Elections Appeal 1/65

Yaakov Yardur v. Chairman of the Central Elections Committee for the Sixth Knesset

At the Supreme Court

[8.10.65, 12.10.65, 23.10.65]

Before President (Agranat), and Justices Zussman and Cohen

Justice H. Cohen:

2. On 3 Tishrei 5726 (29.9.1965), the Chairman of the Elections Committee wrote the representative of the "Socialist List" a letter that stated the following:

> "I hereby inform you that at today's meeting the Central Elections Committee to the Sixth Knesset refused to approve the Socialist List on grounds that this list of candidates was designated an unlawful association due to its denial of the integrity of the State of Israel and its very existence…"

The Appellant drew the Committee's attention to Article 6 of the Basic Law: The Knesset, and argued that "no law gives the Elections Committee the authority to deny any citizen his right to be elected to the Knesset on grounds that the list is an unlawful association….no ruling pursuant to Article 6 of the Basic Law: The Knesset every denied any of the candidates on this list the right to be elected…" (p. 28). Following this the Appellant addressed the issue of the list's platform stating:

> "This list aspires to eradicate the phenomenon of 'Shabbat Goyim [Gentiles]' in the Jewish parties that advocate equality and the granting of full rights to the Arab people, and to express solidarity and cooperation in Israel with the waves of national liberation in the Middle East arena that seek to achieve the right the Jewish people in this country demanded and obtained for themselves, all for the good of the state. From a public perspective, the disqualification of the list signifies barring the Arab people who live in Israel from having their say regarding issues they are most sensitive to in the only forum that allow them to express themselves freely. Logic mandates that Arabs be allowed to be present in the Knesset as part of an independent Arab list, which will prevent irresponsible elements from conducting an unlawful discourse on various types of clandestine alignments. I repeat and reiterate that from the perspective of the laws under which this esteemed committee operates, nothing that took place beforehand nor any feature of any association whatsoever is of any importance. The matter at hand concerns the right to be elected and the right to propose candidates, and

> this right was not denied anywhere, in any declaration, in any ruling, and – with all due respect – this committee is not authorized to deny any of these rights" (ibid).

[…]

7. The legal question that is posed before us is only whether the Central Elections Committee has the legal authority, whether explicit or tacit, to disqualify a list of candidates for the Knesset that was designated an "illegal association." Prior to examining the law, I must say a few things to clarify the question.

As is known, the Committee's decision stated that the list was disqualified as it was designated an "unlawful association due to the fact that its initiators deny the integrity of the State of Israel and its very existence." It goes without saying that this is not only a matter of an unlawful association. Apparently, the "line" which must be drawn, in the opinion of the Committee's chairman, is the one that divides an unlawful association whose illegality is due to its undermining the existence of the state or the integrity of its territory from an unlawful association that is deemed illegal due to other factors. If the Knesset Elections Law is considered in reference to the provisions of Article 3 of the Ottoman Associations Law, then lists of candidates that opposed "law and morality," including some law or the other whose purpose is to "change the existing method of forming a government," or "to affect the separation between various races in the state," are also unlawful. If a list of candidates is indeed unlawful, as defined in the Ottoman Associations Law, I cannot see how the Elections Committee – if it is authorized to disqualify a list on grounds that it is an unlawful association – can approve this kind of list. However, the esteemed chairman explicitly explained to the Committee that a list of candidates who oppose a certain law and seeks to annul or to amend it, or who oppose the existing method of forming a government and want to change it etc. is legitimate, and it would be unthinkable to disqualify it.

[…]

11. A second possibility remains, and it is that the Committee is authorized to disqualify a list of candidates that seek to undermine the existence of the state or its integrity. This matter concerns elections to the Knesset whose sovereignty epitomizes that sovereignty of the state; denial of the sovereignty of the state, while sitting in the Knesset is a contradiction in terms. As this is the case, it is fitting – and possibly also necessary – that the Central Elections Committee has the authority to ban the entry into the Knesset of those who deny the principle of sovereignty.

It is important to immediately state that I truly agree that it is necessary that some body, be it the Central Elections Committee, the Knesset itself, or the Court, should have the authority to remove these subversives from the Knesset, especially those who betray the State and assist its enemies. But this does not imply that this authority was indeed granted by the existing law to a

certain body, including the Central Elections Committee. In a state governed by law, the rights of a person, even the most dangerous, treacherous and contemptible of criminals, cannot be revoked except in compliance with the law. The Central Elections Committee and the Court do not have legislative powers in this country; the Knesset is the legislative authority and it may choose to empower subordinate bodies to impose sanctions against someone that are a consequence of his conduct and deeds. Without such empowerment by the legislator, neither common sense, nor necessity, nor love of country, nor any other consideration whatsoever, can justify taking the law into one's own hands and revoking the rights of others.

One way or another, it is highly probable that the governments who threaten war on Israel are well aware of the nature of the constitutional regime in Israel and have decided to exploit it for their adverse aims. Yet, in the absence of any law in this regard, this does not justify or constitute grounds for the repudiation of our constitutional regime as it stands. On the contrary, we are proud of the freedom of expression, the freedom of association, and the absence of discrimination in the State of Israel and regard governments like those of our enemies with contempt and disgust as they allow the existence of only one party, the ruling party, or leave all of the government's power in the hands of a dictator or a military junta. When the needs of war forced upon us by our enemies will call for it, the Israeli legislator – including the secondary legislator authorized to institute emergency regulations – will know how empower the relevant parties to take all necessary defense measures, and not only in the battle field; but the State of Israel is different from its enemies because even a war does not sanction unlawful means, and any measure that is contrary to the law, or that is executed without legal authority thus violating civil rights, is illegal and no judge in Israel will uphold it.

Furthermore, even had there been an explicit, lawful authorization that allowed the revocation of a certain right from a citizen, if the right is a fundamental civil right, such as freedom of opinion and speech, this court would not have condoned the execution of this legal power unless it was intended to prevent a concrete, clear and immediate danger (HCJ 73/53; HCJ 87/53 PD, Volume 7, p. 871(2)). I cannot see the concrete, a clear or immediate danger to the State, or to one of its institutions, or to one of its rights, in the participation of this list in the Knesset elections. Should it be contended that this danger is hidden from the eyes of the courts and is only known to the government's security services, I would respond by saying that the material submitted to the Central Elections Committee which was presented to us as well did not support, let alone warrant, the conclusion that the above described danger exists as the attention of the Committee members was not directed to an existing, concrete danger that is looming upon us.

In the absence of overwhelming evidence of the existence of the aforementioned danger, the present denial of civil rights may appear to be a sanction against his [the Appellant's] past

behavior and opinions; The Central Elections Committee certainly has no authority to impose a sanction such as this.

[…]

13. There are states where the security of the state, or the sanctity of religion, or the achievements of a revolution, or the dangers of a counter-revolution and other such values are linked to any crime and atone for any act that was committed without authority and contrary to the law. Some of these states invented “natural law” which is above any other law voiding it when necessary, in the sense of “time to act even in violation of the Torah.” These are not the ways of the State of Israel, its ways are those of the law, and the law is legislated by the Knesset or pursuant to its explicit authorization.

President Agranat:

I carefully reviewed the informative, and if I may add courageous, ruling of my esteemed colleague, Justice Cohen, but am unable to concur with the final conclusion. The factual evidence, in light of which this appeal must be deliberated and which must not be questioned, constitutes the basis of the Central Elections Committee’s refusal to approve the Appellant’s list (“the Socialist List”) and is noted in the Respondent’s letter of 29.9.65 to the representative of the list. The letter states that the grounds for this refusal were that this “list of candidates is unlawful as its initiators deny the integrity of the State of Israel and its very existence.” More specifically: the material that was in the hands of the Committee clearly reveals that most of the candidates on the said list are people who belong to the “al-Ard group” whose goals were defined in the judgment delivered in [*Sabri Jiryis v. Haifa District Commissioner*] HCJ 253/64, PD, Volume 18, Part 4, pages 6763,677, as aims that “absolutely and decisively deny the existence of the State of Israel, and particularly the existence of the State within its borders.” Moreover, I am in complete agreement with my colleague who stated that it does not matter that the other candidates on the list were not activists or known members of the above movement, as it can be assumed that when they decided to be part of a joint list with members of al-Ard they verified beforehand who they were joining and to what end. The significance of this factual finding is, therefore, that we are contending with a list of candidates whose goal is to obliterate the State of Israel.

My colleague also hinted that the problem under discussion is not so simple, and that it also poses "a grave and significant constitutional question." If that is the case, it is obvious that in order to define the aforementioned authority of the Central Committee, we are obliged to first of all consider the constitutional “facts” which are relevant to this question. Thereupon, we find that there can be no doubt whatsoever — and this was clarified at the time by the proclamations

entrenched in 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, first and foremost, as "a Jewish State in the Land of Israel" 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 years long aspiration for the redemption of Israel."

It is superfluous to note, at this stage of the life of the state, that the above contentions express the vision of the nation and its creed, and it is our duty, therefore, to keep these in mind "when we come to interpret and construe the laws of the State" (HCJ 73/53; 87/53, *Kol Ha'Am v. the Minister of Interior*, PD, Volume 7, page 871, 884 (2)). The significance of the above "creed" is that the continuity or the "eternity" of the State of Israel constitutes a fundamental constitutional fact which no state authority whatsoever – whether an administrative or a judicial authority or a quasi-judicial authority – may deny when it implements any of its powers. This would, otherwise, signify absolute contempt for the two wars the State of Israel fought since its establishment to avert its annihilation by hostile Arab states. The meaning of this would be a complete denial of the history of the Jewish people and its yearnings, including a denial of the Holocaust that befell the Jewish people before the establishment of the state in which millions of Jews were massacred in Europe and which proved anew – in the words of the Declaration – the "urgency in finding a solution to the problem of the homelessness of the nation by re-establishing the Jewish state in the Land of Israel."

The outcome of the above is that a list of candidates that denies the aforementioned has no right to participate in parliamentary elections. It must be emphasized and noted that my statements must not be understood as implying that I deny the right of the Appellant list's signatories to vote for the Knesset, and I also do not deny the right of this list's candidates to be elected to the Knesset, as individuals, and, therefore, also not the right to have their names included on some other list of candidates. But the system of voting in the Knesset election is not based on a vote for individual candidates but solely on a vote for a **list** of candidates (Article 4(A) of the Knesset Elections Law, 5719- 1959). This means that a vote in elections to the Knesset is a vote for a **group** of people that are advocating a certain political aim and it must, therefore, be presumed that if this group is elected to the Knesset election, its members will act to "realize the will of the people" in the light of this aim (see the book *Unity in Diversity* by Van Den Bergh, p. 18, 38). It is clear, as emphasized by the Chairman of the Central Elections Committee, that a group of people whose candid political aim is not only "to change the internal constitutional regime of the state" but "to undermine its very existence" cannot, *a priori*, have a right to take part in the process of realizing the will of the people and, therefore, cannot stand for elections to the Knesset.

The constitutional problem that occupied us in this appeal was already raised – with the relevant differences – in the United States in the middle of the last century. As known, at that time the southern states announced that they are seceding from the federal state and, in the wake of this event, President Abraham Lincoln, on 4.7.1861, sent his famous message to the congress in which he defined the matter in terms to which there is only one reply:

> "It forces us to ask: Is there, in all republics, this inherent and fatal weakness?
> Must a Government of necessity be too strong for the liberties of its own people,
> or *too weak to maintain its own existence*?"

The reply this revered president gave to this question is well known to all.

Hence, it is my opinion that the Central Elections Committee acted lawfully and the appeal must, therefore, be rejected.

Justice Zussman:

All agree that this appeal raises a constitutional question

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3. In his ruling in HCJ 253/64, PD, Volume 18, (4), (p. 673), my esteemed colleague, Justice Vitkon, mentioned the necessity of learning a lesson from the experiences of the Weimar Republic. It may not be incidental that the Supreme Court of the Federal Republic of Germany, which was established after WWII, was, to the best of my knowledge, the first court to determine the principle that a judge must also rule according to case law that was not incorporated into the legal corpus, and that it takes precedence not only over regular law but also over the constitution whose provisions are also secondary to it.

4. If this is the case in a country that has a written constitution, it is 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 destroyed and obliterated off of the face of the earth. Its judges are not permitted to watch from the sidelines and despair because of the lack of positive legislation when a litigant requests their assistance in bringing about the demise of the state. Likewise, other state authorities are not obligated to serve as a tool in the hands of those who seek to destroy the state, and who may have no other aim.

5. I allow myself to reiterate the example I presented while hearing the appeal: Someone seeks to hurl a bomb in the Knesset in order to kill members of the Knesset, but since this cannot be done from the visitors' gallery, he submits a list of candidates for election to the Knesset declaring that his aim, as a Knesset member who enjoys immunity, is to be able to enter the assembly hall

and implement his scheme. This person submits a list that is flawless. Is the Elections Committee required, pursuant to the above Clause 23, to approve the list and to thus assist him to commit a crime? Or is the committee authorized to state that this is not the purpose of a parliament in a democratic regime, and that the manner in which the individual seeks to exploit government mechanisms constitutes an abuse the committee is not obliged to endorse? And if the committee is authorized to reject a list submitted to it for the purpose of advancing a crime of murder, is it not authorized to deny approval to a list that was submitted in order to advance treason against the state?

6. In our case, these fundamental rules, which are above constitutional law, constitute no more than the right of the organized society of the State to self-defense. Whether we call these rules "natural law," indicating their legality by virtue of the creation of a state (See Friedman, *Legal Theory*, 4th Edition, pages 44-45), or whether we call them by a different name, I am in agreement with the opinion that past experience compels us not to repeat the mistake we were all witness to. As my esteemed colleague, Justice Cohen, stated, the German Federal Constitutional Court, when it deliberated the question of a party's legality, spoke of a "fighting" democracy which does not open its gates to acts of subversion disguised as legitimate parliamentary activity. As for myself, in regard to Israel, I am willing to accept a "defensive democracy," and the tools required for defending the existence of the State are available to us, even if they cannot be found in the Elections Law.

Hence, I agree to reject the appeal.

It was, therefore, decided by the majority opinion to dismiss the appeal.