Elections Appeal 1/65 Yardor v. the Chair of the Electoral Committee of the 6th Knesset

[page 373] **Justice H. Cohen**: … I will begin by stating that factually speaking, we will not reconsider the committee's ruling that this list's candidates are one and the same as the people of the El-Ard group, which is an illegal assembly, whether according to Clause 3 of the Ottoman Law on Association, to Chapter 84 of the Defense (Emergency) Regulations, or to both legislations; and under the given circumstances, it is inconsequential that not all the candidates on the list were activists or known members of this group beforehand because — as stated by the committee chairman — when they decided to join the El-Ard members on the same list, it is presumed that they knew who they were joining and towards what end. Nor will we reconsider the committee chairman's ruling that its illegal status derives, fully or partially, from the fact that the members of this group "seek to undermine the existence of the State, or at least its territorial totality."

The legal question that is posed is: does the central elections committee have the legal authority, whether explicit or tacit, to disqualify a list of candidates for the Knesset once it is designated an "illegal association?"

[page 376]… If a list is deemed to have been properly composed and all the stipulations in the clauses of the previously mentioned legislation are fully met, the law does not grant the committee the authority to decide whether to permit or prohibit the list [from participating]; in such a case, the committee has but one possible course of action, which is to approve the list…

[page 378]… In my opinion, even if an administrative authority usually has the inherent power to ban an activity in the event that the act or those seeking to act are tainted with illegality, I would still deny the Knesset's Electoral Committee that authority as long as the law does not explicitly grant it. Consider the possible consequences of granting such discretion: a party, or another political organization, which aims to substitute the regime or nullify certain laws, is an illegal assembly as stated in the Ottoman Law on Association; and the parties in power that, of course, hold a majority on the Central Elections Committee, which has the authority to approve or ban a list, could ban a party or assembly of this type from submitting a list of candidates for the Knesset because it has been defined as illegal!

[page 379] It is important to immediately state that I truly believe that it is necessary that some agency have the authority, be it the Central Elections Committee, the Knesset itself, or the Court, to remove these types of subversives from the Knesset, especially those who are guilty of treason against the State and assist its enemies. But this is not to say that this authority is indeed granted by the existing law to any agency, including the Central Elections Committee. In a state governed by law, the rights of a human being, even the most dangerous, treacherous and contemptible of criminals, are not revoked except in compliance with the law. Neither is the Central Elections Committee, nor the Court, a legislator in this state — the Knesset has the legislative authority to empower subordinate bodies to mete out what a person deserves in the event that it wishes to do so. Without such empowerment by the legislator, neither common sense, nor necessity, nor love of country, nor any other consideration whatsoever, may justify revoking the rights of others by taking the law into one's own hands.

[page 3811]… What's more, even in the event of the explicit legal power to revoke a certain right of a citizen, if the right is a fundamental civil right, such as freedom of opinion and speech, this court does not condone the use of this legal authority unless the revocation is intended to prevent a concrete, clear and present danger. I cannot see the concreteness, clarity or presence of danger to the State, or to one of its institutions, or to one of its rights, in the participation of these lists in the Knesset elections. Should the claim be made that this danger is concealed from the courts and clear only to the government's security services, I would respond by stating that the material submitted to the Central Elections Committee, which was submitted to us as well, did not justify, let alone warrant, a conclusion that such a danger exists, and that the central consideration of the Committee members was not a concrete danger that exists and is upon us. ...

[page 385] **President Agranat**: … The factual finding, which should be considered as indisputable and the basis of this appeal, led the Central Election Committee to ban the participation of the appellant's list ("The Socialist List"). This finding was also cited in the respondent's letter, dated 29.9.65, to the representatives of the list, in which the stated grounds for the rejection were: "this list of candidates is illegal because its initiators deny the totality of the State of Israel and its existence."...

Indeed, I agree that these formal grounds usually serve as the basis of the Central Committee's authority to approve or ban any given list. However, as was implicitly referred to by my colleague, the problem is not so simple, and furthermore, it poses "a grave and significant constitutional question." If that is the case, it is obvious that in order to define the Central Committee's authority, we are obliged to first consider the constitutional facts, which are relevant to this question. Thereupon, we find that there can be no doubt whatsoever — as was made clear in the statements made at the time of the declaration of independence — that not only is Israel a sovereign, independent and peace-seeking state, which is characterized by a regime that is ruled by the people, but also that it was established as "a Jewish State in the Land of Israel" primarily on the basis of "the Jewish People's natural and historical right to live as any other nation, independent in its own sovereign state, and this act was in fact a realization of the long-lasting hope for the redemption of Israel." …

[page 386] Therefore, if the constitutional fact, which we are required to consider when interpreting the State's laws, especially those with a constitutional character, provides that the State of Israel is a sustainable state whose continuity should not be questioned, it is clear that it should also apply to the interpretation of the law that designates the governmental institution whose members are elected. The statute in the 1st clause of *Basic Law: The Knesset* states that "the Knesset is the Parliament of the **State**". What does this statement mean if not an institution that comprises representatives selected by all citizens, whose duty it is to seek to maintain the existence of the State and its totality through the actions of the government that is accountable to it. In any case, the question of the elimination of the State and the invalidation of its sovereignty could not even be raised on its agenda since even the act of raising the question defies the will of the people residing in Zion, its vision and its beliefs.

Consequently, the list of candidates who deny this principle have no right, *qua* list, to take part in the elections for parliament…

Finally, I am fully aware that Political Science teaches us that in a democracy, the people rule because democracy is, first and foremost, a regime of agreement. The democratic process enables the selection of the people's common objectives and the means to achieve them through verbal inquiry and a free exchange of opinions; this inquiry is conducted through general elections and deliberations in parliament, among other things. All this supposedly necessitates the opinion that it is prohibited to exclude a group of people from nominating itself for the elections for the Knesset in order to advance its objective to deny the state the right to exist. Nonetheless, this opinion is clearly overruled by the ruling of Justice Vitkon Supreme Court (253/64 [3], p. 679), who stated that:

> "The freedom of assembly is a foundation of the democratic regime, and one of the citizen's fundamental rights. We are prohibited from revoking this right and disbanding an assembly solely because its objective, or one of its objectives, is to change the existing legal reality in the state. The existing reality may well need to be amended, and a movement seeking to organize public opinion in the state in order to amend the situation is permitted to do so in the framework of an assembly that is listed according to law. **But no free regime would lend its hand and recognition to an assembly that seeks to undermine that same regime itself**."

He added:

> "More than once throughout history, various fascist and totalitarian movements rose up against states with functioning democratic regimes, and used all the rights including the freedom of speech, press and assembly, which are granted to them by the state, in order to conduct their malicious activities in the virtue of those rights. Anyone who witnessed it in the times of the Weimar Republic will not forget the lesson."

[page 389] **Justice Zussman**:

… As opposed to the opinion concerning Clause 23 of the law cited above, I have no doubt that the Knesset Elections Law does not empower the Central Election Committee to approve or to ban the lists of candidates according to its own judgment. This power is also incompatible with the configuration of the committee, which is a body that is put together on purely political principles in accordance with the composition of the outgoing Knesset, with the exception of the committee chairman, who is a justice of the Supreme Court. But this was not the question that was addressed; the question that the committee chairman posed in the committee's meeting on 29.9.65 was whether or not the committee is permitted to examine the legitimacy of a list according to a principle that is not written in the law. In this meeting, the committee chairman pointed out that in spite of the lack of provision in the written contract law, the court does not implement a contract with an illegal purpose. Considering the honorary president's reasoning, I need not repeat that "an illegal purpose" in our case does not mean an aim to change the order of the regime. This order is not holy, and such changes are not punishable crimes. Rather, "an illegal purpose" in this

case is an aim to destroy the State, to annihilate its citizens for the sake of whom it was established, and to unite with its enemies.

In his ruling from Supreme Court 253/64, volume 18(4), page 673, my esteemed colleague, Justice Vitkon, mentioned the necessity of learning a lesson from the past experiences of the Weimar Republic. It may not be incidental that the Supreme Court of the Federal Republic of Germany, which was founded immediately after WWII, is, as far as I know, the first court to apply the principle that the judge must also rule according to laws that cannot be found in the legal corpus, which take precedence over regular law, and even over the constitution, when the two cannot be resolved. In an opinion of the German Supreme Court on September 6th 1953, the court quoted and upheld the following ruling by the Bavarian Constitutional Court :

> "The invalidity of a law in the constitution cannot be negated just because the law itself is part of the constitution. While some constitutional rules are so elementary and express law higher than the constitution so that they are even binding for the legislator of the constitution, other constitutional laws, which do not rank as high and are contradictory to these rules, can be invalidated."

If this is the case in a country with a constitution, all the more so in a country with no written constitution. Just as one is not obligated to agree to be killed, a country is not obligated to agree to be obliterated and wiped off of the face of the map. Its judges are not permitted to watch from the sidelines in despair because of the lack of positive legislation as a litigant requests their assistance in bringing about the demise of the state. Likewise, other state institutions are not obligated to lend a hand to those who aim to destroy the state and who may have no other aim.

I allow myself to reiterate the example I presented while hearing the appeal: Someone is interested in throwing a bomb in the Knesset in order to kill the Knesset members, but since this cannot be done from the visitors' balcony, he submits a list of candidates with the sole intention of entering the Knesset with a bomb and realizing his plan as a Knesset Member who enjoys immunity. This person submits a list that is flawless. According to Clause 23, is the Elections Committee obligated to approve the list, thus assisting him or her in committing a crime? Or is the committee permitted to state that this is not the purpose of a parliament in a democratic regime, and that the individual's use of the government processes is in fact an abuse, which the committee is not obligated to endorse? And if the committee is permitted to reject the list that was submitted to it in order to commit murder, is it not permitted to deny approval to a list that was submitted in order to promote high treason?

In our case, these fundamental rules, which are above the constitution are no more than the right to self defense of the organized society of the State. Whether we address these rules as "natural law", which designates their legality based on the nature of the creation of a state (See Friedman, Legal Theory, 4th Edition, p. 44-45), or whether we call them by a different name, I am in agreement with the opinion that life experience obligates us not to repeat the mistake that we have all witnessed. When discussing the question of the legality of a party, my esteemed colleague, Justice Cohen, mentioned that the German

Federal Constitutional Court, spoke of a "fighting" democracy, which does not open its gates to acts of subversion that are disguised as legitimate parliamentary activity. As for myself, as for Israel, I am willing to accept a "defensive" democracy. The tools required for defending the existence of the State are available to us, even if they cannot be found in the election laws.

Therefore, in a majority decision, the appeal was dismissed. (23/10.64)