IN THE

SUPREME COURT OF THE STATE OF ISRAEL

Election Appeal 1/88

Before their Honors: **President M. Shamgar**
Deputy President M. Elon
Justice M. Bieski
Justice S. Levin
Justice D. Levin

Appellants: 1. Moshe Neiman,
2. The "Kach" Party

v.

Appellee: The Chairman of the Central Election Committee for the 12th Knesset,

Argued: **30 Tishrei 5749 (October 11, 1988)**
2 Cheshvan 5749 (October 13, 1988)
Decided: **7 Cheshvan 5749 (October 18, 1988)**

On behalf of the Appellants: Adv. A. Papo

On behalf of the Appellee: **Adv. D. Beinish, Deputy State's Attorney; Adv. N. Arad, Director of the Department Handling Cases Filed with the High Court of Justice for the State's Attorney's Office**

JUDGMENT

President M. Shamgar

1. On October 5, 1988, the Central Election Committee for the 12th Knesset, pursuant to its authority under Section 63 of the 5729/1969 Knesset Elections Act, determined that the "Kach" party may not run in the Knesset elections because it is in violation of Section 7a of the Basic Law: The Knesset. On the same day, the chairman of the Central Election Committee, Supreme Court Justice E. Goldberg, informed the party's counsel that pursuant to Section 64(a) of the Knesset Elections Act, the party is "banned from participating in Knesset elections on the grounds that it is in violation of subsections (2) and (3) of Section 7a of Basic Law: The Knesset." As a result of the decision, the Appellants appealed as is their right under Section 64(a) of the Knesset Elections Act.

2. The attorney for the Appellants, Adv. Aharon Papo, supplied a list of reasons why we should overrule the decision of the Central Election Committee. We will address his arguments in order.

3. (a) At the beginning of the hearing, Adv. Papo made a preliminary request for three of the justices on the panel to recuse themselves from this case. At the hearing, the request was immediately denied, and the reason for the judgment was postponed. Therefore, we will first address the aforementioned decision.

(b) As was mentioned in our decision, the justices of whom the request was

made along with the other justices on the panel believe there is no reason for any justice to recuse himself from this case. Constitutional issues, like any other legal issue, frequently appear before this Court, and, on occasion, two parties may reappear as parties before this Court. Sometimes, a party may reappear after appearing before this Court sitting as either the High Court of Justice or as the Court of Appeals. The appealing party in this case, a political party in the Knesset, or its leaders, has petitioned this Court sitting as the High Court of Justice a number of times. It is, therefore, reasonable to assume that most of the judges on this Court have already heard a case in which the [Kach] party was a litigant. In many of these cases, if not all of them, questions involving the objectives and the conduct of the Appellant have been raised and adjudicated by various panels of this Court.

An opinion expressed by a judge in the context of a decision of the High Court of Justice addresses the specific issue raised by a particular case or a given time. The nature of the judicial role is to be open to arguments designed to shed light on a set of factual circumstances or to develop a legal theory. A judge is not disqualified by the mere fact that he has already adjudicated the legal issue in question.

Moreover, like in the U.S., the "rule of necessity" allows judges to sit in judgment in cases affecting the judiciary (*See United States v. Will*, 101 S.Ct 471, 480 (1980)). If in a case such as this Court members recused themselves, the Court would essentially deny the petitioner the ability to have his day in court (*See State v. Sage Stores Co*., 157 Kan. 622 (1943)). The highest judicial authority never exhausts itself and can never become unapproachable because a litigant has turned to it too many times, either by appeal or petition. It is not superfluous to add that in this case there are only one or two judges on this Court who have never sat in a

case to which the Appellant was a party, and it is inconceivable that we would come to a point at which this Court would be unable to hear the case of the Appellant or any other concerned party *(See* CrimA 323/76 *Nir v. State of Israel*, IsrSC 30(3) 592, 594, n.7). If we were to adopt another approach, we could come to the untenable situation in which we would not be able to adjudicate such cases. As the U.S. Supreme Court has said, "There was no other appellate tribunal to which, under the law, he could go" *(Evans v. Gore*, 40 S.Ct 550, 551 (1920)).

(c) The solution to the Appellant's problem, or that of any other litigant frequently appearing in court, can be found within the nature, character and the role of the judiciary and its intellectual discipline. It can be assumed that a judge sitting on the highest court who finds himself in such a situation will not be improperly influenced by irrelevant matters or those which do not arise in the case before him, but will, patiently and with tolerance and an open mind, listen to the different arguments and new approaches to topics he has already heard that are being reargued before him. Therefore, we dismissed the Appellant's preliminary request, and we now turn to the appeal itself.

(4) (a) In his first argument, counsel for the Appellants challenged the validity of Section 7a, added in 5785/1985 as Amendment 9 to the Basic Law: The Knesset. It reads:

> Prevention of participation of candidates' list
>
> 7A. A candidates' list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following:
>
> (1) negation of the existence of the State of Israel as the state of the Jewish people;
>
> (2) negation of the democratic character of the State;

(3) incitement to racism.

Adv. Papo claims that Section 7a is void because it contradicts Section 4 of the same Basic Law, which the legislature has granted superior status. In other words, he argues that disqualifying a party from participating in Knesset elections violates Section 4's guarantee of equality, which, as mentioned is Section 4, is among the most basic foundations of our electoral system. Because [Section 4] states that it cannot be amended except by a majority of Knesset members, its provisions should be viewed not only as protected, but also as superior to any other legislation. Therefore, any legislation found to be inconsistent with Section 4 should be nullified by this Court.

(b) We do not accept this claim. Section 4 sets forth the principles of the Israeli election system and dictates, among other provisions, that the elections should be equal (*See* HCJ 98/69 *Bergman v. Finance Minister*, IsrSC 23(1) 693). However, Section 4 informs us how the legislature can legislate while deviating from the principles set forth by Section 4. It states, "This Section cannot be amended except by a majority of members of the Knesset." This means that it can be amended so long as a majority of (more than 60) Knesset members vote to do so. It does not matter whether the deviation from the principles set forth in Section 4 is significant or not, because the legislature, allowing for the amendment of the Section, did not restrict the nature or extent of the potential amendment. By way of an absolute majority vote, various provisions have been enacted in the election laws that may constitute a deviation from the norms of equality *(See, e.g.*, 5729/1969 Knesset and Local Elections Act (on funding, limiting expenses and auditing) (as amended, 5730); 5769/1969 Elections Law (on the validity of laws); *see also*, HCJ 260, 246/81 *Derekh Eretz Organization v. Broadcasting Authority*, IsrSC 35(4) 1; HCJ 141/82 *Rubinstein v. Speaker of the Knesset*, IsrSC 37(3) 141).

Therefore, Section 4 does not prevent the legislature from enacting provisions that deviate from the principles set forth in Section 4, so long as it does so in a manner consistent with the Basic Law.

Furthermore, Section 46 of Basic Law: The Knesset explicitly allows for contradicting legislation which implicitly changes Section 4. Once it is deemed permissible to make an implicit change, there is no longer a basis for the Appellants' counsel's additional claim that any legislation changing a norm established by Section 4 must explicitly say that the new law deviates from Section 4. Moreover, in this case, we are dealing with a law that explicitly qualifies the aforementioned principle in Section 4 (along with the provisions of Section 6(a) of Basic Law: The Knesset). We are adjudicating a direct amendment to the law, within the same legal framework, by integrating another provision of the Basic Law, alongside Section 4, where the impact upon Section 4 is clear to everyone.

(c) Finally, counsel for the Appellants also confirmed that Section 7a was passed by a majority of Knesset members. In light of what we have said, nothing in Section 4 requires us to overturn Section 7a.

5. (a) The Appellants argue that by its very nature and content, Section 7a is invalid, and not only because of the aforementioned test concerning the conflict between Section 7a and Section 4; the Appellants claim that the provisions of Section 7a are radically inconsistent with the principles of democracy. [They claim that] these provisions contradict the foundations of the constitutional and democratic regime of the State of Israel because they harm the general right to be elected, and, as a result, violate the right to vote, which is a basic and perhaps the most important civil right. Appellants' counsel claims that such anti-democratic legislation is null and void.

(b) This claim also does not change our position as to the validity of Section

7a. The accepted principles of this Court do not allow it to invalidate legislation passed by the Knesset, except in cases formally challenging the procedure by which the law was adopted (*See, e.g.*, HCJ 98/69). In this context, I see no reason to address this constitutional argument in depth. I would add though, that as far as I am concerned, this argument is essentially the same as the previous one comparing Section 7a and Section 4.

6. Furthermore, the Appellants argue that Section 7a is invalid and inapplicable because of its internal contradictions, its vagueness and ambiguity. These claims require an analysis of the text of Section 7a, which will be addressed later on in this decision. We begin with a few words about what preceded the enactment of the provision, as far as the Court's ruling is concerned.

7. Section 7a was enacted in 5785 in response to this Court's decision in EA 1/65 *Yardor v. Chairman of the Central Election Commission for the Sixth Knesset*, IsrSC 19(3) 365 and EA 3, 2/84 *Neiman v. Chairman of the Central Election Commission for the Eleventh Knesset*; *Avni v. Chairman of the Central Election Commission for the Eleventh Knesset*, IsrSC 39(2) 225. In EA 2, 3/84, this Court provided insights and comments for proposed legislation meant to limit the right to participate in Knesset elections. It noted that the right to be elected and the right to vote are among the most important basic rights. The right to stand for election is a fundamental political right, which expresses the idea of equality, freedom of expression and freedom of association. Therefore, the existence of this right and its protection is a sure sign of a democratic society. Moreover, some say that the right to vote is incomplete if the right to stand for election is limited, because limiting the right to be elected also reduces voters' rights, and this involves, albeit indirectly, a limit upon the freedom of expression. In EA 3, 2/84, at 278, we said:

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

The decision then goes on to cite the enlightening quote from Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 377 (1927), which addresses the issue of limiting free speech:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of

education, the remedy to be applied is more speech, not enforced silence.

Basic rights and their application cannot be absolute because of the likelihood that in extreme circumstances the use of such rights by one person will conflict with the constitutional rights of another or may create extreme and immediate danger that must be stopped. However, the authority for establishing general limitations or limitations in specific circumstances rests with the Knesset (HCJ 337/81 *Mitrani v. Transportation Minister*, IsrSC 37, 337).

In other words, limiting these freedoms, including the right to be elected, requires direct and explicit legislation, clearly delineating the limitations without allowing for unlimited discretion on the part of administrative or other authorities. We note, however, that in order to safeguard and honor these freedoms not only is a formal statute necessary, but also the establishment, within the statute, of the standards by which these powers can be activated. Such statutes must have two essential components. The first expresses the fact that formal authority has been granted, and the other clearly defines the circumstances in which such authority can be exercised.

It was stressed that the possibility that legislation limiting the right of parties wishing to harm the very existence of the State to participate in elections (*see* EA 1/65) is not, theoretically, difficult in principle; however, as one seeks to expand the number of parties excluded from the elections, the ramifications of such legislation upon the continued existence and realization of our basic democratic foundations will necessarily grow as well.

8. (a) The Basic Law, as amended by Section 7a, must be interpreted textually and within its context and on the basis of its purpose (*See* A. Bendor, *The Right to be a Candidate in Knesset Elections*, 18 MISHPATIM 269 (5748-49)). Note that while we have expressed different approaches in the aforementioned decisions,

here, the explicit intent of the legislature prevails, especially because we are dealing with legislation that was enacted pursuant to a detailed ruling of this Court.

(b) The beginning of Section 7a refers to the sources from which indication of the negative behavior described in subsections (1), (2) and (3) can be inferred. In that context, the legislature refers to goals or actions. This means that we are dealing with the political party's outlook and opinions which express its goals or, alternatively or additionally, the party's conduct which demonstrates and reflects its character. A party's objectives can generally be derived from its formal platform or from its advertisements, speeches or opinions expressed within political frameworks.

(c) The legislature added that the three grounds for disqualification, outlined in subsections (1) to (3), can be expressed either explicitly or implicitly. The terms "explicit" and "implicit" includes that which is clearly expressed and that which can be derived from the circumstances or concluded from a stated goal or action that, by itself, are not blatant expressions of unlawful conduct or intent pursuant to subsections (1), (2) or (3).

(d) In setting forth the principles of Section 7a, the legislature did not require the existence of 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).

(e) Section 7a deals with objectives and conduct, but it does not become, as a result, a technical provision that takes effect only in certain circumstances without any interpretive guidelines. 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. In other words, [Section 7a] should be applied in a way that takes into account the great weight given to our fundamental liberties.

(f) As previously mentioned, [Section 7a] includes both objectives and conduct. When we refer to "objectives" we mean ideological goals that the political party in question wants to implement and that reflect the party's primary platform. As we understand it, the Section refers to objectives and conduct that reflect the character of the party, and those that flow naturally from the party's identity. The authority granted by Section 7a is not intended for marginal matters whose realization would be insignificant and inconsequential. Subsections (1) to (3) refer to dominant characteristics that are central to the aspirations or to the actions of the party characteristics that represent the reason for the party's establishment and because of which the party wants to be elected. [We refer to] a platform or behavior that is prominent and typical of such a party, though it is certainly possible that they will be accompanied by other objectives and conduct as well. In any event, the facts should indicate that the objectives or conduct, as stated in Section 7a, are central among the objectives and conduct of the political party in question and that there is intent to implement the objectives and realize their [goals].

All this concerning the objectives and conduct must be clearly seen, and there must be no doubt that it falls under the categories specified in subsections (1) through (3). This also applies, mutatis mutandis, to the interpretation of the term "implicitly." As noted, the meaning of that provision is that at times, we can derive

the objective from the circumstances that demonstrate the true nature of a particular action without an accompanying explicit declaration or statement. Sometimes we can arrive at a conclusion through logical reasoning even without an explicit declaration. On the other hand, the expression "explicitly" refers to clear and declared matters. However, even when arriving at a conclusion based on implicit data, the final conclusion must be clear and unequivocal that the behavior in question is included in subsections (1) through (3); that the trait is among the dominant characteristics of the party; and that it intends to act upon its objectives. Once again, the evidence in such a case must be clear, unequivocal and convincing.

9. (a) Section 7a lists three main points: denying that the State of Israel is the national homeland of the Jewish people, denying the democratic nature of the State and incitement to racism.

(b) As we have mentioned, Adv. Papo claims that there is an internal contradiction between subsections (1) and (2), since denying the democratic nature of the State (subsection (2)) can stem from the desire to maintain the State as the state of the Jewish nation (subsection (1)). Under this approach, the desire to be loyal to one of the stated goals that the legislature wishes to protect can also be what causes a party to be disqualified. Furthermore, within his critique of Section 7a, he argues that the term "democratic" in subsection (2) and the term "racism" in subsection 3 are not properly defined.

(c) The democratic nature of the State of Israel has been well established since its founding. This is clear from the language of the Declaration of Independence itself, which expresses the basic foundations of the State until this day (HCJ 73, 78/53 *Kol Am, Ltd., Al-Etihad Newspaper v. Interior Minister*, IsrSC 7, 781, 784; *see also*, Dr. Z. Segal, *Israeli Democracy, Constitutional Principles in*

the Regime of the State of Israel, at 262, (Ministry of Defense, 5748)).

The democratic concept as well as its implementation is reflected by the government and the legal and practical status of the State's citizens and residents and, among other things, the principle of the rule of law, which includes equality before the law. The characteristics of democracy flow through the State's political, social and cultural makeup. A great expression of this is the guarantee of basic rights and freedoms.

(d) The establishment of Section 7a expresses the desire of the legislature to block, in the most extreme cases, activities that intend to uproot the basic principles of the State. As stated in HCJ 620/85 *Mitri v. Speaker of the Knesset*, IsrSC 41(4) 169, 210:

> The purpose of Section 7a is to create a separation between legitimate parliamentary activities and actions of the type described by the statute. It is as if it states that Knesset members are not allowed to take part in parliamentary positions adopting such objectives or conduct.

The history of the Jewish people is the basis for why we see the importance of eliminating racism, so much so that an explicit prohibition is enshrined in our constitution.

10. There are no real grounds for the claim that there is a contradiction between the different subsections of Section 7a. The existence of the State of Israel as the State of the Jewish people does not change its democratic nature any more than the French nature of France changes its democratic nature. The main point expressed in subsection (1) does not take anything away from the [main point of] subsection (2), as both provisions can exist harmoniously.

The lack of such conflict has already been emphasized by President Agranat

in EA 1/65 at 385:

> There is no doubt, as the Declaration of Independence has already made clear, that not only is Israel a sovereign, independent state, which seeks freedom and is characterized by a government of the people, it was also established as a "Jewish State in the Land of Israel." The State was established, first and foremost, by virtue of "the natural and historical right of the Jewish people to live as any other people in its own sovereign state, and its [establishment] was the realization of the yearning of generations for the redemption of Israel."

My colleague, Deputy President Elon also addressed this matter in EA 2, 3/84 at 297:

> The democratic character of the State of Israel found expression in the Declaration of Independence, which speaks of ensuring complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex, and guaranteeing freedom of religion, conscience, language, education and culture. These principles serve as our guiding light. The Jewish character of the State of Israel [is expressly found] in the Declaration of Independence in the very definition of the state as a Jewish State, and not merely as a state of Jews, in the opening of its gates to Jewish immigration for Ingathering of Exiles (as was expressed later in the Law of Return, 5710-1950), and so on. These principles likewise serve to guide us. This constellation of principles forms part of the Jewish state's special make-up. Prominent Zionist thinkers of all trends and streams, Jews of varying world outlook, citizens of the State of Israel of different ethnic and religious belonging, have all reflected upon and continue to

debate the practical significance and application of the principles of the Declaration of Independence in the Jewish state.

The Appellants' attempt to demonstrate a contradiction between subsections (1) and (2) is doomed to failure even if we apply it to the purpose of the legislation. Each subsection is self-sufficient and exists alongside the other. Not only is there no contradiction between them, but we also cannot assume that the legislature intended for one of the provisions to diminish the illegal nature of an objective or conduct just because a party wishes to advance one provision that the legislature wishes to protect at the expense of another. To illustrate, from the wording of Section 7a it seems that incitement to racism (a term we will discuss further) can disqualify a party from participating in an election, even if the incitement is supposedly driven by the will to maintain the State of Israel as the state of the Jewish nation. The desire to maintain the State, as stated in subsection (1) cannot serve as a license for racism. The presumption of the legislature, with which we agree, is that it is possible for the State of Israel to be the state of the Jewish nation without inciting racism.

11. Subsection (2) addresses the democratic nature of the State.

There is no reason for us to fully define the term "democracy" in this context. The question before us does not require this, and it will suffice to address the implication of the Appellants' objectives and conduct upon a citizen's right to vote and be elected, which undoubtedly stems from the democratic nature of the State; and, all the more so when such objectives and conduct are part of a campaign that aims to harm the equality that exists between citizens in both rights and stature.

We already stated that the right to vote and to be elected is one of the foundations of a democratic regime, and, in this context, there is no reason to

expand upon this.

12. (a) Indeed, Section 7a does not define the term "racism."

When amendment 12 to the Basic Law: The Knesset was proposed, another bill, 5745/1985 amendment 24 to the Penal Code, was proposed as well. This second law was passed in the Knesset, although slightly after the amendment to the aforementioned Basic Law and is now part of Section 144a-144e of the 5737/1977 Penal Code. As explained in the comments for the then-proposed amendment 24 to the Penal Code, because incitement to racism has become a troubling phenomenon, there is an educational need to amend the Penal Code to explicitly prohibit incitement to racism, instead of settling for the more general prohibitions that were listed in Sections 133 and 134 of the Penal Code. The 5746/1986 amendment 20 to the Penal Code includes a definition of the term "racism," and this is what is says (Section 149a of the Penal Code):

> Racism is the persecution, humiliation, degradation, open hatred, hostility, or violence, or causing strife for a certain group or portions of the population because of their color or their membership in a certain race or national-ethnic origin.

No other law defines the term in question.

Additionally, the attorney for the Appellee, Assistant Attorney General Dorit Beinish, has brought to our attention the 1966 Convention on the Elimination of all forms of Racism as well as foreign criminal laws defining the term "racism."

(b) As we have mentioned, the legislature has not defined the term "racism" in the Basic Law: The Knesset, and I do not believe it is necessary to come up with an exclusive definition of the term. For our purposes it suffices to determine whether the objectives and conduct in question are included in the term in

question. I believe we can look, inter alia, to the definition in Section 144a [of the Penal Code] to identify some of the characteristics of the aforementioned phenomenon in judging the nature of the objectives and conduct of the Appellants.

Section 144a of the Penal Code includes a definition for the term "racism." At the beginning of the section its states that the two definitions in it refer to "this article," which directly refers to Chapter 8, Article 1(a) of the Penal Code. Nevertheless, I see no reason for us not to use this definition in order to help us understand Section 7a of the Basic Law: The Knesset, without creating an exclusive list. The amendments to the Basic Law: The Knesset and to the Penal Code were proposed at the same time to further the same goal, namely, for the first time, to combat racism in different ways. The two amendments are explicitly *in pari materia*, meaning that they are meant to prevent the same behavior, and only differ as to where they apply. One of the amendments was enacted to fill a legislative void found by this Court (first mentioned in EA 1/65, and then in EA 3, 2/84), and the second amendment was enacted to stress the wrongness of racism by making it a separate crime listed in the Penal Code.

While we accept that a term can be interpreted differently for different pieces of legislation, they are all influenced by the legislative context and the purpose of the law (*See* CA 31/63 *Feldberg v. Director of Tax Law Relating to Land Value Increase*, IsrSC 17, 1231, 1235; HCJ 442/71 *Lansky v. Interior Minister*, IsrSC 26(2) 337, 349). There is no contradicting rule of interpretation compelling the interpretation of a term differently than the way it is interpreted in other statutes (HCJ 441/86 *Masada Ltd. v. Appraiser of Large Factories*, IsrSC 40(4) 788, 798 note b).

The fact that a definition is created for the needs of the statute in which it is found, does not prevent us from interpreting the term by using its definition in

another statute, when the definition is applicable under the circumstances, regarding its subject, context and legislative purpose (CA 341/80 Eili v. Sasson, IsrSC 36(3) 281).

(c) Adv. Papo claims over and over again that the term "racism" refers only to differentiations and distinctions based on biological features that distinguish between different races of people.

This claim is unfounded. As we have seen, the Penal Code definition of the term also refers to unlawful acts, as defined there, against people of different national origins. Likewise, the International Convention on the Elimination of All Forms of Racism and legislation in other countries, including Austria (section 283 and 302 of its 1974 penal code), Belgium (1981 law), Bulgaria (section 35 of their constitution and section 196 of its penal code), Denmark (section 266(b) of its penal code), Finland (chapter 13, article 5 of its penal code) and France (sections 72-545 of its 1972 Law Against Racism), as well as other examples. Different forms of persecution based on nationality are widely accepted today as a form of racism.

(d) Adv. Papo also claims that "incitement" is not listed among the prohibited actions in the provision defining racism. To support his claim, he turns to the Knesset debate regarding the suggestion to include incitement in the definition in the new Section 144a of the Penal Code, but notes that the suggestion was ultimately not accepted.

I do not see how the [Knesset] debate helps us interpret Section 7a. Subsection (3) explicitly mentions incitement; therefore, there can be no doubt that in the context, the legislature refers to incitement. Furthermore, even in the case of the Penal Code, such a claim cannot stand because the criminal offense (unlike the definition of "racism") explicitly refers to publicizing with the intent to incite.

13. We now turn to the Appellants' claims against the decision of the Central Election Committee. Adv. Papo first raises a formal claim against the validity of the decision (absent a reason); second, he challenges the validity of the considerations taken into account by the members of the committee; and third, against what he claims is the wrongful application of the law to the concrete facts brought before the committee.

14. (a) We quoted the reasoning of the Central Election Committee in paragraph 1 above. The Appellant's objection is based on the argument that in the specific set of circumstances before us, the committee is bound by the Administrative Procedure Amendment Law (Statement of Reasons) 5719-1958 and is obligated to provide detailed reasoning for its decisions. Because it did not do so, its decision should be nullified.

(b) The 5719 law is not relevant to this issue because of those entitled to a reasoned response, [who, in this case, are those seeking a disqualification], and in light of the definition of the term "public servant" under Section 1 of the law.

(c) The question of when the Knesset plenum or a Knesset committee must provide a reason for its decisions has been addressed by this Court in HCJ 306/81 *Flatto-Sharon v. Knesset Committee*, IsrSC 35(4) 118, and this judgment also applies to decisions made by the Election Committee. As then-Deputy President Y. Cohen stated (at 133):

> The decision of the Knesset committee regarding the suspension did not provide any reasoning. I see no problem with this, as we are dealing with a body made up of various members, each of whom certainly had their own reasons. The decision is a reflection of the collective will of the members who voted in favor. To a certain extent we can find out the reasons by examining the transcripts of the hearings before the committee…

This issue came up again in HCJ 620/85 where my honored colleague, Justice S. Levin said (*Id*. at 285):

> …When we refer to a collective body such as the Knesset, which has no requirement to rationalize its decisions, we can, to a certain extent, understand its considerations by examining the transcript of its hearings (HCJ 306/81).

We also have all the information that was before the committee, including transcripts from the hearings in which the members stated their reasoning. Included in the transcripts are the exhaustive and well reasoned summaries of the committee's chairman. Thus, we see that the reasons and the background of the committee are available to us and to the Appellant.

(d) There can be no doubt that, practically speaking, the underlying reason for the committee's decision can be understood, and that the Appellant was well aware of it. When informing the Appellant of its decision, the committee cited the paragraphs of Section 7a that it believed to be relevant to the matter and notified the Appellant of its right to appeal the decision as required by the Knesset Elections Act.

(e) Furthermore, as the court hearing this appeal, this Court has the right to reach, based on the material before it, any decision that the Committee could have made (HCJ 86/58 *Boganim v. Chief of General Staff of the IDF*, IsrSC 12, 1653, 1663, note d). Essentially, this Court, hearing such an appeal, has a lot of authority and, in light of this, one reason or another does not hold us back from reaching a decision on the merits.

Therefore, claiming that there is a lack of reasoning in the decision is baseless.

15. In EA 3, 2/84, we listed the issues that this Court, as the appellate court, must investigate when reviewing a decision made by the Central Election Committee. They are: whether the proceedings were held in a legal manner, meaning that there was no violation of natural justice; that the hearing followed the procedural guidelines established by the statute applying to the authority or its own regulations; that the decision was rendered by the proper authority, and is consistent with the power of the authority. Additionally, we examine if the deciding body exercised its authority consistent with its purpose; that there was no legal error; and that the decision was not reached deceitfully or influenced by deceit. We must also make sure the decision is supported by the evidence provided and does not violate the law in any way. An authority may only exercise its power pursuant to its purpose. This obligation is made up of several parts, which include: it cannot take irrelevant or external considerations into account; the authority must not fail to take into account any relevant information; the decision cannot be so radically unreasonable that no reasonable authority could ever reach such a decision, and it cannot be proven that the decision was reached arbitrarily.

16. (a) The general claims of Adv. Papo against the decision of the committee are that the committee acted discriminatorily, in bad faith and took into account irrelevant considerations. The discrimination manifested itself from the fact that the committee did not investigate other parties to determine whether or not they are also in violation of Section 7a. Its lack of good faith was expressed, according to Adv. Papo, inter alia, because of the fact that members of the committee came to the hearing prejudiced and with their minds already made up after previously meeting with their respective parties. The irrelevant consideration was the fact that the members of the committee were interested in disqualifying the Appellant's party because their own respective parties stand to gain electorally or because of

the publicity.

(b) The claim of discrimination in the case before us is unfounded. This time, for the first time, there were many requests to disqualify parties, including that of the Appellant, which, asked to disqualify all the other parties. Therefore, from a factual standpoint, there is no basis for the claim that the committee only took up the Appellant's case.

(c) If [the members of the committee] indeed met internally with their respective parties, a claim which has been denied, it would probably reveal a side effect of the statutory arrangement in the Knesset Elections Act, according to which, the Central Election Committee, which is made up of representatives of the parties, is the body that determines whether a particular party is approved or disqualified. In other words, it is a natural byproduct of the political segment of the committee, established to organize the elections and that also has authority pursuant to Section 63 of the aforementioned act, when political activity is at its peak (*See also*, HCJ 731/84 *Kariv v. Knesset Committee of the Knesset*, IsrSC 39(3) 337, 338 (S. Levin, J.); HCJ 620/85 at 242 (Deputy President). In both EA 1/65 and EA 2, 3/84, this Court has pointed out the problem of authorizing a political body to disqualify political parties. As it appears from [the law], the legislature disagrees and has left the current arrangement as is, even after enacting Section 7a. This demonstrates the importance of the right to appeal to the courts, which is guaranteed by the Knesset Elections Act.

Nevertheless, one cannot expect a politicized committee to conduct itself in the same way as a court.

(d) Regarding the claim that the committee members took into account their own interests and that of their respective parties, there has been no evidence from which we could conclude anything more than what we said above regarding the

allegation of bad faith. All we have are the assumptions and speculations of the Appellants, which, as we have said, are essentially anchored in the structure of the system by which disqualifications are decided. If we find the decision to be just on its merits based upon the information before us, the aforementioned allegations regarding bad faith and self-interest are irrelevant.

17. (a) We turn to the decision of the committee, which was, by a majority vote, to disqualify the Appellant because it is in violation of both subsections (2) and (3) of Section 7a. The Appellant claims, however, that its actions are legal both inside the Knesset and outside of it, and that its goal is to revoke civil and other rights of the Arab population in Israel and to restrict it in order to counteract the demographic balance tilting against the Jewish population. It claims that it is acting within the confines and on the basis of Jewish law. The Appellant also claims that its actions do not constitute racism, because positive discrimination in favor of the Jewish population does not constitute racism against the Arab population.

(b) The general claim of Adv. Papo that we cannot take into account the legal actions of the Appellant (for example, proposing legislation, protesting with a permit, etc.) is unacceptable. When the legislature refers, in Section 7a, to objectives and conduct denying the democratic nature of the State or inciting racism, it did not distinguish between objectives and conduct according to the standard suggested by the Appellant, which distinguishes between legal actions and those which are illegal. The nature and content of an objective or behavior and their results are what make the determination, because the legislature wanted to prevent the occurrences described in Section 7a. Incitement against a portion of the civilian population and calling for their rights to be denied; suggesting that close relationships between Jews and members of another nation be outlawed; calling for discrimination against members of another nation in matters of criminal

punishment; revoking their right to petition the High Court of Justice; separating where they can bathe; revoking their social rights and forbidding them from serving in the army, while hurting and insulting those who already serve – all these actions and anything similar are all clear indicators of anti-democratic or racist acts. The same applies even if these suggestions are stated in a newspaper article which is published with a proper license or if the idea surfaces by way of proposed legislation in the Knesset (HCJ 620/85 at 210).

(c) My colleague, the Deputy President, has already extensively dealt, on the basis of his profound knowledge, with the Appellant's claim requesting recognition that its goals and actions are justified under Jewish law, and dismissed [it] entirely. I will not repeat all of what he had to say on the matter, which is written in EA 2, 3/84 at 298 on, but I will quote a part of his decision (at 301-302):

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

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

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

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

18. These are the guiding principles for interpreting Section 7a:

(a) The objectives or conduct of a political party are included in subsections (1), (2) or (3).

(b) The objective in question is central and essential to the party's platform and not merely a subordinate or marginal issue; the objective must reflect the party's identity. The same applies, mutatis mutandis, regarding conduct, as it must be an act that prominently expresses the nature and character of the party.

(c) The party is acting to implement its goals in order to turn what is currently conceptual into a realization.

(d) [The party's] participation in the elections is a method for the party to realize its objectives or further its conduct.

(e) The negative conditions listed in subsections (1), (2) and (3) manifest themselves with great gravity and are taken to the extreme.

(f) The evidence of the presence of all of the above must be clear, convincing and unequivocal.

Throughout the examination of the relevant factors listed above, it must always be remembered that it is preferable to allow the freedoms than to limit them.

19. A lot of evidence was submitted, including books, proclamations, proposed legislation and a newspaper interview. With the exception of some unimportant details, which bear no impact upon the matter, there is no real dispute as to the content of the evidence. As stated, the Appellants' claim is not directed at the content of the evidence; its argument is that all its actions are consistent with Jewish law, stem from it and are necessary for security purposes. Security purposes do not justify the serious and repulsive racist agenda such as the Appellants', [and] as to their reliance Jewish law, this [argument] has already been explicitly and clearly refuted in EA 3, 2/84, and I have cited to part of the decision of my colleague, the Deputy President, who discussed this issue in great detail.

20. Our clear conclusion is that the Central Election Committee rightfully disqualified the Appellant's party, because its publications, speeches, proposals and actions contain both incitement to racism and the deprivation of the democratic nature of the State under Section 7a.

The Appellant wishes to deprive a portion of the citizens of the State, which it distinguishes by its national origin and ethnicity, of their right to vote, to be elected and to be appointed to government positions. Stripping such rights is a clear and unequivocal infringement upon the very soul of democracy, which is based on equal political rights among all citizens, irrespective of race, religion, nationality or gender. The comparison to other countries who, for example, have only allowed women to vote in recent years, and who, even prior to that were

considered democratic, is pointless. We refer to the definition of democracy which is accepted today and in accordance with our own view, according to which, for example, not allowing women to vote would be considered a distinctly anti-democratic act, which no one would even think of doing. The same applies to the idea of collectively depriving citizens belonging to a certain group of their rights, which is also an absolutely anti-democratic act that one should not come to terms with.

The Appellant's objectives and conduct 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. All these reasons suffice, in light of the evidence presented, to come to this conclusion regarding incitement to racism. The extent of the actions taken by the Appellant in all its forms; the extremism through which it presents the action accompanying it; and the terrible distortion of the nature of the State and its regime that flow from it point to the severity of its objectives and conduct that requires that we affirm the decision of the Central Election Committee.

We have decided to dismiss the appeal.

Decided today, 7 Cheshvan 5749 (October 18, 1988)