



February 22, 2016

To:

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Re: Proposed Basic Law: The Knesset (Amendment – Suspending a Member of Knesset to Whom Section 7A Applies)

Dear Sirs:

I am turning to you in regard to the unconstitutionality of this proposed legislation as follows:

1. The proposed legislation calls for amending Basic Law: The Knesset (hereinafter: “the Basic Law”) on two levels: A. The proposal allows a majority of 90 members of Knesset to suspend an incumbent member of Knesset on one of the three grounds listed in Section 7A of Basic Law: The Knesset; B. the proposal expands the grounds for disqualifying a candidate or list under Section 7A of the Basic Law, stipulating that it is sufficient that they express support for an armed struggle that is not necessarily identified with a terrorist organization or enemy state. In addition, it asserts that when deliberating on disqualification, the candidates will also be judged by their statements and not only by their objectives or actions.
2. It is impossible to ignore the context that led to this proposed legislation. The legislation was proposed in response to a meeting held by members of Knesset Jamal Zahalka, Haneen Zoabi and Basel Ghattas of the Joint List with

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representatives of families of the casualties from Jerusalem, in an effort to help the latter return the bodies of their children, who have been held for about four months by Israel Police, and to bring them to burial. After the meeting, Prime Minister Netanyahu launched a campaign of incitement against the three [MKs], resulting in hundreds of complaints submitted to the Knesset's Ethics Committee and the suspension of the three [MKs] from the Knesset for various periods. In this atmosphere of political and vindictive incitement, this legislative proposal was born, designed to give the angry majority in the Knesset the power to "punish" and suspend Arab members of Knesset because of their "infuriating" actions.

The authority to suspend

3. The proposed amendment excessively infringes upon the basic constitutional right to vote and [the right] to be elected; its purpose is unworthy in that it is political [and] illegitimate. Notably, we are speaking about an amendment to a Basic Law, which is supposed to reflect a constitutional outlook, based on the fundamental constitutional values of the legal system. The proposed legislation gives the representatives of the state's majority an additional tool to further relegate the elected representatives of the Palestinian minority to the political sidelines. We are dealing with a proposal that very clearly illustrates a mechanism for political subjugation of the minority, amounting to tyranny of the majority vis-à-vis the minority in the state. [This bill would] grant judicial authorities to a political body that most certainly acts out of conflict of interests.
4. The right to vote and to be elected has been recognized in the Supreme Court's rulings as "a constitutional right of the highest degree" (HCJ 5364/94 **Welner v. Chairman of the Israeli Labor Party**, PD 49(1) 758, 800-801 (1995). See also Election Confirmation 11280/02 **Central Elections Committee for the 16th Knesset v. MK Tibi**, PD 57(4) 1, 16 (2003) (hereinafter: "the Tibi case")). This right is closely tied to the right to equality, freedom of expression and freedom of assembly, anchored in Basic Law: Human Dignity and Liberty (Permission for Civil Appeal 7504/95 **Yassin v. Registrar of Parties**, PD 50(2) 45, 57-59 (1996); see also HCJ **Abu Arar v. Minister of Interior**, PD 52(4) 26 (1998)).

5. The aforementioned [principles] receive further weight as this matter entails the suspension of the parliamentary representation of the Palestinian minority in Israel; the amendment would engender a flagrant infringement of the right of the Palestinian minority, or also of other minorities, to be represented in the Knesset with all of their viewpoints. The Supreme Court has repeatedly emphasized the importance of the principle of [political] representation, especially of weak groups and minority groups: “The essence of democracy, is that it should afford a suitable opportunity for different views and interests to gain representation and influence, in a fair way, without strong entities exploiting [their] positions of power and without depriving weak groups. Ultimately, equality in this context, as in other contexts, expresses justice in consideration of the reality” (HCJ 3434/96 **Hofnung v. Knesset Speaker**, PD 50(3) 57, 66 (1996)).
6. The proposed mechanism for suspension is in addition to the mechanism of preliminary screening, which the candidates for election and their lists must undergo, and which is described in Section 7A of Basic Law: The Knesset. As is known, Section 7A lists three grounds for precluding the participation of candidates or lists in elections for the Knesset. A. “negation of the existence of the State of Israel as a Jewish and democratic state”; B. “incitement to racism”; C. support for an armed struggle against the State of Israel. In addition to this mechanism, there is also a mechanism for terminating the membership of an incumbent member of Knesset following a criminal conviction for offenses entailing moral turpitude (sections 42A and 42B of Basic Law: The Knesset).
7. Therefore, this legislative proposal is not intended to serve a worthy purpose because the legal situation today addresses the conditions for membership in the Knesset – both as a threshold condition for participation in elections and during the term in office, and this is through existing legal proceedings and criteria. Adopting the proposed legislation could also create an opening for “a slippery slope” leading to [other] violations, no less flagrant, of the Arab minority’s political rights. (For a similar case, see the ruling of former President Beinisch in Miscellaneous Criminal Motions 8823/07 **Ploni [John Doe] v. State of Israel** (unpublished, February 11, 2010), p. 545 (hereinafter: the “**Ploni case.**”))
8. Therefore, the one and only purpose for adding the mechanism of suspension by the Knesset as expressed in this legislative proposal is political [and] illegitimate; its

objective is to place a belligerent political tool in the hands of the majority in order to oppress the minority and push it out of the most important arena of political action – the Knesset.

9. It has already been ruled that in light of the supreme importance of the right to vote and to be elected, “the restrictions imposed on this right must be **minimal**, and must protect **the most vital interests**” (bold emphasis added here) (HCJ 5364/94 **Welner v. Chairman of Israeli Labor Party**, PD 49(1), 758, 801; see also the **Tibi** case, p. 18). The proposed mechanism of political suspension runs contrary to these fundamental criteria and violates the constitutional balances created to minimize restriction of the right to vote and to be elected.

The amendment of Section 7A

10. As noted, the proposed legislation also seeks to amend Section 7A of Basic Law: The Knesset by barring a list or candidate from participating in Knesset elections whose words – and not only whose objectives or actions – meet one of the grounds for disqualification. The proposed amendment in effect expands the disqualification mechanism, which is problematic from the outset. It also expands the possibilities of disqualifying candidates in elections for the Knesset and, consequently, of flagrantly infringing upon the freedom of political expression. As noted, the Supreme Court has explained more than once that the mechanism of disqualifying Knesset candidates must be used very carefully and sparingly, and this is due to the mechanism’s inherent infringement of the freedom of political expression and the right to vote and to be elected. Thus, the court determined that the objectives justifying requests to disqualify a candidate must be clear, unequivocal, central and dominant; that there must be a real effort to advance them (Elections Appeal 1/88 **Neiman v. Chairman of the Central Elections Committee for the 12th Knesset**, PD 42(4), 177 (1988)); and that there must be a “critical mass” of clear, convincing and unequivocal evidence of this (the **Tibi** case, p. 43).
11. We note in this context that nearly all of the cases pertaining to Knesset elections that have reached the Supreme Court have been based, in part, on statements made by the candidates. This was true in the **Tibi** case and in the **Central Elections Committee for the 20th Knesset** case (Elections Appeal 1096/15 **Central Elections Committee for the 20th Knesset v. MK Avigdor Lieberman** (published

in legal databases, December 10, 2015)). The Supreme Court explained in these rulings that based on fundamental principles, first and foremost the freedom of political expression, and regardless of the content of legislation, statements do not constitute sufficient grounds for disqualifying a candidate or list from participating in elections for the Knesset, and that such disqualification must be based on actions and not just words, and that a single action is not enough. Rather, these actions must constitute a guiding principle in the list's actions and they must be actions that are repeated (Elections Appeal 561/09 **Balad – The National Democratic Party v. Central Elections Committee for the 18th Knesset** (not published (March 7, 2011))).

12. Adding the possibility of disqualification due to “the statements” of candidates violates the criteria of the rulings and balances created to prevent excessive infringement of the right of political expression, and could engender a very dangerous expansion of the mechanism of disqualifying candidates for the Knesset. And again, the Supreme Court invalidated [this criterion] based on the balance created between freedom of expression and the right to be elected, on the one hand, and the state's values, on the other hand. That is, this balancing formula also remains valid in the face of legislative attempts to violate it because it is a balancing formula for constitutional principles.
13. Finally, we note that the proposed amendment, if enacted, would join a string of legislation that directly limits the freedom of political expression of Palestinian citizens of the state, and would escalate the legislative efforts that seek to curtail their political rights. These laws include Amendment 62 of the Knesset Elections Law [Consolidated Version], 1969, which raises the threshold percentage for election to the Knesset from 2% to 3.25%; Section 7A (A) (1) of Basic Law: The Knesset, which disqualifies lists or candidates for the Knesset, inter alia, for rejecting the existence of the State of Israel as a Jewish state; Amendment 40 of the Budget Foundations Law (The Nakba Law), which authorizes the finance minister to cut state funding for an institution or organization if it conducts activity that rejects the existence of Israel as “a Jewish and democratic state” or “marks Independence Day or the day of the state's formation as a day of mourning; and the Law for the Prevention of Damage to the State of Israel Through Boycott, 2011.

(For the cumulative effect of the legislative measures restricting constitutional rights, see the **Ploni** case, p. 540.)

Based on all of the above, we ask you to express strong opposition to this proposed legislation and to take action to stop its advancement in the Knesset.

Respectfully,

Nadeem Shehadeh, Attorney