Elections Disqualifications Cases

Excerpts from Legal Arguments Submitted by Adalah to the Central Elections Committee and the Supreme Court

December 2002 – January 2003

Editors' Note

The following are excerpts from the reply briefs submitted by Adalah to the Central Elections Committee and to the Supreme Court of Israel in the 2003 elections disqualification cases. In these cases, Adalah represented MK Dr. Azmi Bishara and the National Democratic Assembly; MK 'Abd al-Malek Dahamshe and the United Arab List; and MK Dr. Ahmad Tibi and the Democratic Front for Peace and Equality-Arab Movement for Renewal List against motions to disqualify them filed by the Attorney General and numerous right-wing MKs and political parties. Adalah argued in these cases that the May 2002 amendment to the Basic Law: The Knesset is unconstitutional, in particular, with regard to the provision that any individual candidate or political party list that "support(s) the armed struggle of an enemy state or of a terrorist organization against the State of Israel" may be disqualified from running in the elections for the Knesset.

Legal Problems Inherent in Section 7A(a)(3)

1 The respondents will argue that the applicants' position regarding the application of Section 7A(a)(3) of the Basic Law: The Knesset – which refers to "support(ing) the armed struggle of an enemy state or of a terror organization" – raises two serious legal problems. The first relates to the legal interpretation of this provision, and the second involves its retroactive application. [*Editors' Note: This document does not contain the arguments relating to retroactivity.*]

Invalidity of Section 7A(a)(3)

2 This section was enacted in May 2002, subsequent to the enactment of the Basic Law: Human Dignity and Liberty, which was passed in 1992. Therefore, the principles of the limitations clause of the said Basic Law apply. Section 7A(a)(3) relates to a "terror organization." However, the legislature did not define, at the time of enactment of the said section or subsequent thereto, a terror organization, nor did it establish in primary legislation, the rules to be used in defining a terror organization. The Prevention of Terrorism Ordinance - 1948 (hereafter: the Ordinance), authorizes the government [the executive] to determine which entities are terror organizations; however, that Ordinance cannot apply to primary legislation that deals with terror organizations, where the legislation itself does not set forth which entities are terror organizations. The problem with regard to the Prevention of Terrorism Ordinance is that it was enacted

prior to the Basic Law: Human Dignity and Liberty, thus making it difficult to attack the Ordinance directly. It is clear, though, that where subsequent legislation exists, the limitations clause applies. The principle established in *Tsemach*, which applied the limitations clause to an amending law, when the legislation amended was enacted prior to the Basic Law: Human Dignity and Liberty, certainly applies to this case:

> The Court may examine whether a statute is compatible with the requirements of the Basic Law: Human Dignity and Liberty, even if the statute is beneficial to the individual, by reducing the infringement of the individual's liberty in comparison with the statute law that preceded it, notwithstanding the original statute being immune from review on constitutional grounds because it was adopted before the Basic Law took effect. As a result, the validity of laws clause, in Section 10 of the Basic Law, applies… Therefore, although in the present case the amending law – which took effect after the enactment of the Basic Law: Human Dignity and Liberty – significantly shortens, in comparison with the statute that preceded the amendment, the maximum period of detention that an officer-judge who is a military policeman is allowed to order from 35 days to 96 hours, and [while] the prior statute itself is immune to the requirements of the Basic Law, the amending statute is subject to the requirements of the Basic Law … Nevertheless, in examining the legality of a statute in light of the requirements of the Basic Law: Human Dignity and Liberty, the Court will take into account the fact that the statute benefits those to whom it applies.
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> H.C. 6055/95, *Tsemach v. Minister of Defense, et. al.*, 53(5) P.D. 241, 258-261.

3 The respondents will argue that, by its nature, any arrangement regarding terror organizations relates to freedom of speech, a fundamental right reinforced by enactment of the Basic Law. Thus, and in accordance with the limitations clause, any such arrangement must be established in primary legislation, for the common law provides that restrictions on fundamental rights are only allowed when set forth explicitly by statute. This was the holding in the Torture Case, cited below, in which the Supreme Court ruled that constitutional rights, such as bodily freedom, cannot be infringed unless there is explicit legislation permitting it, and in accordance with the limitations clause. In the case involving the conscription of yeshiva students, the Supreme Court held that, since the matter involved the right to equality, the right cannot be restricted except by primary legislation.

> H.C. 3267/97, *Rubinstein v. Minister of Defense*, 52(5) P.D. 481.
>
> H.C. 5100/94, *The Public Committee Against Torture, et. al. v. Government of Israel*, 53(4) P.D. 817 ("the Torture Case").

4 The current situation is irrational and violates the principle of separation of powers, in that the executive branch is given the power to determine, as it sees fit, which entity is a terror organization, without clear rules or directives of any kind. Therefore, the executive branch makes this determination rather than the legislature. It is widely known that the decisions as to which entities come within the rubric of terror organizations stem from changing political motives, and the various governments of Israel have not necessarily agreed with each other as to the entities that are terror organizations. The Honorable Justice Heshin raised, in *dicta*, the problem that arises from such definitions given by the various governments:

> As to the appellant's argument regarding the PLO's aim to deny the existence of Israel, it would not be wise for the Court to take upon itself to characterize the PLO, to give it distinguishing characteristics and to define its current aims. On the one hand, the Palestinian Covenant calls, in practice, for the denial of the existence of the State of Israel and for its destruction, and the government has issued a statement declaring the PLO a terror organization. On the other hand, there have been changes in PLO-Israel relations, and various agreements have been signed between the State of Israel and the PLO.
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> H.C. 2316/96, *Isaacson v. Registrar of Political Parties, et. al.*, 50(2) P.D. 529, 544.

5 Furthermore, the section under discussion is vague. The term "support" is overly broad. For example, a statement setting forth the position that every people has the right to oppose occupation may be interpreted as support for an armed struggle against the State of Israel. A statement contending that a neighboring country has the right to defend itself against an Israeli military attack may be interpreted as support for an enemy state against the State of Israel. Professor Mordechai Kremnitzer related to this issue in his comments to the Knesset's Constitution, Law and Justice Committee:

> I would like to say this as clearly as possible. Democracy is a type of ladder. If this law is enacted, we shall lose some of the democratic character of the state… No one will think that the comments made by MK Bishara, with all due respect, or comments made in the past or that will be made in the future by some other Member of Knesset, truly and drastically endanger the existence of the state … In my opinion, most of the free, enlightened world, in a situation in which, let's assume, an Israeli government says: we shall not negotiate towards a permanent agreement with the Palestinian Authority under any circumstances, or that we offer the Palestinian Authority an additional one percent of the territories, and a diplomatic [international] effort fails to convince an Israeli government to budge from its position – a large portion of the developed and enlightened world would state under these circumstances that the Palestinians have a right to conduct an

> armed struggle against continuation of Israeli control, an armed struggle that is subject to limitations, it is not allowed to harm civilians, certain objectives must be taken into account. A large portion of the world would say that the struggle is just. Then, if someone in Israel takes a similar position, he would be told: you are forbidden to participate in the Israeli political arena. This position seems unreasonable to me, and radically weakens the democratic character of Israel… There is another point I would like to direct your attention to. I have great difficulty with what has been said here about "a terror organization against Israel." Assume a party list is formed tomorrow and it says that it supports a terror organization whose aim is to harm Palestinians, or Israeli Arabs, or anything else. According to this bill, this party list would be qualified to run.
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> See Protocol No. 346, Knesset's Constitution, Law and Justice Committee, 24 July 2001.

6 In an article written by Professor Kremnitzer that is relevant to the issue under discussion, he related to the offenses included in the Prevention of Terrorism Ordinance, some of which are identical to Section 7A(a)(3). Kremnitzer noted that a grave problem would arise if it were determined that behavior was being punished and not its causal effects. In his words:

> Doesn't the statement, "Were it not for the intifada, the Oslo Agreement would not have been made," support a violent act? Does the description of the discrimination against the Arab minority and the difficulty or inability to significantly change this situation encourage violence? Does describing the oppressive measures carried out in the Occupied Territories, while sharply criticizing them, constitute such support? Does historical research pointing to the fact that, in certain situations, the attention of the majority to the plight of the minority could not be attained other than by employing violent means, constitute encouraging violence? Does discussing the connection between Israeli actions and terror activities encourage terror? Such statements lie at the core of the area protected by freedom of speech.
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> Mordechai Kremnitzer, "The Alba Case: An Investigation into a Racial Incitement Law," 30(1) *Mishpatim* 105, 142 (1999) (Hebrew).

7 The Honorable Justice Or ruled unequivocally that the language of the Prevention of Terrorism Ordinance, which is similar to Section 7A(a)(3), violates the conditions of the limitations clause. Yet, it is clear that, because the Ordinance was enacted prior to the Basic Laws, it was inappropriate to nullify it. The Honorable Justice Or wrote as follows:

> The conclusion I have arrived at clarifies and provides a reasonable explanation to the serious criminal prohibition included within Section 4(a), a prohibition that infringes the freedom of speech. When the section is examined outside of its

legislative context and history, it seems as though its infringement on freedom of speech is drastic and broad.

Reh. Crim. 8613/96, *Jabareen v. State of Israel*, 54(5) P.D. 193, paragraph 9 of the judgment (hereafter: Jabareen).

8 Thus, Section 7A(a)(3) does not meet the conditions of the limitations clause, violates constitutional principles, and is vague. Also, the principal part of the section is not based on primary legislation, and the section infringes freedom of speech to an extent greater than necessary. For all these reasons, the section should be nullified.

See Aharon Barak, "The Constitutionalization of the Legal System following the Basic Laws and their Implication on the Penal Law – The Essential and the Polemic," 13(1) *Legal Research* 5 (1996) (Hebrew).

In the Alternative: Strict Construction

9 Alternatively, the respondents will argue that Section 7A(a)(3) of the Basic Law: The Knesset should be strictly construed, in accordance with fundamental principles of law, primarily that of freedom of speech. Interpretation of the section must begin with a balancing of the principle of the freedom to express one's views and the real and actual danger to public safety. During the hearings on the proposed bill in the Knesset's Constitution, Law and Justice Committee, MK Ofir Pines-Paz, chairman of the Committee, commented that:

The [bill's] intention is to make clear that political support for a terror organization, which is comparatively amorphous, may not be the pretext for disqualification, but, rather, support of an armed struggle of a terror organization against the State of Israel, which is very feasible, tangible, and clear [is grounds for disqualification].

See Protocol No. 461, Knesset's Constitution, Law and Justice Committee, 30 April 2002.

10 Thus, infringement of the right to freedom of speech is permitted where the legislative purpose is to prevent citizens from taking part in the armed activities of terror organizations against [Israeli] citizens and state institutions. That is, it is not enough to find that a person made an analytical study of the political situation which concludes that opposing the occupation is permitted and legitimate, nor is it sufficient to find that a person states that the intifada is legitimate because its aim is to end the occupation, nor is it sufficient to find that an individual made contact with a terror organization– incidentally, the offense of making contact with a terror organization was repealed and deleted from the Prevention of

Terrorism Ordinance because of its overly broad restriction on the freedom of speech. Rather, it must be proven that there *was actual physical support for a specific terror organization which assisted its armed struggle, including an explicit call to join a specific terror organization in order to assist it in its struggle, or an explicit call to a specific terror organization to continue its armed activity. The same is true for an enemy state.* This interpretation adheres to the ruling in *Jabareen*. As Justice Or stated:

> Violent acts of the nature described in the said article were performed during the intifada both by individuals and by organizations that come under the rubric "terror organizations." Stones and Molotov cocktails were thrown in an unorganized fashion by individuals, including children, all of whom acted on their own. Yet, these activities were also performed by groups with an organized infrastructure, which use violent means to accomplish their goals. I explained earlier that to apply Section 4(a) of the Ordinance, it is not enough that the violent activities described in the publication are of the kind that characterize terrorist activity. Rather, they must be actions carried out by such an organization. Does Section 4(a) cover a publication of the type we are dealing with, a publication praising and encouraging violent acts carried out by both individuals and terror organizations, but which includes no indication, explicit or by implication, of the acts of anyone who seeks to praise and encourage, the emphasis being on the violent acts themselves, with no link to the nature of their perpetrators? I am of the opinion that Section 4(a) does not cover such a publication. The reason for this is found in the purpose of Section 4(a), which, as I explained above, is not intended to prevent publications encouraging, praising, or supporting violent acts of the kind characterized by terrorist acts. It is intended to prevent support for terror organizations, which it does in the context of the overall workings of the Ordinance, whose purpose is to destroy the infrastructure of these organizations.
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> *Jabareen*, paragraphs 15-16 of the judgment.

This interpretation is consistent with the common law, specifically with the principles as outlined in H.C. 73/53, *Kol Ha'am Ltd. v. Minister of Interior*, 7(2) P.D. 871 and the case law relating to freedom of speech. It is also consistent with the rulings of the European Court of Human Rights (ECHR), the leading judicial body in Europe, which hears cases dealing with terror and freedom of speech.

11 In *Castells v. Spain*,[1] the appellant authored a harsh editorial criticizing the government of Spain. In the editorial, he argued that most of the murders in recent times occurred in the Basque-minority region in Spain, that the right-wing government did not investigate [these murders], that

the acts were "fascist murders," and that many of the murderers were senior government officials. The appellant was sentenced to one year in prison and was prohibited from serving in his post for one year. The Court [ECHR] ruled that because the government's action did not pass the close-scrutiny test, the appellant's right to freedom of speech had been violated. The Court emphasized the distinction between criticizing governments and criticizing private individuals. When criticizing governments, wide latitude is granted, and, in any case, the appellant's statements criticized the government, but did not urge the use of violence.

12 In *Surek & Ozdemir v. Turkey*,[2] two appellants were involved. One was the owner of a newspaper and the other was the leader of the Kurdish organization, the PKK, which had been declared an illegal organization. Both had published interviews in which they criticized the Turkish authorities for their oppressive policies. In his interview, the newspaper owner stated that because of the ongoing oppressive policies, the Kurdish armed struggle against the Turkish authorities was justified, and that the armed struggle resulted from the lack of any other realistic option for the Kurds. In the interview, the leader of the PKK stated, *inter alia*:[3]

> It is a well-known fact that Turkey and imperialism want to divert our people from its national identity… But we are resisting. No one can tell us to leave our own territory…we are in Kurdistan. We are amongst our own people. If they want us to leave our territory, they must know that we will never agree. We are people who have lost everything we had and who are fighting to regain what we have lost. That is the purpose of our action. We have nothing to lose… That is why we act without fear.

The European Court of Human Rights ruled that the factual determination made by the Turkish court, whereby these statements constitute praise and support for Kurdish terrorists, was an irrelevant basis for restricting the appellants' freedom of expression. Furthermore, the Court ruled that these statements did not constitute a positive call for the use of violence and terror against Turkey, that the interviews related to the position that they [the Kurds] were unwilling to accept the ongoing policy of oppression, were unwilling to compromise on the continuation of this policy, and that despite the harsh criticism [the statements embody], they do not constitute violent incitement because they come within the purview of freedom of speech:[4]

> [T]he interviews contained hard-hitting criticism of official policy and communicated a one-sided view of the origin of and responsibility for the disturbances in south-east Turkey. While it is clear from the words used in the

> interviews that the message was one of the intransigence and refusal to compromise with the authorities as long as the objectives of the PKK had not been secured, the texts taken as a whole cannot be considered to incite to violence or hatred.

13 In *Erdogdu and Ince v. Turkey*,[5] the appellant was a newspaper editor. In an editorial, he wrote that the policy employed by Turkey against the Kurds was a fascist policy of genocide. The European Court of Human Rights ruled that, although these statements were extremely harsh, it cannot be said that they called for violence or terror. A similar ruling was given in *Ceylan v. Turkey*,[6] in which the appellant described Turkey's policy as one of terror and genocide. However, in *Surek No.1 v. Turkey*,[7] the European Court of Human Rights upheld the conviction of the appellant, who wrote an article in which he stated, "If we aren't given rights, we will take them by force." In this case, he accused certain individuals, mentioning names, of being responsible for murders and killings. In its decision, the Court emphasized that the names of individuals were mentioned, and that the editor had justified the use of force.

14 The European Court of Human Rights overturned a case in which a Turkish court convicted a defendant for violating the Turkish Prevention of Terrorism Ordinance by making statements that were much harsher than those attributed to the Arab MKs. In making its decision, the Court found that the Ordinance illegally infringed the right to freedom of speech under Article 10 of the European Convention of Human Rights (1950). In 1999, the European Court of Human Rights gave its decision in *Huseyin Karatas*.[8] Karatas, a Turkish citizen of Kurdish decent, published a book of poetry that included poems supporting the Kurdish struggle against the Turkish oppression in southeast Turkey. One of these poems urged people to sacrifice their lives on behalf of the Kurdish uprising:[9]

> Young Kurds
> I am seventy-five years old
> I die a martyr
> I join the martyrs of Kurdistan
> Dersim has been defeated
> but Kurdism
> and Kurdistan shall live on
> the young Kurd shall take vengeance
> when life leaves this body
> my heart shall not cry out
> What happiness
> to live this day
> to join the martyrs of Kurdistan.

Despite the extremely harsh statements made by Karatas, the European Court of Human Rights ruled that they came within the fundamental right of freedom of speech, in accordance with the close-scrutiny test. In giving its reasons, the Court stated that these statements were directed against the government policy as such:[10]

> Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system, the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.

15 We see, therefore, that the only possible interpretation of Section 7A(a)(3) that comports with the legislative purpose, on the one hand, and applies fundamental principles of law is the interpretation stating that *physical support for a specific terror organization that assists it in its armed struggle, including an explicit call to join a specific terror organization to assist the organization in its struggle, or an explicit call to a specific terror organization to continue its armed activity. The same is true with regard to an enemy state.*

End Notes

1 *Castells v. Spain*, App. No. 11798/85 (Eur. Ct. H.R., 23 April 1992).

2 *Surek and Ozdemir v. Turkey*, App. No. 23927/94 (Eur. Ct. H.R., 8 July 1999).

3 Id. at para. 10.

4 Id. at para. 61.

5 *Erdogdu and Ince v. Turkey*, App. No. 25067/94 (Eur. Ct. H.R., 8 July 1999).

6 *Ceylan v. Turkey*, App. No. 23556/94 (Eur. Ct. H.R., 8 July 1999).

7 *Surek No.1 v. Turkey*, App. No. 26682/95 (Eur. Ct. H.R., 8 July 1999).

8 *Karatas v. Turkey*, App. No. 23168/94 (Eur. Ct. H.R., 8 July 1999).

9 Id. at para. 10.

10 Id. at para. 50.