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HCJ 11243/02

1. Moshe Faiglin
2. Hagai Yekutiel

v.

1. Mishael Cheshin, Chairman of the ElectionsCommittee
2. Naomi Hazan, KM
3. Ya'akov Stotland
4. The Likud Movement

The Supreme Court Sitting as the High Court of Justice
[May 15, 2003]

Before President A. Barak, Vice-President S. Levin, Justices E. Mazza, T. Strasberg-Cohen, D. Dorner, Y. Turkel, D. Beinisch, E. Englard, A. Rivlin, A. Procaccia, and E. Levi

Petition to the Supreme Court sitting as the High Court of Justice, pursuant to section 6 of the Basic Law: The Knesset.

Facts: Petitioner wished to be a candidate in the elections for the sixteenth Knesset. Petitioner included, with his candidacy application, a "Statement of Agreement" pursuant to section 57(i) of the Knesset Elections Law. Petitioner did not add any additional materials to note that he had been convicted of the criminal offense of incitement and sentenced to six months imprisonment, to be served as community service. Additionally, petitioner did not subject a request "to expunge the disgrace" of his conviction to the Chairman of the Central Elections Committee. In light of these circumstances, petitioners asked the Court to hold that petitioner was ineligible to compete for the Knesset elections.

Held: The Supreme Court held that petitioner could not compete in the Knesset elections, as he had not fulfilled the technical requirements of the Knesset Elections Law, including the requirement to submit a request to "expunge the disgrace" of his conviction. Justice E. Levi, in a dissenting opinion, asserted that

petitioner was eligible to compete in the Knesset elections. The Court split as to the substantive question—whether the offence of which the petitioner was convicted did "involve disgrace."

Basic Laws cited:

Basic Law: The Knesset, §§ 6, 6(a), 7, 7A

Legislation cited:

Knesset Elections (Consolidated Version) Law-1969, §§ 56, 56B, 56B(1), 57(i), 142, 143

The Penal Code-1977, §§ 133, 134, 151

Israeli Supreme Court cases cited:

[1] HCJ 705/78, *The "Chai" Party for the Givaataim Municipal Council v. The Elections Officer*, IsrSC 32(3) 608

[2] HCJ 6790/98 *Avretz v. The Elections Officer for the Municipality of Jerusalem*, IsrSC 52(5) 323

[3] HCJ 2573/99, *Ba-Gad v. The Elections Committee for the Knesset*, IsrSC 43(3) 193.

[4] HCJ 5769/93 *Hamza v. The Elections Officer for Shahb* (unreported case)

[5] EA 2/84 *Neiman v. Chairman of the Central Elections Committee*, IsrSC 39(2) 225

[6] EA 1/65 *Yaakov Yeredor v. Central Elections Committee*, IsrSC 19(3) 365

[7] HCJ 753/87 *Boronstien v. Minister of Interior*, IsrSC 42(4) 462

[8] EA 1/88 *Moshe Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*, IsrSC 42(4)177

[9] C.App. 2316/96 *Issacson v. Political Party Registrar*, IsrSC 50(2) 529

[10] HCJ 3090/97 *Cohen v. Southern District Commissioner, Ministry of Defense* IsrSC, 52(2) 721

[11] HCJ 6859/ 98 *Ankonina v. Or Akiva Elections Official*, IsrSC 52(5) 433

[12] Crim.A. 6696/96 *Binyamin Kahane v. the State of Israel*, IsrSC 52(1) 535

[13] HCJ 436/66 *Menahem Ben Aharon v. Head of the Pardesia Local Council*, IsrSC 21(1) 561

[14] HCJ 251/88 *Wajia Oda v. Talel Rabi*, IsrSC 42(4) 837

[15] CA 2211/96 *Cohen v. Cohen*, IsrSC 50(1) 629

[16] HCJ 6163, 6177/92 *Eisenberg v. Minister of Building and Housing*, IsrSC 47(2) 229

[17] HCJ 103/96 *Cohen v. The Attorney-General*, IsrSC 50(4) 309

[18] EA 11280/02 *The Chairman of the Central Elections Committee v. Ahmed Tibi*, IsrSC 57(4) 1

[19] CA 10596/02 *Leah Ness v. Likud Movement*, IsrSC 57(1) 769

[20] F.Crim.A. 1789/98 *State of Israel v. Kahane*, IsrSC 54(5) 145

Israeli Magistrate Court cases cited:

[21] CC (Jerusalem) 3996/95 *State of Israel v. Faiglin*

United States Supreme Court cases cited:

[22] *Brandenburg v. Ohio*, 395 U.S. 4442 (1969)

Israeli books cited:

[23] 11 S.Z. Feller, Foundations of Penal Law (1994)

[24] I. Levi & A. Lederman, *Principles of Criminal Liability* (1981)

Israeli articles cited:

[25] R. Gabizon, *A Dishonorable Offense as a Disqualification for Holding Public Office*, 1 Mishpatim 176 (1965)

Miscellaneous:

[26] Professor M. Kremnitzer & H. Ganaim, Sedition and not Incitement, Incitement in Penal Law: *Legi Lata and Legi Fernada* (1997)

For the petitioner— Haim Misgav, Tom Misgav, Yekutiel Hagai
For respondent 1— Dina Zilber
For respondent 2— Dafna Holtz-Lechner
For respondent 3— Ron Dror
For respondent 4— Eitan Haberman

JUDGMENT

Vice-President S. Levin

1. Elections for the sixteenth Knesset were held on January 28, 2003. Petitioner, Moshe Faiglin, wished to run in the elections as part of the Likud List. He was number 40 on the list. The final date for submitting lists of candidates for the Knesset was December 20, 2002. Faiglin appended a signed Statement of Agreement to the candidate list submitted by the Likud, in which he declared:

> I have read and understood sections 6 and 7 of the Basic Law: The Knesset, and the provisions of section 56 of the Elections

> Law (Consolidated Version)-1969… I declare that to the best of my knowledge and understanding, the above sections do not prevent me from running for the Knesset.

Faiglin did not add any other documents to the Statement of Agreement. He did not note that he had been convicted of offences for which he was sentenced to six months of community service or that, on the day of the submission of the candidate list, seven years had not yet passed from the day he finished serving that sentence. Nor did he ask the Chairman of the Elections Committee to determine that, under the circumstances, the offences which he was convicted of did not involve "disgrace."

On December 14, 2002, Knesset Member and Vice-Chairman of the Knesset Naomi Hazan submitted a petition to the Chairman of the Elections Committee. Ya'akov Stotland also submitted a petition on December 16, 2002. These petitions requested that the Chairman of the Elections Committee declare that Mr. Moshe Faiglin could not be elected to the Knesset, and that he should be removed from the Likud candidate list. The Chairman of the Committee requested responses from both Faiglin and the Attorney-General. After these responses were received, and short oral arguments were heard, the Chairman of the Committee decided that Faiglin would be removed from the candidate list. This was a result of his delay in submitting a "request to expunge the disgrace" as well as due to the concealment of facts. The Chairman of the Elections Committee also determined that the offences of which Faiglin was convicted involved "disgrace."

On December 30, 2002, Faiglin and others appealed from the decision of the Election Committee. Their petitions were heard, along with other matters, before a panel of eleven justices on January 7, 2003 On January 9, 2003 we handed down our majority decision, against the dissenting opinion of Justice E. Levi, to deny the petition. Our reasoning is set forth below.

2. On February 9, 1997, Faiglin was convicted of incitement and of the publication of inciting materials under sections 133 and 134 of the Penal Code-1977, and of an offence under section 151 of the Code. On November 11, 1997, he was sentenced to 18 months imprisonment, of which he was to effectively serve six months of community service. At the same time, Mr. Faiglin was put on six months probation. Mr. Faiglin did not appeal the judgment and served his sentence.

The petitioner's conviction and the sentence which he served are at the heart of the matter at hand. Their significance becomes clear in light of

the provisions of section 6 of the Basic Law: The Knesset and section 56B of the Knesset Elections (Consolidated Version) Law. Section 6 of the Basic Law sets forth limitations on the right to be elected to the Knesset. Section 6 (a) of the Basic Law provides:

> 6(a). Every citizen of Israel who, on the date of the submission of a candidates list containing his name, is twenty-one years of age, shall have the right to be elected to the Knesset, provided that a court of law has not deprived him of that right pursuant to statute, or that he has been sentenced, in a final verdict, to serve more than three months imprisonment, and on the day of the submission of the list seven years have not yet passed from the date upon which he finished serving his sentence, unless the Chairman of the Central Elections Committee determined that, under the circumstances, the offence of which he was convicted does not involve disgrace.

Section 56B, which implements the general provisions of section 6 of the Basic Law, provides:

> 56B. The following provisions apply to an offence which "involves disgrace" under section 6 of the Basic Law: the Knesset:
>
> (1)(a) A candidate shall submit to the Central Committee, together with his Statement of Agreement to be a candidate as stated in section 57(i), a declaration regarding section 6 of the Basic Law;
>
> (b)A candidate, or anyone who wishes to be a candidate, who has been convicted of an offence as stated in section 6 of the Basic Law, and requests that the Chairman of the Central Committee decide that the offence does not "involve disgrace," shall submit a request to the Chairman of the Central Committee, together with his indictment, the judgment, and all other relevant material, no later than the day of the submission of the candidate list.
>
> (c) The decision of the Chairman of the Central Elections Committee shall be final and shall be presented to the Central Committee no later than 28 days preceding the election.

From these provisions it is apparent that a candidate who wishes to run for the Knesset must submit a statement regarding section 6 of the

Basic Law: The Knesset. If that person has been convicted and sentenced to imprisonment for a term which exceeds three months, he must request that the chairman of the Central Election Committee determine that the offence does not "involve disgrace." This must be done no later than the day of the submission of the candidate list to the Central Elections Committee. If he does not do so, the conviction is presumed to be dishonorable.

In his decision, the Chairman of the Elections Committee noted that there is an exception to the right to be elected, and to that exception "there applies another exception—an exception to the exception—which is: where the Chairman of the Central Elections Committee determines… that the offence which the individual was convicted of is not dishonorable under the circumstances." The Chairman of the Elections Committee also determined that Faiglin had the responsibility to submit a request to "expunge the disgrace" of his actions no later than the time of the submission of the candidate list. Faiglin, however, submitted no such request. Only after Mr. Stotland petitioned for a declaration that Mr. Faiglin could not, by law, be a candidate for the Knesset, did Faiglin request that "the Chairman determine that his actions were not dishonorable." Faiglin claimed that he was unfamiliar with the law; However, the Chairman of the Elections Committee weighed this claim harshly—in the Statement of Agreement which Faiglin submitted, he explicitly declared that he read the provisions of sections 6 and 7 of the Basic Law and the provisions of section 56 of the Elections Law. As such, the Chairman believed, it should have been clear to Faiglin that, pursuant those sections, imprisonment includes community service. Faiglin also declared that "to the best of my knowledge and understanding, the above sections do not prevent me from running for the Knesset." The Chairman of the Elections Committee noted in his decision that he did not receive a satisfying explanation from Faiglin.

3. This Court reviews decisions of the Chairman of the Central Elections in its capacity as the High Court of Justice. Faiglin has not convinced us that there is cause to intervene in the Chairman's conclusions, both with regard to his delay in submitting the request and also with regard to his concealment of the facts. On the contrary—this Court has, in the past, strictly construed the dates and times set forth in elections laws. The legislature sets forth a strict schedule, and the many dates follow one another and are dependent upon each other. Reality demands that these dates be preserved in order to prevent chaos in the elections. *Compare:* HCJ 705/78, *The "Chai" Party for the Givaataim Municipal Council v. The Elections Officer* [1]; HCJ 6790/98 *Avretz v. The Elections Officer for the Municipality of Jerusalem* [2]; HCJ

2573/99, *Ba-Gad v. The Elections Committee for the Knesset* [3]. *See also* HCJ 5769/93 *Hamza v. The Elections Officer for Shahb* [4]This is one of the cases in which the public interest in the uniformity of election law takes precedence over the interest of the candidate to be elected.

A strict approach to dates and times can also be discerned in sections 142 and 143 of the Elections Law. Thus, for example, section 142 of the Elections Law provides that "when a certain action shall be completed a certain number of days preceding the elections, the Central Committee, with a two-thirds majority, may extend that date for up to five additional days, if it finds sufficient reason to do so." Section 143 of the Elections Law, as amended by Amendment 49, provides that "section 142, and any other legislative provision allowing extension of dates, shall not apply to petitions and appeals under this Law."

Faiglin argued that the Chairman of the Central Election Committee granted him an extension to submit a request to "expunge the disgrace." Indeed, after the submission of the requests to remove Faiglin from the candidate list, Faiglin submitted a request to extend the period to respond to those requests. The Chairman of the Central Election Committee determined that "*ex gratia*, I consent that the period for the submission of his response—in fact, his request—shall expire on Friday, December 20 2002, at 2:00pm." Faiglin's interpretation of this decision, however, is groundless. The decision only approves the submission of the request; the decision does not approve that the submission of such a request will be considered a request to "expunge the disgrace" which was submitted on time. Moreover, the Chairman of the Central Elections Committee does not have the authority to extend such dates.

4. All these suffice to deny the present petition, as we decided on January 9, 2003. As such, we have no need to discuss the other claims submitted by the respondents. Under these circumstances, there is no need to take a position concerning whether Faiglin was convicted of dishonorable offences.

Justice I. Englard

I agree with the judgment of my colleague, the Deputy President.

Justice E. Levi

1. The right to be elected in enshrined in section 6(a) of the Basic Law: The Knesset, which reads:

> 6(a). Every citizen of Israel who, on the date of the submission of a candidates list containing his name, is twenty-one years of age or over shall have the right to be elected to the Knesset, provided that a court of law has not deprived him of that right pursuant to statute, or he has been sentenced, in a final verdict, to serve more than three months imprisonment, and on the day of the submission of the list seven years have not yet passed from the date upon which he finished serving his sentence, unless the chairman of the Central Elections Committee determined that, under the circumstances, the offence of which he was convicted does not involve disgrace.

Section 56B, especially sub-section(b) of the Knesset Elections (Consolidated Version) Law-1969, compliments the provisions of section 6:

> A candidate, or anyone who wishes to be a candidate, who has been convicted of an offence as stated in section 6 of the Basic Law, and requests that the Chairman of the Central Committee decide that the offence does not "involve disgrace," shall submit a request to the Chairman of the Central Committee, together with his indictment, the judgment and all other relevant material, no later than the day of the submission of the candidate list.

2. At the end of 1995, an indictment was submitted against the petitioner in the Magistrate Court of Jerusalem, in light of petitioner's activities in the "Zu Artzeinu" movement. It was alleged that the petitioner conspired to incite the Israeli public in an attempt to frustrate the decisions of the government and the Knesset, subsequent to the signing of the "Oslo Agreements." It was also alleged that the petitioner and his colleagues called upon the public to disrupt the operation of the authorities by blocking roads, by protesting before the government offices in Jerusalem, and by erecting new settlement outposts in Judea and Samaria which would be manned by armed persons, while ignoring the military declaration that certain regions be considered "closed military territory." It was also claimed that the petitioner and his colleagues called for detaining cars which displayed license plates of the Palestinian Authority, and when the time came, the frustration of evacuations of territories in the area of Judea and Samaria. Due to all these activities, petitioner was charged with the offence of incitement under chapter 1 of paragraph 8 of the Penal Code-1977, and the offence of unlawful assembly under section 121 of that law.

Petitioner did not deny his connection to the relevant publications, and the court determined, in its judgment of September 1997, that the petitioner intended to sabotage the implementation of government policy to the extent that it would undermine the stability of the government. Therefore, it was determined that the petitioner's actions did not constitute legitimate protest. Petitioner was convicted of the offences of incitement, inciting publications and unlawful assembly, under sections 133, 134 and 151 of the Penal Code-1977. The court sentenced him to 18 months of imprisonment, of which he was to serve six months of community service. He was also sentenced to six months of probation.

The parties did not appeal the judgment of the Magistrate Court.

3. The petitioner was placed on the 40th spot on the Likud list for elections for the sixteenth Knesset. Pursuant to section 57(i) of the Knesset Elections Law, the petitioner signed a "Statement of Agreement" which included a declaration that he read and understood the provisions of sections 6 and 7 of the Basic Law and section 56 of the Elections Law. The petitioner also declared that "to the best of my knowledge and understanding, the above sections do not prevent me from running for the Knesset."

Petitioner had been sentenced to imprisonment. Seven years have not yet passed since he finished serving his sentence. Therefore, he is among those included in section 6(a) of the Basic Law, meaning that, in order him to be elected into the Knesset, he must first approach the Chairman of the Elections Committee, so that the latter may determine that the offences of which petitioner was convicted of were not dishonorable. However, the petitioner did not do so until December 20, 2002, in response to the petitions that called for his disqualification.

Respondent number 1 inferred, from the fact that the petitioner signed the "Statement of Agreement," that petitioner was aware of his obligations to submit a request as stated in the latter part of section 6(a) of the Basic Law. Moreover, his signing of the "Statement of Agreement" constituted a declaration that he was not prevented from running in the Knesset elections. This declaration, according to the Chairman, was inaccurate at best, and perhaps even unfaithful to the truth.

Respondent number 1 also dealt with the question of the "dishonorable" element in the offences of which the petitioner was convicted. Regarding this, the Chairman concluded that they:

> undermine society and destroy the foundations upon which government and public administration rest. Indeed, were others to imitate the actions of Mr. Faiglin it could be said: In those days, there was no king in Israel and each person did as he saw fit. *See* Judges 21:25. The fabric of society would unravel. The offences of which Mr. Faiglin committed are extraordinarily dishonorable; and they are dishonorable even for one who does not wish to be elected for Knesset.

See para. 17 of the Chairman's decision.

4. *The Right to be Elected: A Fundamental Right*

All agree that the right to vote and the right to be elected is the soul of democracy—they incorporate the principles of equality, of freedom of expression, and of the freedom of assembly. *See* EA 2/84 *Neiman v. Chairman of the Central Elections Committee*, [5] at 264; EA 1/65 *Yaakov Yeredor v. Central Elections Committee*, [6] at 382; HCJ 753/87 *Boronstien v. Minister of Interior*, [7] at 473. Deprive a person or group of their right to be elected, and you have deprived them of their right to express the political opinion which they have formed and of the right to participate in shaping the government. Indeed, such restrictions are not well-received by those who love democracy. Objections to those restrictions fade, however, when they are directed at a minority group; especially in those cases where the majority believes that the minority's political positions will undermine the foundations of democracy. As such, and still fully aware of the fundamental importance of these rights, the majority deprives the minority of its right to compete in democratic elections. There is but a short distance between these actions and forcing the minority to search for other manners of influence and expression, even if they constitute prohibited activity. In order to prevent this, the legislature must plan with wisdom, so as not to perpetuate the rule of the majority in unlawful ways on the one hand, while preventing the minority from fighting for its opinion, on the other. In this area, the Court performs a critical function, as it is supposed to review legislation intended to restrict the right to vote and to be elected, in order to ensure that the glory paid to these rights is more than simply lip service.

Indeed, this is the position consistently taken by our caselaw as expressed by President Shamgar in EA 1/88 *Moshe Naiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*, [8] at 185-86. His opinion remains relevant for us today.

> Basic liberties, such as the freedoms of speech and religion, and the insistence on equality in elections, are part and parcel of our government system, and thus also of our judicial system. The opinions and views of those in society are always different and variegated—in a free society, the differences are overt; in a totalitarian society, the differences are hidden. The exchange of ideas, the clarification of views, as well as public debate and the desire to know, teach and convince are available to every opinion, every view, and every belief in a free society. Making exceptions and distinctions between citizens, granting some rights while others not, is opposed to the truth that lies at the base of our liberties. Such inequities, in a democratic society, would present the same internal contradictions inherent in the actions of an individual who preaches against democracy while, at the same time, wielding the very rights that democracy grants. Even unacceptable opinions and views should be debated, and peaceful ways of persuasion should be taken up against even these. Prohibitions and restrictions are extreme devices which are a last resort. Our point of departure is that the freedom of speech should be granted even to those whose opinions seem mistaken and even dangerous.

To complete, I will add what is obvious—when you prevent an individual from being elected, you deprive others of their right to elect that candidate. The voters, as this Court noted in EA 2/84, [5] at 263, "wish to elect a candidate according to their preferences, based on their right to equality under the provisions of the Elections Law. From the perspective of the voter, restricting the right to be elected includes an indirect limitation of the freedom of expression, as this deprives him of his ability to connect with others for the advancement of his views and opinions, as the candidate which he would prefer would have represented them."

All this must guide us as we decide the petition at hand, and not only in our decision regarding the substantive question—whether there is disgrace in the offence that the petitioner was convicted of—but also the procedural claims—petitioner's delay in submitting his request to the Chairman of the Elections Committee. I have chosen to open with the procedural claim since, as the majority has concluded, if the petitioner cannot overcome this first obstacle, there is no reason to examine the second.

5. As stated, the petitioner submitted his request to the Chairman of the Central Lections Committee on December 12, 2002, and failed to

meet the date set by section 56B(b) of the Elections Law. For the purposes of this discussion, I am willing to presume that, absent explicit authorization, the Chairman of the Elections Committee could not extend the period for the submission of the request. Nevertheless, I am of the opinion that, considering the special circumstances of this case, the petitioner could still bring his case before the Chairman of the Elections Committee and request a substantive decision as to the question of whether there was disgrace in his conviction. What the petitioner lacked, was provided in the petitions submitted by respondents numbers two and three, the Vice-Chairman of the Knesset, MK Naomi Hazan and Mr. Stotland. These respondents did not raise the procedural claims which formed part of the basis for the Chairman's decision—petitioner's concealment of his conviction from the Election Committee and his delay in submitting his request regarding the "disgrace" of his conviction, a delay which has critical significance due to the tight elections schedule prescribed by the law. These respondents based their petition upon a different cause—the "disgrace" inherent to petitioner's conviction. As such, the matter of "disgrace" was open to respondent one, not as an alternate cause for the disqualification of the petitioner, but as the single, sole cause.

I emphasized the significance of the basic right to compete in the elections, since this is what obligates us—even when a candidate neglects a provision, we should aspire to maintain his right to be elected, so long as this is not opposed to the law, and so long as it serves the law's purpose. In this regard, and with respect to the status of the basic rights and their relationship to other rights, I find the words of Justice M. Cheshin, in C.App. 2316/96 *Issacson v. Political Party Registrar* [9], quite appropriate. There, in my colleague's decision to allow the "Arab Movement for Change" to register as a political party, he noted:

> We are dealing with an individual's fundamental, basic rights—with the freedom of assembly, the freedom of expression, and the right to vote and be voted for—and we all know that the force of these rights radiates into their surroundings, and that they are powerful in conflicts which may arise between them and other rights. That blinding light which shines, from the basic rights, out in all directions also expands the areas over which they extend, thus limiting opposing rights. In other words: we must do our best to expand the boundaries of the basic rights—here, the right to assemble as a political party—while simultaneously limiting the boundaries of those provisions which restrict and limit these rights.

I fully approve of my colleague's words, especially in this current situation. This in light of an additional rule of construction in our caselaw, which provides that if "two possible interpretations stand before us, one based on the legislation's language and the other on the legislation's purpose, we should choose whichever interpretation least violates the basic right." *See* HCJ 3090/97 *Cohen v. Southern District Commissioner, Ministry of Defense*, [10] at 737; HCJ 6859/ 98 *Ankonina v. Or Akiva Elections Official*, [11] at 454. With regard to the petitioner, he is the one responsible for submitting a petition for a declaration to "expunge the disgrace" under section 56B(b) of the Elections Law. This is only natural, since he himself has the greatest interest in not being disqualified. However, and so I suggest to interpret section 56B(b) of the law, we should not infer from here that there is no possibility that a request to review the disgrace of the offence be brought by someone else. Such other persons would not be limited by the schedule imposed upon the candidate, for would they be so limited, respondents two and three would also be prevented from bringing their petition. As such, we must infer that, if in the context of deciding with regard to a request to disqualify the candidate, the Chairman of the Central Elections Committee determines that his conviction is not dishonorable, it would be unreasonable not to perceive this as a green light for the candidate to run for the Knesset, even if he himself never approached the Chairman of the Elections Committee as specified in section 56B(b) of the law, or if he missed the date set in that section.

Had respondents two and three based their petition solely upon petitioner's delay in submitting his request, or solely upon the fact that petitioner concealed facts from the committee, it is doubtful whether petitioner could be granted any remedy. However, as stated, this is not the case, as the question of "disgrace" is the only claim which respondents two and three brought before the Chairman. Since this issue was raised, it demands a substantive decision, not merely a decision which would, in the words of my colleague, Justice M. Cheshin, in paragraph 12 of his decision, "cover all the bases."

In light of this, I am of the opinion that the examination of the current petition should not have stopped with the procedural claims, since it became unnecessary to decide these latter claims after the submission of the petition for the disqualification of the petitioner based on a claim of "disgrace." Therefore, it would have been just to examine the substantive question of the "disgrace" involved in the petitioner's conviction. However, my esteemed colleagues are faithful to their view that the petitioner did not meet the procedural conditions and thus see themselves as exempt from discussing the question of "disgrace." In this situation,

and since the decision in this petition has already been made, and my reasoning can no longer affect the petitioner's situation, at least not with regard to the elections for the sixteenth Knesset, I did not think it right to expand upon my reasoning where they had already decided in advance to base their judgment upon a different claim. Nevertheless, I will not hide my opinion that I find it difficult to understand how there is dishonor in the offence of incitement of which the petitioner was convicted, an offense which is meant to protect the structure of the regime and not its content, and about which it has been said that "it would be appropriate to consider its invalidation…and replacement with an offence which is more suitable for our system. The wording of the offence is too vague and its boundaries too wide. It reflects a worldview which is not democratic. It suits a mandatory government, which is not a government of the people. It does not award sufficient weight to freedom of expression." These are the words of my colleague President Barak in Crim.A. 6696/96 *Binyamin Kahane v. the State of Israel*, [12] at 585; *see also* Professor M. Kremnitzer & H. Ganaim, Sedition and not Incitement, Incitement in Penal Law: *Legi Lata and Legi Fernada* (1997)

I also wish to draw attention to another matter, which I also commit myself not to expand upon. The language of section 6(a) of the Basic Law provides that the "disgrace" in the actions of the petitioner will be examined "under the circumstances." As is known, our caselaw does not see "disgrace" as a formal ingredient of the specific offence of which an individual has been convicted, but rather that as that severe moral flaw which accompanies the circumstances of its execution. *See* HCJ 436/66 *Menahem Ben Aharon v. Head of the Pardesia Local Council* IsrSC 21(1) 561, [13] at 564; HCJ 251/88 *Wajia Oda v. Talel Rabi* IsrSC 42(4) 837, [14] at 839; C.A. 2211/96 *Cohen v. Cohen* IsrSC 50(1) 629, [15] at 632; HCJ 6163, 6177/92 *Eisenberg v. Minister of Building and Housing* IsrSC 47(2) 229, [16] at 266; HCJ 103/96 *Cohen v. The Attorney-General* IsrSC 50(4) 309, [17] at 327. With regard to the "disgrace" involved in the petitioner's actions, as viewed from the perspective of the "circumstances," I wish to make several comments:

a. The events which provided the grounds for the petitioner's conviction took place in 1995, against the background of what was seen, as the Magistrate Court stated in its convicting judgment, as "a feeling of helplessness before the repeated injuries to the Jewish population, at the hands of Palestinian terrorists." *See* para. 8 of the judgment. The Court determined that "in the relevant period, the accused lived, like many others, with the strong feeling that the government's policy was mistaken—a mistake that would cost human life and harm national security." *See* pg. 47 of the judgment. The Court added that the

petitioner's action exceeded the bounds of the freedom of speech, However, it seems that even the Magistrate Court was of the opinion that the petitioner and his colleagues demonstrated "openly that they did not intend to act violently, and restrained themselves before the violence of the police." *See* pg. 10 of the judgment. These reasons explain the lenient punishment imposed upon the petitioner.

b. Petitioner was not the only one, during those long-ago days, who objected to the government's policies. As the wave of terrorism intensified, opposition to the "Oslo Agreements" formed a central part of the platform of many public figures, and this position played a central role in their campaigns during several Knesset elections. Moreover, many of these public figures have actually been elected to the Knesset, and more than a few have climbed to the highest ranks of the executive branch. In light of all this we must ask whether we should continue to visit upon the petitioner the sins of his past. Under these circumstances, should we see the petitioner as one who was then, or is now, set upon destroying the foundations of democracy in Israel? Can it be said today of the petitioner—despite the harsh events which have been the fate of the State of Israel since 1995—that he is, in the words of Justice Haim Cohen in HCJ 436/66, [13] at 564, "unfit to enter the congregation of the just…and that he is unfit to be publicly responsible for the decisions and actions which matters of the public and public security depend upon." It seems that my answer to these questions is clear. It is all the more clear in light of the fact—a fact which must be emphasized and encouraged—that the petitioner decided to channel his activities into the institutions of public democracy, as any person who wishes to participate in the government and influence its activities should do.

For all these reasons I have abstained from joining the majority.

Justice T. Strasberg- Cohen

I agree with the judgment of my colleague, Vice-President S. Levin and with the conclusion that he reached. Although his reasoning is sufficient to reach his decision here, I would also join the opinion of the Chairman of the Election Committee, who believed that the offences at issue here are dishonorable.

Justice A. Procaccia

I agree with Vice-President S. Levin's judgment and reasoning. I will add, although it is not necessary, that I am of the opinion that the offences of which Faiglin was convicted are dishonorable. As such, even had the

procedural claims not sufficed to disqualify Faiglin, his candidacy could still be disqualified based on substantive grounds.

"Disgrace" means a negative element which denotes more than a mere breach of the law. This is a concept which carries moral weight, and which stems from the value, views, and moral standards of the public. This is a multi-faceted concept which depends upon the nature of the offence committed and the circumstances under which it was committed, and which must be examined in the specific context in which it is employed. Thus, the disgrace involved in an offence in the context of disqualification from holding public office or disqualification from being employed in a profession that serves the public, is not the same as the disgrace involved in the context of an individual's candidacy in public elections.

Here, we are concerned with the offences of incitement and inciting publication of which Faiglin was convicted. Faiglin's actions were directed against the policies of the government, and were directly opposed to the foundations of the democratic structure upon which our government system is based. Faiglin was convicted of conspiracy to frustrate the execution of government policies in Judea and Samaria. He intended to force the government to change its policies by calling upon the public to carry out unlawful actions in order to impair the operation of the government, hamper the authorities, and break down the obedience to the rule of law in the State. His actions were a danger to "rule of law, public security and public order, as well as a danger to social stability and the stability of the government, all of which are a product of democratic elections." CC (Jerusalem) 3996/95 *State of Israel v. Faiglin* [21] (judgment of November 11, 19997). These attempts to dictate governmental activities by incitement conflict with the democratic idea, which is built upon the rule of the majority acting within the bounds of the rule of law. These offences against the democratic public order are not mere breaches of the law—they find their foundation in the rejection of the democratic foundation of society, and the foundation of the structure of the government. Such offences provide sufficient reason to infringe an individual's right to be elected into the very institution that he wishes to destroy.

This view of "disgrace" is consistent with section 7A of the Basic Law: The Knesset, which provides that one may not be a candidate for the Knesset if he, as evidenced by his actions, rejects the existence of the State of Israel as a democratic state. *See* section 7A(a)(1) of the Basic Law. Rejecting the democratic character of the State precisely means the refusal to acknowledge the sovereignty of the people, and the rejection of

the rule of law. It means a desire to change the regime and government policy through force or other unlawful means. If such actions suffice to infringe the right to be elected even where an individual has not been prosecuted or convicted for such actions, *a fortiori* where the individual has been convicted of offences of this character. As such, there is a connection between the concept of "disgrace" with regard to the disqualification of a candidate who has been convicted of an offence which undermines the foundations of our system, and the disqualification of a candidate whose actions—even where he has not been convicted of them—constitute a rejection of the democratic existence of the State.

Section 6(a) of the Basic Law; The Knesset deprives an individual of his right to be elected if that individual has been sentenced to serve more than three months imprisonment, where seven years have not yet passed since the end of his sentence. The presumption is that conviction and sentencing are sufficient to deprive one of the right to be a candidate for election, if insufficient time has passed to "expunge the disgrace" of the individual's actions. This is the rule, and no element of "disgrace" need be found in order to apply it. Any person who wishes to deviate from the rule bears the burden of proving that his conviction lacks the element of disgrace. Only if he succeeds in doing so may that individual become a candidate.

Faiglin bears the burden of proving the absence of disgrace. He has not carried this burden. The offences which he was convicted of are dishonorable according to the fundamental values of the democratic regime. This is sufficient to disqualify him from being elected for Knesset, as state in section 6(a) of the Basic Law: The Knesset.

President A. Barak

I agree with the judgment of my colleague, Vice President S. Levin. Indeed, none contest the fact that Mr. Faiglin did not meet the provisions of section 56B(1) of the Knesset Elections (Consolidated Version) Law-1969. He did not submit a request to the Chairman of the Elections Committee to the effect that he determine that the offences which he committed were not dishonorable. Additionally, Mr. Faiglin added a "Statement of Agreement" to the Knesset candidate list, which stated that we was able to compete in the elections. This situation led the Chairman of the Elections Committee to disqualify the petitioners' candidacy, and I have found no cause for our intervention in this decision.

2. My colleague, Justice E. Levi, elevates the significance of the fundamental rights to vote and be voted for. He emphasizes the

judgments of this Court that have concretized these principles. He notes the significance of preserving these principles, especially regarding the freedom of opinion of a minority group, and regarding ensuring the fairness of the rules of the political game. Needless to say, I agree with all of the above, and these very principles served as the basis for my opinion that it was appropriate to accept the appeal from the decision of the Central Election Committee to disqualify the Balad party list (EA 131/033 [18]), to reject the appeals regarding the Committee's approval of Mr. Baruch Marzel's candidacy (EA 55/03 [18] and EA 83/03 [18]), and to reverse the decision of the Central Elections Committee to disqualify MKs Azmi Bishara (EA 50/03 [18]) and Ahmed Tibi (EA 11280/02 [18]) from running in the current elections. *See The Chairman of the Central Elections Committee v. Ahmed Tibi* [18]

3. Of course, these principles also apply to the case at hand. However, it is not only the facts that are at issue here; we also consider the relevant statutory provisions. The language and purpose of these provisions are clear. Regarding the language of these provisions: the law clearly provides a date for the submission of the request to the Chairman of the Central Elections Committee ("no later than the day of the submission of the candidate list"). It also provides who shall submit the request ("anyone who wishes to be a candidate.") Regarding the purpose of these provisions: it is obvious that realizing the right to vote and be voted for involves, and even depends upon, clear and ordered rules with regard to dates, procedures and rules. These rules should guarantee a number of interests, including the transparency of the elections, their fairness and regularity, as well as ensuring their equality. *See* CA 10596/02 *Leah Ness v. Likud Movement*, [19] at 775-76. It is not the law's purpose to allow for its own circumvention by allowing for the submission of the request to the Chairman of the Elections Committee after the date specified by the law. It does not allow its own provisions to be rendered superfluous by allowing requests to be submitted by one who is not supposed to do so. Its object is not to violate the principle of equality by giving an advantage to a person who submitted a request to the Chairman of the Elections Committee via a member of the Committee, while other candidates cannot do so. Thus, I am of the opinion that it is our very adherence to the fundamental principles at issue here that lead to the conclusion that the petitioner was lawfully deprived of his right to run for election.

4. Though it is unnecessary, I will add that even if the interpretation that my colleague, Justice E. Levi, gives to these provisions of the law should be adopted, I find it hard to ignore the "Statement of Agreement" which the petitioner himself submitted—as required by law. Therein he

noted that he read and understood the provisions of sections 6 and 7 of the Basic Law: The Knesset and the provisions of section 56 of the Elections Law. He agreed that "to the best of my knowledge and understanding, the above sections do not prevent me from running for the Knesset." He did this despite the fact that under section 6(a) of the Basic Law it is clear that absent a determination by the Chairman of the Central Elections Committee that the petitioner's actions were not dishonorable, he could not run, as he had been convicted and sentenced to serve over three months imprisonment and, on the day of the submission of the candidate list, seven years had not yet passed since the completion of his sentence.

5. With regard to the substantive issue—the disgrace in the petitioner's actions—I see no reason to decide in the matter. I note, however, that in this case I agree with the position of the Chairman of the Central Elections Committee, Justice M. Cheshin, and with the opinions of my colleagues, Justices T. Strasberg- Cohen and A. Procaccia.

Justice E. Mazza

I agree with the judgment of my colleague, Vice-President S. Levin, and like him I prefer not to take a position with regard to the question of whether, under the circumstances, the offences which the petitioner was convicted of are dishonorable, as per section 6 of the Basic Law: The Knesset.

Justice Y. Turkel

Like most of my colleagues, I am also of the opinion that the petition of Moshe Faiglin should be denied. I support the reasoning of my esteemed colleague, Vice-President S. Levin. The main reason for my position is that we should have true equality between the candidates, and this aspiration cannot be realized without strictness and stringency with regard to every jot and title of the election laws. The door of candidacy must be wide open or well-locked, and cannot be only partially open or shut.

2. Therefore, it is not necessary to discuss whether the offences of which Faiglin was convicted of are "dishonorable," as per section 6 of the Basic Law: The Knesset. Nevertheless, since my esteemed colleague, Justice T. Strasberg- Cohen, commented that "the offences which Faiglin was convicted of are dishonorable," I will briefly add my own comment. I am of the opinion that, under the circumstances, the offences of which Faiglin was convicted of were not dishonorable. In this regard, I rely

upon the reasoning of my esteemed colleague, Justice E. Levi. The following remarks by Justice H. Cohen, regarding the dishonor of offences, hold true in our case as well:

> This dishonor means moral turpitude which, when attributed to a person, attests to the fact that that he is unfit to enter the congregation of the just, and this "dishonor" must remain with the person even after his punishment. As the verse states: "his reproach shall not be wiped away." *See* Proverbs 6:33.

HCJ 436/66, [13] at 564. In this regard, Justice (as he was then) A. Barak has said:

> The expression "offence which…involves disgrace" is vague, since the word "disgrace" is uncertain in its application. Not every offence "involves disgrace," and there are certainly offences which are not dishonorable. The line between the different offences must be drawn according to a moral standard. In HCJ 184/73 *Hudayfee v. Amar* IsrSC 27(2) 746, 750 we stated that "we do not look to the formal elements of the offense, but rather to the circumstances under which the offence was committed. It is these circumstances which point to any moral severity implied in the term disgrace."

See also HCJ 6163/92, [16] at 266; HCJ 103/96, [17] at 327; R. Gabizon, *A Dishonorable Offense as a Disqualification for Holding Public Office* 1 Mishpatim 176 (1965) [25]; 11 S.Z. Feller, Foundations of Penal Law 30 (1994) [23]; I. Levi & A. Lederman, *Principles of Criminal Liability* 20-24 (1981) [24]. Regarding the offence of incitement see F.Crim.A. 1789/98 *State of Israel v. Kahane* [20]; M. Kremnitzer & H. Ganaim, Sedition and not Incitement, Incitement in Penal Law: *Legi Lata and Legi Fernada* (1997) [18].

Indeed, the offences of which Faiglin was convicted are severe. However, we do not look to whether the offences themselves are severe, but rather to the circumstances under which they were committed. These circumstances, as they were described in the decision of the Magistrate Court, attest to popular sentiments of "pain," which were "in response to harsh terrorist attacks," and the "the opinion of many people, who have come to feel that the government does not consider their opinions or respect their views." *See* pp. 8-9 of the judgment. I find no "unforgivable shame" in such actions and, in my opinion, where a person protests against a public issue which is significant to him, and this protest

is done peacefully, as is apparent from pages 9-10 of the judgment, his actions are not even slightly dishonorable. Therefore, had the decision regarding the petition rested solely upon the issue of "disgrace," I would have granted the petition.

Justice B. Beinisch

I agree with the judgment of my colleague, Vice-President S. Levin. Like him, I am also of the opinion that Mr. Faiglin's petition should be denied, since he did not meet the demands of section 56B of the Knesset Election (Consolidated Version) Law-1969, in combination with the provisions of section 6 of the Basic Law: The Knesset. As such, he has not met the procedural conditions for submitting his candidacy. Nevertheless, since my colleagues have taken a position regarding the substantive matter of "disgrace," I will not refrain from expressing my own opinion in the matter. I would add my voice to that of the Chairman of the Central Elections Committee, Justice M. Cheshin, and assent to the opinions of my colleagues, the President, Justice Strasberg Cohen and Justice Procaccia. Like Justice Procaccia, I am also of the opinion that any person, who has been criminally convicted of an offence which is entirely directed at undermining the foundations of our democratic system and government, has been "disgraced" to the extent that he is disqualified from running in the elections. I also agree with her that there is a strong connection between the dishonor of the petitioner due to his criminal conviction, and the separate disqualification cause provided for in section 7A(a)(1) of the Basic Law.

As such, the petition should be denied.

Justice D. Dorner

1. I agree with the judgment and reasoning of my colleague, Vice-President S. Levin, and with the comments of my colleague, President A. Barak, in so far as they regard the denial of the petition due to the petitioner's failure to fulfill the provisions of section 56(b) of the Knesset Elections (Consolidated Version) Law-1969.

The procedural rules for submitting one's candidacy in the elections are not technical conditions which may be waived if the candidate is otherwise eligible. These are substantive conditions, which were intended to ensure the principle of equality, which is at the heart and soul of our system of election law.

2. As such, there is no need to discuss the question of whether the offences of which the petitioner was convicted are dishonorable.

However, since my colleagues addressed this question, adopting conflicting positions regarding the matter, I shall also express my own opinion.

Incitement may, under certain conditions, constitute a dishonorable offence under section 6 of the Basic Law: The Knesset. One of the objects of this provision is to prevent the candidacy of persons who have been convicted of activity which is intended to undermine our democratic regime. At the same time, however, we should note that any activity which takes place outside of the parliament, including entirely legitimate activities such as strikes and protests, not only express the opinions of the participants but, sometimes by disrupting our daily life, are also intended to influence the government and change its policies.

In the matter at hand, as is apparent from the judgment of the Magistrate Court, petitioner initiated and organized protests around the country in which thousands of people participated, with the intention of forcing the government to change its policy by disrupting the order of daily life. The legitimacy of the government was denied. In its verdict, the court emphasized that the protests were not violent. Even when confronted with the violence of the police, the petitioner instructed protestors to refrain from violence. The court determined that the petitioner intended to advance views to which he was deeply and faithfully committed, and that he took a position regarding a serious public controversy. In light of these factors, petitioner received a light sentence.

Petitioner, as stated in the judgment of the court, exceeded the bounds of legitimate protest, and was therefore convicted. Petitioner's actions, however, which were expressed through non-violent activities, do not involve that disgrace which disqualifies a candidate from the Knesset. Similar to the authority to disqualify pursuant to section 7A of the Basic Law: The Knesset, the power to disqualify pursuant to section 6 of the Basic Law should be strictly construed. The offence of unlawful political protest should only be deemed dishonorable in extreme cases—which the petitioner's case is not.

Justice E. Rivlin

I agree with the judgment of my colleague, Vice-President S. Levin.

Section 6a of the Basic Law: The Knesset deprives an Israeli citizen, who has been sentenced to serve over three months of imprisonment, of his right to be elected to the Knesset if, on the day of the submission of

the candidate list, seven years have not yet passed from the end of his sentence. The Basic Law provides only one way to remove this obstacle—the determination of the Chairman of the Central Elections Committee that the offence of which the individual was convicted is not, under the circumstances, dishonorable.

2. The petitioner before us was convicted of incitement—including inciting publication and unlawful assembly. He was sentenced to serve six months imprisonment and twelve months of probation.

The petitioner, as he was required, did not submit a request to the Chairman of the Central Elections Committee to determine that the offences of which he was convicted were not dishonorable. Additionally, in the statement which he submitted to the Central Elections Committee, he declared that, to the best of his knowledge and understanding, he was eligible to run for the Knesset. These omissions suffice to deprive the petitioner of his right to present his candidacy. Therefore, it is unnecessary to address the question of whether the petitioner's conviction was, under the circumstances, dishonorable.

3. With regard to offences of incitement, this Court has already stated that "it would be appropriate to consider its invalidation…and replacement with an offence which is more suitable for our system. The wording of the offence is too vague and its boundaries too wide. It reflects a worldview which is not democratic. It suits a mandatory government, which is not a government of the people. It does not award sufficient weight to freedom of expression." Crim.A. 6696/96 *Binyamin Kahane v. The State of Israel*, [12] at 585 (Barak, P.). *See also* Professor M. Kremnitzer & H. Ganaim, Sedition and not Incitement, Incitement in Penal Law: *Legi Lata and Legi Fernada* (1997) [26]. Similarly, in the Unites States, in the first half of the 20th century, there were remnants of colonial incitement laws. *See* The Smith Act (1940); The Subversive Activities Control Act (1950). The United States Supreme Court discussed the constitutional difficulty of applying those criminal provisions, and of their possible infringement upon the freedom of speech. The Court clearly distinguished between mere advocacy and incitement to immediate illegal activity—between expressing invalid opinions and actually acting towards their realization. In *Brandenburg v. Ohio*, 395 U.S. 4442 (1969) [22], the United States Supreme Court required proof that words of incitement were intended to incite immediate illegal action, as well as requiring the probability of the materialization of the danger.

In light of the above, it is doubtful whether our offence of incitement attributes sufficient weight to freedom of speech, s*ee* Crim.A. 6696/96 [12], and this may effect the question of "disgrace." Nevertheless, it is doubtful that this is the case here since, according to the judgment of the Magistrate Court, the petitioner's behavior exceeded the bounds of legitimate protest. In any case, for the reasons given by my colleague, Vice-President S. Levin, I concur with his judgment.

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Comments, questions and suggestions are all welcomed, and may be directed towards elig@supreme.court.gov.il