

3. ASSOCIATION

O. SABRI GHARIS v. HAIFA DISTRICT COMMISSIONER

In the Supreme Court Sitting as a High Court of Justice

Landau J., Berinson J., Witkon J.

Y. Yardor for the petitioner
Z. Terlo, Deputy State Attorney, for the respondent.

DECISION

Witkon, J.

This petition concerns the formation of a society in accord with the Ottoman Societies Law, 1909. A society by the name of "The El-Ard Movement" was founded, and the petitioner, as member of its directory board, sent the respondent notice of its establishment as required under sections 2 and 6 of the Law. Enclosed with the notice was the society's memorandum, article 3 of which specifies its objects, as follows:

"(a) To raise the educational, scientific, health, economic and political level of all its members.

(b) To bring about full equality and social justice among all classes of the people in Israel.

(c) To find a just solution to the Palestinian problem -- whilst perceiving it as an indivisible unity -- in accord with the will of the Palestinian Arab people, that will meet its interests and aspirations, restore its political existence, assure its full and legal rights, and perceive it as having the primary right to determine its destiny independently within the framework of the supreme aspirations of the Arab nation.

(d) To support the movement for liberation, unification and socialism in the Arab world by all lawful means, whilst perceiving that movement as a determinative force within the Arab world that obliges Israel to relate affirmatively to it.

(e) To act towards making peace in the Middle East specifically and in the world at large.

* (1964) 18 P.D. (4) 673

(f) To support all the progressive movements throughout the world, to oppose imperialism and to support all the peoples aspiring to liberation therefrom."

The petitioner received a response to this notice, signed by the respondent's deputy, in the following terms:

"(1) I have studied closely the memorandum enclosed in your above-mentioned letter, in particular article 3(c) thereof, and likewise further material that has been brought to my attention.

(2) Pursuant to such study, I hereby inform you as follows:

(a) The society by the name of "The El-Ard Movement" -- which you, together with other persons, purported to establish -- is a society that has been constituted with the content to prejudice the existence and integrity of the state of Israel.

(b) Therefore, in accord with section 3 of the Ottoman Law on Societies, the establishment of the body purporting to be "The El-Ard Movement" is prohibited.

(3) If it transpires that despite the aforesaid you are acting as a body, legal measures may be taken against you."

The petitioner objected to the content of this letter, but the respondent answered that he had nothing further to add.

In his petition to this Court the respondent, in fact, complains of two things. He contends, firstly, that under the Ottoman Societies Law the respondent is not empowered at all to prohibit the formation of a society. He asks the respondent: who appointed you to rule on the lawfulness of the society of whose formation I have informed you? According to the petitioner's construction of the Law, the whole purpose of section 6 is to prohibit and prevent the establishment of clandestine societies. For this reason the respondent has no alternative but to accept the notice sent to him and to confirm it for the purpose of promulgating a notice as to the society's establishment. The respondent's second argument relates to the merits. He denies that there is anything in the society's objects to prejudice the existence or integrity of the State of Israel. He contends that it is not a prohibited or unlawful society in the sense of section 3 of the Law, or in any other sense. The petitioner, therefore, appeals to the Court to declare that the society is not prohibited, that the respondent's letter be seen as an acceptance of the notice and that the founders of the society should now give public notice as to its substance. The Attorney-

General joined the hearing for the issue of an order nisi by virtue of his authority under section 6 of the Procedure Law (Amendment) Ordinance, 1936, on his opinion that there is a public interest in this petition. We have heard arguments and studied documents, and on the basis of all these have reached the conclusion that the requested order should not be issued.

The petitioner's first argument can be dealt with briefly. The point in controversy is whether the respondent is indeed authorized under the law to inquire into the lawfulness of the society as to the formation of which he received notice, and, if his opinion is in this respect negative, whether he may refuse to deliver an acceptance of the notice and object to its public promulgation. The petitioner contends that the respondent must always issue the acceptance, thereby complying with section 6 of the Law, the whole purpose of which is to prevent the founding of clandestine societies. In support of this argument counsel for the petitioner cited references from French Law, which served as inspiration to the Ottoman legislature, whereas the Attorney General referred our attention to Hamis v. Tel Aviv District Commissioner, (1954) 8 P.D. 1483, where the Court justified the Commissioner's refusal to confirm notice of the formation of a society that was a mere commercial enterprise. However, were we to accept the petitioner's argument in this respect, we would have no cause to address his second argument, and that was not the intention of the petitioner and the other founders of the society in bringing their matter before us. They sought this opportunity to expose their society's objects to the test of judicial purview, and it is only right that they know where they stand. One might also note that a new Bill has already been deposited on the floor of the Knesset, and when that statute is enacted it will no longer be necessary to delve into the interpretation of the outdated Ottoman Law. We therefore proceed to the merits of the matter.

According to Laniado's translation,* section 3 of the Law provides: "The existence is prohibited of societies that are founded on unlawful grounds, that oppose law and morality, or the object of which is to prejudice the public order or the country's integrity or to change the method of composition of the existing government or to exert influence towards political differentiation between the various races within the state." It is evident that the society is prohibited if its object, or one of its objects, is an unlawful purpose or if it prejudices the public order existing within the State or its integrity. And indeed, the respondent claims, as we have already seen in his reply to the petitioner, that the society was founded with the intention to prejudice the existence and integrity of the State of Israel. The Attorney-General contended that such intention

* The original version of the Law was in Turkish

arise from the definition of objects in Articles 3 (c) and (d) of the society's memorandum, and the other objects, although not in themselves unlawful, are merely secondary to the principle one. In fact, even the petitioner concedes that if the society's object was to prejudice the existence and integrity of the State, that would be an unlawful purpose and the society prohibited, but he takes issue with the meaning that the respondent attributes to the society's objects. In support of his contention the petitioner submitted an additional affidavit in which he gave various interpretations of the society's memorandum, whereas the Attorney-General submitted two extracts from newspapers that are published in the Hashemite Kingdom of Jordan, and a transcript of a newspaper review that was broadcast on Radio Cairo and received in Israel. He also suggested that we study classified material relating to the El-Ard Movement and its founders, which according to a certificate from the Minister of Defense is not to be revealed for security reasons except to the judges. So as not to prejudice the petitioner we decided at the time not to admit this material, so long as we remained unconvinced, or the basis of the overt material, that justice lies with the petitioner; and we will likewise not refer to it now, after it has become apparent that, on the basis of the overt material, the application is to be dismissed.

We proceed with an analysis of the objects as formulated in the memorandum. And indeed, it is only just that the decision as to the lawfulness or unlawfulness of the objects should turn primarily upon the version found in the memorandum itself. That formulation is binding upon the members of the society, and not the explanations and interpretations that the founders attach to it. Where the unlawful object is covert and obscured and concealed behind a smoke-screen of rhetoric, the government may certainly bring material likely to uncover the true object. But where the unlawfulness is evident from the text of the memorandum, or even where the memorandum is merely ambiguous and raises serious doubts in the heart of the reader, we will not permit the society's founders to whitewash the text with reservations and interpretations; rather we tell them to amend the text, if it is possible to do so in good faith. In the present instance it is possible to say -- perhaps to the credit of the petitioner -- that neither in his letters nor in his affidavits did he attempt to conceal the true purpose of the society (unlike his counsel who did not hesitate to argue untenable points in this respect). In any event, whether according to the formulation in the memorandum or according to the explanations in the petitioner's affidavit, the object is apparent.

That object absolutely and conclusively refutes the existence of the State of Israel in general, and the existence of the State within its present borders in particular. It raises the Palestinian problem and demands its solution "as

illegally, only reinforces thereby the view that the society, which he wishes to be declared as a lawful one, was primarily intended to serve as a convenient cover for unlawful action.

Berinson J. I concur and have nothing to add to the exhaustive opinions of my esteemed colleagues.

Petition for order nisi dismissed.

Judgment given on November 11, 1964

to her destruction by force. In face of this apparent relationship, one cannot put faith in the declaration that the initiators of the society intend to support the liberation movement in lawful ways.

In my view it is no mere coincidence that Mr. Yardor's arguments also evoked a sympathetic tone towards Egypt. He remarked that on one or two recent occasions the President of Egypt said in his public speeches that a war with Israel is out of the question. But it is clear to any intelligent person that so long as there is no more concrete proof of the change in Egyptian policy, it would be naive to take these statements as more than a tactical "withdrawal", without relinquishing the final objective. The controversy and increasing hostility is clearly heard in the Cairo broadcast of July 29, 1964 which deals specifically with the El-Ard Movement, the transcript of which was submitted to us by the Attorney General. This is what was said there as regards that movement:

". . . on that same despoiled land, which the Arabs outside are preparing to repatriate, the Arabs within are now cooperating toward its purge.

The Arabs exult in the spread of the fire of the Nasserian revolution, which constitutes the great motto and realization of the national revolutionary influence on occupied Palestine These Arabs themselves now appeal to their Arab League in the hope that it will not cease in its support of this new and practical movement that is one of the movements of Arab opposition to its enemies. . . ."

The response of the Jordanian newspaper "Palestine", in an article which was likewise submitted to us, is less enthusiastic: it speaks of the El-Ard group as "one of tens of similar movements that are active in our conquered land". Mr. Yardor conjectured that this reserved tone is due to the rivalry between Jordan and Egypt since this newspaper also considers the El-Ard group to be pro-Egyptian. It is very likely that this is so.

The elementary right of every state is to preserve its freedom and its very existence in face of enemies from the outside and their followers within. As my colleague said, no government should be required in the name of protection of the freedom of association to give its authorization to the establishment of a fifth column within its state's boundaries. On the basis of the material before us there is sufficient ground for the fear that the society, which the petitioner wishes to register, would have taken this dangerous course, in violation of the duty of allegiance that every citizen bears to the country in which he resides.

Mr. Yardor voiced what amounts to a warning, that if the society is not allowed to act overtly, the result might be to create an underground movement. It would have been better had he refrained from voicing this covert threat on behalf of his client, even if he did so only by way of insinuation. Anyone who is ready to consider going underground, that is to say, acting

The principle is that only weighty considerations can justify the prohibition of a society. The freedom to associate is of the essence of a democratic regime and a fundamental civil right. Far be it from us to deny this right and disqualify a society for the sole reason that its object, or one of its objects, is an aspiration to alter the legal situations that exists within the state. The existing situation might require correction from one or another point of view, and a movement that seeks to organize public opinion within the state to such end may do so as a legally registered society. However no free regime will support and recognize a movement that undermines the regime itself. Even the Declaration of Human Rights (section 11(2)) restricts the freedom of association to the extent that this is necessary in a democratic regime for the security of the nation and the public, prevention of disaster and violence, or protection of health, morality or the rights and liberties of others. This restriction is essential. There is more than one occasion in the history of states with proper democratic regimes, in which various fascist and totalitarian movements arose and made use of all the rights granted by the state to freedom of speech, the press, and association, so as to carry on their destructive activity under its auspices. Whosoever saw this in the days of the Weimar Republic will not forget the lesson. I have already said in another matter (it too related to the same El-Ard Movement whose members wished to register a company), Kardosh v. Registrar of Companies (1960) 15 P.D. 1151, at 1170: "I do not think at all that on this instance any question of freedom of speech or freedom of press arises. These freedoms are valuable possessions, the tradition of a democratic regime in a free country, but just for this reason they may not be used as an excuse or tool by those who seek to undermine that regime." Likewise in the present matter. And the encouragement given the El-Ard Movement from across the borders impresses us even more with its potential to endanger the State of Israel. It would be blind folly to sanction it.

Landau, J. 1 concur.

As my esteemed colleague, Witkon J., noted, we are dealing with the freedom of association, which is one of the fundamental liberties of the citizen in a democratic state, and the natural tendency is therefore not to deprive such freedom unless there are decisive reasons to do so, that are similarly recognized in a state adhering to the rule of law.

A national minority has a right to organize itself for the purpose of correcting through lawful means any wrong caused it, whether it be a real or even imaginary wrong. Thus, if the petitioner and his companions had intended to strive towards a political settlement between Israel and its neighbors through peaceful means -- a settlement that would result in an abatement of the tension in the region and hence a blessing to all its

inhabitants including the Arab minority in the State of Israel -- surely no one would have regarded such a purpose as unlawful, even if the peace plan contained proposal for altering the constitutional regime within the states in the region, including Israel. In the oral pleadings before us, Mr. Yardor spoke of such a plan, although I admit that I too found his words vague and full of self-contradictions. But one must distinguish between a real peace plan and a program that aims at changing the existing regime by forcing the will of one of the parties and if necessary even through resource to violent means. Here we will not pay heed to learned counsel's words of interpretation, nor to the explanations given in retrospect by the petitioner in his affidavit for the purposes of the Court hearing, but will refer directly to the proposed memorandum of the society in order to establish the intent of its drafters.

My colleague analyzed the text of article 3(c) of the memorandum. I wish to supplement his words, with an emphasis on the last part of this section together with the words of the following section (d). The ending words of section (c) perceive the Palestinian Arab people

"as having the primary right to determine its destiny independently within the framework of the supreme aspirations of the Arab nation,"

and the society's object as designated in section (d) is:

"to support the movement for liberation, unification and socialism in the Arab world, by all lawful means, whilst perceiving that movement as a determinative force in the Arab world, that obliges Israel to relate affirmatively to it."

Again, if the petitioner and his companions had intended to emphasize in these words their national ties with the Arabs beyond the border, nothing would have been more natural. For the Jewish citizens of the State also nurture their ties with the Jews of the Diaspora. But this is not the intention that arises clearly from the quoted passages. Here the Court may make use of its knowledge of world affairs, especially in this region of the world, as things that are evident in themselves.

The terms "the movement for liberation, unification, and socialism in the Arab world" have a clear and definite meaning -- precisely in their conjunctive use -- in our present day political dictionary: under these slogans Egypt makes its claims to leadership of the Arab world, and in Egyptian propaganda these slogans are closely connected with incitement to the annihilation of the state of Israel which, according to the falsehoods that are disseminated therefrom, is an obstacle to the realization of the nationalistic aspirations of the Arab peoples. Whoever identifies with this movement, whose center is in Cairo, and perceives in it the "determinative force in the Arab world", thereby adopts the hostile intentions against the State of Israel and the aspiration

an indivisible unity", "in accord with the will of the Palestinian Arab people". It, and no other, has "the primary right to determine its destiny", and such "within the framework of the supreme aspirations of the Arab nation". We shall not dwell upon the question what one is to perceive as an "indivisible unity", whether it is the Palestinian problem or Palestine itself, as one might be given to understand from the petitioner's letter. The main point is that the State of Israel was established in part of the area of Palestine, and that this fact is not recognized here in any way. And it is only natural for proponents of the society's objects to ignore the existence of the State and the rights of the Jewish people residing therein, for they see the geographical expanse that contains the State as an area in which the problem will be resolved "in accord with the will of the Palestinian Arab people". The text does not speak of coexistence or of equal rights for both peoples. The Arab people have been declared here, without further ado, as having "the primary right to determine its destiny". The Jewish factor does not exist in this viewpoint. Who would be so naive as to believe that this program can be realized through peaceful and persuasive ways, and that its meaning is not subversive action, and belligerence its end. It is not surprising therefore that the El-Ard Movement reaped enthusiastic acclaim from the organs of the Arab nationalistic propaganda which day and night instigates the annihilation of Israel, as we learnt from the newspaper extracts and the Radio Cairo broadcast that the Attorney-General submitted.

Even the affidavit prepared by the petitioner for this hearing changes nothing as to the apparent meaning of the memorandum. There the petitioner describes the situation of the Arabs in Israel as one of discrimination, suppression and deprivation of rights. A change in this situation, so he claims, would also affect the abnormal relations that exist between Israel and the Arab states and be conducive to peace between them. Thereafter the petitioner explains one by one the principle objects enumerated in article 3(c) of the memorandum. He reiterates the proposed solution that will "restore to this (Arab) people its political existence and allow it to determine its destiny by itself, in accord with its will, without external interference on the part of any factor" -- and again it is clear, both from the spoken and the unspoken, that the other concerned factor, the Jewish people, is to exercise no influence on this decision. This is not a mere conflict of rights and interests between the Jewish people residing in Zion and the Palestinian Arab people; in the words of the petitioner in his affidavit "the Palestinian Arab people are an integral part of the Arab nation, it is therefore natural that this people take into account the aspirations and interests of the Arab nation when determining its own destiny".

If I praised the petitioner for his candor I am sorry to say that I found in the words of his learned counsel an overdose of feigned innocence. He did not even flinch at saying things that are surely unacceptable to his clients. He opened by saying that two peoples live in the land of Palestine. The Hebrew people have already gained self-determination; the Arab people have not.

Is it unlawful for the Arab people to aspire to the same right? Of course, the supposed equality in this argument is for appearances only, for the exclusive self-determination that is claimed here for the Arab people in the entire area of Palestine does not leave any part of it for the self-determination of the Jewish people and the sovereignty of its state. In order to extricate himself from this dilemma Mr. Yardor was forced to argue that the El-Ard Movement in Israel is pursuing its own course and diverging from that of the Arab nationalistic movement inside the Arab countries. There the State of Israel is not recognized, although the notion of a war of annihilation against it has been relinquished. Whereas the El-Ard Movement within this country recognizes the State of Israel; and it demands self-determination for the Palestinian Arabs with the assurance of equal rights to the Arab minority within the State's territory. Do his clients aspire to an alteration of the state's borders? They are not prepared to answer this question, Mr. Yardor tells us, adding that the state of Israel does not have borders, meaning -- so he explains -- that the petitioners do not recognize the borders that were delineated in the armistice agreements. And that is not all. When counsel was asked whether his clients recognized the sovereign State of Israel and its foundations and purposes, including free aliyah and the return of the Jewish people to its homeland, he answered in the affirmative. He claims that they also concede that the incorporation of the State of Israel into one Arab unity will depend on the will of the Jewish people. And finally, and here again the cat was let out of the sack: the El-Ard Movement does not constitute a "fifth column", as contended by the Attorney General, but a possibility that it will evolve into a resistance. The only question left for us to ask is: who is the foreign oppressive government against which this movement is likely to rise up and organize subversive action, if not the State of Israel and its authorities?

The short answer to this astounding argument is, of course, simple. The founders of the society did not deem it proper to specify among its objects all these things that we heard from their counsel: neither their supposed reservations from "the supreme aspirations of the Arab nation", nor their recognition of the sovereign State of Israel and its foundations and purposes, nor their concession that the conclusion of the State's territory within the boundaries of Palestine is contingent on the will of the Jews to be incorporated within that political unit. They did not express or include such notions, because their entire struggle is directed as against them. It is true that the denial of the sovereignty of the State of Israel was not stated expressly in the society's memorandum, but it is implied and necessarily deduced therefrom; and the "declaration of allegiance" to the State that was made on behalf of the members of El-Ard for the purpose of this proceeding is no more than lip service. The respondent rightly took the view that this society's existence is prohibited under the provision of section 3 of the Societies Law.