



February 18, 2016

To:
MK Nissan Slomiansky
Chairperson
Constitution, Law and Justice Committee
The Knesset
Jerusalem

To:
Members of the Constitution, Law and
Justice Committee
The Knesset
Jerusalem

Re: Discussion in the Constitution, Law and Justice Committee of the Proposed Basic Law: The Knesset (Suspension of Members of Knesset)

This paper outlines the updated position of the Association for Civil Rights in Israel (in light of new reports concerning the wording of the expected proposal) prior to the discussion by the Constitution Committee on Feb. 23, 2016 of the **Proposed Basic Law: The Knesset (Suspension of Members of Knesset)**. It should be emphasized that a formal version of the proposal has not been published. Accordingly, our comments at this stage are based on the information published in the media.

We must clarify from the outset that we oppose this proposed law. Granting powers to Members of Knesset, by means of a political procedure, to suspend or depose serving Members of Knesset violates the right to vote and to be elected and harms the foundations of democracy.

The content of the proposed law

According to the reports, the proposed law constitutes an amendment to the Basic Law: The Knesset. The proposed law will include three grounds on which a Member of Knesset may be suspended from their position: Negating the existence of the State of Israel as a Jewish and democratic state; Incitement to racism; and Supporting an armed struggle against the State of Israel. The proposal establishes that a statement by a Member of Knesset will be sufficient to prove the grounds.

It must be emphasized that the proposed changes to section 7a of the Basic Law: The Knesset will also apply with respect to the disqualification of lists and candidates from participating in elections to the Knesset.

According to the proposal, the Knesset will be able to suspend one of its members if 90 members vote to do so. According to the proposed procedure, 61 Members of Knesset will be required to submit a complaint to the Knesset Committee. Three-quarters of the Knesset Committee will be required to approve a vote on the suspension of the Member of Knesset and to determine the period of suspension, which is unlimited. During the suspension, the



Member of Knesset will be replaced by the next candidate in his/her party's list, who did not secure a seat in the Knesset.

It should be noted that the three above-mentioned grounds are included in the Basic Law: The Knesset regarding the disqualification of a list or candidate from participating in elections. However, the current procedure regarding participation in elections differs from the proposed procedure in several respects. Firstly, the decision on the disqualification of a candidate is subject to the approval of the Supreme Court. By contrast, the proposed law discussed here enables a procedure that is completely political, and not subject to approval in a judicial proceeding. Secondly, the procedure currently set out in the law involves the disqualification of a candidate or party on the basis of an extensive and principled examination of actions and ideology. The proposed law, however, relates to the examination of specific, political instances whereas in reality such a matter requires an in-depth examination similar to that in criminal law.

It should be emphasized that there is no room for comparison between the proposed mechanism and that which is already set out in law for the suspension of the president of the state and the speaker or deputy speaker of the Knesset; as the supporters of this proposal have claimed. The reason for this is that these positions are appointed by the political echelon. In any case, the speaker and deputy speaker are deposed from their positions but not from their office as Members of Knesset.

The right to vote and to be elected is a basic right

1. The right to vote and to be elected is a basic constitutional right in a democratic regime, without which it is not possible to maintain such a regime or to ensure basic individual rights. The Supreme Court has discussed this basic right on countless occasions, and has repeatedly stated that *“the right to vote and to be elected is the essence of democracy, since it combines the rights to equality, freedom of expression, and freedom of association.”*¹
2. It has further been established that: *“The right to vote and to be a candidate for election is a basic human right in any democratic regime. These rights are based on the basic right to equality and freedom of expression. It has been said of the right to be elected that it is ‘one of the representatives both of the equality of citizens and of freedom of*

¹ See, for example, Elec.App. 2/84 *Naiman v Chairperson of the Central Elections Committee for the Nineteenth Knesset*; Elec.App. 1/65 *Yardor v Chairperson of the Central Elections Committee for the Sixth Knesset*; H CJ 753/87 *Borstein v Interior Minister*.



expression.’ It is said there of the right to vote that ‘... its primary theoretical basis is the principle of political equality...’²

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

3. There are many grounds for the special protection of the constitutional right to vote and to be elected. All of these grounds are closely connected to ensuring the existence of a democratic regime and ensuring individual rights in a democratic regime. First and foremost, the right to vote and to be elected expresses the right of individuals to be autonomous, to express themselves and their worldview, to associate to advance their ideas, and to express their ideas freely within the framework of their freedom of expression. Denying the right of an individual or group to elect and to be elected violates their rights and violates the equality between them and other citizens of the state who participate in the democratic process.
4. Moreover, a democratic regime must ensure in an egalitarian manner that all citizens can take part, participate, and exert political influence. The central way to do this is by creating the possibility to present the public with a full range of worldviews and opinions and by ensuring freedom of choice. Suspending Members of Knesset impairs the diversity of opinions. It may even lead to the exclusion of entire groups, both in terms of the presentation of their worldview and in terms of their actual participation in the democratic process; which they are unlikely to want to participate in when their position is not presented.
5. In addition to the damage to the legitimacy of groups within the population and their exclusion from the political domain, the absence of true diversity of opinions impairs the essence of the democratic process, as there is no opportunity for true and full political debate; the results of elections do not reflect the range of positions of the electors; and the positions and needs of electors are not taken into account by those who select and advance policy in Israel after the elections.
6. Maintaining diversity of opinions is the basis for the existence of the freedom of expression and the basis for a true democracy – and without the possibility to express every opinion, to criticize opinions – including the government’s positions – and to act to advance positions, there can be no true freedom of expression and no true democracy. As is well known, the freedom of expression is manifested precisely in the ability to respect and inclusion of extreme positions that are difficult to accept and absorb; to protect the rights of speakers and to guard their legitimacy; and to refrain from excluding and

² HCJ 8238/96 *Abu Arar v Interior Minister*.

האגודה לזכויות האזרח בישראל

جمعية حقوق المواطن في اسرائيل

The Association for Civil Rights in Israel



delegitimizing them. A democratic and free society should contain the entire range of opinions in society, and afford them space and respect.

7. Furthermore, the suspension of Members of Knesset is contrary to the rules of the democratic game, as it excludes political rivals in an illegitimate manner. Indeed, this is a clear instance of the tyranny of the majority, whereby the political majority exploits its power against a political minority. It should be taken into account that in a country with a permanent Arab political minority, as well as numerous political rifts, the implication of this step is that entire groups in the population will be permanently excluded from the political system by the majority. They will not form part of the political system and will not be represented, which would seriously harm the democratic regime in Israel.
8. Regarding the grounds for protecting this right, see the Supreme Court's comments in the *Feiglin* petition:

Deprive an individual or a group of people of the right to be elected and you have denied them the right to manifest the political worldview they have developed, as well as the right to participate in shaping the government and influencing its actions. It is true that restrictions of this type meet with disapproval from the supporters of the democratic regime, but on occasions the impression is that the strength of opposition to these restrictions is diminished when their inherent damage is directed at minority groups in the population. Our intention is primarily to those instances when a broad consensus consolidates that a minority should not be permitted representation in the institutions of government since, according to the majority worldview, the minority's platform includes goals intended to undermine the foundations of the democratic regime. Accordingly, and while proclaiming basic rights, the majority denies the minority the right to compete in the most prominent democratic tool (elections); and it is a short distance from here to the tendency of the minority to seek other forms of expression and influence, even if these descend into the realm of prohibited conduct. In order to prevent all this, the legislator must consider its steps wisely, in order not to find itself perpetuating the government of the majority by improper means, on the one hand, and denying the minority the ability to struggle for its opinions, on the other.³

The disqualification of candidates in accordance with the existing law versus the proposed law

9. Section 7a of the Basic Law: The Knesset permits in certain instances, the disqualification of candidates or lists from participation in elections. The justification for such disqualifications relates to the protection of the foundations of democracy –

³ HCJ 11243/02 *Feiglin v Chairperson of the Elections Committee*.



protection of the rule of law, individual rights, equality, the separation of powers, and so forth, as well as the protection of the very existence of the state. The disqualification mechanism effectively seeks to ensure that democratic tools will not be abused in order to eliminate the state itself or its democracy.

10. It is very important to emphasize in this context that the legal possibility of disqualifying candidates or lists does not mean that such tools can or should be employed lightly. Since such steps violate basic rights with far-reaching ramifications for democracy itself, and for individual rights, as detailed above, the possibility of disqualification should be used only in instances that are clearly and unequivocally extreme. To do otherwise would be a disservice to the goal of protecting the existence of the state and its democracy. In any case, it seems preferable to choose less extreme means of action whenever possible (the standard rule is public discourse, but additional tools also exist, such as the individual rejection of proposed laws in accordance with the Knesset by-laws; the use of the incitement clauses in the Penal Code, under the supervision of the Attorney General; the disqualification of a specific, anti-democratic campaign, and so forth).
11. The Supreme Court has established that the power of disqualification is to be used in an extremely restricted manner. It has been determined, for example, that the objectives (for requesting the disqualification) must be clear and unequivocal; they must be central and dominant; and there must be concrete action to advance them, in a recurrent and consistent manner, and with grave and extreme strength. The Supreme Court justices have reiterated in their rulings the importance of applying a restrictive interpretation to the various grounds for disqualification.⁴
12. **Despite the above, the current proposed law** seeks to charge the Knesset Committee, without the review of the Supreme Court, with the authority to make decisions regarding the suspension of Members of Knesset. This is despite the fact that the Committee is a political body comprised of Members of Knesset, in a composition reflecting the structure of the Knesset. In other words, this body includes a clear and permanent majority of the “political majority” in Israel at any given time. It must be remembered that the members of the Committee have political and electoral interests, as well as their own clear political worldviews, which form the basis of their decisions on the disqualification of Members of Knesset when they are asked to discuss this. Moreover, the Committee members do not take into account the legal considerations or the proper balances for the protection of democracy and individual rights, as is proper with respect to an issue of such great importance. The ramifications are that political minorities,

⁴ See the ruling in Elec.App. 2/84 *Naiman v Chairperson of the Central Elections Committee for the Nineteenth Knesset*.



including the Arab minority in Israel face a constant threat of the denial of their right to political representation, with all the grave implications and ramifications that this has for minority groups and for society in Israel in general.

13. In addition to the proceeding established in section 7a, **criminal and ethical tools are available** to be used if a serving Member of Knesset acts illegally or improperly. Insofar as the Member of Knesset's actions constitute a criminal offense, including incitement to racism, incitement to violence, or support of terror (which are criminal offenses under Israeli law), the normative approach is the instigation of a criminal investigation regarding that Member of Knesset. If it is decided to prosecute and convict the Member of Knesset, this will cease the membership of the Member of Knesset in appropriate instances. This ensures appropriate professional proceedings without damaging the separation of powers and the protection of basic rights. In addition, another tool that already exists and has been used, relates to a situation when the actions of a Member of Knesset constitute an ethical offense. In this case the Knesset Ethics Committee has appropriate tools to impose temporary suspensions and the withdrawal of salaries.

The addition of “statements” to the acts establishing grounds for suspension

This proposed amendment has particularly grave consequences. Clearly, the court may in any case interpret the “actions of a list or person” as including their statements. However, the explicit and distinct inclusion of “statements” in section 7a is serious for several reasons. Firstly, the freedom of expression is a basic right that enjoys special protection in Israeli law, not only as a basic right, but also in the procedures established in law for its protection. In this instance, attention to the freedom is overridden by a political procedure and the special protection otherwise afforded to the freedom is removed. Secondly, it would appear, prima facie, that this addition is intended to expand the “actions” included in section 7a in a manner that will distance them from concrete, explicit, and clear activities toward a broader and more vague definition. This constitutes a threat to the freedom of political expression not only in this context, but also more broadly regarding the scope of the protection afforded to the freedom of expression in Israel.

The proposed grounds for suspension

14. Beyond the proposed procedure itself (the disqualification of serving Members of Knesset by the Members of Knesset in a political proceeding), which is problematic as is noted above, we also wish to note that a distinction should be made between the grounds for disqualification. We believe that some of these are legitimate while others are not.
15. As noted above, the grounds for suspension that seek to protect the very existence of the state or its democratic regime, including individual rights therein, are proper and legitimate as they realize the goal for which the mechanism of disqualification is

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



intended. These grounds include addressing the prohibition against incitement to racism, the prohibition of support for an armed struggle against the state, or opposition to the existence of the state as a democracy.

16. Conversely, in our opinion the grounds for disqualification that are ideological are improper and illegitimate, for example the ground concerning Israel's existence as a Jewish state. This ground is open to interpretation, and accordingly provides the majority with a tool for oppressing minority groups. The character of the state, the manner in which its Jewish character is defined, and the ramifications of these matters are legitimate topics for debate, that do not damage the state's existence or its democracy. However ideological grounds do a disservice to the goal, and indeed damage democracy by permitting the delegitimization and exclusion of entire groups in the population on a purely ideological background. It is important to remember that the existence and protection of diverse ideological worldviews forms the basis of the existence of a democratic and free state, the freedom of expression, individual rights and equality.

The manner of advancement of the legislation

As an aside, it is also worth noting the improper manner in which the legislation is being executed. Although this concerns a basic law, which effectively forms part of the informal constitution of the State of Israel and requires broad consensus and serious consideration; and although it concerns extremely important basic rights – both the right to vote and to be elected and the right to freedom of expression - which are pillars of a democratic society; we have witnessed a particularly rapid procedure in this case. No clear versions of the proposal have been published for public review and comment (and not even for the attention of Members of Knesset), and there has been no consultation or discussion with all sectors of the public. It is not proper or right to pursue legislative procedures of such significance and with such far-reaching consequences in this manner.

We urge the Committee and its members, as well as the government and the Members of Knesset, not to approve this proposed law and not to transfer the important issue of the suspension of Members of Knesset to politicians. Instead, they should protect Israeli democracy and protect one of the most basic rights of individuals in Israel – the freedom to vote and to be elected, and thereby to secure political representation – even in the presence of ideological disagreements and different worldviews.

Sincerely,

Debbie Gild-Hayo, Att.
Director of Policy Advocacy
052-8282444

Dan Yakir, Att.
Chief Legal Counsel

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



CC:

Members of the Government
Members of Knesset
Attorney General
Legal Advisor to the Constitution Committee