Aaron and his sons, became great Torah scholars (Numbers 3:29 and Rashi *ad. loc*.). If that is so for the arrangement of an encampment and the placement of neighbors, all the more so when we are concerned with a party joining with another. Joining together is premised upon a shared ideological, political, and conceptual platform. As the prophet Amos said: "Can two walk together, unless they are agreed?" (Amos 3:3). We cannot accept the argument that if there is a cause for the disqualification of the Balad party, the very joining of Ra'am suffices to remedy it. The joining of the Balad party with the Ra'am party does not purify it, but rather it contaminates the Ra'am party that tied its fate with it in a joint list. The "pure" does not purify the "impure", but rather the "impure" corrupts the "pure". It would be better were parties to act cautiously when choosing to join parties whose

extremist course is on the boundary (and certainly when it crosses the boundary) defined in the Basic Law.

To summarize, in my opinion, both in the matter of Cassif and in the matter of the Ra'am-Balad list, "all else has failed" even according to the strict criterion of my colleague Justice Sohlberg.

40. In conclusion, my colleagues' interpretation in regard to the disqualification of a single candidate and in regard to the disqualification of a list on the cause of support for armed struggle against the State of Israel and the cause of denying the existence of the State of Israel as a Jewish state render the words of the legislature merely theoretical. The Talmud (BT Sanhedrin 71a) addresses the elements of the offense of an individual – the stubborn and rebellious son, and of a group – the idolatrous city, which have committed certain offenses. However, the Tannaim interpreted the elements of the offenses so rigidly that that the Talmud concludes: "There never was and never will be a stubborn and rebellious son. And why was it written? So that you may expound upon it an receive reward", and: "There never has been an idolatrous city and there never will be one. And why was it written? So that you may expound and receive reward" (a similar expression also appears in regard to Job, of whom it was said: "Job never existed and was never created, but was a parable" (BT Bava Batra 15a). However, alongside this view we find the view of Rabbi Yochanan, who was of the opinion that these were not merely theoretical matters, and who states in regard to the stubborn and rebellious son, "I saw him", and in regard to the idolatrous city, "I saw it". We are concerned with practical matters that were and will be in the future. By analogy, the above is applicable to the matters before us, as well.

And so I say loudly and clearly: "I saw him," "I saw it," and we cannot turn our eyes away from seeing.

Justice G. Karra:

I concur in the opinion of President E. Hayut and with the opinions of my colleagues U. Vogelman, I. Amit and E. Baron on the matter of the inapplicability of the probability test to the cause of disqualification for incitement to racism under sec, 7A(a)(2). I would add that the

accumulated critical mass of statements and actions detailed at length in the President's opinion thoroughly ground the conclusion that incitement to racism is a dominant, firmly rooted, and central purpose of Ben Ari's doctrine. The escalation of racist statements over the last years leaves no possibility for accepting his artificial explanations, not even to the extent of raising doubt as to the intention and purpose of the statements.

From among Ben Ari's racist statements and actions, I would like to spotlight a dark, severe act mentioned in para. 44 of the President's opinion, that is lost in the large catalogue of his inciteful publications. I refer to the act of tearing up the New Testament and throwing it into the waste basket when Ben Ari was serving as a member of the Knesset in the years 2009 to 2013. It is an act that has nothing to do with incitement against Arabs, but it serves to show us that Ben Ari's racist worldview, which he has espoused over the course of years, is much broader and deeper than incitement against Arabs, whom he sees as enemies. It would appear that this racism is deeply rooted in hatred of the "other" and the different, per se.

Approving the candidacy of a person who incites to racism and hatred of the other would taint Israeli democracy, and therefore, a normative statement is required saying that such an inciter must be relegated from the Israeli Knesset.

Justice N. Hendel:

1. I concur in the clear, comprehensive opinion of my colleague President E. Hayut. I would briefly sharpen what I see as the main points in regard to each of the actors – candidates and lists – examined in the present proceedings, regarding which there are disagreements among the members of this panel. I will also present my position on a number of general issues regarding which questions or doubts were raised – the probability test, the consequences of two parties running jointly in regard to the existence of a cause for the disqualification of one of them, and the interpretation of the cause "denial of the existence of the State of Israel as a *Jewish* and Democratic state".

The relationship between law and elections can be likened to two pillars. One pillar says: "This is democracy's holiday. An equal vote for every citizen. The people must have its say. The Court

does not – and must not – take a stand as to the desired results". The other pillar says: "Elections without law may distort democracy. Not a day of celebration but of mourning. Bribery, bullying, or a regime takeover of the elections. The answer is the open eyes of the law as written, expressed, and intended. There must be rules even for the smallest details: the timeframe must be strictly observed; the ballot box must be accessible; who can vote and who can be elected. Maintaining the laws is also vital to democracy". While the first pillar maintains a distance between the law and the elections, the second requires involvement and supervision. Is there a contradiction between the two? I believe that the answer is in the negative, and it is unsurprising. The two pillars sing the praises of democracy together. In other words: there is no contradiction between democracy and the Court's supervision over the rules. On the contrary, the Court acts to advance democratic principles by virtue of the authority conferred upon it by the legislature.

Democratic elections are not self-evident. History gives context. In the past, and for a very long period, change of regime was achieved by military coup or the death of the autocratic ruler. Democracy changed the rules. Not power but election. Decisions are made not by the powerful but rather every citizen has equal power. That is the aspiration, and it must strictly be put into practice. It is not a simple task. After all, the voice of the single voter is not, of itself, strong in comparison to the regime. Democracy strives to preserve its character and not lose it in the course of elections. This gives rise to the role of the Court and the proximity of the pillars.

2. Israeli law establishes when a candidate or a list should be prevented from participating in the elections due to their objectives, actions, and expressions. Section 7 of Basic Law: The Knesset presents the substantive test and the procedures for preventing a list or candidate from participating in elections for the Knesset. This section, and section 63A of the Knesset Elections Law [Consolidated Version], 5729-1969, establish the procedures for this. The substance is defined by three causes for disqualification:

> (1) negation of the existence of the State of Israel as a Jewish and democratic state;
> (2) incitement to racism;
> (3) support for armed struggle by a hostile state or a terrorist organization against the State of Israel.

The procedures are that when the Central Elections Committee for the Knesset Elections prevents the participation of a *candidate*, the approval of a nine-judge panel of the Supreme Court is required. It is not an appeal but an approval proceeding. The law chose to introduce the Court into the proceedings. It is not *post facto* judicial review but an *ex ante* decision. For the prevention of the *participation of a list or the approval of a candidate of a list* – there is an appeals process.

We addressed the tension between the two pillars presented. Each holds great power in our legal system, and thus the sensitivity required in the course of moving between them in practice and in real time. The path chosen by this Court is one of caution and self-restraint before it prevents the participation of a candidate or a list. Doubt acts in favor of the candidate. This is the consistent approach of the case law in election matters, as explained by my colleague the President. It is interesting to turn to another area of law in which doubts wields great power. In criminal law, a person can be convicted if the charge is proved beyond reasonable doubt. The reason for this is the recognition of the regime's power to taint and punish the individual. As opposed to this, in Knesset elections, the power of doubt lay in a different consideration – the role of the voter in choosing the candidate and the list it prefers. This Court does not eagerly intervene in election matters. On the other hand, the law requires it to do so in the appropriate circumstances. Just as the will of the electorate must be honored, so too the will of the legislature in such matters. The compromise – or more precisely, the proper balance – is to employ the law only to prevent candidacy in exceptional cases in which, for example, the doubt is not of substance and is not rooted in reality. This rule is intended to permit the voter to express its position on the matter within the four cubits of the ballot box. As opposed to criminal law, in which the court establishes facts in regard to the defendant's acts and intentions – in the present matter, we look not only backward but forward as well: is the candidate or the list, at the time of the elections, expected to act contrary to the causes enumerated in the law if elected – but in the present and not necessarily in the past. We are thus concerned with a certain evaluation in regard to the future.

However, in the exceptional case in which the candidacy of a candidate or a list meets the following criteria: the cause is a dominant characteristic of the list or the candidate; there is clear, unambiguous evidence of the cause; there is active conduct, including expression in the case of a candidate, for realizing the wrongful objectives; there is a critical mass of highly credible evidence (see the detailed description in para. 16 of the opinion of my colleague the President). Only if these

conditions are met is there the necessary certainty to justify the result of disqualification. In the background stands the right to vote and to be elected. That underlies the democratic foundation of elections. And note that the right to be elected has direct consequences for the right to vote.

Another aspect of the matter is remorse or a candidate's recanting an objective or activity related to one of the constitutional causes. The reason is self-evident. The decision is not personal or punitive but rather institutional and preventative. In other words, its purpose is to prevent an inappropriate actor from becoming a member of the next Knesset. Of course, we are not concerned merely with a declarative test. There must be an examination of whether there are grounds to conclude that the declaration is sincere. Or more precisely – that the declaration is not sincere. Of course, there is a possibility that a candidate may not live up to his declarations. This is not a danger that would justify expanding the list of disqualified actors. If a candidate or list does not live up to its expectations, there are "sanctions" and other means for contending with the matter, whether in the course of the Knesset's term or in the elections for the next Knesset.

3. Two points to conclude the general sections. The first concerns the dissenting opinions of my colleagues. I have read the opinions of my colleagues Justice N. Sohlberg and Justice D. Mintz. My colleague Justice Sohlberg is of the opinion that no one should be prevented from participating in the elections for the 21st Knesst, while my colleague Justice Mintz is of the opinion that along with Michael Ben Ari, Ofer Cassif and the Ra'am-Balad list should be prevented from participating in the elections for the Knesset. In my opinion, and pursuant to the above, Justice Sohlberg's approach might lead to the non-disqualification even of candidates who clearly meet the causes for disqualification. This, while making even the strict case-law tests weighed prior to preventing the participation of a candidate or list in the elections more strict. As for the approach of my colleague Justice Mintz, in my view, his approach might lead to over-disqualification of candidates and lists from both sides. It would appear to me that the path taken by the case law in the past and in the present embraces both of the pillars presented above. Disqualification is imposed cautiously and only exceptionally.

The second point is that of the symmetry test. My colleague Justice Sohlberg presented a statement by MK Michael Eitan in which he asks: "Where is the symmetry?" I agree with this question and would only like to sharpen the point. Symmetry does not have to be expressed in the

final result, but rather in the application of equal criteria. Aspiring to symmetry in order to balance the results is a quasi-political consideration that the Court cannot adopt. I will allow myself to say that reading the opinions of my colleagues – of the majority and the minority – shows that the conclusions were based upon a legal approach and the examination of the evidence, and not upon any desire to maintain equally balanced results.

Armed with these tools, I will conduct an individual examination of the relevant actors – Michael Ben Ari, Ofer Cassif, and the Ra'am-Balad list.

4. *Michael Ben Ari*: The relevant cause in the matter of Ben Ari is "incitement to racism". We are concerned with some forty different statements, most of which were uploaded to the Facebook page of "Otzma Yehudit with Michael Ben Ari", such that the matters cannot be denied. Indeed, Ben Ari does not deny them. Most of the material dates from the year preceding the elections. My colleague the President presented the relevant statements (paras. 38-41 of fer opinion). It makes for difficult reading. What was presented suffices, and there is no need to present it again, Comparing the statements with the language of the law raises the question of what is the test for "incitement to racism"?

I will begin with the term "incitement". Not racism but *incitement* to racism. The hand or mouth of one and the hearing ear of the other. In other words, we are not concerned with personal views that the candidate keeps to himself. The opinions must be expressed in order to incite to racism. In addition, my colleague Justice M. Mazuz referred to the probability test. In his opinion, that test should not be applied to the causes under sec. 7A of Basic Law: The Knesset. I agree with his conclusion and reasoning. The language does not support the application of such a test, and such is also the purposive interpretation. Such a test would be too speculative and very difficult to apply at the time of the elections. Additionally, the basis of the causes for disqualification is not necessarily the prevention of a real, concrete threat to one of the protected values, but rather clearly expresses not granting legitimacy to lists or candidates who adopt the approaches set out in the causes. In summary, I accept his conclusion that "we are concerned with causes of 'conduct' not 'results'" (para. 2 of his opinion).

Now to the question of what constitutes "racism". My colleague the President addressed, inter alia, the aspects of hatred, hostility, persecution, degradation, and humiliation (paras. 25-32

of her opinion). In regard to Ben Ari's candidacy, I will say: there is no need to establish the minimal threshold for disqualifying a candidate on the basis on incitement to racism. It suffices to find that in this case, the candidate exceeded the threshold by a wide margin. His statements seek to influence conduct. And note that the lack of a need to prove the elements of the probability test does not contradict the fact that the aspiration to influence conduct in practice reinforces the ground for disqualification. In his statements, Ben Ari espouses the denial of civil rights to the Arab public. So in regard to participating in public tenders and so in regard to their ability to live in cities. He supports their collective deportation in certain circumstances, and employs violent imagery in regard to that community, including shooting. The evidence is very substantial, unambiguous, and dominant in his doctrine.

In his affidavit to the Elections Committee, Ben Ari argues that he is not a racist, in that he accepts that every person – including the Arabs – are created in God's image. Only then does Ben Ari proceed to the loyalty test. He is not against Arabs because of how they were born, but because they failed the loyalty test. Moreover, the overwhelming majority of Arabs are not loyal. That "overwhelming majority" was defined in various statements: from 99% to a few who can be counted on the fingers, and Ben Ari never met a loyal Arab. Thus, they have all become enemies. This is the fallacy at the base of incitement to racism. As President Shamgar held, racism is not just a matter that derives from the biology of the other (EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset* [5], 191-192). Racist views can also be examined in accordance with theories, conclusions, and factors that arose after a person's birth and not upon the DNA that characterizes a group of the population. Not just genetics but epigenetics. Ben Ari did not explain the meaning of the "loyalty test" – what are the criteria of this test, when does one fail it, and how is it that with the exceptions of a very small number of individuals, all Arabs belong to the disloyal group. We are concerned with very severe matters that are not based upon facts but upon a circular conclusion. The results are harsh. An Arab is presumed to be an enemy who must be dealt with. This, by means of denial of rights, deportation, or the possibility of violent treatment. For example, it was stated that anyone who dares to speak against a Jew doesn't live. He doesn't live, but rather "a firing squad kills him, he is done away with"; that the "murderers" should not be employed, also in reference to the Arab residents of Israeli cities; that affirmative action should be rescinded in view of the "treasonous" and "murderous" character of Arabs; that Arabs are a

“murderous people, a murderous nation”; and that the village from which a terrorist went to an “airport” should be uprooted and its residents “flown” to other countries.

5. I will clarify the matter from another perspective. One may ask why these particular causes established in the law were chosen. The cause of support for armed struggle against the state is clear and requires no explanation. The cause of denial of the State of Israel as a Jewish and democratic State was intended to defend the existing foundations of the state. As for incitement to racism, we are concerned with a desire to deny the legitimacy of a group. In a varied, multi-group society like that of the State of Israel, this harms the nature of the society. This is striking when we are concerned with some twenty percent of the population. It saddens me to say that reading Ben Ari’s positions – and the reader can read paras. 38-41 of the opinion of my colleague the President – leads not only to racism in the form of humiliation and hatred, but also to severe acts that might undermine social order or create discriminatory law in regard to the foundations of civil rights, including the right to remain a citizen of the state. This is not due to the actions of the group, not due to criminal offenses perpetrated or plans to do harm, but because they do not meet the conception of a proper minority as Ben Ari understands it. By that, I am not finding that he has committed a crime, but there are special requirements in regard to lists and candidates for the Knesset. Particularly in a system in which a representative often represents a specific group, we must make certain that even if he does not fight for the rights of the group, he cannot fundamentally deny the legitimacy of the other group and its right to elementary rights. And all the more so, harm and violence lacks any legitimacy.

6. The conclusion from all of the above is that this is an unambiguously extreme case. And note well, Ben Ari did not express remorse, but rather embraced his position while explaining that he is not a racist and does not reject Arabs on the basis of their birth. To clarify the picture, let us compare him to Advocate Itamar Ben Gvir and to former candidate Baruch Marzel. It can be assumed that the three share a similar ideology, in that they ran together on the same list. However, this Court refrained from disqualifying Marzel and Ben Gvir. The decision not to disqualify Ben Gvir in these proceedings was unanimous. What difference is there between him and Ben Ari, who was disqualified by an eight-judge majority? It would appear that the tests of the strength of the evidence, its extent, quality, and unambiguity led to that result. But we would note one additional criterion: expressing remorse. Both Marzel and Ben Gvir informed the Court that they intended to

act in accordance with the requirements of the law, including the causes for disqualification that it establishes. Even if they behaved differently in the past, they declared that that is how they would conduct themselves. They understood and internalized the qualifying conditions for Knesset candidacy. Ben Ari was not a partner to that choice. He continues to support the views that he expressed. We are not concerned with some technical defect or lack of comprehension. Just as we must respect the manner in which Ben Gvir and Marzel presented their arguments at the moment of truth, so we must respect Ben Ari's position that justifies his disqualification. My colleagues spoke of how, due to its history, the Jewish people in particular must be sensitive to statements like those expressed by Ben Ari. In my view, we should add that it is not just the history of the Jewish people, but also its faith. But truth be told, there is no need for that. In these circumstances, there is not even a need to demonstrate the matter by a thought experiment in which Ben Ari would express his views in another country against Jews.

7. *Ofer Cassif*: The disqualification request points to two causes that can bar his participation in the Knesset elections. The first is "negation of the existence of the State of Israel as a Jewish and democratic state" and the second is "support for armed struggle by a hostile state or a terrorist organization against the State of Israel". The evidence presented against him relies upon four publications, the central of which is an interview he gave to the Ha'aretz newspaper in February 2019. It would appear that my colleague Justice Mintz addressed both causes together, but there is a difference in the scope of the evidence and in Cassif's explanations in regard to each cause, which requires that they be addressed separately. My colleague presented Cassif's case as so clear as to leave no doubt, and according to his approach, there is no possibility of arriving at a different result.

Below, I will sketch the general outline of why I hold a different view. The question in regard to Cassif, as for every candidate, is whether there is justification for preventing him from being elected as a member of Knesset in view of the causes established in the Basic Law. As I explained above, the matters are examined in a particular period of time, with a view to the future, and in regard to the candidates functioning in the legislature if he be elected. Past statements and actions may serve as the evidentiary foundation in regard to a position in the present and in the future. The purpose is not to punish improper actions and statements, but to ascertain whether the candidate constitutes an exception that justifies barring his participation in the elections. Cassif

said things in the past, although not with great frequency and consistency, that would require him to explain why he should not be prevented from participating in the elections. Cassif's answer to this is clear, consistent, and divided into three parts: one, in regard to the possibility that he supports armed struggle by a terrorist organization against the State of Israel, is that he does not support violence, not in the past and certainly not at present. I believe that an examination of the matter, as I will explain, supports that conclusion. Even if Cassif spoke harshly, there is a lack of a foundation proving that he supports violence – certainly the foundation needed to prove that he supports armed struggle by a terrorist organization against the State of Israel.

The second part of his answer concerns the possibility of negating the State of Israel as a Jewish and democratic state. In this regard, he does not deny that he has made statements in the past against various symbols of the state and against the Law of Return, but he declared that he accepts the platform of his list – Hadash-Ta'al – and does not, in that or any other frameworks, act or call for the annulment of the symbols or the Law of Return. He accepts the parliamentary rules. In other words, not only is this not a case of a dominant purpose, but rather there is no such purpose at all. As I explained above, the Court has consistently granted weight to a change of position and a declaration in regard to an absence of intent to act or express oneself contrary to the causes enumerated in Basic Law: The Knesset. As noted, this consideration, applied *mutatis mutandis* to other causes, is what allowed the candidacy of Baruch Marzel in the past, as well as that of Itamar Ben Gvir at present. It his unwillingness to follow that path that stands in Ben Ari's way.

The third part concerns various statements by Cassif that compare the State of Israel and the members of its government to Nazi Germany. My colleague Justice Mintz gave weight to those statements. We are concerned with shameful statements that do no honor to one who makes them, and certainly not to one who seeks election a member of Knesset. It were better had they never been said, and one hopes that if Cassif is elected to the next Knesset, he will refrain from acting in this manner. However, as my colleague the President noted in her opinion – and this is the third part of Cassif's response – those statements do not fall within the scope of any of the causes enumerated in sec. 7A, and to my understanding, the Court cannot take them into account in examining the disqualification of a candidate. In this regard, I would note that the opinion of my colleague Justice Mintz also referred to Cassif's statement in his affidavit (para. 13) that he would "*not necessarily* use those expressions if elected to the Knesset" (emphasis added). According to

his approach, the absence of an undertaking by Cassif in regard to his future conduct does not work in his favor. However, and see paras. 12 and 13 of the affidavit, it appears that this statement referred to the shameful statements mentioned above, and not to statements related to the causes enumerated in the law, such that I do not think that this can be held against him in this proceeding.

In view of the severity of the cause of supporting armed struggle by a terrorist organization against the State of Israel, it would be proper to present Cassif's own words as stated in his affidavit to the Elections Committee. He affied that "I have never called for violence, and I am opposed to violence as such against any person". As my colleague the President noted, Cassif explained to the Elections Committee that "I never supported violence, I always expressed opposition to violence, I belong to a party that has always rejected violence […]" and stated further on that "I rejected, and I reject, and I will reject, and I never even hinted at support for armed struggle or violent struggle at all". In regard to the definition of the term "terror" as opposed to "guerilla warfare" in all that concerns harm to soldiers, Cassif's attorney emphasized in the hearing before us that the statements were made in the course of an academic debate on the subject and that one should not infer that he expressed support for harming soldiers from the presentation of his position in the matter:

> He said that he has a dispute with the term "terror" even in the UN there is a dispute about this word. He wrote this and teaches his students. The dispute about the Prevention of Terror Ordinance then was a debate. Therefore, what he says about this matter of who is or isn't a terrorist from an intellectual and academic perspective is debated […] these terms that he employs are not foreign to the Supreme Court and not to the international humanitarian court. Not one word here is a call [to terror] (p. 9 of the transcript).

Even if one does not agree with the definitions adopted by Cassif, and even if they cause indignation, in the context presented to us they cannot be taken to imply, of themselves and certainly not given the entire collection of statements and explanations, support for armed struggle by a terrorist organization against the State of Israel. It is sad that his words show, in my opinion, a certain sense of contempt for the lives of IDF soldiers and complacency in regard to many citizens who have lost what was most dear to them in the name of defending the homeland. In such matters, a member of Knesset and a candidate for election as a member of Knesset is expected to

act with sensitivity. But there is a gap between such a failing and the existence of a cause to prevent participation in the elections.

In summation, I would say as follows. In my opinion, there is no basis for attributing to Cassif statements that support armed struggle by a terrorist organization against the State of Israel or the negation of the existence of the State of Israel as a Jewish and democratic state. As noted above, there are four conditions that must be met in order to bar a candidate from participating in the Knesset elections: the cause for disqualification constitutes a dominant feature; the existence of clear, unambiguous evidence of the existence of the cause; activity, including expression, for the realization of the wrongful purposes; a critical mass of highly credible evidence. In my opinion, there is no basis for attributing to Cassif expressions of support for armed struggle by a terrorist organization against the State of Israel. He made it clear that he always was and always will be against violence. As for his positions on the symbols of the state and the Law of Return, he declared that he abides his party's platform. In regard to both causes, the evidentiary foundation is sparse, certainly not unambiguous, and lacks the requirement of dominance or activity for the realization of the purpose. In other words, both independently and cumulatively, the evidentiary foundation against him does not meet the four tests.

8. *Ra'am-Balad*: The proceeding in the matter of the Ra'am-Balad list focused upon the Balad party. It is argued that the central piece of evidence for disqualifying the list in these elections is the Basic Law: A State of all its Citizens Bill that Balad sought to propose to the 20th Knesset. The bill was submitted to the Knesset presidium, but that body did not approve its presentation before the Knesset.

The bill was of a general character. For example: "The state is a state of all its citizens, in which the regime is democratic; the state's regime is based upon the values of the dignity of the person, his liberty and his being an equal among equals". There is also reference to the language, the symbols and the anthem, which will be in the same spirit. It is argued that the positive implies the negative, that is, that the practical significance of this bill is the revocation of the Law of Return and changing the symbols of the state and its anthem such that they would not express its being Jewish but only democratic. Taking this step carries some weight. It is more forceful than a newspaper interview, for example. It is parliamentary activity that can bear fruit. The list's attorney

argued that the bill was a sort of "gimmick" in response to Basic Law: Israel – The Nation State of the Jewish People. This argument, in itself, is insufficient. The bill refers to the negation of the State of Israel as a Jewish (and democratic) state, and even if some party or other is frustrated as a result of the activity of the government and the Knesset, it is not exempt from the requirements of the Basic Law. However, the submission of the bill must be examined not just on the legal level but on the factual level. To be more precise, the factual level constitutes a central part of the legal examination. Thus, the party's conduct in regard to the causes under the law must be examined in accordance with the strict rules. From that perspective, the bill, by itself, does not cross the necessary threshold. First, as already stated, one of the conditions is that of dominance in the purposes and active conduct. It was not argued that the bill also appears in the party's platform. Second, the bill is signed by the Knesset members who served at the time, some of whom are no longer candidates in the current list, and others are place only symbolically. Thus, for example, MK Hanin Zoabi was placed in the 118th spot on the list. In regard to the candidates who appeared before us and who are placed at the top of the list, it turns out that they do not support that position. Their attorney even referred to the bill as a kind of mistake. And again, the matter must be examined according to the relevant tests. It would not appear that the desire to annul the anthem, the law and the symbols is dominant, or that they are actively working in such a manner, in particular in regard to the figures who currently represent the list. On the contrary, those positions are not part of the party's planned parliamentary activity. Not just remorse, but a lack of devotion to the purpose, and conduct at a very specific time. Were the list continuing in that conduct – since the Law of Return remains in force – the situation might be different. But that is not the situation before us.

From reading the opinion of my colleague Justice Mintz, it appears that he does not agree with the reasoning of the majority. He expanded upon the subject of the party's conduct that was addressed in the case law in the past, in regard to previous Knesset elections. Of course, one can be of this or that opinion in regard to decisions rendered in regard to previous Knesset elections, but it does not appear that at present, significant weight should be attributed to conduct that this Court already decided was insufficient to prevent the party's participation in the elections. Thus, the focus is upon the new material, and that is what I addressed.

My colleague Justice Mazuz is of the opinion that the term "Jewish state" in the context of Basic Law: The Knesset should be understood as referring to the identity of the state in the national sense. In other words, it does not necessarily refer to a change of the internal content, like the state's symbols. In my view, it would be incorrect to construe the term "Jewish state" as a test of the right of the Jewish people *solely* to national existence for three reasons. First, the term "Jewish" is not merely a geographical matter, but an historical one as well. The state's symbols carry weight in the basic definition of the state. So it is in regard to other states as well. Second, the case law has also adopted this view in the past (see, e.g., EDA 50/03 *Central Elections Committee v. Tibi* [35], 21-22, according to which "the 'nuclear' characteristics that shape the minimal definition of the state being a Jewish state…the right of every Jew to immigrate to the State of Israel in which Jews will be the majority; Hebrew is the primary official language of the state; Jewish heritage is a central component of its religious and cultural heritage"). Third, it would appear that practical experience shows that the objections in debates upon negation of the Jewish state focused upon the return to Zion, and not upon questions of general, historical, and religious symbols. Thus, the practical consequences of this distinction are unclear. The primary practical problem concerns proposals to annul the Law of Return, and not merely the changing of the symbols. In any case, it would seem that a construction that includes "internal" characteristics of the term "Jewish" would be more precise, and thus I would take exception to my colleague Justice Mazuz's distinction. Of course, when I say "internal", I refer to the most basic matters, but there is no need for elaboration or for a precise delineation.

A final point. According to the position of the Attorney General, there is significance to the fact that the Ra'am and Balad parties are running together on one list. As opposed to this, I am of the opinion that as a rule, a party that has been tainted by a cause that disqualifies it from participating in the elections cannot cross the hurdle by joining with another party. Such an approach would afford too easy an exemption for a party that should be disqualified simply because it joins with another. In my view, the Attorney General's approach, according to which weight should be given to the combining of parties – even if this does not grant an "exemption" – is problematic. The reason for this is that it is not clear how to calculate such a factor. There is also the fear that parties might join together so that one will "clean" the other of the cause that has tainted it. It is one thing to recognize remorse, and another to grant a seal of approval due to joining another party. I am of the opinion that if there is a cause for disqualification, then the law requires

that the list be barred from running, subject, of course, to restricting disqualification to exceptional cases. Therefore, I did not grant weight to the arguments concerning the relationship between Balad and Ra'am in examining the matters.

9. The right to vote and the right to be elected are twins, but not identical. In practice, "to vote and be elected" is presented as a single right, when each actually has an independent dimension. This is so, despite the strong connection between them, regarding which it suffices to mention that the right to be elected influences the right to vote. I will demonstrate what the two rights share and what distinguishes them in regard to the issue addressed in these proceedings – the application of sec. 7A of Basic Law: The Knesset.

The right to vote focuses upon the identity of the decider and the right to be elected on the question of who is qualified to represent the people, or in our case – who is not qualified to represent them. It would appear that the right to vote places its emphasis upon the individual. The vote of every voter is worth no less that the vote of any other voter, regardless of his status, position, conduct, or statements. Therefore, the criteria for identifying who is entitled to vote are formal. As opposed to this, the question as to who can be elected is not merely formal, but value based. This is how we are to understand the causes that prevent participation in the elections that concern not only support for armed struggle, but also negation of the existence of the State of Israel as a Jewish and democratic state, and incitement to racism. Its purpose is to define the society and its boundaries. The purpose of the right to vote is to protect the individual, whereas the purpose of the right to be elected is to protect the unity of the nation. Both rights are precious.

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It was therefore decided, on March 17, 2019, by a majority, in accordance with the opinion of President E. Hayut, not to approve the decision of the Central Elections Committee in the matter of the disqualification of the candidacy of Cassif; to grant the appeal in the matter of the Ra'am-Balad list and rule that it is not barred from participating in the elections for the 21st Knesset; to grant the appeal in the matter of Ben Ari and rule that he is barred from participating in these elections. In addition, the Court unanimously decided to deny the appeal in all that regards the Election Committee's decision not to disqualify the Hadash-Ta'al list, and to deny the appeal in the matter of the non-disqualification of Ben Gvir.

Given this day, 15 Tammuz 5779 (July 18, 2019).