A Politician Withdrawn in Eliminationist Times

On the Pre-Elections Disqualification Proceedings of Sami Abu Shehadeh

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Alexander Hamilton wrote in Federalist 78 that the judiciary has neither sword nor purse. Courts have quoted him ever since. When it comes to the Israeli Supreme Court, however, the phrase is often cited not only to point to the separation of powers; there is a flavour of self-congratulation in how it is invoked – as if it is precisely because it has no material power, that the court is so strong. In a state long characterised by a permanent state of emergency, now seemingly replaced with a permanent state of war, powerlessness is the court's favourite brag.

Last Thursday, nine justices of Israel's Supreme Court, under President Yitzhak Amit, heard appeals against the Central Elections Committee. This body, made up of party delegates, had barred two Arab lists from the Knesset election of 27 October 2026. One was the Joint List, an alliance that includes the "National Democratic Alliance" (Balad) as well as the Democratic Front for Peace and Equality (Hadash). The other was the United Arab List (Ra'am), a moderate Islamist party, which recently recruited Yoav Segalovitz, a former senior police commander, as its number two. The committee had also personally barred MK Ofer Cassif of Hadash and Sami Abu Shehadeh, leader of Balad. The court reinstated the lists and Cassif. Abu Shehadeh withdrew a day later, after Amit told him a majority favoured disqualification.

Section 7A of *Israel's Basic Law: The Knesset* lets a political body bar parties and individual candidates. This 1985 constitutional amendment was made after the far-right Rabbi Meir Kahane was elected to join the Knesset. Section 7A a (1) disqualifies parties that reject Israel's existence as a "Jewish and Democratic" state; Section 7A a (2) disqualifies based on incitement to racism. Section 7A a (3) covers support for armed struggle by an enemy state or terrorist organization. The Supreme Court has overturned every ban, including the 2003 attempt against Azmi Bishara.

And yet, for the first time, Thursday's hearing forced a candidate to withdraw. This post argues that, within the current Israeli context, the judges' words spoken in that room constituted a form of state violence that must be recognized as such. The Court exercised coercive authority through an informal, reasonless indication of its intended judgment, producing the effects of a judgment while avoiding the legal constraints attached to one.

First, I describe the hearing and the best defence of the bench. I then argue that its words constituted violence, in a sense I define following Robert Cover. Finally, the third part of this post proposes a limit on such violence through a constraint on Section 7A. It considers what it means to disqualify a candidate representing a national minority, when that national minority may be the subject of systematic and potentially eliminationist state violence.

The Hearing

The political character of the livestreamed proceeding was visible from the first moment. Itamar Ben Gvir, National Security Minister, appeared in a lawyer's robe for Otzma Yehudit, the party that brought the petition before the Central Elections Committee. Ben Gvir oversees the police, which of course is the body that the Court relies on to enforce its judgements. His first words paraphrased Gideon Hausner, who prosecuted Adolf Eichmann in 1961 and told the judges that six million accusers stood with him.[1] Where I stand today,

[1] Gideon Hausner, *Justice in Jerusalem* (1966), 323: "As I stand before you, Judges of Israel, to lead the prosecution of Adolf Eichmann, I do not stand alone. With me, in this place and in this hour, stand six million accusers."

said Ben Gvir, stand the victims of Hamas on 7 October.

Readers may recall Hannah Arendt's sardonic description of Hausner's historical performance: "he believed that only a Jewish court could render justice to Jews, and that it was the business of Jews to sit in judgment on their enemies." But if Hausner put up a tragic show trial, Ben Gvir's was surely farcical. At his side stood attorney Ze'ev Wolf. In 1992, as a teenager and a member of Kahane Chai, Wolf took part in a grenade attack in the Old City's Muslim Quarter, in revenge for the murder of Rabi Kahane two years earlier. The attack killed a 65-year-old Palestinian man and wounded nine others.

As he argued, Ben Gvir beamed with self-satisfaction. In terms of his legal work, however, he remained rather casual. One explanation might be that, on the bottom line, he is not a particularly talented litigator. A better one may be the conflict of interest in which he found himself. As counsel, he was to argue for disqualification. As a politician running up to elections, he knew that a ruling against his party would garner him more votes for his proposal to continue his ongoing attack upon the Court. As he sat down, he muttered: "I am a lawyer by title, but not in my daily work".

Importantly, Ben Gvir was not alone in wanting Abu Shehadeh out. The Attorney General supported the bar. Justice Noam Sohlberg, who chaired the committee, also voted for the decision, deviating from established practice according to which the Judge overseeing the procedure does not vote. The opposition parties backed it as well, including Eisenkot's Yashar! and the Democrats.

The petition rests on an article Abu Shehadeh published on 8 October 2023 on Arab48, titled "The Al-Aqsa Flood: Preliminary Observations." The Article includes seven numbered points. The first calls the attack unsurprising, since excessive pressure leads to an explosion. The second attacks Israeli racism and the habit of some Arabs to accept it.

Point 3 compares the attack with the war of 1973. Israel's intelligence services, he writes, are human beings like us. If small, besieged Gaza could do this, others could do it more effectively and more simply. Point 7 turns to the political harvest. After the struggle and sacrifices still to come, he writes, the resistance (al-muqawama) must bring the PLO and the important Arab states into the process the battle opens.

The word muqawama carries some weight. Palestinian usage covers many forms of resistance, armed and unarmed. In a text about a battle called Al-Aqsa Flood, it seems to denote the armed factions in Gaza, led by Hamas. The sentence confirms this, because it asks the resistance to bring in the PLO, which stands outside it. It seems that Abu Shehadeh writes as an adviser to the fighters on how to turn their battle into political gain.

The text avoids the name Hamas, never mentions the Israeli dead, and offers no condemnation. It also advises a negotiated end. Abu Shehadeh told the committee he wrote it before he grasped the scale of the massacre, which may be the case – but it was surely already clear that numerous civilians were targeted. He said he regrets this and opposes armed struggle.

In my view, the text is extremely disturbing. Whether that amounts to support for armed struggle under Section 7A(3) is another question. My view is that it does not; under the Supreme Court's jurisprudence, a cumulative test has generally been applied, examining a politician's views over time rather than any one statement. The petition's reading is not frivolous. It is also not compelled. The fact that many Israeli politicians have made much worse statements, including statements that incited genocide, is a separate point to which I will turn below.

When counsel Hassan Jabareen said his client wished to make a statement, President Amit replied that the judges would have questions. It soon became clear that the bench meant to cross-examine Abu Shehadeh. Judges rarely do this in a system where the parties, not the court, question witnesses. They do so even less in this kind of proceeding, where the Court does not hear evidence. The context in which this does occur, sometimes, is in lower Courts hearing a criminal case, and thus required to establish facts. Emphasizing the criminal law analogy that emerged, Justice Alex Stein invoked a Latin phrase from the common law of

evidence: *res gestae*. The doctrine holds that spontaneous statements are more reliable because the speaker had no time to invent a lie. Stein and others on the bench suggested that Abu Shehadeh's article was spontaneous, therefore reflected the truth better than anything else; that Abu Shehadeh really supports terrorism, though he denies this now. The aim, plainly, was to look behind Abu Shehadeh's words. In the courtroom, Abu Shehadeh and his lawyer Jabareen both reiterated that the politician rejects violence and condemned the events of 7 October. Yet the judges' suspicion seemed only to deepen with every denial. What began as an administrative proceeding against a politician became a kind of interrogation.

The Psalmist says that *God* tests hearts and kidneys, and despite the need to ascertain *mens rea*, even criminal law claims no such power. The Israeli Supreme Court assumed it on Thursday in an inquisitorial and frankly threatening manner.

The Violence of a Judgment Not Yet Written

Robert Cover famously wrote that legal interpretation takes place in a field of pain and death, making him the pioneer of the critique of judicial violence.[2] According to the image Cover painted, a word is usually followed by *someone else*'s act. In earlier work with Lihi Yona, focused in part on the Eichmann trial, we called that person the Executioner, meaning the guard, officer or hangman who carries out law's violence.[3] Hangmen are typically subordinates who hold the post for a salary, and the work is allocated to them downward, often along lines of class and ethnicity. The judge keeps clean hands. But in today's Israel, the class of "executioners" is controlled by Ben Gvir, who has tried to champion them and raise their wages. The Court's institutional position is structurally altered when the executive/political actor responsible for coercive enforcement is simultaneously the political actor seeking a candidate's exclusion. The Court must choose either to align itself with the political branch and deploy its coercive power, or to rule against it and risk intensifying an attack by that branch, one that the Court itself may not survive. Against this backdrop, the bench announced that the majority favoured Abu Shehadeh's disqualification and gave him one day to decide whether to withdraw his candidacy or have a decision written against him. Balad said he had little choice. The offer to withdraw could not be refused, because a refusal would have summoned the adverse judgment.

The bench's strongest defence is that the signal was intended as a courtesy. A formal ruling would have carried precedential consequences for Balad and for Abu Shehadeh, and the party was thus spared. But a courtesy that cannot be declined is an order. It also spares the court the work a ruling would have required, namely, a written answer to the question whether the 2023 text supports armed struggle, and more importantly—whether that would be enough for disqualification, given Abu Shehadeh's reiterated commitment to non-violence.

One might say, therefore, that the offer Abu Shehadeh received was extra-jurisprudential. The Court's words carried no reasons and no holding. They appeared rather quickly, apparently with no plan to deliberate among judges and their teams; no time to hesitate. Put quite simply, the announcement of where a majority stood preceded any reasoning, and the reasoning will now never be written. The court kept its image as the institution without a sword. But as lawyers we know very well that words too can be violent, in and of themselves. To paraphrase John Austin's famous phrase, this is true especially when they are a command backed by a future sanction.

A Constraint on 7A in Eliminationist Times

Section 7A states when a candidate may be barred from running for office. The problem, however, is that Israeli law lacks its necessary complement. Such a counterpart would identify the circumstances in which a candidate may *not* be barred, and in which any attempt to do so ought to be treated with particular

[2] Robert M. Cover, "Violence and the Word," 95 *Yale Law Journal* 1601 (1986).

[3] Itamar Mann, "Hangman's Perspective: Three Genres of Critique following *Eichmann*," in Kevin Jon Heller, Frédéric Mégret, Sarah Nouwen, Jens David Ohlin and Darryl Robinson (eds.), *The Oxford Handbook of International Criminal Law* (OUP 2020), sections 4 and 5; Lihi Yona and Itamar Mann, "The Executioners: Mizrahi Jews and State Violence in Israel," 23 *Law and Government in Israel* 59 (2021).

suspicion. Such a rule would have given the bench something more to work with, if it had wanted to do so.

This complementary principle would have two elements. The first is already reflected in existing law. Evidence of support for armed struggle must be clear, convincing and unambiguous, and it must concern the candidate's present position. Thursday's proceedings show that the standard can be bypassed without a ruling. The second element is novel. Where state violence systematically targets the community a candidate represents, ambiguity in his words should be resolved in his favour.

Two objections arise. First, who is to determine whether official measures systematically target a community? Presumably the Court would. It would have to compile evidence such as official statements, policy decisions and data. It is in this context that the countless statements of Israeli officials—much worse than Abu Shehadeh's as they clearly incited genocide—would have to be considered. In that regard, the Court would not rely on the candidate's own account. But if we start with the latter, it is clear that Abu Shehadeh seeks to represent the Arab Palestinian national minority in the state of Israel; one that in his view is under systematic attack, closely related to the ongoing genocide in Gaza, and the ethnic cleansing in parts of the West Bank. A second objection is that such a rule might reward the most extreme rhetoric in the most severe circumstances. However, the proposed rule would operate only where the impugned statements are ambiguous.

What, then, does Abu Shehadeh's present position look like? In front of the Court, he spoke, for example, of visiting the families of Jewish victims of the 7 October attack. It was clear he had been moved by the tragedy that they had suffered. But perhaps one should also consider evidence not directed to the Court and not addressed to the Israeli public. A two-hour conversation with the famous Palestinian podcaster Ahmad al-Baqawi, published days before the hearing, offers an answer. Palestinian society in Israel, Abu Shehadeh says, is under an attack that threatens to dismantle it gradually. During what he describes as a genocide in Gaza, now in its third year, an old subordination of Palestinians in Israel became an existential threat. His first political aim is survival. He calls it, again and again, "stopping the bleeding" (*waqf al-Nazif*).

The image covers shootings in the streets and also what Abu Shehadeh talks about as the quiet expulsion of Palestinian citizens. He describes members of the Palestinian national minority in Israel leaving for Cyprus, Turkey and Europe. And he talks about how the government steers and exploits the crime wave ravaging Palestinian society (with Ben Gvir arguably reaping the fruits he so desired). To protect the rights of Palestinians in Israel, individual and collective, one must stay (*sumud*). These are his claims, and I report them as such. A court applying my test would have to examine them. If the Court were to find that indeed the Palestinian national minority is under an organized attack, it would have to suspect that disqualifying one of that minority's most articulate voices is merely part of that same attack.

My test presupposes a court able to say no to its own government. But this presupposition may not prove plausible in the relevant real-life situation. When a state is truly in the process of eliminating a national minority, its courts are unlikely to keep the independence needed to protect a politician from that minority. This is especially so when his words gesture toward violence, as Abu Shehadeh's 2023 text arguably did. But of course, this only deepens the need for other states to act. Where domestic courts cannot protect a national minority under attack, foreign policy must do so.

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