



December 18, 2012

**Disqualification of Candidates and Lists from Participation in the Elections**

Ahead of the elections to the 19<sup>th</sup> Knesset, which will take place in approximately one month, several requests have been submitted to the Central Elections Committee to disqualify various candidates and/or lists from both the left and the right wing of the political spectrum. The discussion of these requests will take place on December 19<sup>th</sup>. This paper presents the positions of the Association for Civil Rights in Israel (ACRI) concerning the important question of **the disqualification of candidates and lists from participation in the elections**.

This paper aims to present a principled position regarding this issue, due its great importance and its ramifications for the democratic system in Israel and for the protection of basis human rights.

**The right to vote and to be elected – a basic right**

1. The right to vote and to be elected is a basic constitutional right in a democracy. Without this right, it is not possible to maintain a democratic regime and to protect the individual's basic rights. The Supreme Court has addressed this basic right on countless occasions, and has repeatedly established that *"the right to vote and to be elected is part of the very soul of democracy, since it combines the rights to equality, freedom of expression and freedom of association."*<sup>1</sup>
2. It has further been established that: *"The right to vote and to be a candidate for election is a basic right in any democratic regime. These rights are based on the basic*

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<sup>1</sup> Election Appeal 2/84 *Neiman v Chairperson of the Central Elections Committee for the Eleventh Knesset*, *Piskei Din* 59(2) 225, 264 (1985). See also: Election Appeal 1/65 *Yardor v Chairperson of the Central Elections Committee for the Sixth Knesset*, *Piskei Din* 19(3) 365, 382 (1964); HCJ 753/87 *Borstein v Minister of the Interior*, *Piskei Din* 42(4) 462, 473 (1989).

*right to equality and freedom of expression.*” Regarding the right to be elected, it has been noted that this is “... *one of the manifestations both of the equality of all citizens and of freedom of expression.*” Regarding the right to vote, the same ruling notes that “*its principal conceptual foundation is the principle of political equality...*”<sup>2</sup>

### **Grounds for the special protection of the right to vote and to be elected**

3. There are many grounds for the special protection afforded to the constitutional right to vote and to be elected, all of which are profoundly linked to ensuring the existence of a democratic system and securing individual rights within a democracy.<sup>3</sup> Above all, the right to vote and to be elected manifests the individual’s right to be autonomous, to express his or her own self and opinions, to associate to promote certain ideas, and to express these ideas freely under the protection of the freedom of expression. Negating the rights of an individual or a group to vote and to be elected violates all these rights, and also violates equality between certain individuals and groups and the remainder of the nation’s citizens who participate in the democratic process.
4. Moreover, a democratic system must ensure in an egalitarian manner, and for all citizens, the right to participate in the system and to enjoy political influence. The principal way to achieve this is by allowing the presentation of the full range of worldviews and opinions to the public and by facilitating freedom of choice. Disqualifying candidates and lists impairs the range of opinions represented and may lead to the exclusion of entire sections of the population, both in terms of the representation of their worldview and in terms of their participation in the democratic process itself. It is doubtful whether people will find grounds to participate in the process if their views are not represented.
5. In addition to the damage to the legitimacy of groups within the population and their exclusion from the political domain, a lack of genuine diversity in opinions impairs the essence of the democratic process, since it mitigates against genuine and full political debate. The election results will not reflect the range of positions held by the voters, and their positions and needs will not be taken into account by those elected to lead policy in Israel after the elections.

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<sup>2</sup> Ibid.

<sup>3</sup> For further discussion of this subject, see the paper of the Israel Democracy Institute (in Hebrew): [http://www.idi.org.il/media/305798/pp\\_59.pdf](http://www.idi.org.il/media/305798/pp_59.pdf). English abstract available here <http://en.idi.org.il/analysis/idi-press/publications/hebrew-policy-papers/disqualification-of-lists/>

6. The presence of diverse opinions is the basis for freedom of expression and for a genuine democracy. Without the ability to express any opinion, to criticize other opinions – including those held by the governing parties – and to act to promote these other opinions, there can be no true freedom of expression and no true democracy. It is axiomatic that freedom of expression is manifested precisely by respecting and including extreme views, unpalatable as they may be; by protecting and maintaining the legitimacy of those who present these views; and by refraining from excluding and delegitimizing them. A democratic and free society must contain, respect and provide space for the full range of views in society.
7. Moreover, disqualifying candidates and lists is contrary to the rules of the democratic game. It removes political rivals from the game in an illegitimate manner. In effect, this constitutes a clear case of the tyranny of the majority, when a political majority abuses its strength against a political minority of some form. In this context, it is important to bear in the mind the actual reality in Israel – a country where one of the basic facts of national life is the presence of an Arab civilian minority. In this context, there is a danger that entire groups within society – and, in particular, the Arab population – will be permanently excluded from the political system by the majority, will not form part of the system and will not be represented in the Knesset. Such a scenario would deal a mortal blow to the democratic system in Israel.
8. Regarding the grounds for protecting this right, see the Supreme Court ruling in the “Feiglin petition:” *“Take the right to be elected from a person or a group of people and you have negated their right to express a political position they have developed, as well as the right to participate in shaping government and in influencing its actions. Restrictions of this type indeed meet with disapproval among supporters of the democratic system, but it would seem that the strength of opposition to such restrictions is reduced when the resulting injury is sustained by minority groups within the population. This refers mainly to those cases when broad and a priori agreement develops that a minority should not be allowed representation in the corridors of power, since – according to the majority view – the agenda of this minority includes goals that seek to undermine the foundations of the democratic system. Accordingly, and while declaring their respect for basic rights, the majority deprives the minority of the right to compete in the ultimate democratic instrument (elections). The distance from here to the point where the minority searches for alternative means of expression and influence, even if these veer toward the sphere of prohibited behavior, is short. To prevent all this, the legislator must act wisely in order to avoid*

*perpetuating majority rule by invalid means, on the one hand, and preventing the minority from struggling for its opinions, on the other.”<sup>4</sup>*

### **When is it permissible to disqualify candidates or lists?**

9. Notwithstanding the above, article 7A of the Basic Law: The Knesset permits the disqualification of candidates or lists in certain instances. The justification for such disqualifications relates to the protection of the foundations of democracy – protection of the rule of law, individual rights, equality, and so forth, and to the existence of the state itself. The phrase “defensive democracy” expresses this idea, suggesting that democracy may violate individual rights when it seeks to defend the very existence both of the state and of its democratic character. In effect, the disqualification mechanism is intended to ensure that democratic tools are not abused in order to eliminate the state or its democracy.
10. In this context, it is extremely important to emphasize that the legal possibility of disqualifying candidates or lists does not mean that these instruments should be used lightly. Since such action injures basic rights in a manner that has far-reaching ramifications for democracy itself and for individual rights, as detailed above, the disqualification option should be used only in grossly and unequivocally extreme instances. To act otherwise is to contradict the goal of protecting the existence of the state itself and of its democratic character. In any case, less extreme courses of action are to be preferred whenever possible (the default instrument is public discourse, but other instruments are available, such as: disqualifying individual bills in accordance with the Knesset Constitution; using the incitement clauses in the penal code, under the supervision of the attorney general; disqualifying a specific antidemocratic campaign, and so forth).
11. On the issue of disqualification, the Supreme Court has ruled that this authority is to be exercised in the most restrictive manner. For example, the court has ruled that the goals on account of which disqualification is requested must be clear and unequivocal; that they must be central and dominant; and that tangible action is being taken to advance these goals in a consistent manner and in a grave and extreme degree. In their rulings, the Supreme Court justices have repeatedly emphasized the

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<sup>4</sup> HCJ 11243.02 *Feiglin c Chairperson of the Elections Committee*, *Piskei Din* 57(4) 145, 156 (2003).

importance of applying a restrictive interpretation to the various grounds for disqualification.<sup>5</sup>

12. It should also be borne in mind that the Central Elections Committee is a political body comprised of Members of Knesset in a manner reflecting the composition of the Knesset. In other words, the “political majority” in Israel enjoys a clear and permanent majority on the committee at all times. It should be recalled, particularly as elections approach, that the members of the committee have their own political and electoral interests, and their own distinct political worldviews. These form the basis for their decisions regarding the disqualification of candidates and lists when such requests are brought before the committee. Moreover, the members of the committee do not take into account the legal considerations or the desirable balances for protecting democracy and individual rights, as is proper on such a cardinal issue. The result of this is that political minorities, and most evidently the Arab minority in Israel, face the constant threat that their right to vote and to be elected in Israel will be denied, with the grave ramifications and consequences this would have for minority groups and for Israeli society as a whole.

#### **Grounds for disqualification**

13. In conclusion, we wish to address briefly the grounds for disqualification as established in Israeli law, and to distinguish between these grounds. We believe that some of these grounds are legitimate while others are not, as we will clarify shortly. Article 7A of the Basic Law: The Knesset establishes several grounds for disqualification: Negating the existence of the State of Israel as a Jewish and democratic state, incitement to racism, and support for an armed struggle against Israel.
14. As noted above, grounds that aim to defend the existence of the state or of its democratic system, and thereby also to defend the rights of the individuals within the state, are proper and legitimate grounds, in our opinion. These grounds realize the purpose for which the disqualification mechanism was introduced – to defend the existence of the state and its democratic character. Such grounds are those establishing the prohibition against incitement to racism, the prohibition to support an armed struggle against the state, or negating the existence of Israel as a democratic state.

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<sup>5</sup> See the ruling in Election Appeal 1/88 *Neiman v Chairperson of the Central Elections Committee to the Twelfth Knesset*, *Piskei Din* 39(2) 225, 246-247 (1985).

15. Conversely, we argue that grounds for disqualification that are essentially ideological are improper and illegitimate. Such is the ground of negating the existence of Israel as “a Jewish state.” This ground is open to interpretation and, accordingly, serves as a tool by the majority for oppressing minority groups in the population. A debate about the character of the state, the manner in which its Jewish nature is defined, and the significance of these issues is a legitimate debate that does not threaten the existence of the state or its democratic character. Disqualification on the basis of ideological grounds fails to meet the purpose of this mechanism, and indeed damages democracy by permitting the delegitimization and exclusion of entire groups in the population on purely ideological grounds. It is important to recall that the presence of diverse ideological worldviews, and the protection of these views, form the foundation for the existence of a democratic and free country and of freedom of expression, individual rights and equality.

Sincerely,

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