RABBI KAHANE, INTERNATIONAL LAW, AND THE COURTS: DEMOCRACY STANDS ON ITS HEAD

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I. INTRODUCTION

This article examines two judicial decisions of the Israel Supreme Court and one of a United States federal court: *Moshe Neiman v. Chairman of the Eleventh Knesset Elections Central Committee*,[1] *Kahane v. Schutlz and Meese*,[2] and *Kach Party v. Chairman of the Central Election Committee for the 12th Knesset*.[3] The cases are factually similar and relate to each other in peculiar ways. All three cases concern the legal challenges posed by the political activities of the late Rabbi Meir Kahane,[4] the American born founder of the Jewish Defense League and of Israel's rightist Kach Party. As a political activist at home on both sides of the ocean, Kahane generated a series of legal problems which present distinct challenges to two sets of national judiciaries.

Perhaps more interesting than the factual linkage between the three cases is the common thematic connection between Kahane's various trials. Indeed, the identification of these common themes lies at the heart of this article's endeavors. Moreover, closer examination of what otherwise appears to be the disparate legal challenges of Kahane may illuminate the legal implications of Kahanism as a political philosophy[5] and the prevalent normative viewpoints housed by the American and Israeli judiciaries. The response of the two sets of courts—

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1. 39(II) P.D. 225 (Isr. 1984) (Election Appeals).

2. 653 F. Supp. 1486 (S.D.N.Y. 1987).

3. 42(IV) P.D. 177 (Isr. 1988) (Election Appeals).

4. Meir Kahane was shot to death in New York on November 5, 1990. As the rabbis say, may his soul find its peace.

5. For present purposes, the political philosophy espoused by Rabbi Kahane and his Kach Party might properly be characterized as one of ultra-nationalism. See Rabbi Meir Kahane v. Shlomo Hillel, Chairman of the Knesset and Others, 40(IV) P.D. 393, 406 (Isr. 1985) (High Court), where Judge D. Levine described the proposed legislations submitted by Kahane as follows:

> The common denominator of all these proposed legislations is that they are aimed at discriminating between a Jewish Israeli citizen and a non-Jewish Israeli citizen. Their aim is to deny to non-Jewish citizens the fundamental rights which are given to Jewish Israeli citizens and in some of them the idea is to forbid encounters and personal relationships between Jews and non-Jews and to punish those who do so. This idea is obviously racist

through their attempts to curtail Kahane's actions and diminish his legal stature—have revealed much about the nature and operation of their own governing ideas.

This article will analyze each of the domestic court decisions against the body of international law doctrine that each case invokes. Thus, Kahane's confrontations with those administrative and legislative branches of the Israeli state acting in defense of minority rights will be compared with those pronouncements of international human rights law which enunciate the universal prohibitions on discrimination. Likewise, Kahane's citizenship battles with the United States government will be compared with public international law cases which address the question of nationality and the sovereign state's relationship with its nationals.

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and its goals contradict the fundamental principles and the high moral standards and values of the State of Israel.

Id. See also Rabbi Meir Kahane v. Shlomo Hillel, Chairman of the Knesset, 39(IV) P.D. 85, 88 (Isr. 1984) (High Court), where Judge Barak described in detail the proposed legislation submitted to the Knesset by Rabbi Kahane as follows:

> The first proposed legislation according to its name deals with Israeli citizenship and the exchange of population between Jews and Arabs. According to this proposal only a member of the Jewish people would be a citizen of the State of Israel. Non-Jews would have the status of a resident alien ("*ger toshav*"). Every resident alien would have personal rights only, he would not be allowed to live in Jerusalem, he would not be entitled to any national right, he would not participate in political proceedings in the State of Israel, he would not be entitled to be appointed to any public office and obviously he would not be entitled to vote in the elections to the Knesset or any other public body. Non-Jews who refuse to accept this status would be expelled from the State, willingly or unwillingly, and would be compensated according to certain standards. The second proposed legislation is a law for the prevention of assimilation between Jews and non-Jews. In this proposal it was laid down that all governmental programs that might create contact between Jews and Arabs would be abolished, separate beaches would be established for Jews and non-Jews, non-Jews would not be allowed to live in a Jewish neighborhood, intermarriage or intercourse between Jews and non-Jews would be forbidden and the parties to any existing intermarriage would be obliged to separate.

Id. Judge Barak described this proposed legislation as "one of the rare cases of a black flag of disgrace and of racist hatred and nationalistic propaganda." *Id.* In *Moshe Neiman*, 39(II) P.D. 225 (Isr. 1984), Judge Bejski described the material on the Kach Party submitted as evidence to the Central Elections Committee (CEC) of the Knesset as follows:

> Many publications, leaflets, pamphlets, articles and papers [are] so full of racist hatred, that it is more than even the paper on which they are written can bear, the substance of which is the expulsion of the Arab population to other countries and the denial of rights to the Arab population remaining in our country and the denial of social security to Arabs in order to discourage child bearing in this sector of the population. In a press conference, Rabbi Kahane advocated terrorism against the Arab population by according the status of saint to people involved in such terrorist acts. In one of his speeches Rabbi Kahane promised that if he were appointed as Minister of Defence he would destroy the Arab mosques on the Temple Mount. He proposed five years' imprisonment as mandatory punishment for any non-Jewish person having intercourse with a Jewish woman. He advocates not hiring Arab workers and he advocates persuading the Arab population to leave the country willingly.

Id. at 333. In Kahane's own terms, Kahanism is most accurately understood as a movement that stands in direct opposition to the ideology of liberalism. *See* Kahane, *Is Israel's Soul Imperiled? Yes, By Liberal Jews*, N.Y. Times, Dec. 20, 1985, at A35.

II. *MOSHE NEIMAN*: INDIVIDUAL RIGHTS BOW TO THE POLITICAL COMMUNITY

In the 1984 election to Israel's Knesset, Rabbi Kahane emerged as a serious candidate for the first time. His Kach Party gained 1.2% of the popular vote, allowing Kahane to attain a seat in the legislature.[6] The electoral success inaugurated a new political era for Kahane and his supporters. Moreover, Kahane's election came in the wake of an attempt by the Knesset to banish the Kach Party candidates to the political wilderness by administrative fiat. As a prelude to the 1984 election campaign, the Central Election Committee (CEC), whose statutory responsibility it is to confirm the participation of submitted party lists,[7] refused to confirm Kach's list of candidates. The result was a challenge to the CEC's exercise of administrative powers brought by Kahane and others in the Israel Supreme Court.

The reasons for the administrative decision to ban Kahane and his party were straightforward. Specifically, the CEC found that the Kach platform expressed a fundamentally racist ideology, and that its principles were thereby contrary to the Declaration of Independence[8] of the state of Israel. The CEC also reasoned that since Kahane openly and vocally supported terrorist acts against the country's Arab population, his political activities were aimed at producing an unacceptable inflammation of ethnic relations between different sectors of the Israeli public.[9] Accordingly, the electoral registration mechanism was implemented to defeat Kahane in the name of race relations, minority rights, and furthering the basic legal norms of equality and anti-discrimination.

The Israel Supreme Court denied the CEC's statutory authorization to make such a decision. The court held that the CEC's decision-making power in administering the electoral lists was limited to the consideration of various formal requirements expressly embodied in the governing legislation, and did not embrace substantive ideological scrutiny.[10] The court went on to agree with the

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6. Kahane had run in the 1981 elections, but had attracted no more than .25 percent of the electorate. *See Kahane Appeal To Oust Arabs Gains In Israel*, N.Y. Times, Aug. 5, 1985, at A1, A6.

7. Law For The Election Of The Knesset (Knesset Elections Law), 5729-1969 S.H. 103, ch. 8, § 63 (consolidated version).

8. The Israeli Declaration of Independence states in part:

> The State of Israel will be open for Jewish immigration and for Ingathering the Exiles (*kibbutz galuyot*); it will foster the development of the country for the benefit of all inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

The Israeli Declaration of Independence (Isr. 1948) [hereinafter Israeli Declaration].

9. *See generally supra* note 5 and accompanying text (describing the political philosophy of Rabbi Kahane and the Kach party).

10. In *Moshe Neiman*, 39(II) P.D. 225 (Isr. 1984), Judge Shamgar stated:

> The fundamental rights, including freedom of speech, freedom of belief and equality in running for public office are the basic elements of our governmental system and our judicial system. Views and opinions among every society are always different and varied. In a free society the variety is in the open, in a totalitarian society the variety is disguised and hid-

CEC's concern for protecting minority rights and weighed this attitude against other norms prevailing in Israeli society. Thus, in order to fully grasp the significance of this legal vindication of Kahane's claim, the conceptual underpinnings of the defeated anti-discrimination norms must be more thoroughly understood.

A. Anti-Discrimination and Human Rights in International Law

It would seem trite to observe that as a fundamental human right, the right to be free from ethnic, racial, or religious discrimination stands as a vindication of individuality as against the political community or state to which the bearer of the right belongs. Indeed, the very starting point for the discussion of such norms in international discourse is generally the Universal Declaration of Human Rights[11] and other post-World War II instruments of human rights law. The thrust of such declarations is to place restraints on the acts of states for the sake of protecting their individual constituents.[12] Thus, while the classic posture of public international law might be said to have envisaged international order as composed of nations whose primary normative concern was with the

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den. The exchange of views, the clarification of attitudes, the public argument and the desire to know, to learn and to persuade are vital tools for every opinion and every belief in a free society. Establishing limitations and distinctions between citizens, some of whom are entitled to those rights and some of whom are not, contradicts the truth on which the foundations of those liberties are based. Theoretically the same attitude applies to the acts of someone who advocates against democracy using the rights of democracy and the acts of someone who denies democratic rights based on the danger to democracy. Even with unacceptable views and ideas one must argue and search for ways of persuasion. Prohibitions and limitations are only an extreme and last measure to be taken. . . . Hence the meaning of liberty is not anarchy and there are circumstances when it is vital to impose limitations just as it is vital to open legal proceedings when a felony is committed. But it must be obvious that the limitation has to be based on formal legislation and also that the main motive for its operation is only as a last and extreme measure when inevitable danger to democracy is evident. There always has to be a logical connection between the amount of damage and the measures applied in order to prevent it and not every provocation, revolting though it may be, has to give rise to denial of liberty right down the line. Democracy which applied limitation, other than against existential necessity, loses its values and strengths. The existence of rights must not be influenced by passing events and momentary emotions and when there is a need for limitation of fundamental rights there is no room for improvisation and characterisation according to the needs of the hour.

In a state which views the rule of law as the main means of protection of its citizens against any dangers from inside and which believes in the values of democracy, there is no limitation on the freedom of the human being, other than according to law, and any limitation is denial unless it is the last and extreme measure against obvious danger which might cause those liberties the same damage.

Id. at 279.

11. G.A. Res. 217A (III), 3(1) U.N. GAOR at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

12. *See* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950); M.S. MCDOUGAL, H.D. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980); L.B. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973); R.B. LILLICH & F.C. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY (1979).

preservation of separate and equal nationhood,[13] the modern human rights trend (of which anti-discrimination law is an integral part)[14] is to posit world order as composed of a universe of equal persons legally requiring human dignity from all national political actors.[15]

Perhaps the most obvious cases in point are those in which racially discriminatory governments have been found to offend against operable international human rights, notwithstanding that no other sovereign state was violated in any direct way. Thus, for example, the segregationist character of the Southern Rhodesian regime (prior to the 1979 emergence of Zimbabwe) was condemned by the United Nations Security Council as being contrary to fundamental human rights.[16] The ruling has been taken as establishing racial discrimination as an independent international offense.[17] Similarly, international legal pronouncements on South Africa's system of *apartheid* emphasize the concept of individual equality in a way which makes this principle paramount to the political will of any given national community.[18] Accordingly, South Africa's attempt to exploit international law's classical conceptual structures by dividing the country's ethnic groups into quasi-sovereign political "nations" has been met with condemnation on the basis of universal human similarity and equality.[19] The doctrinal statements reflect a reversal of traditional international law notions. Persons are significant in contemporary human rights discourse not because of their identity as part of a particular nation, but as independent bearers of international rights. This legal vision at once distinguishes persons from the juridical identity of their given political community and makes them indistin-

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13. For a history of the way in which classical international law dealt with the relationship between individuals and states, see Morgan, *Retributory Theatre*, 3 AM. U.J. INT'L L. & POL. 1 (1988).

14. The Universal Declaration states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Universal Declaration, *supra* note 11, art. 2. Article 7 states: "All are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.* art. 7.

15. For a legal theory argument to this effect, see Brudner, *The Domestic Enforcement of International Covenants On Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219 (1985) [hereinafter Brudner]. For a discussion of the inappropriateness of considerations of national sovereignty in the human rights era, see R. LILLICH, HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (1973).

16. For further commentary on these developments, see Fawcett, *Security Council Resolutions on Rhodesia*, 1965-66 BRIT. Y.B. INT'L L. 112 (international resolutions on Rhodesia establish the principle that "[a state] shall not be based upon a systematic denial in its territory of certain civil and political rights.").

17. *Id.*

18. *See, e.g.*, G.A. Res. 2775, 26 U.N. GAOR Supp. (No. 29) at 39, U.N. Doc. A/8429 (1971); G.A. Res. 3411, 30 U.N. GAOR Supp. (No. 34) at 35, U.N. Doc. A/10034 (1975) (both declaring the international illegality of South African policies aimed at perpetuating racially and ethnically unequal treatment).

19. *See* G.A. Res. 31/6A, 31 U.N. GAOR Supp. (No. 39) at 10, U.N. Doc. A/31/39 (1976) (condemning "the so-called independent Transkei and other bantustans"). *See generally* Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185 (1978).

guishable from the universe of equal rights bearers in all the world's communities.

On the other hand, it is not accurate to say that the concept of international human rights has altogether countered the doctrinal significance of state sovereignty, or that the philosophy of individual rights has undermined the conceptual primacy of the national community as the organizing structure of international legality. Thus, human rights themselves are generally said to derive from the interstate covenants and other consensual instruments in which they are authoritatively articulated.[20] The implication is that the principal creator and protector of individuals' legal stature is the political will of nations.

In similar fashion, the debate to define the scope of international law's substantive rights and wrongs wavers between vindication of the individual in a way which transcends and penetrates all political communities, and vindication of nations in a way which insulates communities from the invasive interests of outsiders.[21] Human rights norms in general, and anti-discrimination laws in particular, are not, therefore, unambiguous phenomena. They seem to evoke, in surprisingly equal fashion, a theoretical concern for nations and their constituent elements, or the public's general good and particular private rights. They can also be seen to emphasize political community at the expense of submerging individual identity, as well as submerging individual dignity in the face of the community.

At issue in the *Moshe Neiman* case was not, of course, the direct enforcement of an international treaty rule binding on the state of Israel. Rather, Kahane's challenge was launched against the administrative enforcement of anti-discrimination norms as generally existing legal principles. In seeking to comprehend the court's dismissal of the concern for minority rights, it is instructive to examine some leading judicial decisions considering the domestic internalization of international human rights where there is no direct treaty on which to rely. After all, the Israeli court was not faced with legislation that in some explicit way prohibited the considerations which the Knesset's committee took into account in carrying out its mandate. Rather the court was faced with a silent governing statute.[22] Accordingly, the court had to draw on *some* extant principles in undermining the exercise of administrative powers under the cir-

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20. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (tracing enforceable human rights to U.N. Charter, unanimous General Assembly resolutions, and multilateral conventions); *See* Fujii v. California, 242 P.2d 617, 620-22, 38 Cal. 2d. 718 (1952) (human rights are only enforceable when they qualify as binding treaty provisions and are thus "supreme law of the land").

21. *Compare* Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985) (arguing that modern rules of international conduct express a basic concern for keeping governments and states in their rightful place) *with* D'Amato, *Nicaragua and International Law: The 'Academic' and the 'Real'*, 79 AM. J. INT'L L. 657 (1985) (arguing that even the traditional rules of international conduct express a basic concern for human rights).

22. The point of the case is not that the Law for the Election of the Knesset specified substantive scrutiny by the Committee with regard to certain subject matters and not with regard to others, but rather that it was silent on the question of substantive scrutiny altogether. Indeed, in a previous decision, the Israel Supreme Court had ruled that the Committee did have the power to refuse to confirm a particular party's list based on substantive examination of that party's platform where the

cumstances. Thus, the ways by which other domestic courts have internalized human rights will be identified before considering the norms that the court in this case found to be counterpoised against such rights.

In *The Paquete Habana*,[23] the United States Supreme Court made a seminal attempt to extract and internalize a notion of individual rights from the norms of international relations. The case involved a small fishing boat flying the Spanish flag and operating out of Havana which was captured in the United States blockade of Cuba during the Spanish-American War. The vessel was brought into an American port and was claimed by its captors as a prize of war. The central question was whether the prevailing principles of international legality allowed for the owner of the impounded boat to defend himself against the United States claim.

The Supreme Court's opinion articulates the premise that "[i]nternational law is part of our law, and must be ascertained and administered by the courts . . . as often as questions of right depending upon it are duly presented for their determination."[24] At the time, there was little prior jurisprudence on the subject of domestic incorporation of international law doctrine; hence, the fisherman's claim for return of his vessel presented the United States courts with a quandary. Since the Paquete Habana flew the flag of Spain—a nation with which the United States was at war—the international claim made by the individual fisherman placed the judiciary in the position of passing judgment on (and, in effect, thereby regulating) America's military operations against a national enemy.[25]

The Court reasoned its way to enforcement of the appellant's claim by subtly dissociating fishermen as a class from the identity of their ship's flag. The Court asserted that "coast fishing . . . is, in truth, wholly pacific, and of much less importance, in regard to the national wealth that it may produce, than maritime commerce or the great fisheries."[26] Furthermore, the Court acknowledged that the appellant, like "peasants and husbandmen," was part of "a class of men whose . . . labor . . . [is] foreign to the operations of war."[27] Then, after effectively separating the claims of Spanish fishermen from the military activity of Spain, the Court felt free to pronounce agreement with the international law rule that "exemption of coast fishing vessels from capture is perfectly justiciable."[28]

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party advocated destruction of the state of Israel. Yeridor v. Chairman of the Election Central Committee, 19(III) P.D. 365 (Isr. 1965) (Election Appeals).

23. 175 U.S. 677 (1900).

24. *Id.* at 700.

25. In a case nearly a century earlier, the United States Supreme Court considered a similar question of judicially enforceable rights flowing from the law of nations. The Nereide, 13 U.S. (9 Cranch) 388 (1815). In that case, however, the question was the less dramatic one of the rights of neutral shipping during times of naval hostilities. For a discussion of the historical development of legal doctrine in this field, see Morgan, *Internalization of Customary International Law: A Historical Perspective*, 12 YALE J. INT'L L. 63 (1987).

26. *The Paquete Habana*, 175 U.S. at 702.

27. *Id.* at 703 (citing CALVO, INTERNATIONAL LAW § 2368 (5th Ed. 1896) (French translation)).

28. *Id.* at 708.

In other words, the act of capture of the fishing boat was distinguished from acts done in pursuit of the public's good "to which all private interests must give way."[29] In this way the Court was able to pay some homage to "the recognized rights of belligerents"[30] to pursue their national interests in an unimpeded way, while at the same time separating vessel and flag—or the enemy's actions from those of its private fishermen—so as to create a judicially enforceable exemption for the latter.

This distinction between international law rights in the public realm and those in the private realm effectively recharacterized the issues at stake in *The Paquete Habana*. The law of nations was transformed from a forum in which people interact as agents on behalf of disputing states, to one in which state power confronts individual rights. The distinction, although highly functional, is not quite logically defensible; the internalization of fishermen's private rights under the circumstances effectively circumscribed the distinctly public war-making power, regardless of the Court's refusal to evaluate the nation's military activities. For present purposes, the point to be noted is that the two types of rights—that of the American public as against a foreign (and belligerent) nation, and that of the individual Spanish fisherman as against the American state—seem to go hand-in-hand in international law even where one type is being distinguished from the other for the purposes of enforcement.

In legal theory terms, it might be noted that the Court in *The Paquete Habana* deliberately classified the protection of coastal fishermen as a requirement not of natural right, but of positive law.[31] As is typical of international discourse, the judgment was supported in this regard by making constant reference to sovereign consent.[32] Thus, although there was no specifically applicable treaty for the Court to examine, it engaged in a lengthy survey of other existing treaties which called for an exemption of coastal fishermen from capture as prize of war. The freely willed consent of sovereign states was identified by the Court as the means of sanctioning the exemption rule. The Court reasoned that "[l]ike all the laws of nations, it rests upon the common consent of civilized communities . . . [and] is of force . . . because it has been generally accepted as a rule of

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29. *Id.*

30. *Id.*

31. In the early nineteenth century the United States judiciary felt free to restrain sovereign power in a number of contexts by invoking natural right. *See, e.g.*, Gardner v. Village of Newburgh, 2 Johns. 161 (N.Y. 1816) (stating that the "great and sacred principle of private right"—that of compensation for a taking of property—could not be violated even by an explicit statute); *The Nereide*, 13 U.S. at 388, can be seen as an international law parallel to this idea, in that the court constrained American "privateers" from capturing neutral shipping by simply invoking (or concocting) a rule of natural reason.

32. *See, e.g.*, The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 18 ("international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted. . . ."); Reservations to the Genocide Convention Case, 1951 I.C.J. 32 (advisory opinion) (Guerrero, McNair, Read, and Hsu Mo, JJ., dissenting) ("the legal basis of . . . conventions, and the essential thing that brings them into force, is the common consent of the parties"); Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277 (articulating a generalized, but distinctly consensual basis for customary legal obligation).

conduct."[33]

The international positivist theme, much like the distinction between public and private international law rights, helps dissipate the conflicts created by domestic incorporation of an international human right. The Court seems to rationalize that even if norms not specifically authorized by domestic law are imposed to limit the exercise of sovereign power, the source of these norms is none other than the consent of the sovereign itself. One should not, however, allow the references to consensual positivism obscure the picture of the case. What is internalized in *The Paquete Habana* is not all of international law, but only those particular rules which here translate readily into a claim of individual right. Thus, expressions of humanitarian concern for coastal fishermen, grounded on the natural rights implicit in the human condition, consistently accompany the references to sovereign consent and at times transcend the otherwise felt need for state concurrence. In one typically double-edged sentence, the Court therefore concluded that "by the general consent of the civilized nations of the world . . . founded on considerations of humanity to a poor and industrious order of men . . . coast fishing vessels . . . are exempt from capture as prize of war."[34]

The curious mixture of sovereign consent with humanitarian impulses produces a constant interplay in the case between theories of positivism and notions of natural right. Although there is no explicit identification of natural rights, the Court protects persons pursuing the "absolutely inoffensive, and deserving" and "eminently peaceful"[35] business of coastal fishing not because of any positive enactment or agreement by heads of state, but because "the principles of equity and humanity"[36] seem to demand it. In the Court's view, Spain and the United States may have consented on behalf of their respective polities to the positive rules of international conduct out of national self-interest. Under the present circumstances, however, it is equally clear that the general agreements are simply part of the idea that failure to honor the private exemption accorded the fishermen would be inhumane. Ironically, international legal rights are characterized as both a product of the two nations' politics, and a matter about which neither nation has any real political choice.

At this point it would be helpful to examine the domestic internalization phenomenon in the specific context of international norms aimed at prohibiting racial discrimination. The interesting question is whether a repeat can be found of the ironic play of rights exhibited in *The Paquete Habana*, in which personal rights are said to come from the public's participation in international affairs as well as from the private individual's conceptual distinction from the public's affairs. Afterall, the concern of anti-discrimination norms— the fostering of legal protection for the individuals of society as against each other— is somewhat distinct from that of the rights of private persons as against state power.

33. *The Paquete Habana*, 175 U.S. at 677, 711.

34. *Id.* at 708.

35. *Id.* at 707.

36. *Id.*

One wonders, therefore, whether the law's discernible ambivalence over the theoretical source of human rights norms will be clarified in this context.

In one of the earliest Canadian human rights cases, *Re Drummond Wren*,[37] the Ontario High Court considered a challenge to the enforcement of a covenant precluding the sale of a particular parcel of land "to Jews or persons of objectionable nationality."[38] The petitioner successfully argued that although there was no specific statutory prohibition on such ethnic and religious discrimination in private transactions, the restrictive covenant was substantively contrary to existing public policy. In particular, the court considered the question of public policy as expressed in the United Nations Charter, various Canadian federal and provincial civil liberties enactments not technically applicable to the sale of land, the resolutions of various international bodies (some of which Canada was a member), and even a comparative law survey of other countries' domestic constitutions (including both Western and Soviet models).

In a far-reaching decision, the court found that the variety of international and domestic anti-discrimination instruments were, although formally inapplicable to the case, relevant as evidencing "wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate."[39] The victory for internalizing non-discrimination norms in Ontario, however, was short-lived. It took only three years for the Ontario High Court to reverse itself, finding in *Re Noble and Wolf*[40] that ethnically restrictive covenants in land transactions could not be said to offend any existing policy of the province or the country. Indeed, the court reasoned that in the previous case of *Re Drummond Wren*[41] it had mistakenly ignored "the paramount public policy that one is not lightly to interfere with freedom of contract."[42] The internalization of an international policy, especially in the absence of a specific transformative legislative act, was said to always be subordinate to an identifiable and contrary domestic legal principle.

Inherent in the theoretical objection to internalization of the anti-discrimination policy in *Re Noble and Wolf* was a perception that "public policy" was not an appropriate basis for a judicial decision. The court expressly associated public policy of the type invoked in *Re Drummond Wren* with "political expedience,"[43] the connotation being that enunciation of any such standard was a matter for the legislature rather than for the court's elaboration. The distinction over appropriate institutional functions, in turn, translated into the notion of a crisp differentiation between public law and private law rights. In the court's view, the legislature could certainly articulate the norms engendered by the public's participatory politics, one of which might well be the requirement that all

37. 4 D.L.R. 674 (1945).

38. *Id.*

39. *Id.* at 679.

40. 4 D.L.R. 123 (1948), *aff'd*, 4 D.L.R. 375 (1949).

41. 4 D.L.R. 674 (1945).

42. Re Noble and Wolf, 4 D.L.R. 123, 139 (1949).

43. The court made reference to a renowned dictum to this effect by Parke, J. in Egerton v. Brownlow, 10 E.R. 359 (1853).

members of an ethnically heterogeneous public be permitted equal participation and be given equal treatment under the law. However, the other side of the coin was that the judiciary's role was, in the absence of specific and explicit statutory direction, to implement and protect private rights of contract rather than the norms of public participation.

The reasoning of the Ontario High Court in *Re Noble and Wolf* may, therefore, be seen to underline a distinction between rights in the private sphere and rights in the public sphere, relegating anti-discrimination norms to the latter. Thus, it is the legislature's task to implement the public's collective policies and acts, while the judiciary's task is seen as limited to delineating the private rights of society's individuals *inter se*. To state this as the ground for overruling the earlier decision in *Re Drummond Wren*, however, is to misconstrue the theoretical essence of *Re Drummond Wren* itself. What the language and reasoning of the earlier case in fact evokes is a vision of anti-discrimination norms derived from a hybrid public and private source, much like the human rights articulated in *The Paquete Habana* and contemporary international law instruments.

The *Re Noble and Wolf* court's reference to public policy as "political expediency" creates the impression of a process that attempts to maximize the public's welfare in light of a scheme of private rights which are the source of domestic common law.[44] The idea, embodied in international agreements and applied to public policies, is that the nation's self-interest collectively enhances the public's welfare as a national community; and it is for this reason that the court insists on specific legislative transformation of such nationally engendered policies before applying them among the constituents of the nation. However, it seems counterintuitive to apply such logic to the contents of international human rights instruments, whose very aim is not to foster the collective aspirations of nations but to enunciate individual rights within and against the world's sovereign states. In other words, human rights norms, of which the specific anti-discrimination provisions are a subset, are more typically portrayed not as manifesting particular national interests but as standing for universal personal rights—the very principles which the court in *Re Noble and Wolf* felt were within appropriate judicial bounds.[45]

Accordingly, when the Ontario court in *Re Drummond Wren* invoked the "public policy" of anti-discrimination, it was calling upon a notion that was on one hand a collective judgment of the nation in its dealings in the immediate post-War international arena, and so constituted a publicly imposed limit on the private right of freedom of contract. On the other hand, the policy itself stands

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44. *See, e.g.*, Brudner, *supra* note 15, at 240-247 (elaborating on private rights).

45. The notion of a right of contractual freedom that was seen by the court in *Re Noble and Wolf* as central to the law governing private transactions only makes sense as a manifestation of an underlying vision of the equality of individual free wills. It is this concept of personal equality which gives private, non-legislated legal rights their theoretical force. *See* KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 12-13 (Ladd trans. 1965) (discussing the universal human capacity for reasoned action as being the starting point for the analysis of rights); Weinrib, *Toward A Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983) (identifying equality of disputing parties as providing the ground for the corrective justice form of private law adjudication).

for something which is the antithesis of public wealth maximization in the face of private interests: the universal right of individuals and ethnic minorities to be free from the impositions of the community and its majority. It is the universality of the individual rights at stake, as opposed to the particularity of most nationally self-interested international policies, which allowed the *Drummond Wren* court to take into account policies contained even in foreign constitutions and international instruments to which Canada was not a party.

The lesson of the *Re Drummond Wren* and *Re Noble and Wolf* series of adjudications is that the rights identified with anti-discrimination notions, like all human rights, derive from and represent both the public's collective interests and the atomistic interests of the private individuals of which the public is composed. There is simply no logical way to separate the two themes. Of course, from a functional point of view a given court or administrative decision-maker may choose under the circumstances to emphasize one facet of rights and subordinate the other. However, the conceptual structure of international human rights is such that nations and persons, public and private interests, communities and individuals, are inherently intertwined and theoretically inseparable.

B. Moshe Neiman Revisited

With the international human rights phenomenon firmly in mind, one can look back on the *Moshe Neiman* case and appreciate the structural irony of the Israel Supreme Court's decision. As indicated, the CEC flexed its decisional muscles against Kahane and his party, invoking the spectre of racial discord and Kahane's espoused platform of anti-Arab discrimination as justifying the state's administrative intervention.[46] The idea, as suggested in *Re Drummond Wren*, is that the law (and its administrators) is obliged to internalize and apply prevailing norms of human rights and principles of anti-discrimination, even in the absence of an explicit legislative direction.[47] The CEC's vision of the relevant human rights principle is one which vindicates the individual dignity of those members of society victimized by the discriminatory affront.[48]

The *Moshe Neiman* court's response was to quash the administrative decision on the grounds that the governing statute provided no express authorization for the CEC to look beyond adherence to the formalities of registration by Kahane's party.[49] Accompanying this somewhat technical administrative law conclusion, however, is a thoughtful opinion by the majority on the nature of legal rights in a regime of parliamentary democracy. In Kahane's favor, the court invoked a number of "basic rights" of constitutional stature in Israeli law,[50] the foremost of which is the right of every citizen to vote and to be elected

46. *Moshe Neiman*, 39(II) P.D. 225.

47. *Id.*

48. *Id.*

49. *Id.*

50. Section 5 of The Basic Law of Israel states: "Every Israeli national aged eighteen and over shall have the right to vote in elections to the Knesset unless a court has deprived him of that right

to the Knesset.[51] In other words, unlike the *Re Noble and Wolf* approach in which the individualistic notion of freedom of contract was falsely paraded as a counter-principle to the similarly individualistic notion of non-discrimination, the court in *Moshe Neiman* invoked the truly public value of participatory politics as the legal counterweight to the CEC's anti-discrimination sentiments.[52]

Although the political ramifications of the decision might not be to one's taste,[53] it is difficult to criticize the court's approach on the level of legal theory. As discussed above, individual rights such as those supported by the CEC and participatory politics as the value invoked by the court, are two inseparable sides of the same legal coin. Both evoke the themes of human rights in contemporary legal discourse, and both sides of the equation seem integral to the governing norms of liberal democracy which human rights law inevitably reflects. While it was certainly up to the CEC in interpreting its silent statutory mandate to pick one theme over the other, it was equally open to the reviewing court to make the opposite choice. Thus, the court did not misconstrue the notion of fundamental rights; it simply preferred the public good of political participation over what was perceived as the private right of an ethnic minority to protection from abusive members of society.

The irony of the *Moshe Neiman* conclusion—that the answer to the CEC's liberal concern for unimpeded individual rights is the court's democratic concern for political participation—is evident almost as soon as it is stated. However, a closer reading of the decision reveals one final twist to the judicial reasoning pattern. The court's opinion proceeds on the premise that the crucial individual rights at stake in the controversy are not those of the Arabs who bear the brunt of Kahane's ideology, but are those of Kahane himself in being excluded from the electoral process. Thus, the court indicates that "the value and the power of a statute which grants rights . . . operate in equality, and in the event of infringement every person will get the same equal treatment."[54] The connotation is that failure to confirm Kahane's list on the basis of a discriminatory ideology will effectively subject Kahane and his colleagues to unequal treatment vis-a-vis all those whose electoral lists are (or would doubtless be) confirmed without regard to ideological considerations.

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by virtue of any Law . . . ." Basic Law (The Knesset), 5718-1959 S.H. 69, No. 244, § 5. Section 6 provides:

> Every Israeli national, who, on the day the List of Candidates in which his name is included is submitted, is twenty-one years of age or over, is entitled to be elected to the Knesset unless a court has deprived him of that right by virtue of any Law or he has been sentenced to five years or more imprisonment for a felony against the security of the State, as established by the Law of Election to the Knesset, and from the day of finishing his sentence five years have not elapsed.

Id. § 6(a).

51. *Id.*

52. *Moshe Neiman*, 39(II) P.D. 225.

53. Indeed, the majority of the court clearly indicated its own political distaste, reflected in Judge Bejski's comments, for the decision's ultimate support for Kahane's party and its racist platform. *See id.* at 333 (Judge Bejski's comment).

54. *Id.* at 262.

The final step in effecting the thematic reversal comes with the characterization of the CEC's invocation of anti-discrimination norms as being a form of public good, which in the court's view should not be taken to undermine Kahane's private right without specific statutory authorization.[55] Accordingly, the minority's right of freedom from ethnic discrimination is countered in the case by the public value of democratic political participation, which in turn translates into Rabbi Kahane's individual right not to be treated unequally in pursuit of the public value of non-discrimination. In a final ironic proof of the law's inability to conceptually separate forces which at first seem to stand in opposition to each other—public and private, or individual and political community—are manipulated at will. Thus, the competing themes of liberal democratic legalism are not only conceptually interrelated, but are quite figuratively capable of being judicially turned upside down.

III. *KAHANE V. SCHULTZ*: THE NATION BOWS TO INDIVIDUAL RIGHTS

Having won his courtroom battle in Jerusalem, Rabbi Kahane went on in 1984 to win his first ever contest at the ballot box.[56] It was not, of course, Kahane's first act of participation in Israeli public life. Indeed, the United States State Department noted that he "long ago became a citizen of Israel. He has served in the armed forces of Israel. His taking a seat in the Knesset climaxed fourteen years of political activism . . . ."[57] In the opinion of American consular officials,[58] however, Kahane had simply gone too far in divorcing himself from his nation of birth by assuming a position in a foreign legislature.[59] Under the citizenship law of the United States, he was found to have committed an "expatriating act," thereby relinquishing his American nationality.[60]

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55. In the court's words, "[t]he competent authority according to a specific law might limit the particular use of the said right in certain circumstances. . . . Democracy which imposes limitations without urgent need for self-defense loses its power and its spirit. Without legislative basis there is no way to allow adding more limitations on the right of a list of candidates to participate in the election to the Knesset." *Id.* at 270. *See also supra* note 10.

56. According to the trial judge in *Kahane v. Schultz*, "Under Israel's system of proportional representation, the Kach Party received insufficient votes to garner even one seat in the Knesset following the elections of 1973, 1977, and 1981. In 1984, however, Kach received sufficient votes to seat one candidate, and Kahane took that seat on August 13." *Kahane*, 653 F. Supp. at 1488.

57. In re Kahane, slip op., at 13 (Dept. of State Board of App. Rev., May 1, 1986). The Board had, on prior occasions, indicated that merely taking Israeli citizenship by virtue of the operation of the Law of Return, 5710-1950 S.H. 159, § 1, and Israel's Citizenship Act, 5712-1952 S.H. 146, § 2, or service in the Israeli armed forces, would not ordinarily be grounds for relinquishing United States citizenship. *See* In re M.F., slip op. (Dept. of State Board of App. Rev., Jan. 29, 1982).

58. A Certificate of Loss of Nationality of the United States was issued to Kahane on December 18, 1984 by Ray E. Clore, the United States Consul in Jerusalem. The certificate was then approved on October 2, 1985 by Carmen A. DiPlacido, director of the Office of Citizens' Consular Services in the Bureau of Consular Affairs of the Department of State. Kahane v. Schultz, 653 F. Supp. at 1488. *See also* 8 U.S.C. § 1501 (1952).

59. The United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

60. For the statutory definition of an "expatriating act," see 8 U.S.C. § 1481(a) (1952).

Kahane sought federal court review of the State Department's determination of his loss of citizenship.[61] It was common ground between Kahane and the United States government that the acceptance of a seat in the Knesset was technically within the statutory meaning of an "expatriating act,"[62] and that Kahane had performed the act of his own volition.[63] The issue at stake in the litigation, however, was whether he intended to relinquish his citizenship.[64] While the State Department insisted that the expatriating intention be ascertained through a broad examination of Kahane's various acts and statements over the years leading up to his Knesset election, Kahane argued for the most narrow and literal view of his immediate intentions upon taking his legislative seat. The intention requirement translated into a debate over maintaining a substantive connection between a United States citizen and the nation.

A. Nationality Rules in International Law

As a legal concept, nationality plays a central, but ambiguous, role in public international law. On one hand, it is traditionally the only way in which individuals figure in international relations, so that only the parent sovereign can make a claim of right on behalf of its individual nationals.[65] Of course, states are considered competent in their sovereign capacities to confer rights on persons within their scope,[66] but the classical perception of individuals by international lawyers and statesmen is that the citizenry is a medium for, not a restraint on, state power. The state defines the scope of its own legal personality vis-a-vis other international actors through its nationals. Thus, for example, even extraterritorial protection of one's own citizens has been considered within a sovereign's jurisdictional capacity and, therefore, is not an incursion into the international arena or a foreign state's territorially sovereign sphere.[67] Likewise, a state can claim breach of its international legal rights where another has mis-

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61. The determination of the State Department's Board of Appellate Review is subject to *de novo* review. 8 U.S.C. § 1503(a) (1952). *See* Richards v. Secretary of State, 752 F. 2d 1413, 1416 (9th Cir. 1985).

62. 8 U.S.C. § 1481(a)(4)(A) (1952).

63. *See* Nishikawa v. Dulles, 356 U.S. 129 (1958) (holding that an expatriating act had to be performed in a non-coerced, voluntary manner to produce grounds for relinquishing United States citizenship).

64. *See* Vance v. Terrazas, 444 U.S. 252 (1980) (actual intention rather than statutory deemed intention read into the "expatriating act" provision).

65. *See* STATUTE OF THE INT'L COURT OF JUSTICE art. 34, para. 1 ("Only states may be parties in cases before the Court"); Barcelona Traction, Light and Power Co. Case (Belg. v. Spain), 1970 I.C.J. 4, 39 (Feb. 5) (only a state in which a corporate entity is registered has standing to assert a claim on that corporation's behalf).

66. *See* 1 H. LAUTERPACHT, INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT, 469-471 (1970) (individuals hold international legal rights solely by virtue of the intention of state parties through conventions or by incorporating international law into domestic law).

67. *See, e.g.*, The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7) (Turkish victims' jurisdiction on behalf of its nationals justifies jurisdictional incursion into French ship); Skiriotes v. Florida, 313 U.S. 69 (1941) (criminal conviction under Florida statute for damaging ocean wildlife upheld even though conduct was performed outside United States territorial waters).

treated its national, even where in substance the identical acts aimed at the foreign state's own citizen would offend no international or domestic norm.[68] The idea is that through their nationals, states create and expand their presence, and are empowered and endowed with rights in a world of nations.

On the other hand, however, the concept of nationality can be seen to play an equally important restraining role with respect to state power in international law. While a state gains rights through identification of, and with, its nationals, it delineates the borders of its own legal rights by logical extension. Thus, for example, one ramification of the centrality of nationality in international law is that one state's inherent legal jurisdiction is generally thought to fall short of ensnaring the nationals of a foreign state located within their own state, notwithstanding the possibility of extraterritorial legislation.[69] Similarly, the publicly identified nationals of a foreign state are traditionally attributed legal immunities that effectively restrain the host state, where the host state would not otherwise be curtailed in its actions with respect to its own citizens.[70] The idea is that through the notion of nationality, states define and enforce their collective differences that effectively restrain the acts of other states in the name of their own sovereign nationhood.

One implication of the empowering and restraining effect of nationality in international discourse is that while states cannot wrongly impinge on the nationals of another, they are at liberty as sovereigns to define the scope of their own citizenry. The seminal statement of this principle is found in the *Nationality Decrees in Tunis and Morocco Case*.[71] The British government objected to the enforcement of French nationality decrees in its North African colonies that touched on persons who were the descendants of British subjects. Under English law, they were British subjects. In responding to the French argument that questions of a state's nationality laws are solely within the domestic sovereign jurisdiction, the court indicated that international relations required this liberty.[72] Thus, the court's conclusion in favor of Britain had to be couched in a

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68. *See, e.g.*, Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30) (injury to an alien national is an injury to the alien's parent state); Wright, *Opinion of Commission of Jurists on Janina-Corfu Affair*, 18 AM. J. INT'L L. 536, 543 (1924) (editorial comment) ("The recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf."); B.E. Chattin Claim (U.S. v. Mex.), United States and Mexico Claims Commission, 4 R. Int'l Arb. Awards 282 (1927) (United States claimed denial of due process by Mexican authorities towards American citizen arrested in Mexico even though due process was not recognized under Mexican law).

69. *See, e.g.*, Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956) (Lanham Act does not apply to trademark infringement by a Canadian corporation in Canada despite its potentially extraterritorial application to United States companies).

70. *See* Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (host state interference with foreign public ship cannot occur without affecting its power and dignity; ship enjoys exemption from host sovereign's jurisdiction while within host territory).

71. Nationality Decrees in Tunis and Morrocco Case (Gr. Brit. v. Fr.), 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7).

72. The court reasoned that questions of domestic jurisdiction pose "an essentially relative question; it depends upon the development of international relations." *Id.* at 24.

way which supported unrestrained sovereign capacity with respect to national self-definition while restricting French jurisdiction.[73] The new French nationality laws contravened France's treaty obligations toward Britain. Simultaneously, the French government's actions were restrained while vindicating France's freedom to act in its own national interest.[74]

Nationality Decrees, therefore, represents a starting point for examining the nationality question. The nationality concept can point to either state empowerment or state restraint. The jurisprudence of international tribunals seems to invoke both positions. In other words, nationality is a central mechanism for both restraining state action and vindicating sovereign freedom.[75] In the end, France may delineate its national constituency without external restrictions but is constrained by Britian's freedom to define and protect its own citizenry. Accordingly, the nationality rules at issue are posed as both a product of, and a limitation on, national power.

Perhaps the most stark illustration of this rhetorical phenomenon is provided by the International Court of Justice's most renowned decision on the question of nationality laws: *The Nottebohm Case*.[76] The litigation arose in a way which had the appearance of just one more controversy over the question of alien versus host country rights. Liechtenstein alleged mistreatment of one of its nationals by the authorities of his country of residence, Guatemala.[77] What makes the case interesting for present purposes, however, is that the adjudication quickly veered away from its starting point in the substantive law of aliens' rights and moved into the legal process question of "standing" before the International Court of Justice. Specifically, Guatemala successfully challenged "the admissibility of the claim related to the nationality of the person for whose protection Liechtenstein had seized the Court . . . ."[78]

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73. *Id.*

74. In the court's view, the generally applicable international legal principle is one of sovereign freedom, while the particular legal policy to which France is bound is one of restraint vis-a-vis Britain as its treaty partner. "For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States." *Id.* at 24.

75. In a theme that harks back to the interplay between naturalist and positivist theories of law seen in *The Paquete Habana*, the nationality cases highlight international law's need to cast what might appear to be a natural restraint on sovereign states in positive law terms. *See The Paquete Habana*, 175 U.S. at 677. Thus, sovereigns are limited in their actions in a way which accentuates every sovereign's unlimited ability to consent to international limitations. *See supra* notes 34-37 and accompanying text; Morgan, *Criminal Process, International Law and Extraterritorial Crime*, 38 U. TORONTO L.J. 245, 253 (1988) (international case law is "permeated by various rhetorical techniques in which states are told what they should be doing simply by being told what they actually do").

76. The Nottebohm Case (Liechtenstein v. Guat.), 1955 I.C.J. 4 (Apr. 6).

77. Liechtenstein's request to the International Court of Justice was for the international body to adjudge and declare that "the Government of Guatemala in arresting, detaining, expelling and refusing to readmit Mr. Nottebohm and in seizing and retaining his property without compensation acted in breach of their obligations under international law . . . ." *Id.* at 6-7.

78. *Id.* at 12.

The legal controversy in *Nottebohm*, therefore, effectively shifted from Guatemala's treatment of the individual to Liechtenstein's connection with its citizen. Guatemala attacked the relatively lax Liechtensteinian nationality laws under which Mr. Nottebohm had acquired his citizenship;[79] the connotation being that Liechtenstein had not established the requisite link to the individual on whose behalf it claimed international adjudicative standing. On the theoretical plane, of course, the pattern of legal arguments presented in the case reveals the dual nature of nationality norms and international legality: the substantive rights and wrongs of international law seem inextricably tied to the process of state participation in the international system. It is difficult to judge sovereign actions without speculating on the nature of sovereign interrelationships within a legally sovereign system.[80]

The court's ruling in *Nottebohm* contained an interesting double-edge. It managed to both uphold Liechtenstein's citizenship law and to acknowledge the force of Guatemala's "standing" argument leveled against Liechtenstein. In its central passage, the judgment reasserts the fundamental rule of freedom with regard to nationality matters that had been the starting point of the *Nationality Decrees in Tunis and Morocco* case: "It is for . . . every sovereign State to settle by its own legislation the rules relating to the acquisition of its nationality . . . ."[81] In the first place, therefore, the court seems to have been prompted by a desire to assert even the nonconforming state's sovereign powers over the pattern of customary rules pertaining to nationality.[82] Immediately following this passage, however, the court asserts that "the issue that the Court must decide is not one which pertains to the legal system of Liechtenstein. . . . It is international law which determines whether a State is entitled to exercise protection and to seize the Court . . . ."[83] Thus, the court also champions the cause of international legality over the domestic laws of the deviant state.

Given the generally more defensive tone of international pronouncements, the court's assertion of its own "standing" norms over the laws of Liechtenstein represents an admirable moment in international jurisprudence.[84] On the other

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79. The court summarized the Liechtensteinian law for the naturalization of foreigners (under which Mr. Nottebohm had acquired Liechtensteinian nationality) as one which allowed most of the typical residency and other requirements to be "dispensed with in circumstances deserving special consideration and by way of exception." *Id.* at 14. Thus, the only mandatory criterion to which the non-resident candidate for naturalization had to conform was the submission of "proof that he has concluded an agreement with the Revenue authorities . . . [and] the payment by the applicant of a naturalization fee . . . ." *Id.*

80. For a thorough discussion of the curiously separate and connected categories of international substance and process, see KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987).

81. *Nottebohm Case*, 1955 I.C.J. at 20.

82. The customary law on point was described as follows: "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." *Id.* at 23. Evidently, Mr. Nottebohm's connection with Liechtenstein was perceived as lacking the requisite level of intimacy.

83. *Id.* at 20-21.

84. The court stated emphatically that "[i]t does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection [in international adjudication]

hand, it can be seen to simply reintroduce, with a twist, the ambivalence for which international law is so well known. In *Nottebohm*, international law seems to override the state's acknowledged powers in its assessment of Liechtenstein's standing on its national's behalf while simultaneously deferring to sovereign powers in its non-assessment of Guatemala's treatment of its domestic resident. If the result appears to restrict sovereignty, it does so in a way which repeats the theme of the *Nationality Decrees* judgment—the denial of one nation's standing effectively empowers another nation (and all nations) since Guatemala is seen to have offended against no other national sovereign.

The lesson of nationality cases, therefore, is that sovereigns often appear to be restrained in the name of individuals and a superior normative force, but the cases are equally explicable as articulating sovereign restraint only in the name of sovereignty itself. Notwithstanding that nationality questions frequently arise in contexts which pose questions characterizable as aliens' rights, the theme of individuals against state power is typically discernible only as a partial and subordinate answer to these controversies. The law's primary emphasis is one which allows sovereigns to assert their powers in delineating their own constituencies up until the point where they impinge on someone. The significance of the impingement, however, is that the offended person represents the constituency, and therefore the legal personality, of another equal sovereign.

For illustration of the point that nationality stands with (as much, if not more than it stands against) sovereignty, one need only keep the conceptual place of nationality in mind in reviewing some of the leading aliens' rights cases. In the famous *Roberts Claim*,[85] the United States sought damages against Mexico for, *inter alia*, the inhumane prison conditions which Roberts, a United States citizen, suffered during his eighteen months awaiting trial for armed robbery in Mexico. As a preliminary matter, the arbitral tribunal noted that there was little doubt that the Mexican officials were within their substantive rights in taking Roberts into custody, since he had been identified as one of a group of armed bandits that attacked a private Mexican estate.[86] The fundamental question, which seems at first to distinguish this adjudication from other public international controversies of the era, is whether the treatment of Roberts as an

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. . . ." *Id.* at 20. As if to tone down its assertiveness, the court then recharacterized its own decision as a matter of merely assessing fact. The decision, therefore, holds that in cases of disputed citizenship, "the real and effective nationality [is preferred], that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved." *Id.* at 22.

85. The United States of America on Behalf of Harry Roberts v. The United Mexican States, General Claims Commission—United States and Mexico, No. 185 (Nov. 2, 1926), *reprinted in* 21 AM. J. INT'L L. 357 (1927) [hereinafter Roberts]. *See also* 8 BRIT. Y.B. INT'L L. 184 (1927).

86. The case was adjudicated by the U.S. - Mexico General Claims Commission, established under the Convention of Sept. 8, 1923, 43 Stat. 1730, U.S.T.S. No. 678, 4 R. Int'l Arb. Awards 773 (1940). Regarding the initial arrest, the Commission indicated that "[i]n the light of the evidence presented in the case the Commission is of the opinion that the Mexican authorities had ample grounds to suspect that Harry Roberts had committed a crime and to proceed against him as they did." Roberts, *supra* note 85, at 359.

individual violated an international norm with respect to aliens despite Mexico's having acted within its rightful domestic jurisdiction.

The tribunal's opinion starts out sounding like a precursor to the fully developed human rights law of a later era, asserting emphatically that Roberts enjoyed an international law right to humane prison conditions.[87] Nevertheless, the question of whether this right was attributable to, or stood against, state sovereignty was subtly answered with a yes and a no. The commission characterized the conditions of Roberts' captivity as depressingly substandard and articulated a universal test of "whether aliens are treated in accordance with ordinary standards of civilization."[88] Thus, the first point is that treatment such as that to which Mr. Roberts was subjected is inhumane regardless of who the individual claimant is or what his relation to the state authority might be. Roberts, in this view, is an individual with rights as such against any state, foreign or domestic, which so degrades his humanity.

This first view of the *Roberts* case, however, all but ignores the significance of nationality and alienage in aliens' rights law. Thus, the tribunal continues its analysis of the United States claims on its national's behalf by describing the Mexican offense in a way which distinguishes the foreigner, Roberts, from his legally unoffended cell mates. The tribunal stresses that he was made to share a toilet and a prison cell only "thirty-five feet long and twenty feet wide with . . . thirty or forty [Mexican] men."[89] The crucial point, of course, is that Roberts and his cell mates are essentially unequal in the eyes of the law. The holder of international rights is quite distinctly identified on the basis of his representative capacity as a member of a foreign nation. The domestic prisoners belong to the imprisoning nation, and therefore must find their rights, if any, in the domestic Mexican law; contrarily, the alien prisoner belongs, by definition, to a foreign nation with rights of its own in international law.

While the upshot of the case law is that citizenship and alienage has the effect of protecting persons against the acts of nations, the thematic undercurrent of all of these decisions is that the concept of nationality represents a sense of belonging to a given nation. Aliens and nationals are significant in the law as persons, but their significance derives primarily from the fact that they are perceived as individual appendages of their parent nations. Correspondingly, states are both empowered in the delineation and treatment of their nationals, and restrained in their impact on alien nationals. Nationals are linked to their sovereign state, the point of their rights being in the first instance that they are not linked to some other sovereign state with nationals of its own.

B. Kahane v. Schultz Revisited

With the international law concept of nationality in mind, one can look back on *Kahane v. Schultz* and more fully appreciate the structural irony of the

87. In the Commission's words, "We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment." *Id.* at 361.

88. *Id.*

89. *Id.* at 360.

United States court's decision. As indicated, the State Department exercised its decisional power against Rabbi Kahane, invoking the self-induced disconnection of Kahane from the American national fabric as justifying the state's revocation of his citizenship.[90] Indeed, it might be noted that Kahane's substantive severance from any notion of belonging to United States political or social life was not only voluntary, but expressly self-declared. Thus, for example, the State Department placed in evidence an assortment of statements made by Kahane in his writings and his political and other speeches in which he affirmatively asserted his sense of allegiance to Israel and to Israel alone among the nations.[91] In Kahane's words, "Israel [is every Jew's] home. . . . The Jew could never find peace in exile as a stranger . . . ."[92]

It seems in keeping with Kahane's ultra-nationalist political ideology that all other nations, including that of his birth, be thought of as places of "exile" where Kahane was but a "stranger". Indeed, the State Department recounted one particular episode in which Kahane was arrested by the Israeli police.[93] Kahane flatly rejected the efforts of a United States consular official to intervene on his behalf. Asked by the American whether he had been mistreated in the Israeli jail, Kahane responded, "What do you expect? That I should complain about my country to you people?"[94] The State Department's argument illustrates the thematic currents of international law's pronouncements on nationality. Kahane belonged to a nation, in a political, psychological, and symbolic sense, but the nation was Israel, not the United States.

The court's response reflects the civil libertarian ethic of American constitutionalism. The court drew on a line of cases in which the United States citizenship birthright asserted by Kahane was not only traced to an origin in the Fourteenth Amendment,[95] but was conceptually assimilated to other more typical guarantees which the United States Constitution attributes to individuals confronting the actions of the state.[96] Kahane's American citizenship was thus held to be a constitutional right which, absent voluntariness and intent on his part, could not be denied or infringed either by Congress or officials of the executive branch. The concept of nationality was treated not as symbolizing any sense of Kahane's "belonging" to the nation's fabric as a product of its empowerment, but as a legal bullwark constitutionally erected between Kahane as a national and his nation's asserted power.

Kahane's motivation to keep his United States citizenship was rooted in his desire to avoid the visa requirement for lecture tours of the country.[97] This

90. *Kahane*, 653 F. Supp. at 1486.

91. *Id.*

92. *Id.* at 1490.

93. *Id.*

94. *Id.* at 1491.

95. *See* U.S. CONST. amend. XIV, § 1.

96. The seminal case in this regard is Afroyim v. Rusk, 387 U.S. 253 (1967) (Congress' asserted power to strip an American citizen of citizenship without her assent rejected). For a survey of citizenship law following this line of cases, see Note, *United States Loss of Citizenship After Terrazas: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. INT'L L. & POL. 829 (1984).

97. In Kahane's words: "I would have long since given [United States citizenship] up if I did

uncommendable reason, however, did not undermine his intention to remain a citizen. Indeed, in the court's view, the opposite seems to be true.[98] The fact that citizenship for him in no way reflected an intimacy of relation to the United States, and that it is no more than a legal, although necessary technicality,[99] is not the relevant point. What is at stake, for the federal court, is not the nation's self-delineation, but one of its constituent's constitutional rights.

In transfixing the legal vision reflected in the case from one focusing on the sovereign nation's stature as against foreign others, to one focusing on the individual's stature as against his own domestic state, the court cannot be said to have misconstrued international law. Both themes are certainly available to be played, although the court's chosen route draws from the subordinated theme of personal liberty rather than from the dominant theme of nationhood present in international law's nationality concept. While nationality in international forums tends to establish the legal integration of persons within nations, nationality as viewed through the lens of American constitutionalism establishes the legal separation of persons from their governing political body. The nation as a collective whole is legally flipped around, becoming an aggregate of individuals who happen to confront the same state.

IV. *THE KACH PARTY* CASE: DEMOCRACY'S POSTSCRIPT

As can be seen, the themes of individualism and political/national community stand both in opposition to, and in unison with, each other. In *Moshe Neiman*, the administrative organs of the Israeli state weigh in by protecting particular minorities against discriminatory attack, and the court answers by invoking the fundamental value of the nation's participatory politics. Then, in *Kahane v. Schultz*, the United States executive branch moves in the name of the national community's fabric, and the court answers by invoking the rights of the individual as against the acts of the state. The vindication of unrestricted participation in political affairs and of individual civil liberties— values to which his own ideology of ultra-nationalism would seem to be opposed— worked well for Rabbi Kahane in 1984. The courts struggled with the thematic opposites of liberal democracy, and in the result manipulated these values to his benefit on both sides of the world.

In 1988, Kahane and his Kach Party once again sought election to the Knesset. This time, however, the legal obstacles placed in his path by the Israeli government were insurmountable. Following the 1984 courtroom victory, and

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not fear— and with justification— that if I gave it up, the American government would place great obstacles in . . . my path in attempting to obtain a visa to enter America for lecture tours." *Kahane*, 653 F. Supp. at 1490.

98. The court states in its conclusion: "When Kahane said that he did not believe a person should be a dual citizen, it was immediately after he stated that he was such a person. . . . The government's burden is to prove that Kahane intended to relinquish American citizenship. The most it can prove, instead, is that Kahane is a hypocrite, for telling people that they should do as he says and not as he does." *Id.* at 1494.

99. The court dubbed Kahane's American citizenship as being a mere "boarding pass" to the United States. *Id.*

Kahane's subsequent achievement of a legislative seat, the Knesset enacted an amendment to its own constituting legislation which was aimed at providing a statutory resolution to what the government continued to perceive as the problem of Kahanism.[100] Accordingly, when the Central Election Committee took action against the Kach Party prior to the 1988 elections, it had a specific legislative mandate on which to rely.[101]

If the lesson of the two 1984 cases was that the liberal values of the law are composed of self-destructive opposites, the message of the 1988 *Kach Party* decision is that democracy can, if it so desires, fight back. The Israel Supreme Court upheld the anti-racist legislation on the grounds of parliamentary supremacy even over the entrenched right of Kahane as a citizen to run for elected office.[102] In doing so, the court produced a judgment with theoretical implications going beyond its doctrinally simple resolution. The notion that majoritarianism can override Kahane's right as an individual within the polity, all in defense of the country's ethnic minority individuals, is at once a contradictory pronouncement and a perfect deployment of the liberal democratic values that have lurked in this series of cases all along. The court authorizes unequal treatment of Kahane in favor of equality for the Arab citizenry, and permits an electoral ban on the Kach list for the sake of preserving the free exercise of electoral rights across all sectors of the population.[103]

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100. "The Knesset bans any party which engages in: (1) the denial of the existence of the state of Israel as the state of the Jewish people; (2) the denial of the democratic character of the state; and (3) advocation of racism." Basic Law (The Knesset), 5745-1985 S.H. 196, amend. 9, § 7(a) (1985) [hereinafter Basic Law]. While subsection 1 was directed at parties of the extreme left, subsections 2 and 3 were evidently drafted with the Kach ideology in mind. *Id.*

101. In reviewing the Committee's refusal to accept the Kach Party's list, the Israel Supreme Court made specific reference to the fact that in the 1984 *Moshe Neiman* case it had been indicated that "only the formal authority given by the legislature with defined and strict standards may enable the Israeli courts to strike out a list of candidates from participation in the Knesset . . . ." *Kach Party*, 42(IV) P.D. at 186.

> The establishment of limitation with a general implication and the authorization for limitation in specific circumstances has to be based on formal legislation of the Knesset. In other words, the limitation of liberties, including the right to be elected, has to be based on direct and formal legislation which will define clear areas and standards and will not leave the matter to the unlimited discretion of the administrative authority or judicial authority. Therefore the proposed legislation has to include two vital elements; the first one expressing the formal authority and the second defining the circumstances in which this authority shall be excluded."

Id.

102. Kahane argued that § 7A of the Basic Law of the Knesset must be void as it contradicts § 4 of the same statute which establishes the basic principle of equality in the electoral system. *See* Basic Law, *supra* note 100. The court noted that notwithstanding the significance in principle of the equality provision, the statute expressly made itself subject to amendment by a bare majority of sixty-one (out of 120) Knesset members. *See Kach Party*, 42(IV) P.D. at 184.

103. The Kach platform followed a two-step approach that denied the Arab population electoral rights in Israeli politics, and ultimately advocated a complete Arab expulsion from Israel. *See Kach Party*, 42(IV) P.D. at 195.

> The Kach Party claims that its actions are legitimate actions within the Knesset and out for the purpose of denying the Arab population in Israel civil rights and political rights and limiting its progress in order to prevent the demographic balance tipping to the detriment

Certainly the most difficult conceptual challenge in the case comes in the form of Kahane's argument regarding a possible contradiction within the very legislation that has been directed against him. Counsel for the Kach Party asserted that the first two subsections of the governing statute—banning political parties that attack, respectively, (1) the essence of Israel as the state of the Jewish people, and (2) the democratic character of the state[104]—potentially stand in opposition to each other.[105] According to the Kahanist political ideology, the denial of democratic rights to the major non-Jewish sector of the population is a necessary step in protecting the Jewish character of the nation.[106] The idea, of course, is a central one of extreme nationalism; the cohesive social and political formation of the nation state necessitates exclusion of non-national "others."[107]

By stressing the conflict between nationalism and liberalism, the argument put forward by *Kach* underscores the inherent opposition between the values of national community and individual rights that has characterized all three of the Kahane cases.[108] It is difficult, if not impossible, to logically reconcile the two impulses, one of which points toward individuals as significant only in their capacity as belonging to a larger national grouping, and the other of which stresses the significance of individuals in their own right as against their nation. The essence of the Kach Party's argument, then, is to force the court to choose between the alternative values reflected in the Knesset's legislation: the rights of Jews as a people, and the rights of persons within the Jewish state.[109]

Given what one would think is indeed a fundamental and perplexing problem, the fact that the court found an answer at all is rather commendable. Moreover, the *Kach Party* decision goes beyond the simple, but technically complete, answer provided by the doctrine of legislative supremacy, and endeavors to address the theoretical questions which lie beneath the legal challenge. What is most interesting is that the court managed to articulate a decision which, although failing to reconcile the conceptual contradiction between nationalism and liberalism, or the participatory community and the insular individual, also

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of the Jewish population. This, according to its allegations, is not racism but discrimination in favour of the Jewish population, which does not amount to racism towards the Arab population.

Id.

104. *See* Basic Law, *supra* note 100.

105. *Id.*

106. *See Kach Party*, 42(IV) P.D. at 195.

107. Ironically, the classical formulation of this point by early nationalist theorists was typically aimed at the Jewish population of the various European nation states. For a historical development of nationalist theory, see KEDOURIE, NATIONALISM 62-80 (1960). In the words of German nationalist Friedrich Schleiermacher, "How little worthy of respect is the man who roams about hither and thither without the anchor of national ideal and love of fatherland." *Id.* at 73. Such sentiment, in which Europe's semites were characterized as foreigners inherently incapable of "sinking their own persons in the greater whole of the nation," may be said to have plagued European Jewry until the end of the Nazi era. *Id.* As the Israel Supreme Court pointed out, the goals and actions of Kahane and his followers "are horribly similar to the worst examples experienced by the Jewish people . . . ." *Kach Party*, 42(IV) P.D. at 197.

108. *Kach Party*, 42(IV) P.D. 177.

109. *Id.*

avoided merely choosing one essential value over the other. Rather, the judgment simultaneously deploys both sides of the law's theoretical coin. While in one sense it remains unique to the context of Israeli political life, in another sense it restates the basic international law motifs of human rights and nationhood with which courts everywhere have been seen to contend.

The court's analysis of the interplay between Jewish nationalism and democratic rights contained in subsections 1 and 2 of the statute took an interesting twist, tracing the requirement of respect for discreet minorities to modern Israeli legal instruments, as well as to classical Jewish texts. Thus, in addition to the full participatory rights guaranteed by the Declaration of Independence to the state's Arab population,[110] the court made assorted references to the Torah, to Talmudic elaboration on the scriptures and Jewish law, and finally, to rabbinic commentaries such as those of Maimonides.[111] Jewish life was found to encompass an identifiable normative impulse with regard to ethnic minorities. The Jewish nation was seen in these texts as obligated under its own essential norms to treat any minority living within it with a degree of respect that in contemporary terms translates into a full panoply of civil rights.[112] The implication, of course, is that the state need not sacrifice democratic character, as Kahane would have it, for Jewish character; rather, if the latter is abandoned, the former is equally undermined.

As indicated, it is in an abstract sense not possible to solve the conceptual

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110. The Israeli Declaration of Independence states: "In the very midst of the onslaught launched against us now for months we appeal to the Arab inhabitants of the State of Israel to preserve peace and to participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions." *See* Israeli Declaration, *supra* note 8.

111. As summarized by the vice-president of the High Court, Judge Elon, in *Moshe Neiman*:

> A member of a national minority group was defined in the world of Jewish law (Halacha) as a "resident alien" (*Ger Toshav*). The only condition required for entitlement to this status was the observation of the seven commandments of the sons of Noah (Noahide laws) i.e., those elementary obligations of maintaining law and order that every civilized nation must observe and that the scholars look on as natural and universal law. Maimonides, Mishne Tora, Sanhedrin, 56, 1. Such national minority was entitled to all political and civil rights of the Jewish state: "resident alien— he shall live with you." Leviticus 25:35. "We treat resident aliens with courtesy and benevolence like an Israelite, for we are commended to let them live. And a resident alien, since you commended to let them live— we healed him at no cost." Maimonides, *Kings* 10:12; Maimonides, *Avodah Zarah* 10:2. And further the sages said: "We do not settle a resident alien in a border district, and not in a bad dwelling place, but in a good dwelling place, in the middle of the land of Israel, in a place where his craft is." Deuteronomy 23:17. And it is said: "He shall dwell with you, in the midst of you, in the place which he shall choose within one of your gates where he likes it best; you shall not wrong him." Tractate *Gerim*, according to Deuteronomy 23:17. The fundamental principles which guide in the question of the relationship between the Jewish State and all its inhabitants are the fundamental principles of the world of Jewish law as quoted from Maimonides: "Behold it is said: The Lord is good to all and his mercies are all over all his works, and it is said: its ways are ways of pleasantness and all its paths are peace." Maimonides, *Kings* 10:12.

Moshe Neiman, 39(II) P.D. at 301-2.

112. *Id.* at 195.

paradox of liberal nationhood which is so starkly illustrated by Kahane's ideological challenge. However, in tracing the values of political participation and majority rule to the values of individual rights and non-discrimination, the court employs a mechanism which effectively deflects attention away from the underlying theoretical dilemma. Furthermore, in aligning the concept of Jewish nationhood with the concept of participatory rights for the country's non-Jewish nationals, the *Kach Party* judgment harnesses the competing values of liberal democracy in a way which is admirably tailored to Israel's own national experience. Since the lesson of the previous cases was that the national community and its individual members inevitably stand together as well as in opposition, the lesson of the *Kach Party* case is that nothing need separate the law's contradictory strands. This includes a challenge from someone who seems to fully understand and wishes to fully exploit the contradiction.

V. A FINAL WORD

The thematic link between the *Moshe Neiman, Kahane v. Schultz*, and *Kach Party* decisions may be said to rest on the judicial capacity to live with the irreconcilable principles of which liberal democratic nations are necessarily made. In *Moshe Neiman,* the Israeli state desired to protect individuals from each other, and the court chose to protect the unexclusive participatory nature of the polity. In *Kahane v. Schultz*, the executive officials of the United States desired to define the country's constituency in nationalist and participatory terms, and the court chose to protect the citizen as individual. Either side of the polarity would have been acceptable to either nation in either case. When reading *Kach Party*, one realizes that the somewhat ironic lesson must have been well-learned. Accordingly, when the Israeli legislature desired to protect the community's democratic and national character as well as the rights of the individuals within it, the court accommodated the desire. The last Kahane judgment exhibits a paradoxical, but forceful, legal vision in which the collective polity and its particular members— the Jewish nation and all Israel's citizens— move in the same direction.