

האגודה לזכויות האזרח בישראל
جمعية حقوق المواطن في اسرائيل
The Association for Civil Rights in Israel



September 29, 2013

To: MK David Rotem,
Chairman of the Constitution, Law and Justice Committee,
Israel Knesset

Members of the Constitution, Law and Justice Committee,
Israel Knesset

Dear Members of Knesset,

Regarding: Association for Civil Rights in Israel's position paper on raising the electoral threshold

- Proposed basic law: The Government (increasing governance and raising the vote threshold) by MK Rotem and others
- Proposed basic law: The Government (changing the system of government) by MK Hoffman

Recently, these two bills to amend the 'Basic Law: The Government' have passed a first reading in the Knesset. The proposals include, *inter alia*, doubling the electoral threshold, dramatically raising it from 2% to 4%.

The following is the position of the Association for Civil Rights in Israel, which focuses primarily on the potential harm to the representation of various groups in the Israeli Knesset, particularly the Arab public and the Haredi public, if this change is adopted.

Even though it is difficult to accurately predict the consequences of raising the electoral threshold for minority groups in Israel, we believe that **the most severe scenario must be taken into account, because minority representation in the parliament is a critical foundation stone of the democratic system in any country. This is especially true in a country like Israel, given the diverse social, religious, and national composition of its citizenry. In the absence of Knesset representation for the main minorities in society, Israeli democracy will be severely damaged.**

Despite the harsh and extremist public discourse in recent years against various minorities in society, we are convinced that it is clear to all that a Knesset without Arabs and without Haredim, and perhaps even

without ideological and political minorities, would not be a realization of democracy and cannot serve as the central core of a democratic system.

In this document, the potential faults involved in raising the electoral threshold will be presented, based on the worst-case realistic scenario. First and foremost, it shall examine the obstacles to minority representation in the Knesset – particularly that of Arabs and Haredim – but also other issues.

1. Subverting minority representation, particularly the Arab minority and the Haredi minority

An obvious underlying assumption for this discussion is that a low electoral threshold ensures easier entry for various people and parties to the political arena. This fact ensures both representation for various minority groups in the political arena, as well as entry for new voices and participants in politics. On various occasions, the High Court of Justice has addressed the significance of ensuring representation through parliamentary elections as an important foundation of democracy. For example, in H CJ 3434/96 Hofnung v. Knesset Speaker [1996] IsrSC 50(3) 57, it was determined, in the context of a discussion on how to ensure equality in Knesset elections, that it must be done “by taking into consideration values that are important in this context: the essence of democracy, which must fairly provide suitable opportunities to different opinions and interests to obtain representation and influence, without exploitation of positions of strength by powerful entities, and without discrimination against weaker groups...”

In the case H CJ 6427/02 Movement for Quality Government in Israel v. Knesset PD 61(1) 619 (2006), page 7 of (then) Justice Grunis’s ruling, in the context of instances where court intervention in Knesset legislation would be justified, referred to the electoral threshold claiming that: “Court intervention would be justified even in cases in which the legislature changes the rules of the game in a manner likely to distort the basic principles of the democratic regime... An additional example which may be considered is raising the electoral threshold to a level so high that it may exclude minority groups from the representative democratic system.”

As said, the electoral threshold has a critical impact on the representation of various minority groups in Israeli society. A high electoral threshold, such as the proposed 4%, is likely to exclude representatives of the Arab public from the Knesset and is also likely to impact the level of representation of other groups – for example Haredim and the national-religious.

The solution sometimes proposed, according to which the parties which represent minorities should unite, is also harmful, as well as racist. As for the Arab public: this is a large native minority (approximately 20% of the population, one in five citizens), which includes a range of groups and opinions and has the right to free choice and political diversity, just as there is diversity of ideology and opinion amongst the Jewish population expressed through a variety of political choices and representatives. It is clear that the diversity required is not unlimited, but reality makes clear that in Arab society, there is a stable diversity of three to four parties which has held steady for many years. This is a minimal level of diversity compared to the size of the Arab population – a level which any democratic system is obligated to ensure for minority groups. If we assume that the entire Arab minority votes for the various Arab parties – then a 4% electoral threshold would comprise an effective electoral threshold of approximately 30% of this

group (meaning, if a party receives approximately 30% of the Arab vote, it will not pass the high electoral threshold of 4% of all voters nationwide).

As said, other minority groups, such as the Haredi public, which also possesses significant internal diversity, may also be harmed by an increased electoral threshold, and may be entirely excluded from politics if it preserves a certain level of political diversity and does not choose to merge into other large or medium-sized parties. The unique national and religious groups in Israeli society and the importance of their expression in Israel's political system must be taken into account. It is also clear to all that they will not find meaningful political expression within the framework of other political blocs or large parties.

Ensuring a real opportunity for entry to the Knesset is also critical in order to ensure widespread participation of representatives of Israeli society in politics. The higher the threshold and the more difficult it is to pass, the more new voices will be deterred from participating in the democratic process, which even without this limitation is rife with various obstacles and high costs. The democratic system must aspire to encourage as many people as possible to organize and participate in elections and politics.

2. Undermining voter participation

Reducing the number of small parties may also reduce voter turnout. Throughout the world, when the electoral threshold rises, it has resulted in increased wasted votes. That is to say, experience shows that raising the electoral threshold does not cause "strategic voting." But even if people who vote "strategically" choose not to vote for parties which they fear will not pass the electoral threshold, it will not necessarily cause them to vote for large or medium-sized parties with which they do not identify. We are witness to the fact that throughout the world, as competitiveness among parties decreases, so does voter participation. The opposite is also true: the more parties there are that are closer to voter's views, the higher the chance that they turn out to vote. Therefore, when the electoral threshold is raised dramatically with the number of parties decreasing and/or parties uniting, we may see a situation in which many people do not participate in elections at all. In addition, large amounts of votes cast by voters who chose to participate in the elections but whose chosen party will not be represented in Knesset will be wasted and their votes will be *de facto* disqualified.

The primary concern in this context is that raising the electoral threshold will damage voter participation amongst minority groups, first and foremost the Arab public – which may fully exclude them from Israeli politics and cause a problematic anti-democratic situation in which 20% of the country's citizens (the largest minority in Israel and the only native minority) are not represented at all and do not take part in the country's political system. Of course, this situation would have severe consequences for Israeli democracy, as well as for the relationship between the majority and minority in the country.

3. Undermining the principles of proportional representation and equality

Raising the electoral threshold will undermine the principle of proportional representation, which is established in the Basic Laws of the Knesset, as it will create distortions in the outcome of future elections. When the electoral threshold is high, the result is the invalidation of a great number of

legitimate votes (in the last elections in Israel, 7% of votes were discarded because they were for parties which did not pass the threshold!) These votes – which would have been considered in determining the outcomes of the elections – would have undoubtedly changed the makeup of the Knesset. Moreover, this brings about a situation in which the intermediate and large parties have undue influence and power, much greater than their actual public support, as they enjoy the benefits of disqualified votes and receive a larger share of the seats in the Knesset than they were supposed to. And the bigger the party, the greater this effect: they receive more and more seats than their percentage of the vote would indicate. It is clear that in this situation the Knesset will not necessarily reflect the actual wishes of the public in terms of political representation.

Equality is tested by its results in practice and not merely by the existence of egalitarian principles. There is enough information to know that, when equality is tested by the results of future elections, Arabs and other minority groups in Israel will suffer as a result of using a higher electoral threshold to determine seats in the Knesset. This is because, as stated previously, a high electoral threshold stands in contradiction to the constitutional right to equality, as well as the right to representation which stems from the right to equality.

In parallel, the principle of equality as determined by the Basic Laws will also be undermined. This is because of the possibility of excluding minority groups from the political system, as well as a reduction in the variety of voting options that exist and a reduction in the participation of parties likely to be affected (in light of the expectation that they will unite in order to run as one list).

4. What is happening around the world

The electoral threshold in other states around the world is fixed in accordance with the voting systems themselves. In states that use first-past-the-post voting, there is no threshold whatsoever. In states that use proportional voting, like in Israel, there is sometimes, but not always, a fixed electoral threshold. In many of the states there is indeed an electoral threshold which stands at 4-5% (see the report of the Knesset Research and Information Center for more on this matter), but their voting systems are more complex, so this does not prove to be a real barrier to entry. For example, in many states there are different electoral regions, such that a party may enter parliament if it attains a certain percentage in just one of these regions. In others, there is a mixed system that combines proportional voting and first-past-the-post voting, and the electoral threshold is tossed aside if representatives are elected in the first-past-the-post system. Another method that exists in many states is the establishment of different electoral thresholds for individual parties, on the one hand, and for joint lists of united parties on the other. In the Netherlands, which has just one electoral region like in Israel, they set a low electoral threshold of just one seat (the exact percentage depends on the number of votes which yield one seat, and is determined according to the actual number of votes casts in elections).

Other states defend the right of minorities to representation in parliament via other means. In Denmark, for example, there is a national electoral threshold of 2%, but the parties that represent two special districts (Greenland and the Faroe Islands, whose residents have a non-Danish identity) do not need to meet this requirement and can still enter parliament. In Poland there is indeed an electoral threshold of 5%, but the parties representing ethnic minorities are exempt from this demand and are thus afforded

fixed seats in their parliament. In Romania, too, there exists a different electoral threshold for minorities. In Australia, they introduced a system in which a vote for minority parties that do not cross the electoral threshold is not wasted, but is instead passed on to another party in accordance with the voter's preferences.

5. The claim about damage to stability/governability

In light of the actual damage to the democratic system and to the abovementioned constitutional rights, it is appropriate to carefully examine whether there is a proper basis for the claim, brought forth in order to justify the proposed increase of the electoral threshold, that this increase is necessary in order to create political stability. There are serious arguments that refute this claim, or at least cast doubt on whether it is serious enough to justify the severity of the damage that will be caused by an increase in the electoral threshold. (See, for example, the [statement of professor Avraham Diskin](#) on this topic, as presented to the Knesset's Constitution, Law and Justice Committee in March 2007).

We want to look beyond the empirical (and speculative) question about how an increase in the electoral threshold will influence government stability and the position of the political parties. On the normative level, we would like to respond to the claim that small parties "blackmail" larger parties; it is highly problematic to relate to the pursuit of political demands as "blackmail". This is the essence of our coalition-based parliamentary system: the function of different parties that join the coalition is to represent and advance the interests and agendas for which they were elected and which are why they take part in politics. The political demands of small parties are not any less legitimate or any more "blackmail" than those of the large or mid-sized parties; the only difference is that their impact is less.

6. What must be done?

We are of the opinion that the electoral threshold should not be raised in a manner which is liable to reduce political participation, minority group representation, and voter turnout for Knesset elections.

So long as this government moves forward with the plan to raise the Knesset's electoral threshold in a way which will cause the aforementioned scenarios to become a reality, it is incumbent upon this government, at the very least, to find tools and avenues through which they can ensure the representation of minority groups in the Knesset. This could be done in a number of ways: by safeguarding places in the Knesset for minorities groups; by setting a special electoral threshold for minorities groups; by determining the electoral threshold for an entire minority group together (on the basis of its parties), and so forth. One example of these kinds of tools is the "Serbian Law," which determines that political parties recognized by the Central Elections Committee as ethnic minority parties will be exempt from the electoral threshold as it applies to the rest of the parties.

Conclusion

Democratic standards are not technical matters, but rather deep issues at the root of the political system. We hold that, in the context of changing the rules of the system and of the political “game,” we must act with particular care in order to ensure that there will never be a tyranny of the majority in Israel, and to protect the rights of the state’s minorities and all its citizens.

We must take into account the worst possible scenario, in which raising the electoral threshold to 4% will undermine the political representation of minorities, hamper the general public’s ability to participate in politics, and reduce the voter participation rate in future elections.

If this is not taken into account, we believe that the democratic system in Israel may suffer deep and profound damage at its very core that will severely undermine its constitutional principles.

Sincerely,

Attorney Debbie Gild-Hayo

Director of Policy Advocacy

The Association for Civil Rights in Israel