In the Supreme Court

EA 1/65

Before: President Agranat
Justice Sussman
Justice Cohn

Yaakov Yeredor

v.

Chairman of the Central Elections Committee for the Sixth Knesset

Judgment

Justice Cohn:

1. This appeal comes before us pursuant to section 24 of the Knesset Elections Law, 5719-1959 [13 L.S.I. 121], which states as follows:

> (a) Where the Central Elections Committee has refused to confirm a candidate' list…it shall, not later than the 29th day before election day, notify the same to the representative of the list and his deputy, and they may, not later than the 25th day before election day, appeal to the Supreme Court against such refusal.
>
> (b) The Supreme Court shall hear an appeal under this section by three Judges, and its judgment shall be final. The judgment shall be served on the Central Committee not later than the 20th day before election day.

According to section 66A of the Law [13 L.S.I. 157], "In a year in which the elections to the Knesset take place on the first Tuesday in the month of Cheshvan" then in section 24(a) the 35th day should be read instead of the 29th day, the 28th day should be read instead of the 25th day, and in section 24(b) the 21st should be read instead of the 20th day.

2. On the 3rd of Tishrei 5726 (September 29, 1965), the Chair of the Central Elections Committee wrote to the representative of the "Socialists' List" as follows:

> I hereby notify you that in its meeting today, the Central Elections Committee for the Sixth Knesset refused to confirm the Socialists' List because this list of candidates is an unlawful association inasmuch as its initiators deny the integrity of the State of Israel and its very existence.
>
> According to section 24(a) and 66A of the Knesset Elections Law, 5719-1959, you may appeal this refusal no later than the 28th day before election day, that is not later than October 5, 1965, to the Supreme Court.

3. In the sixth meeting of the Elections Committee, on September 16, 1965, the Committee Chair said the following about the "Socialists' List" (hereinafter: the List) (among other things that are not relevant to this appeal):

> This list has ten candidates. As it turns out, five were members of an organization that was declared an unlawful association by the Minister of Defense. These candidates are: Salah Baransa and Habib Quagi, who are the first two candidates on the list; Ali Raffa, who is the fifth candidate on the list, and the last two are Muhammad Abd Al Hamid Muari and Mansur Kardosh. I think that the third one on the list, Sabri Elias Jerias, is also among them. These are people who were previously in the El Ard group. That group attempted to register as an association under the Ottoman Associations Law and the application was denied by the District Commissioner. They turned to the Supreme Court, and it, too, rejected their request and held that they were a group whose purposes harm the existence of the state and its territorial integrity. Thus, their request was denied by the Supreme Court as well (the decision was published in IsrSC 18 (4) 673). Additionally, a declaration by the Minister of Defense was published in the Official Gazette pursuant to Regulation 84(1)(b) of the Defense (Emergency) Regulations 1945, in which the Minister of Defense declared: "The association known as the El Ard Group or the El Ard Movement, and whatever its name may be from time to time, as well as an association incorporated as El Ard Ltd., including an association created by a common action of shareholders in the above company or any part thereof, are an unlawful organization." Here I must add that prior to the request to associate under the Ottoman Association Law, there was another request to the Companies Registrar to register a stock corporation under the name of the El Ard Company Ltd., and

> the Companies Registrar refused to register it. They then turned to the Supreme Court, which ordered the registration of the company. The declaration by the Minister of Defense applies to this organization as a limited liability corporation, as well.
>
> These are the facts I wish to provide to you at this point. And as I understand it, the question will ultimately be whether this list must be confirmed or not. The purpose of today's discussion, as far as I understand, is for you to consider these facts that I have presented today, and should it be decided that this list is expected to be rejected, I understand that it is the duty of plenum to invite this list's representatives to appear before it so that they can voice their arguments against the rejection…" (p. 5-6).

In the course of discussing this notice, one of the committee's members said that: "The group received encouragement from the broadcasts of Cairo radio. If it is possible, I would ask that we be supplied with copies of those broadcasts. One of the pieces of advice they received from Cairo radio was to secure diplomatic immunity so that they will not be harassed" (p. 14.) The Chair responded to this by saying he was willing to distribute the material among the committee members. He added as follows:

> I believe that this committee has judicial authority. Basic Law: The Knesset has been mentioned. Basic Law: The Knesset includes section 6, which says that every Israeli citizen who, on the day of submitting a list of candidates which includes his name, is aged 21 years or older, shall have the right to be elected to the Knesset unless a court has deprived him of that right by virtue of law. I bring the matter to your attention and each of you may use it to the best of your understanding (*ibid*.)

At the end of the meeting it was decided to invite the list's representatives to explain to the committee why the list should not be rejected (*inter alia*) by reason of the fact that "the list and the group of candidates should be deemed an unlawful organization and thus should not be confirmed" (p. 16).

4. On September 24, 1965, at the seventh meeting of the Elections Committee, the Petitioner appeared before the Election Committee as the list's representative. The Committee Chair addressed him as follows:

> …I would like to explain to you, sir… in general terms, what the issue is. The Committee believes that it has material that prima facie shows that the initiators of this list are members of El Ard, and an examination of the names reveals that six of the candidates were incorporators of the El Ard Company (reads the names.) We are aware of the declaration by the Minister of

> Defense, published in the Official Gazette 1134. In addition, the Committee was presented with the Supreme Court's decision in the matter of *El Ard v. District Commissioner* in HCJ 253/64. I refer you, sir, to that section in the Ottoman Associations Law discussed in the decision, section 3, along with the definition of 'Association' in section 1 of the Law. This was the material that prompted the Committee to invite you, sir, to present your arguments (p. 27).

The Petitioner referred the Committee to section 6 of Basic Law: The Knesset, and claimed that "no law grants the Elections Committee the power to deny any citizen his right to be elected to the Knesset due to the list being an unlawful association… No court decision under section 6 of Basic Law: The Knesset has ever denied the right of any of the candidates on this list to be elected…" (p. 28.) The Petitioner went on to address the list's purpose, stating:

> This list wishes to eliminate the phenomenon of "*goy shel shabbat*"[1] in the Jewish parties, which support equality for the Arab people and granting full opportunity to the Arab people, and to express solidarity and partnership – including within the territory of the State of Israel – with the waves of national liberation in the Middle East to the same extent that the Jewish people in this land demanded and achieved this right, and all this to the benefit of the State. From a public perspective, rejecting the list means denying the Arab people who live in Israel the ability to voice its position on the matters most sensitive to it in the only forum that would permit it to express itself freely. Logic requires that Arabs be permitted to reach the Knesset through an independent Arab list, which would prevent irresponsible elements from improperly discussing such things as various kinds of undergrounds. I summarize and repeat that there is no significance, in terms of the laws that govern the activity of this esteemed Committee, to anything prior, to the character of any association. We are concerned here with the right to be elected, the right to nominate candidates, and this right was not revoked anywhere, by any declaration, by any judicial decision, and – with all due respect – this Committee does not have the power to revoke any of these rights (*ibid*.).

5. In its eighth meeting, on September 9, 1965, the Elections Committee held a full, comprehensive discussion of this matter. After the committee members expressed their opinions, the Chair of the Committee expressed his opinion at

[1] Literally: "Sabbath Gentile" – a non-Jew who performs certain types of work which Jewish religious law prohibits a Jew from doing on the Sabbath (ed.).

length, and since the learned Attorney General adopted this position of the Committee Chair for the purposes of his arguments before us, I will present the excerpts of his speech that address the legal question in dispute, as they were recorded in the minutes, as follows:

> Of course we consider this question within our judicial authority. The matter before us is by its nature a legal question… (p. 24).
>
> We do not sit here as a court, and therefore we do not require evidence as a court would require according to the standards of evidence law. We may be satisfied with less that that which would meet the criteria of legal proceedings in court. And the Supreme Court, I believe, would put itself in the shoes of this Committee when it comes to consider the factual questions related to the legal decision. Indeed, the matter is very serious, because, as was rightly stated here – if we reject this list, we might ask, where does this end? However, our role is to set the boundary according to legal considerations, and determine where it ends. In my opinion this limit can and must be set… (*ibid*.).
>
> … An association is not only a registered association or one that which wishes to register, but it is defined in the most broad terms in section 1 of that law (the Ottoman Associations Law) as a body composed of several people who join… their knowledge or activity in order to achieve a purpose that is not the division of profits. This is a very broad definition, and it applies to those people who wished to register the El Ard Association. And I say that in the absence of any evidence before us to the contrary, it applies to these people today as well… In my opinion, the association that we must view here is not the 750 signatories to the list, but they are the 10 candidates. After all, according to the law, each of the candidates must give written consent to being a candidate. It must be assumed that they consent to being a candidate after looking into whom they join on the list. Well, there is here that consent by these ten people, which is addressed in the first section of the Ottoman Associations Law. I myself am satisfied, according to the material before us, that the initiators of this list of candidates are the same El Ard Group that made previous attempts to organize… and later the Minister of Defense, in his declaration… turned the group of the incorporators of the stock corporation into an unlawful association under the Defense (Emergency) Regulations of 1945, along with any part of this group. However, the declaration is only an accessory tool in my conclusion. The

foundation, in my view, is section 3 of the Associations Law. And here I have no difficulty in setting the boundary between this list, whose purposes were defined in its memorandum, of which parts were cited by the Supreme Court in its opinion, and other groups who wish to change the internal constitutional regime in the country (p. 25).

I see a great difference, as the distance between east and west, between a group of people that seeks to undermine the very existence of the state, or in any event its territorial integrity, and a party that recognizes the political entity of the State but only wishes to change its internal regime. The question asked here was, what will tomorrow bring were we to apply this section against other parties. I do not know of another party in the state against which I could apply that section…. (p. 26).

… I would like to say that Basic Law: The Knesset does not at all address the issue with which we are concerned here. It addressed the individual ineligibility of a candidate, while we are talking about the barring of a list as an association. When we consider our legal regime as a whole, we are permitted to read both Basic Law: The Knesset, and certainly the Knesset Elections Law together with the Associations Law, and we may read into the Knesset Elections Law a general rule that an illegal association may not be approved as a list… (*ibid.*).

… I say that we must add to the conditions detailed in the Law an implied condition according to the same rule of contract law that asks what a bystander would say were he asked this question as to whether a condition should be read into a contract entered into by the parties although not detailed in the agreement, and if his response would be that it is obvious, then it is permitted to read an implied condition into that contract. In the same way we must analogize here the interpretation of the Law. I now wish to remind you of a different idea, again from contract law: the idea that *ex turpi causa non oritur actio* – no cause of action can arise from unlawful or immoral conduct. This is also not written in any statute, but we read this into every contract, although we have statutory contract laws. I believe this Committee, in its judicial approach, must follow that same path and find that a list that is unlawful in the sense that it denies the very existence of the state must not be confirmed, for the same reasons explained in the Supreme Court's decision, because a body that objects to the very existence of the State must not participate in the Knesset, which is the sovereign institution in the State – the institution that gives expression to the people's will. As was said in the

> decision, democratic ideas must not be used in order to undermine that same democratic regime. These are fundamental ideas of our constitutional regime, which we are permitted to read into the provisions of the Knesset Election Law (p. 27).

6. I agree with the honorable Chair of the Elections Committee that the question before the Committee, and that is now before us, is an extremely serious, constitutional question, and the fact that the Law mandates that we hand down our decision within four days, including the Sabbath and a holiday, does not make our difficult task easier. I have been greatly assisted by the members of the Committee, whose statements in the course of the debate held by the Elections Committee shed light and clarify the problem in its many aspects, each one according to his approach and view – and particularly by the comprehensive, clear opinion by the honorable Chair, some of which I have presented above, and following which I will discuss all the questions arising here, according to the order that he set for himself. I will first say that from a factual standpoint, we will not examine the Committee's finding that the candidates on this list are indeed the members of the El Ard group, which is an unlawful association, whether according to section 3 of the Ottoman Associations Law, or Regulation 84 of the Defense (Emergency) Regulations 1945, or the two statutes taken together. And in this context it is irrelevant that not all the candidates on the list were active or known members of this group before, because – as the Committee Chair has said – once they decided to join one list and to cast their lot with the people of El Ard, they are presumed to have first examined with whom they were joining and for what purposes. Similarly, we shall not examine the finding of the Committee Chair that such illegality is, partially or fully, the result of the fact that the members of this group "undermine the very existence of the State, or in any event undermine its territorial integrity."

7. The legal question before us is but this – does the Central Elections Committee have express or implicit legal authority to reject a list of candidates for the Knesset because it constitutes an "unlawful association"? But before I examine the law, I must say several things to clarify the question.

The Committee's decision said, as we recall, that the list was rejected as an "unlawful association, because its initiators reject the integrity of the State of Israel and its very existence." This means that merely being an unlawful association is insufficient. The "line" that the Committee Chair believes must be drawn is, it seems, the line that distinguishes between an unlawful association whose illegality is rooted in the undermining of the State or the integrity of its territory and an association that is illegal for other reasons. If indeed the provisions of section 3 of the Ottoman Associations Law must be read into the Knesset Elections Law, then we shall find that a list of candidates who object to "law and morality", including a particular statue, or whose purpose is to "change the composition of the current government" or

"influence the separation between the different races in the state" – are unlawful. And if indeed a list of candidates is an unlawful association in terms of the Ottoman Associations Law, I cannot see how the Elections Committee – assuming it is authorized to reject such a list for being an unlawful association – could approve such a list. But generally there is no dispute, and the honorable chair explained this to the Committee in no uncertain terms, that lists of candidates who object to a particular statute and wish to repeal or amend it, or those who object to the composition of the current government and wish to change it, and the like – are fully eligible lists and rejecting them would be inconceivable.

Such is the case in regard to Regulation 84 of the Defense (Emergency) Regulations 1945. Under subsection 1(a), an association may be unlawful when it incites to violence against the government, for example. And under subsection 1(b) – the subsection according to which the members of this group were declared an unlawful association – the Minister of Defense is granted free discretion to declare a group of people as an unlawful association for any reason he sees fit.

As a result, the mere fact that a certain list of candidates is an unlawful association – be it under the Ottoman Associations Law or under the Defense (Emergency) Regulations 1945, is not deemed cause for rejection by the Elections Committee. The cause is that the unlawfulness is rooted in undermining the existence of the state or its integrity. However the *cause* that is at the basis of the Committee's decision cannot in itself point to the *authority* of the Committee and the scope of such authority. It is possible that the Committee is authorized to reject a list for being an unlawful association, whatever the root of that unlawfulness may be, but that it does not choose to exercise this authority except in the case of a particular unlawfulness. Or it is possible that the Committee is not authorized to reject a list *merely* by reason of its being an unlawful association, but is authorized to reject the list when the relevant unlawfulness is undermining the existence of the state and its integrity. The honorable Chair of the Committee seems to have hinted at the first possibility when he proposed to read section 3 of the Ottoman Associations Law into the Knesset Elections Law. He seems to have hinted at the second option when he proposed that the Committee establish the mentioned distinction between lists whose candidates undermine the existence of the state and lists whose candidates only wish to change its internal regime.

I shall examine both options.

8. The authorities of the Elections Committee as to the approval or rejection of lists of candidates are set out in section 22 and 23 of the Knesset Elections Law. Section 22 establishes as follows:

> Where a candidates' list has been submitted otherwise than in accordance with the preceding sections, the Central Committee

> shall notify the representative of the list and his deputy of the defect not later than the 40th day before election day, and such representative and deputy may correct the defect not later than the 34th day before election day; where the signatories of a candidates list include a person who was not entitled to vote, this shall be considered a defect, but insufficiency of the number of signatories invalidates the list.

The "preceding sections" mentioned in this section are sections 18 through 21. Section 18 mandates that a list of candidates must be signed and submitted by 750 people who have the right to vote, or be submitted by an elected party of the departing Knesset. A list shall include the names, addresses and occupations of no more than 120 candidates who are "entitled to be elected" and whose consent to be elected was annexed to the list. A date for submitting the list to the Central Committee was also set. Section 19 establishes that any person may appear as a candidate on one list only. Section 20 requires those submitting the list to specify two people, one as the list's representative and the other as the representative's deputy. Section 20A requires depositing a sum of 5,000 Israeli Pounds, without which the Committee may not approve the list. And section 21 mandates that every list of candidates "bear a title and a letter, or two letters, of the Hebrew alphabet" in order to distinguish it from other lists.

Should a list be submitted without complying with all of these instructions, then section 22 above applies. But what if a list has been submitted following all of these instructions correctly and in a timely manner? Then section 23 instructs as follows:

> A candidates' list duly submitted, or that was corrected in accordance with the previous section, shall be confirmed by the Central Committee, which shall notify the confirmation to the representative of the list and his deputy…

The arguments of the parties before us focused extensively on the interpretation of section 23 above. As one party's argument goes "a list duly submitted," means a list that was submitted "in accordance with the preceding sections", as required by the legislative language of the previous section; whereas the other claims that "a list duly submitted" means a list that is not defective or ineligible under the rules, be it according to the preceding sections of the Knesset Elections Law or according to any other law. One party says "shall be confirmed" is the language of a categorical command, whereby the Elections Committee has no discretion as to the confirmation, and the other maintains that "shall be confirmed" means may confirm, and that this is not necessarily the imperative language.

I believe the Petitioner is in the right. Section 22 establishes what the Committee should do when a particular list was submitted improperly, that is,

as it should have been submitted under the preceding sections, and section 23 establishes what the Committee should do with a particular list that was duly submitted, that is, as it should have been submitted according to the preceding sections. The emphasis is on the "submission", both in section 22 and in section 23. The term "submission" points to the manner of making the list and submitting it, that is, to all the details in the said preceding sections. Should a list be found to be properly drafted and in accordance with all the provisions of the preceding sections as written, then the Law does not grant the Committee discretion to confirm or reject a list as it wishes. Rather, the Committee has only one path, and that is to confirm the list.

The learned Attorney General further argues that should section 23 not avail, there are additional, alternative sections in the Knesset Elections Law on which one may rely. Section 9(a) establishes that the Central Elections Committee is convened for the purposes of "conducting the elections" and conducting elections is like executing[2] the law – it is a broad term that comprises all that concerns elections and includes all that is necessary and useful in preparing elections and executing them. In support of this view, section 70 grants the Committee exclusive jurisdiction over "any complaints as to an act or omission under this Law", and section 71 authorizes the Committee to issue directives "as to any matter relating to the preparation and conduct of the elections and the determination of their results".

In my view, whatever the scope of these provisions – and I do not find it necessary to interpret them on this occasion – they cannot stand against the special provisions that treat of the submission and approval of candidates' lists. They were drafted in plain language, and we must interpret them as written.

This was, it seems, the opinion of the Committee Chair as well. He told the Committee as follows:

> What is a list of candidates that was submitted properly? When I read this along with section 22, I believe that the answer I find within the framework of the Knesset Elections Law is: a list that meets the conditions detailed in the preceding sections. It does not say here, in the language of the Law, that the committee still has discretion. Rather, it says: will confirm it, after these conditions are met. Thus, here I see the seriousness of the legal problem… (Minutes from September 29, 1965, p. 26).

The emphasis, in Committee Chair's statement is on the words "within the framework of the Knesset Elections Law", and the question is whether there is

[2] The term "conducting" in the official translation (13 L.S.I. 121, 123) is *bitzu'a* which literally means "execution" (ed.).

some statute outside of the framework of the Knesset Election Law that authorizes the Elections Committee to reject a list of candidates.

9. If I correctly understand the position of the honorable Chair, he sees the Central Elections Committee as an authority with quasi-judicial authority (and certainly no one would dispute him on this), and just as a court, by the inherent authority vested in it by its very existence, would refuse to grant relief under an unlawful cause of action or for an unlawful purpose, so too, a competent quasi-judicial authority, by virtue of the inherent natural authority vested in it as well, may refuse to grant relief for such a cause or purpose.

With all due respect, I fear that this is an over-generalization. Many administrative authorities hold quasi-judicial authority, and it is inconceivable that they may refuse to fulfill their lawful duties merely because they believe that a citizen's request is tainted by illegality. The learned Attorney General presented us with precedents where the High Court of Justice declined to grant relief when the competent authority refused to issue a certain business license to those who conducted a business in violation of the law. Clearly, no support can be drawn from those cases. First, the High Court of Justice will not lend a hand to perpetrators of offenses; second, the authority of a particular agency to refuse to issue a license for an unlawful purpose does not prove the authority of another agency to refuse to fulfil its legal duty, even in similar circumstances, much less in different circumstances.

The learned Attorney General adds that even if this rule does not apply to all the various agencies, it does in any event apply to the Central Elections Committee, which is not just any agency, but somewhat of a "mini-Knesset" in which all the parties in the outgoing Knesset are represented, and it is headed by a Supreme Court Justice. The unique composition of this Committee and its high stature call for the assumption that the legislature did not intend to grant it only ministerial authority, and if it was granted discretion and general freedom of action, then the said discretion is primary.

I would be more sympathetic to this argument by the learned Attorney General were the Chair of the Committee granted any authority to determine, following his own discretion, matters such as these as they arise before the Elections Committee. But the Law does not grant the Chair any discretion or any privilege, and in the Committee's decision making he is as any of the Committee members. And the Committee members, as I have already noted, all represent political parties, each with its own clear interests, both in preparing the elections and in conducting them. These interests are political interests, as legitimate as they may be, but when the decisions of a certain authority are, by its nature, a result of political considerations and motivations, it is reasonable to assume that the legislature would not rely upon its discretion when it comes to granting or revoking rights to participate in elections for the Knesset. Even in the absence of the explicit provision in Basic Law: The Knesset, the legislature must be presumed not to have

intended to deny the right to vote for or be elected to the Knesset, except by an explicit law or a judicial decision by a competent court.

I believe that even if, as a general rule, an administrative agency holds inherent authority to refuse to act when the request or the requester is tainted by illegality, I would deny this power to the Knesset Elections Committee as long as the legislature did not explicitly grant it. Consider what dangerous outcomes might result from granting such discretion: a party or another political group that desires a change in the regime or the repeal of certain statutes would be considered an unlawful association as defined by the Ottoman Associations Law, as noted, and the parties in power, which of course hold a majority in the Central Elections Committee, might bar such party or group from submitting a list of candidates for election, inasmuch as it is an unlawful association and the Elections Committee is granted the authority to refuse such a list for being illegal! The same is true in regard to the declaration by the Minister of Defense under Regulation 84(1)(b) of the Defense (Emergency) Regulations 1945: a party or political group which the Minister or the coalition parties may not like would be declared an unlawful association and would thus be rejected by the Elections Committee for illegality, and all will be right with the coalition. As I said, these are dangerous consequences, and I could have said absurd consequences, and are intolerable.

10. However, I do not believe that the provisions of section 3 of the Ottoman Associations Law can be read into the Knesset Elections Law and be applied to lists of candidates. It is true that the definition of association in that law is broad enough as to include the initiators of a list of candidates to the Knesset or the candidates on one list as well. But the Knesset Elections Law is, in my view, a special piece of legislation in this regard, and its provisions as to the lists of candidates stand on their own, independent of and unrelated to other statutes concerning associations of people. Although under the broad, comprehensive definition of section 1 of the Ottoman Associations Law, neither the initiators of the candidates' list nor the candidates themselves constitute an association under that law – not because the definition does not encompass them, but because their coming together is for the purpose stated in the Knesset Election Law and for that purpose alone, and in the manner and form established for such purpose by the Knesset Elections Law. They need not notify the District Commissioner of their association; they need no board or register; and they cannot sue or be sued in a court of law. But were the definition of section 1 to apply to them, then all the other provisions of the Law – and not just section 3 – would also apply to them.

Both the initiators of a list of candidates and the candidates composing a list are a *sui generis* association. They are unique, and no illegality may compromise or taint them other than an illegality that derives from an explicit provision in the Knesset Elections Law itself.

Therefore the illegality of the association of the initiators of the list at hand, or of its candidates, does not authorize the Committee to reject the list.

11. We are left with the second possibility, which is that the Committee is authorized to reject a list of candidates when such candidates undermine the existence of the state or its integrity. We are concerned with elections to the Knesset which in its sovereignty embodies the sovereignty of the State, and denying the sovereignty of the state while sitting in the Knesset are self-contradictory and irreconcilable. Therefore, it is appropriate – and perhaps necessary – that the Central Elections Committee have the authority to prevent the entry of those who deny the fundamentals of sovereignty.

I will immediately say that I wholeheartedly 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 from the Knesset such dissidents who betray the state and assist its enemies. But this is not to say that such authority is indeed granted to any body, including the Central Elections Committee, under the existing law. In a state under the rule of law, one cannot be denied rights, even if he be the most dangerous criminal or the most despicable traitor, but by law alone. Neither the Central Elections Committee nor this Court legislate in this state. The Knesset is the legislative authority and it empowers its authorities, should it wish to do so, to do to one as his ways and deeds warrant. In the absence of such authorization from the legislature, not logic, necessity, love of country, nor any other consideration whatsoever can justify taking the law into one's own hands and denying another's rights.

12. The learned Attorney General argues that if the Law comprises no explicit authorization for the Central Elections Committee, there is implied or alluded authority. That allusion is sufficient for the Committee, especially in view of the fact that such allusion reveals the intent and wishes of the legislature. This argument relies on the provisions of sections 1 and 2 of the Law and Administration Ordinance, 5708-1948, and it impressed me when I first heard it. However, after careful study I found that this provision has no trace of allusion as to the legislature's intent or its position in regard to the matter before us. This is the provision:

> Representatives of Arabs being residents of the State who recognize the State of Israel will be co-opted on the Provisional Council of State (in sec. 2: the Provisional Government), as may be decided by the Council.

As the argument goes – and for the purposes of interpreting the provision itself, it is a correct argument – *expressio unius est exclusio alterius*. Arab residents of the State who recognize the State of Israel would be included as participants in the Council of State. Arabs, even if residents of Israel, who do not recognize the State of Israel will not be granted a place in the Council of

State. This provision is consistent with the language of the Declaration of Independence of the State of Israel, which called upon the Arab inhabitants of the State of Israel to participate in building the state "on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions". Should they wish to take part in building the state, then they are assured appropriate representation in the institutions of the state. This does not apply when they not do not take part in state building, but even intend to destroy it completely.

It is true that in the Knesset now takes the place of the Provisional Council of State, and thus the Attorney General argues that what was true for the Council of State is now true for the Knesset, and since the Socialists' List is a list of Arabs, and while they are residents of Israel, they do not recognize the state and they do not wish to take part in building it, but to the contrary, they wish to destroy and abolish it – therefore the law is that they cannot find their place in the Knesset.

This argument ignores the political and legal background of the Declaration of Independence of the State of Israel and the adoption of the Law and Administration Ordinance. The vast majority of Arabs who were residents of the state at the time were suspected of being enemies of the State, if not actually, then potentially. As it soon became clear, many of them not only refused to acknowledge the state, but even fought against it and collaborated with its external enemies to annihilate it. On the other hand, there were Arabs who initially, or over time, recognized the existence of the State and decided to remain and prosper in it. Simply put, in the state of war at that time, it was necessary and lawful to distinguish and identify these and those, friend and foe, as well as enemies and neutrals, not only in order to bar enemies from state institutions, but also in order to ensure that the supporters not be discriminated against on the basis of religion or nationality.

In the meantime, times have changed and laws have been enacted. The vast majority of enemies among the Arab residents of the country have since left the country, and the Arab residents who, from the day the state was founded to the day the Nationality Law, 5712-1952 took effect, did not leave the country, or who lawfully returned to it, became citizens of the State of Israel under section 3 of that law. This is also the case for Arabs who were born in Israel after the founding of the State, and we must assume that an additional number of Arab citizens acquired citizenship under section 5 of that law. There is no difference between all of these and the Jewish or other citizens of this state in terms of their right to vote for the Knesset, or their right to be elected to the Knesset or in any other legal matter. They are all equal before the law, the Knesset Elections Law is included, unless a specific law (such as the Law of Return or the Days of Rest Ordinance) explicitly provides otherwise.

Basic Law: The Knesset includes no provision, explicit or implicit, that permits any discrimination for any reason between Jewish citizens and

citizens who are not Jewish. In any event there is no reason to distinguish or discriminate between Jewish citizens who are not loyal to the State or do not recognize it, and Arab citizens who are not loyal to the state or who do not recognize it. To our dismay, we also have a group of Jews who declare day and night, in speech and in action, that they do not recognize the state. But the learned Attorney General admitted, in response to my question, that no one would conceive of preventing them from submitting a list of candidates for election to the Knesset, should they wish to do so. The argument is that they are not comparable, as one group has links to our surrounding enemies while the other group is contained within their secured (in both senses of the term) walls. But we have already seen citizens of Israel, not Arabs, who served the enemy and paid the price for it – and no one has thought of revoking their rights as citizens – not because they were not potentially deserving of such, but because the prevailing law does not make this possible.

The statements of some of the Committee members who participated in the debate imply that there might be some basis for the concern that the members of El Ard – the people on the list at hand – are attempting to enter the Knesset under the instructions of the enemy with which they are in contact, and their success in this scheme would be somewhat of a victory for the enemy and somewhat of a defeat and disgrace for the state. I am willing to assume that on an informative level, this assumption is correct, and that on a political level, the consideration that relies upon it is certainly reasonable and legitimate. But legally, it would seem to me that this assumption and this concern are immaterial. It is certainly possible that the governments who wage war against Israel are very well aware of the details of Israel's constitutional regime and have decided to exploit it for their contemptible goals. But in the absence of legislation, that is insufficient as justification or as a reason for our own denial of our constitutional regime as it is. On the contrary, we take pride in our freedom of conscience and freedom of association, and in the absence of discrimination in the State of Israel, and we have only contempt and disdain for regimes, such as those of our enemies, where only one party – the governing party – is permitted, or where all the power of government is concentrated in the hands a tyrant or a military junta. When the exigencies of war – which our enemies might compel upon us – may require, the Israeli legislature – including the subsidiary authorities authorized to promulgate emergency regulations – will know how to authorize anyone requiring such powers to take all measures of defense necessary, and not only on the battlefield. But the State of Israel is distinguished from its enemies because in its view, even the ends of war do not justify wrongful means, and any means that violate the law or that are employed without lawful authorization and that may deny the rights of citizens are wrong and a judge in Israel will not approve them.

Moreover, even where there was explicit statutory authorization to deny a citizen a certain right, and the right was a fundamental civil right, such as freedom of conscience and freedom of speech, this Court did not allow the

exercise of that legal authority unless the infringement was intended to prevent a real, clear and present danger (HCJ 73/53; 83/53 *Kol Ha'am v. Minister of the Interior* IsrSC 7, p. 871 [http://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior]). But I cannot see the real, clear or present danger to the state or any of its institutions or rights posed by the participation of this list of candidates in the Knesset elections. Were one to say that this danger may be unknown to the courts but known to government's security services, I would respond that the material that was before the Central Elections Committee, and that was submitted to us as well, was insufficient to justify – let alone require – a finding that there is such danger, and no such real, purportedly impending danger was brought to the attention of the Committee members.

In the absence of decisive evidence of such danger, revoking such civil rights from a citizen may be perceived as a sanction for past behavior and opinions. The Central Elections Committee is certainly not empowered to impose such a sanction.

Therefore, the fact that the candidates on this list are Arabs who do not recognize the State of Israel and who sympathize with its enemies does not authorize the Central Elections Committee to withhold confirmation of their list.

13. There are countries in which state security, or the sanctity of religion, or the achievements of the revolution and the dangers of counterrevolution, and other such values shroud any crime and cure any deed committed without authority and in violation of the law. Some have invented a "natural law" that stands above any legislation and overrides it when need be. These are not the ways of the State of Israel. Its ways are the ways of law, and the law is given by the Knesset or by virtue of its explicit authorization.

The right to vote and to be elected to the Knesset is one of the fundamental rights of the citizen, not just in the State of Israel (section 6 of Basic Law: The Knesset,) but in every enlightened state (see: section 21 of the United Nations' Universal Declaration of Human Rights). Simply put, this right cannot be revoked or infringed by the government except by virtue of law. And so stipulates article 29(2) of the Universal Declaration of Human Rights:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Although this Declaration is not binding international law, it in any event sets minimal standards for the legislative conduct of democratic states. We must not fall from these standards.

14. Indeed, the problem that concerns us has been addressed in many states by explicit legislation.

In England, even before the rules of the Common Law, those who were convicted of treason or felonies were barred from election to Parliament. In the words of Blackstone, those ineligible for election are "aliens born, or minors…any of the twelve judges, because they sit in the lords' house; nor of the clergy, for they sit in the convocation; nor persons attainted of treason or felony, for they are unfit to sit anywhere." (Vol. I, p. 175.) In the days of Queen Victoria, a statute was passed whereby anyone convicted of treason or a felony and was condemned to death or sentenced to hard labor or over a year's incarceration was incapable of being elected or sitting as a member of either House of Parliament until they had served their sentence or received a pardon (33+34 Vict. c. 23, sect. 2).

This statute applied in Ireland as well (see: ROGERS ON ELECTIONS, 20th ed. p. 26). In Ireland, there was a case of a candidate for election to Parliament who was accused of treason and bound over for trial, and the supervisors of the elections barred his candidacy. The court there held that as long as he had not been convicted lawfully, he was as eligible as any other candidate (*New Ross Case* (1853), 2 Pow. R. & D. 188, see: 36 English and Empire Digest, p. 274 note c).

This is so a *fortiori*: A statute bars traitors from being elected, it does not bar one accused of treason, even when the accused is already on trial. Therefore, *a fortiori*, when no statute bars traitors, as aforesaid, then all the more so when the candidate has yet to be accused of treason.

It should be further noted that in England (as well as in most states in the United States of America) it is the privilege of Parliament to remove a duly elected member when Parliament believes he is unworthy of sitting there (see: ROGERS, *ibid*., p. 27).

The authority the Knesset Elections Law grants to the Elections Committee to prepare and oversee the elections are in England granted to the returning officer. It has been known to happen that such an officer purported to determine whether a particular candidate was eligible or not under the law, and the courts reversed such decisions for exceeding authority (*Prichard v. Mayor of Bangor* (1888); *Harford v. Linskey* (1899)). Although that English office is not similar to our Central Elections Committee, we must infer from these precedents not only that it is best to separate between the technical supervision over managing the elections and between establishing the eligibility or ineligibility of a particular candidate or a particular list of

candidates, but also how much care must be taken specifically in matters of election law that the competent authorities empowered to run the election do not exceed their powers as established by law.

15. The second example I wish to give is from the United States of America.

Under article 3 of the Fourteenth Amendment of the United States Constitution, anyone who has ever taken an oath to support the Constitution of the United States and later participated in an insurrection or rebellion against it, or given aid to its enemies is ineligible for election to the House of Representatives or the Senate.

Because this is the only statutory ineligibility rule, it is impossible in the United States to add other or alternative eligibility rules except by further amendments to the Constitution (WILLOUGHBY, CONSTITUTION OF THE UNITED STATES, 2 ed. Vol. 1, p. 602.) However, in effect, there has been no need to do so because under Article I 4.1 [*sic*][3] of the Constitution, each House of Congress is the exclusive judge of the elections of its members and the outcomes of such elections. And under Article I 5.2 of the Constitution, each house, may by a two-thirds majority expel a member who was lawfully elected. The two houses of Congress have employed these supplemental powers to determine the eligibility of an elected member and expel a member who had already served as such many times in order to prevent unworthy or disloyal people from serving in them.

16. Finally I shall mention the constitution (*Grundgestz*) of the Federal Republic of Germany which states in Article 21 as follows:

> (1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds..
>
> (2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality..
>
> (3) Details shall be regulated by federal laws.

Some have expressed the view that this provision is inconsistent with freedom of political opinion. However, the German Constitutional Court ruled that it reflects an expression of militant democracy whose goal is to prevent the

[3] Article I s. 5 (1).

undermining of a free democratic regime by undemocratic elements operating under the guise of legitimate parliamentary activity. This is a preventative, defensive measure, rather than a sanction for acts already committed (Verf G E 5/142, cited in HAMANN, GRUNDGESTZ, 2 ed., p. 219.)

This is, in my view, a legislative path that may serve as an example for our legislature as well.

17. Section 6 of Basic Law: The Knesset, which ensures each citizen over the age of 21 the right to be elected to the Knesset, allows but one exception to this right: "unless a court has deprived him of that right by virtue of law." The law that authorizes the court to revoke this right has yet to be legislated. There is no such authority even in regard to those lacking legal competence under the Capacity and Guardianship Law, 5722-1962, nor anywhere else.

If this matter that was before the Central Elections Committee and that is now before this Court, and the outcome that I am compelled to reach by law – or more precisely by the law's silence and absence – motivate the legislature to act and pass legislation that may guard the state from internal subversives and destructors, then this discussion has not been for naught, and the serious problem before us will be resolved in the appropriate manner.

I would grant the appeal and reverse the decision by the Central Elections Committee not to confirm the Socialist's List.

President Agranat:

I have carefully read the enlightening – and if I may add, courageous – opinion of my esteemed colleague Justice Cohn, but I cannot concur with his ultimate conclusion, inasmuch as, in my opinion, the appeal must be denied. Given the limited time at our disposal, I can only delineate the reasons that led me to disagree with my colleague's conclusion in general terms.

The factual finding that must instruct the discussion of this appeal, and which cannot be disputed, is the finding that led the Central Elections Committee's to refuse to confirm the Appellant list ("the Socialists' List"), which is referred to in the Respondent's letter to the list's representative of September 29, 1965. The letter stated that the reason for this refusal was: "this list of candidates is unlawful because its initiators deny the territorial integrity of the State of Israel and its very existence". And in greater detail: the material that was before the Committee clearly reveals that most of the candidates in the relevant list are people who are members of the "El Ard Group" whose purposes were defined in our judgment in HCJ 253/64 *Sabri Jerias v. District Commissioner of Haifa*, IsrSC 18 (4) 673, 677, as purposes that "completely and absolutely deny the existence of the State of Israel in general, and its existence within its borders in particular". Moreover, I completely agree with my colleague in finding that it is immaterial that the rest of the candidates on the list were inactive or were not known as members of the above

movement because, once they have decided to run with the people of El Ard in the same list, they are held to have first examined who they are joining and for what purposes. The relevant factual finding means, therefore, that before us is a list of candidates whose goal is to bring about the destruction of the State of Israel.

The the common thread running throughout my respected colleague's opinion is the idea that the Central Elections Committee's refusal to confirm the Appellant list violates the principle of the rule of law inasmuch as section 23 of the Knesset Elections Law, 5719-1959 explicitly states: "A candidates' list duly submitted, or that was corrected in accordance with the previous section, *shall be confirmed*". In other words, if the submitted list fulfils the requirements detailed in the previous sections, including the requirements that the list's signatories are citizens of Israel and aged 18 and over and thus hold the right to vote, and that the candidates are Israeli citizens aged 21 and over and thus entitled to be elected to the Knesset, then the Committee possesses only the *ministerial* function to approve the list, which does not include exercising any discretion. Therefore, the Committee is prohibited from basing its decision on any consideration for the political views of the list's candidates, however contemptible, because the Committee is subject to the rule of law, and the law – that is section 23 above – obliges it to confirm the list.

Indeed, I do agree that the above generally reflects the scope of the Central Committee's authority in deciding upon the confirmation of any list of candidates. However, my colleague, too, implicitly indicated that the problem at issue is not so simple. Moreover, he even emphasized that it was "a serious constitutional question". If that is the case, then it is clear that in order to understand the scope of the Committee's said authority, we must first address the constitutional "factors" that pertain to this question. There can be no doubt -- as clearly attested by what was declared upon the proclamation of the founding of the state -- that not only is Israel a sovereign, independent, freedom-loving state that is characterized by a regime of rule by the people, but also that it was founded as "a Jewish state in the Land of Israel," that the act of its founding was made, first and foremost, by virtue of "the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State", which also constituted an expression of the realization of the age-old aspiration "for the redemption of Israel".

It should be superfluous to note at this stage in the life of the state that the above expresses the nation's vision and its credo, and that we must, therefore, bear these in mind "when we come to interpret and give meaning to the laws of the State" (HCJ 73/53, *Kol Ha'Am v. Minister of Interior*, IsrSC 7 871, 884). That "credo" means that the continuation – or if you prefer, "the eternity of the State of Israel is a fundamental constitutional fact", which no authority of the State – whether administrative, judicial or quasi-judicial – may deny in the exercise of any of its powers, for to do otherwise would constitute a complete disregard for the two wars fought by the State of Israel since its founding in order to prevent its annihilation by hostile Arab states. It would constitute a complete denial of the history of the Jewish people and its yearnings, as well as a repudiation of the fact of the Holocaust of the People of Israel in the period before the state was founded, that same Holocaust in which millions of Jews were slaughtered in Europe, and that "was another clear demonstration" – in the language of the Declaration

– "of the urgency of solving the problem of its homelessness by re-establishing in Eretz-Israel the Jewish State".

In order to prevent misunderstanding, I must recall – and the Attorney General addressed this matter in his arguments – that the declaration of the founding of the state called upon "the Arab inhabitants of the State of Israel to preserve peace and 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". The words "participate in the *upbuilding* of the State" speak for themselves. This invitation was given real legal expression in section 1(a) of the Law and Administration Ordinance, 5708-1948: "Representatives of Arabs being residents of the State *who recognize the State of Israel* will be co-opted on the Provisional Council of State…", and in section 2(a): "Representatives of Arabs being residents of the State *who recognize the State of Israel* will be co-opted on the Provisional Government …". Upon the enactment of the Nationality Law, 5712-1952, whereby Arab residents were permitted to acquire, under certain circumstances, Israeli citizenship, the two provisions above became redundant. However, it is clear that the status of Israeli citizenship comprises the duty of allegiance to the State of Israel (section 5(c) of the above law).

This should also be borne in mind: when the legislature enacted the offenses of treason in sections 7(a) and (b) of the Penal Law Revision (State Security) Law, 5717-1957 – the offenses of impairing the sovereignty of the state and its territorial integrity – its goal was to give practical emphasis to the principle that requires ensuring the existence of the State of Israel, its sovereignty and its continuation.

Therefore, if the constitutional factor that we must consider in interpreting the laws of the state – and in particular, laws of a constitutional nature – is the factor that the State of Israel is a permanent state whose continued existence and eternity must not be questioned, then clearly this rule extends to the interpretation that should be given to that provision that establishes the governing institution for which the relevant elections are held, i.e., the provision of section 1 of Basic Law: The Knesset that states: "The Knesset is the parliament of the *State*". What does this phrase refer to other than to the institution that is composed of the representatives elected by the whole of the citizenry and whose function is to ensure, through the government that is answerable to it, the existence of the State of Israel and its integrity? In any event, the question whether or not to act towards the destruction of the state and the end of its sovereignty cannot be on its agenda at all, inasmuch as the very presenting of this question contradicts the will of the people residing in Zion, its vision and its credo.

The result is that a list of candidates who deny the said fundamentals cannot *qua* a list hold any right to participate in elections for the parliament. It should be emphasized that my words should not be taken to mean that I reject the right of the signatories of the Appellant list to vote for the Knesset, or that I deny the right of the candidates on this list, as individuals, to be elected to the Knesset, and therefore I also do not deny their right to have their names included in a particular list of candidates. But voting in the elections for the Knesset is not voting for individual candidates but rather for a *list* of candidates (section 4(a) of the Knesset Elections Law, 5719-1959). The implication of this is that

voting in elections for the Knesset means voting for *a group* of people who support a particular political goal, such that the assumption must be that should that group be elected to the Knesset, its members will then operate there to formulate a popular will toward advancing that goal (see: VAN DEN BERGH, UNITY IN DIVERSITY, pp. 18, 38). Clearly, a group of people whose declared political goal is not merely, as the Chair of the Central Elections Committee stressed, to "change the internal constitutional regime of the State" but rather to "undermine its very existence" cannot, *a priori*, hold the right to participate in the process of formulating the will of the people and therefore cannot stand for election for the Knesset.

As noted, I agree that ordinarily the Central Elections Committee must not investigate the candidates or consider their political views. However this rule does not apply to our matter once the Committee's attention has been directed to the fact that the Appellant list is identical to a group of people that the High Court of Justice found to be an unlawful association, since its purpose is to completely and absolutely deny the existence of the State of Israel in general, and it's existence within its borders in particular, as well as the fact that pursuant to this finding that group was declared an unlawful association. In light of these facts, no discretion remained in the hands of the Central Committee and it had no choice but to decide not to confirm the Appellant list.

Lastly, I am not unaware that political science theory teaches that in a democracy the sovereign is the people themselves – that a democracy is, first and foremost, a regime of agreement under which the democratic process is thus a process of selecting the people's common goals and the manner for realizing them through debate and the free exchange of ideas, and that this debate takes place, *inter alia*, through general elections and deliberations in the parliament. This would seem to require the view that it is not permissible to prevent a group of people – for the sole reason that its goal is to deny the existence of the state – from putting itself up for election to the Knesset in order to promote and realize its cause. However, this approach was decisively rebuffed by Justice Witkon in HCJ 253/64, at 679, when he wrote:

> Freedom of association is one of the principles of a democracy and one of the fundamental rights of the citizen. We must not deny this right and prohibit an association merely because its goal or one of its purposes is the aspiration to change the current state of the law in the state. The current state of the law may warrant change in some way or another, and a movement that wishes to organize the people of the state to correct the situation may do so as a lawfully registered association. *But no free regime would lend its hand and recognition to a movement that undermines that same regime*.

And he added:

> It has happened more than once in the history of states with a functioning democracy that various fascist and totalitarian movements arose against them and exploited all those rights of freedom of speech, of the press, and of association that the state grants, in order to conduct their destructive

> activity under their aegis. Those who saw this happen in the days of the Weimar Republic shall never forget this lesson.

This is also the position expressed in 1942 by one of the great experts of political science (ERNEST BARKER, REFLECTIONS ON GOVERNMENT, p. 405):

> …the democratic State would seem false to itself if it adopted such a policy towards any body of men who could claim to represent some section of popular opinion. *Yet a party owing a foreign allegiance, and only acting in the democratic system in order to overthrow the system, can hardly in justice claim the benefit of the system*.

Indeed, the constitutional problem that concerned us in this appeal already arose – *mutatis mutandis* – in the United States in the middle of the last century. As may be recalled, at that time the southern states declared their secession from the federal state. Following this event, President Abraham Lincoln sent his famous letter to Congress on July 4, 1861 in which he defined the question in terms that yield only one possible answer:

> 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*?" (State Papers by Abraham Lincoln (1907), p. 9).

The response that great president gave in practice to this question is known to all.

My opinion, therefore, is that the Central Elections Committee acted properly, and that the appeal must thus be denied.

Justice Sussman:

1. All agree that this appeal raises a constitutional question of the utmost importance. No wonder, therefore, we did not render our decision immediately after hearing the arguments of the parties, but rather needed time to consider our judgment. That time, as determined by the legislature, is so short that I did not have adequate time to state my reasons in writing when, on October 12 of this year, we handed down our decision to deny the appeal. At the time, I also had not yet had the opportunity to review the reasons of the President.

   In the interim, I have heard and read the opinions of my esteemed colleagues, and I can only add to the words of the President, with which I concur.

2. There is no doubt in my mind that the Knesset Elections Law did not authorize the Central Elections Committee to confirm or deny a list of candidates at its discretion. The contrary is implied by the provisions of

section 23 of the above Law, and granting discretion is also inconsistent with the composition of the Committee, which is a body composed on purely political principles in accordance with the composition of the outgoing Knesset, with the exception of the Committee's Chair, who is a justice of the Supreme Court. But this was not the question before us. Rather the question, as defined by the Committee's Chair in its meeting from September 29, 1965 (on p. 27 of the Committee's notes), was whether the Committee may examine the list's eligibility according to a principle that is not written in the statute books. During the said meeting, the Chair of the Committee pointed out that despite the absence of any written provision in the statutes of contract law, the court does not enforce a contract that has an illegal purpose. In light of the President's reasons, there is no need for me to reiterate that an "illegal purpose" for our purposes does not mean a purpose that seeks to alter the arrangements for the administration of government. These arrangements are not sacred and changes are not a punishable crime. Rather an "illegal purpose" in our case is a purpose that seeks to destroy the state, to bring catastrophe upon most of the citizens for whom it was founded, and to join forces with its enemies.

3. In our opinion in HCJ 253/64 *Sabri Jerias v. District Commissioner of Haifa*, IsrSC 18(4) 673, my esteemed colleague Justice Witkon noted the need to learn the lesson of the experience of the Weimar Republic. Perhaps it is no coincidence that the Supreme Court of the German Federal Republic that was founded after the end of the Second World War is, as far as I am aware, the first court to establish the principle that a judge must also decide based on legal principles that are not written in the statute books, and that stand above not only ordinary statutes but even above the constitution itself, as even the constitution yields to them when it is inconsistent with them. The opinion handed down by the German Supreme Court on September 6, 1953 (VRG 11/53 (*Gutachten*) 347 L (BGH Z 11, at 34, 40) cites with approval (on p. 40, *ibid*.) the following from the opinion of the Constitutional Court of the State of Bavaria:

> The invalidity of a constitutional provision cannot be rejected merely because the provision itself is part of the Constitution. There are fundamental constitutional principles that are of so elementary a nature, and so much the expression of law that precedes the Constitution, that the maker of the Constitution himself is bound by them. Other constitutional norms, which do not occupy this rank and contradict these rules can be void because they conflict with them.

4. If this is so in a country with a written constitution, how much more so in a country that has no written constitution. Just as one need not consent to be killed, so a state need not agree to be annihilated and wiped off the map. Its judges may not sit idly by and despair of the absence of positive law when a party calls upon them for assistance to bring about the country's end.

Similarly, no other authority of the state may serve as a tool in the hands of those whose purpose is to destroy the state and that may have no other purpose but this.

5. I will allow myself to repeat the example I presented at the hearing of the appeal. A person wishes to throw a bomb in the Knesset in order to murder Knesset members, but this is cannot be accomplished from the guest gallery. He therefore he submits a list of candidates for election to the Knesset with the declared intent that as a Knesset member who enjoys immunity he may enter the chamber and carry out his scheme. This person submits a flawless list of candidates. Is the Central Elections Committee obligated, under section 23 above, to confirm the list and thereby assist him the commission of a crime? Or may the Committee find that this is not the purpose of a parliament in a democracy, and that the use this person wishes to make of the regime's arrangements of governance is an abuse to which the Committee need not be reconciled? And if the Committee is permitted to deny confirmation to a list of candidates submitted to it in order to advance the crime of murder, is it not permitted to refuse to confirm a list submitted to advance treason against the state?

6. The above fundamental, supra-constitutional rules are, in the matter before us, nothing other than the right of the state's organized society to defend itself. Whether we term these rules "natural law" to indicate that they are law by the nature of the existence of the state (see: FRIEDMAN, LEGAL THEORY, 4th ed., pp. 44-45), or whether we term them differently, I share the opinion that life experience compels us not to repeat the same mistake we all witnessed. As my esteemed colleague Justice Cohn said, when considering the issue of a party's legality, the German Constitutional Court spoke of a "militant democracy" that does not open its gates to acts of sabotage in the guise of legitimate parliamentary activity. As for myself, in regard to Israel, I am willing to suffice with a "defensive democracy" and tools to defend the existence of the state are at our disposal even if we did not find them explicitly stated in the Elections Law.

Therefore I concur in denying the appeal.

Decided by majority to deny the appeal.