In the Supreme Court sitting as the High Court of Justice

HCJ 4921/13
HCJ 5126/13
HCJ 5597/13
HCJ 5598/13

Before: The Honorable President A. Grunis
The Honorable Deputy President M. Naor
The Honorable Justice E. Arbel
The Honorable Justice E. Rubinstein
The Honorable Justice E. Hayut
The Honorable Justice N. Hendel
The Honorable Justice T. Zilbertal

The Petitioners in HCJ 4921/13:

1. Ometz, Non-profit Organization – Citizens for Proper Administration and Social Justice in Israel
2. Liran Zilberman
3. Tzvika Tzemach

The Petitioners in HCJ 5126/13:

1. The Movement for Quality Government in Israel
2. Ze'ev Hartman, Nazareth Illit Council Member

The Petitioner in HCJ 5597/13:

Eilia Rozenfeld

The Petitioner in HCJ 5598/13:

Aharon Almog Asulin

versus

The Respondents in HCJ 4921/13:

1. The Mayor of Ramat HaSharon, Yitzhak Rochberger
2. Ramat HaSharon City Council

The Respondents in HCJ 5126/13:

1. Nazareth Illit City Council
2. Minister of the Interior and Ministry of Interior's Northern District Supervisor
3. Shimon Gapso, Mayor of Nazareth Illit

The Respondents in HCJ 5597/13:

1. Shimon Gapso, Mayor of Nazareth Illit
2. "Uri Ir" Faction for City Council, Nazareth Illit
3. Minister of the Interior and Ministry of Interior's Northern District Supervisor
4. The Attorney General

The Respondents in HCJ 5598/13:

1. Yitzhak Rochberger, Mayor of Ramat HaSharon
2. "Our Ramat HaSharon" Faction for City Council, Ramat HaSharon
3. Minister of the Interior and Ministry of Interior's Tel-Aviv District Supervisor
4. The Attorney General

Applicants for Joinder in HCJ 4921/13

1. Idan Lamdan, Advocate
2. Meretz Faction

Petitions for *Order Nisi*

Date of session: 6th Tishre, 5774; September 10, 2013

Adv. Dr. Haim Misgav
on behalf of the Petitioners in HCJ 4921/13

Adv. Eliad Shraga, Adv. Tzruya Midad-Luzon,
Adv. Daphna Kiro-Cohen, Adv. Nidal Haik
on behalf of the Petitioners in HCJ 5126/13

Adv. Ofer Lerinman
on behalf of the Petitioner in HCJ 5597/13 and the Petitioner in HCJ 5598/13

Adv. Lior Epstein; Adv. Anat Cohen
on behalf of the First Respondent in HCJ 4921/13

and the First Respondent in HCJ 5598/13

Adv. Ilan Bombach; Adv. Yariv Ronen
on behalf of the Second Respondent in HCJ 4921/13

Adv. Adam Fisch
on behalf of the First Rerspondent in HCJ 5126/13

Adv. Hani Ofek, Adv. Arin Safdi Atila,
Adv. Michal Michlin-Freidlander
on behalf of the Second Respondent in HCJ 5126/13
and the Third and Fourth Respondents in HCJ 5597/13
and in HCJ 5598/13

Adv. Pninat Yanai
on behalf of the Third Respondent in HCJ 5126/13
and the First and Second Respondents in HCJ 5597/13

Adv. Michal Rosenbaum, Adv. Avi Man
on behalf of the Second Respondent in HCJ 5598/13

Adv. Idan Lamdan
on behalf of the Petitioners to Join in HCJ 4921/13

Judgment (Reasons)

Deputy President M. Naor

1. On September 17, 2013, this Court (Justices Naor, Arbel, Rubinstein, Hayut, Hendel, Zilbertal) handed down a judgment without reasons, where we held:

> 1. The Petitions at hand address current mayors of two municipalities – the Mayor of Nazareth Illit Mr. Shimon Gapso and the Mayor of Ramat HaSharon Mr. Yitzhak Rochberger, against whom indictments were recently filed.
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> 2. The indictment against Mr. Gapso was filed on June 17, 2013. It accuses Mr. Gapso of accepting bribes (conditioning a bribe) under sections 290, 294(a) and 29 of the Penal Law 5737- 1977 ("the Penal Law"). According to the details of the indictment, during the negotiations for establishing a coalition, which took place after the 2008 election for local municipalities, Mr. Simion Baron, who was the "Kadima" faction representative elected to City Council, was approached with suggestions from various sources to join the coalition or to resign from his membership in City Council, lest his former wife,

who was employed by the municipality's financial corporation, may be terminated from her position.

Later, the indictment alleged, Mr. Gapso, along with another defendant – a member of his faction and the chairman of the board of the Nazareth Illit municipality's financial corporation – instructed the CEO of the financial corporation to compile a list of employees at risk of termination and instigated the inclusion of Baron's former wife on that list. When Baron learned of the intent to terminate his former wife, he approached the defendants and told them he accepted their offer to join the coalition. However, he was told that the option of joining the coalition was off the table, but should he resign from City Council, his former wife would not be terminated. Allegedly, since Mr. Baron did not resign by the deadline set by the defendants, his former wife was terminated. After her termination, Baron again approached the defendants with a proposition that he join the coalition in exchange for his former wife's re-hiring, but the defendants rejected his proposition.

3. On May 12, 2013, an indictment was filed against Mr. Rochberger, alleging offenses of falsifying corporate documents and of fraud and breach of fiduciary trust in a corporation, under sections 423 and 425 of the Penal Law, which he had allegedly committed between 2003 and 2007. During that period, Mr. Rochberger served as CEO and chairman of the board of the "Fund to further education of local municipalities' employees" ("The Fund"), along with holding office as the Mayor of Ramat HaSharon. In 2004, the Fund's board decided to approve a monthly reimbursement of expenses account for Mr. Rochberger for up to NIS 500 per month.

According to the indictment, Rochberger and one of the Fund's seniors decided that this amount will increase for NIS 6000 per month against the presentation of receipts. This decision, as alleged, was intended to bypass the prohibition specified in section 15b of Local Authorities Law (Election and Tenure of Head and Deputy Heads) 5735-1975 ("the Election and Tenure of Head and Deputy Heads Law") concerning the prohibition of an authority head to engage in any business or occupation in consideration.

According to the indictment, Rochberger would submit to the Fund receipts and invoices that had no connection to his activities with the Fund, including purchase of household items, expenses from his daughter's trip abroad and her English lessons, while falsifying some of the details on such receipts and invoices in order to make them appear as expenses for which the Fund was permitted to reimburse him. The reimbursements Mr. Rochberger received from the Fund for

these expenses amount to NIS 118,000. Once this fraudulent activity was discovered, Mr. Rochberger repaid the entire amount to the Fund.

4. Still, the Nazareth Illit City Council convened on August 13, 2013, under section 22 of the Election and Tenure of Head and Deputy Heads Law, and decided in a majority vote not to remove Mr. Gapso from his office.

The Ramat HaSharon City Council never decided whether to remover Mr. Rochberger from his office, as it decided simply to remove the issue from the Council's agenda.

5. The Petitions before us request, among other things, that we intervene in the Nazareth Illit City Council decision and order the immediate removal or Mr. Gapso from office. We are additionally asked to consider Ramat HaSharon City Council's decision to take the issue of removing Mr. Rochberger from office from its agenda as a refusal to remove him from office, and, therefore, we should intervene. We were asked to rule that the two mayors should be barred from running in the coming election, or to declare – in the event we find there is no place to bar running and that one or both are re-elected – that the municipality be required to hold a special meeting after the election under section 22 of the Election and Tenure of Head and Deputy Heads Law. This section states:

> 22. (a) Should the Council find that the Head of the Authority is engaging in conduct unbecoming the status of Head of Authority and thus believes the Head of the Authority is unworthy of the office, it may, after providing an opportunity to be heard, remove him from office.
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> (b) A decision to remove the Head of the Authority from office will be reasoned and will be made in a special, closed meeting of council members. The decision will be made by a majority of three fourths of council members. The decision shall require approval by the Minister.
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> (c) Should the Head of the Authority fail to convene a special meeting within 14 days from the day a majority of City Council members called upon him to do so, the majority of City Council members may convene such a meeting and they shall select a chairperson to lead the meeting.

6. From the information before us, the deadline for submitting a list of candidates for election is today. The election for local municipalities is to be held on October 22, 2013. The hearing in this matter was held on

September 10, 2013, and it was agreed that the hearing would go on as if temporary injunctions had been granted. Because of the timetable described, we saw no option but to hand down our judgment without reasons. We shall provide reasons in the future.

7. The majority justices (Deputy President Justice Naor, Justices Arbel, Rubinstein, Hayut, Hendel and Zilbertal) find as follows:

(1) In light of the indictments filed against the two Mayors, the City Councils were obligated to convene and discuss removing the Mayors from office, according to section 22 of the Election and Tenure of Head and Deputy Heads Law.

(2) The Nazareth Illit City Council decision not to remove Mr. Gapso from office is inconsistent with the principles of maintaining clean governance and of the rule of law. His behavior, as alleged in the indictment, constitutes weighty administrative evidence, and is conduct unbecoming according to section 22 of the law. This decision is also so extremely unreasonable given that the local election is fast approaching and Gapso has expressed intent to run for mayor again. Therefore, we hereby grant a decisive order that Gapso be immediately removed from his office as Mayor of Nazareth Illit.

(3) Under these same circumstances, Ramat HaSharon's City Council's failure to convene is effectively a decision not to remove Mr. Rochberger from office. This decision is inconsistent with the principles of maintaining clean governance and of the rule of law. His behavior, as alleged in the indictment, constitutes weighty administrative evidence, is conduct unbecoming according to section 22 of the law. This decision is so extremely unreasonable also given that the local election is fast approaching and Mr. Rochberger has expressed intent to run for mayor again. Therefore, we hereby grant a decisive order that Mr. Rochberger be immediately removed from his office as Mayor of Ramat HaSharon.

8. We are uncomfortable, in the public sense, with these two persons running for mayors in the coming election because of the indictments against them (See HCJ 5141/11, *Lilian v. The Mayor of Ramat Gan* (14.7.2013)). However, we see no way, in the legal sense, to prevent them from running.

9. We expressly state that should one or both of them be elected as mayor, the City Council would be obligated to convene soon after the election, to discuss and decide whether the mayor ought to be removed from office, according to section 22 of the Election and Tenure of Head and Deputy Heads Law. Of course, the decision made shall also be subject to judicial review.

Our colleague, President Grunis had a different opinion than ours, and thus it was decided, by majority, according to section 7 of the Judgment without reasons.

2. We now present our reasons, with consideration to the timing of the election on October 22, 2013, and in order to allow the parties and others to plan future steps.

3. The Petitions invite our ruling on three main issues that fall under three different situations: the issue of removing a head of local authority from office due to an indictment filed against them during their term (the first situation;) the issue of barring one to run for local office due to an indictment filed against the head of local authority or against a candidate who is not the head of local authority (the second situation;) and the issue of removing a head of local authority from office after the election due to an indictment filed against him even before the election in which they were elected (the third situation.)

4. Usually, the three situations detailed above (the issue of removing from office because of an indictment filed during term, the issue of barring candidacy due to an indictment, and the issue of removing from office after the election when an indictment was filed before the election) are closely linked. The primary question is then whether one who's been subject to indictments such as those here may serve as head of local authority. Still, it seems, the legal questions arising in the different situations we presented are not identical and they require separate discussion.

5. An additional question has been raised, and it is whether the Petitioners may obtain any alternative remedies in Administrative Matters Court. However, this Court has concurrent jurisdiction with that of the Administrative Matters Court, so we saw it fit to decide these petitions now and leave the matter of alternative remedies for a different, more appropriate proceeding.

The Zvi Bar Affair

6. The cases before us are not the first instances where courts have addressed the issue of removing from office or barring the candidacy for an election of a head of local authority who has been indicted. About two months before the hearing in these Petitions, an affair concerning the Mayor of Ramat Gan and Chairman of the Local Committee for Planning and Construction Zvi Bar ("Zvi Bar") was adjudicated. As early as 2010, a petition against Zvi Bar was filed with this Court, asking that he suspend himself from his positions as Chairman of the Ramat Gan Local Committee for Planning and Construction and Chairman the Tel Aviv District Committee for Planning and Construction, due to a criminal investigation being conducted against him. During that Petition's proceeding, Zvi Bar announced that he had resigned from his position as chairman of the Local Committee and chairman of its sub-committee. He further announced that should an indictment be filed against

him, and a hearing held – and even if the decision would not be final – he would resign from the District Committee. In light of these announcements, this Court decided that at that time – before an indictment was filed – there was no place to grant the requested remedy (HCJ 4888/10, *Lilian v. The Mayor of Ramat Gan and Chairman of the Local Committee for Planning and Construction* (December 27, 2010) ("the first *Zvi Bar* matter")).

Later, the petitioner filed a second petition in which he requested to remove Zvi Bar from his office as mayor. The State notified that it had filed an indictment against Zvi Bar (HCJ 5141/11 *Lilian v. The Mayor of Ramat Gan and Chairman of the Ramat Gan Financial Corporation* (July 14, 2013) ("the second *Zvi Bar* matter")). A copy of the Attorney General's notice in that petition, dated May 26, 2013, was attached to the Petitions here ("The Attorney General's position regarding Zvi Bar matter"). As the notice details, an indictment was filed against Zvi Bar alleging that Bar committed offenses such as bribery, fraud and breach of trust, money laundering, and disruption of legal proceedings, all while he served as Mayor of Ramat Gan and as chairman of the Local Committee for Planning and Construction, as member of the Tel Aviv District Committee for Planning and Construction, and as member of the District's Sub-Committee for Objections. The indictment further alleges that between 1989-2008 Zvi Bar held, vis-à-vis his positions, influence – whether directly or indirectly – on promoting and protecting the economic interests of businesspeople and real estate entrepreneurs in Tel Aviv and Ramat Gan. In the relevant period, he allegedly received bribes from interested parties amounting to NIS 1,924,014. The indictment further alleges that Zvi Bar omitted these incomes in reports he submitted to the tax authorities. In a special city council meeting held on March 19, 2013, the issue of removing Bar from his office according to the city council's authority under section 22(a) of the Election and Tenure of Head and Deputy Heads Law was raised and a majority decision (16 to 6, 1 absentee, and 1 not in attendance) was reached not to remove him from his office.

The Attorney General found the City Council's decision regarding the Zvi Bar matter extremely unreasonable and could not stand. In the notice, the Attorney General argued that the statutory cause for removal of the head of local authority materializes when a head of local authority is convicted of an offense of moral turpitude. However, if this is not found to be sufficient justification for automatic disqualification for office, there is still ample authority conferred upon a city council to exercise discretion in examining the mayor's conduct. Therefore, the Attorney General argued, in the case of serious offenses committed in connection with public office, allowing the continuance of the elected official's tenure of service threatens to cause grave harm to the public's trust and its perception of good moral character and clean governance. Thus, in these circumstances, the right to elect and be elected gives way to the interest of preventing harm to the public's trust and clean governance. As it relates to Zvi Bar's indictment, the Attorney General believed his behavior to be highly egregious, because (a) the alleged offenses

were committed over several years (2000-2006) pointing to a consistent pattern of behavior; (b) the offenses were committed in the course of public office, when that office served as a tool in committing them; (c) the alleged benefits given for the bribes concerned the local authority's land, which is an important and limited resource; (d) the great monetary value of the bribes Zvi Bar received (NIS 1,924,014); and (e) because of Zvi Bar's prominent position as mayor of the local municipality, a position with executive-governance authorities.

The last hearing in the second *Zvi Bar* matter was held on July 14, 2013 before an extended panel, which included President Grunis, Deputy President Naor, and Justices Arbel, Rubinstein, Joubran, Hayut and Vogelman. The decision based on the Panel's proposal to the parties was as follows:

> "At the end of the hearing, and before a legal decision was rendered, we expressed in the courtroom our position that from a public perspective, there is huge difficulty in that the First Respondent (Zvi Bar) continues to serve as Mayor of Ramat Gan, after an indictment alleging offenses he committed related to his office was filed against him. Considering the elections for local authorities are to be held in about three months, we proposed that the First Respondent commit not to run for Mayor of Ramat Gan or for City Council. The First Respondent's attorney committed on his behalf that he would indeed refrain from submitting his candidacy. Under these circumstances, we believe that the Petition has been exhausted, particularly in light of the public message emanating from our words here. The First Respondent's commitment is hereby given the status of a Judgment."

The parties before us made many comparisons between the *Zvi Bar* indictment and the indictments relevant to this Petition, which we have detailed in the Judgment without reasons. We must emphasize early that the *Zvi Bar* indictment is not to be regarded as a floor for severity, and that, with its existence, the mayor must not continue his term. Below I will clarify why the proposal we have made to *Zvi Bar* is consistent with our position in the current petitions.

The Ramat HaSharon Matter

7. The Respondent in HCJ 4921/13 and in HCJ 5598/13, Mr. Yitzhak Rochberger ("Rochberger"), has served as Mayor of Ramat HaSharon since 2003. On May 12, 2013 an indictment was filed against Rochberger, which we have detailed in the Judgment handed down without reasons, quoted above.

8. On July 14, 2013, the city council held a regular meeting where it discussed a proposal to remove Rochberger from office in light of the pending indictment against him, according to section 22 of the Election and Tenure of Head and

Deputy Heads Law. During that meeting, a letter by the Council's legal advisor, dated May 30, 2013, was read aloud. The letter addressed a query by two council members, Mr. Lamdan and Mr. Gruber, who initiated the proposal to remove the Mayor from office. In the letter, the legal advisor argued that there was no legal basis to remove Rochberger from office, and, either way, removal cannot be done without a special meeting, which must be convened by a majority of city council members. Rochberger requested to remove the proposal from the agenda, and the proposal was indeed removed.

The Petitioners' Arguments

9. The Petitioners in HCJ 4921/13, OMETZ, Non-profit Organization - Citizens for Proper Administration and Social Justice, and Mr. Liran Zilberman and Mr. Zvika Tzemach, residents of Ramat HaSharon expected to run for city council in the next election, requested that this Court order Rochberger to resign from office as Mayor of Ramat HaSharon, as well as order the city council to remove him from office through the process of a special meeting held according to section 22 of the Election and Tenure of Head and Deputy Heads Law. The Petitioners argue, in light of the pending indictment against Rochberger and its surrounding circumstances, that failing to convene the City Council essentially prevented the removal of Rochberger from office, constituting an infringement on the rule of law and public trust. They claim the Attorney General's position regarding *Zvi Bar* should be applied to Rochberger's matter.

10. The Petitioner in HCJ 5598/13, Mr. Aharon Assoulin ("Assoulin"), is a resident of Ramat HaSharon who requests that this Court bar Rochberger from running as a candidate in the elections or to not allow him to run for candidacy should it be presented. Alternatively, Assoulin requests that we order the "Our Ramat HaSharon" faction not to nominate Rochberger as its primary candidate under section 4(b) of the Election and Tenure of Head and Deputy Heads Law, or to remove him from the top of the party's candidates list. As another alternative, Assoulin requests that the Court order the Minister of Interior, the Tel Aviv District Supervisor at the Ministry of Interior and the Attorney General to declare Rochberger as unfit to serve as Mayor and to cause him to be removed as candidate, based on the authority prescribed in section 143 to the Municipalities Ordinance [New Version] ("The Municipalities Ordinance"). According to the Ordinance, the Minister of Interior is entitled to order their election of a new mayor or to even appoint one, when the current mayor has not properly fulfilled his statutory duties.

11. Assoulin relies on the Attorney General's position regarding *Zvi Bar* as well, maintaining that it is analogous here. He argues that when an offense of moral turpitude has been attached to an elected official, who is subject to administrative norms, that official must resign. Moreover, the elected official must refrain from running for office. Should the official disregard these

relevant considerations, and fail to reach that conclusion on his own, the Court is then authorized to order the official not to run for office.

The Respondent's Arguments

12. In his response to the petitions, Rochberger argues that the statutory grounds of unfitness should not be expanded to establish an indictment as a bar for serving as head of local authority or running for office. He wishes to distinguish his case from the *Zvi Bar* case, as the offenses Rochberger is accused of committing were not committed in the course of his service as mayor. Furthermore, they are less severe than those of Zvi Bar, and a long period of time has elapsed since the offenses were allegedly committed. Rochberger also noted that even before the commencement of the criminal investigation against him, he had returned the entire amount he had received allegedly through illegal means. He further argues that the Minister of Interior is not entitled to exercise his authority under section 143 of the Municipalities Ordinance to remove a mayor from office during the year prior to his election. Finally, Rochberger argues that he is confident in his innocence and does not believe that a pending criminal case against him would compromise his service as mayor.

13. The State Attorney's response, submitted on behalf of the Minister of Interior, of the Tel Aviv District Supervisor at the Ministry of Interior and of the Attorney General, argues that even if one's eligibility to serve as mayor was not negated by the statutory unfitness rules, this does not eliminate the city council's authority, and at times its duty, to examine the mayor's continued service in light of conduct unbecoming under section 22 of the Election and Tenure of Head and Deputy Heads Law. The State further argues that in light of additional considerations, such as public trust and good moral character and clean governance, when administrative evidence – such as an indictment – exists to support the commitment of serious offenses, it is only right that the mayor should not remain in office. Therefore, the State argues, once Rochberger was indicted for serious offenses against clean governance and good moral character, the Ramat HaSharon city council should have convened to discuss whether he was fit to continue in office. Still, the State argues, in light of the proximity in time to the election, the Ramat HaSharon City Council is permitted to take into account practical considerations, and avoid convening a special meeting before the elections. The State emphasizes that its position is that, should Rochberger be re-elected as mayor in the coming elections, the City Council would then be obligated to convene and discuss the matter of his continued service. In terms of Rochberger's candidacy in the coming elections, the State expressed several difficulties in permitting him to continue to run. It is clear that should Rochberger be re-elected, the City Council would be required to discuss his remaining in office under section 22 of the Election and Tenure of Head and Deputy Heads Law. The State further claims that these difficulties may become overly difficult and impractical; for example, this decision to allow him to run allows any serving mayor to run in

elections despite being found unfit to serve under section 22. In light of these difficulties, the State argues that a question may arise as to what the considerations the city council must take into account when considering removal of a mayor from office also apply to candidates themselves insofar that they must refrain from running. The State believes this question cuts both ways. However, under the circumstances, it need not be decided because the Ramat HaSharon city council has yet to convene to discuss the matter of Rochberger's continued service, and as discussed, it would have to do so after the elections should Rochberger be re-elected. The State further claimed in its response that, in regards to Rochberger, the exception set in section 143(b) of the Municipalities Ordinance applies. This exception prohibits the Minister of Interior from exercising its authority during an election year, and it is impossible to require the Minister of Interior at this early stage to commit to exercising this authority after the elections.

14. The Ramat HaSharon City Council argued, for its part, that the Petition to order it to remove Rochberger from office should be rejected in limine and on its merits. The Ramat HaSharon City Council maintains that its decision not to convene a special meeting and not to remove Rochberger from office constitutes a "decision" by a local municipality, and that it has such authority to decide this through its Court of Administrative Affairs. For this reason and others, the Ramat HaSharon City Council argued that the Petition should be dismissed in limine. Furthermore, in terms of the merits, the City Council claimed that removal from office according to section 22 of the Election and Tenure of Head and Deputy Heads Law cannot prevent Rochberger from running in the coming elections. Therefore, as the City Council's argument goes, in light of the proximity to the date of the elections, requiring the Ramat HaSharon City Council to hold a special meeting is unjustified. The Ramat HaSharon City Council also relied on the decision in HCJ 7367/97, *The Movement for Quality of Governance in Israel v. The Attorney General*, IsrSC 54(2) 547 (1998) to argue that existing law does not include any relevant limitation of qualification, thus whoever is fit to be elected could also continue to serve. To bolster this claim, the Ramat HaSharon City Council pointed out that the local elections are direct elections and thus the will of the people must prevail. Further, bills that would change the current state of the law by conferring an authority to suspend an indicted head of local authority were never passed. Therefore, section 22 of the Election and Tenure of Head and Deputy Heads Law cannot be used to remove a sitting mayor who was not convicted. Additionally, the Ramat HaSharon City Council believes that the offenses Rochberger has allegedly committed are not as serious as those of which Zvi Bar was accused of and, in any event, the scope of the Court's intervention in a city council's decisions, which involve political and coalition-related considerations, is limited.

15. Rochberger's faction, "Our Ramat HaSharon" ("the faction"), argues that the legislature's silence regarding removing an indicted candidate is a "negative arrangement" that does not allow the faction or the Court to require that a

candidate remove their candidacy or refrain from running. The faction emphasized that the desired remedy of barring Rochberger from running and barring the faction from appointing him as its primary candidate and leader is different than the remedy requested in the *Zvi Bar* matter. Thus it claims the Court is not authorized to grant it. The faction reiterated the significance of the right to elect and be elected and claimed that the decision regarding Rochberger's continued service in office should be left to the voters. The faction further argued that the offenses Rochberger allegedly committed are not as serious as those of which Zvi Bar was accused, and for this reason as well there is no place to bar the party from appointing Rochberger as its leader.

16. Advocate Idan Lamdan, City Council member, and the Meretz faction requested to join as respondents, submitted their positions and attended the hearing according to the Panel's decision. Advocates for the Lamdan and Meretz factions pointed out that Rochberger refused to put on the agenda their proposals requesting that he suspend himself from office. Therefore they called upon the District Supervisor, addressing copies to the Minister of Interior and the Attorney General, to order Mr. Rochberger to hold such a discussion. Rochberger's continued refusal was based upon the city council's legal advisor's opinion that the discussion of section 22 (that is, removal from office) could not be held within the framework of a special meeting. He held this even though this Court had already decided to order the City Council to submit its response to the Petition. As argued, the Ramat HaSharon City Council decision to accede Mr. Rochberger's request to remove the issue from the Council's agenda was outside the range of reasonableness.

Advocates of the Lamdan and Meretz factions further argued that the City Council's response to the Petition was submitted without the consent of the factions of which the Council is comprised and without having discussed the response. To them, the claim regarding the proximity to the elections raised by the City Council in its response should not be heard, as Rochberger himself attempted to prevent discussion of the proposal several times.

The Nazareth Illit Matter (HCJ 5126/13 and HCJ 5597/13):

17. The Respondent in HCJ 5126/13 and HCJ 5597/13, Mr. Shimon Gapso ("Gapso") has served as the Mayor of Nazareth Illit since 2008.

18. An indictment was filed against Gapso on June 17, 2013. We have discussed the details of that indictment above.

19. It should be noted that the State suspects that Gapso has committed additional offenses; however indicting him for those offenses is subject to a hearing. These offenses include those of bribery, fraud, breach of trust in relation to receiving a bribe from the manager of the "Ramle Lod" Market in the city, as well as elections bribes in the form of promising employment in the

municipality to supporters. After the Judgment was handed down without reasons, we were notified of a notice submitted by the State Attorney on the same day that, in light of Gapso's conduct, the opportunity to hold a hearing in his matter had been exhausted and therefore the prosecution intended to indict him in the near future. This fact was not before us when we handed down the Judgment without reasons, and we saw no reason to address it.

20. On August 13, 2013, the Nazareth Illit City Council convened to discuss whether Gapso should remain in office as mayor, and decided not to remove him from office. The decision was made by a majority of the seven council members, while Gapso himself abstained. It should be noted, that this meeting was convened after Advocate Fisch, who is representing the City Council in these proceedings, advised the Council to do so, rather than at the City Council members' own initiative.

The Petitioners' Arguments

21. The Petitioners in HCJ 5126/13 are the Movement for Quality Government in Israel and Mr. Zeev Hartman, city council member and member of the Nazareth Illit Audit Committee. They requested that we order the Nazareth Illit City Council to convene immediately and to remove Gapso from office according to section 22 of the Election and Tenure of Head and Deputy Heads Law. The Petitioners further request that we order the Minister of Interior and the Northern District Supervisor at the Ministry of Interior to exercise their authority under section 141 of the Municipalities Ordinance, which empowers the Supervisor to decree that the City Council fulfill its duty and remove Gapso from his service. We were also requested to order Gapso to resign from office, and to bar him from running for mayor in the coming elections.

The Petitioners maintain that the indictment against Gapso constitutes evidence of conduct unbecoming the position of mayor in terms of section 22 of the Election and Tenure of Head and Deputy Heads Law. They claim that the conduct he is alleged to have committed is egregious and directly linked to his public office and is further inconsistent with the mission of elected public service. They argue that the severity of the conduct and its link to the public office warrant removing Gapso from his office, and, really even, warrant Gapso himself – as an elected official bound by the norms of administrative law – to resign. They further argue that the reasons that justify removing Gapso from office also justify preventing him from running in the coming elections, lest he be re-elected and a need for holding elections again will arise, with all the institutional and financial damages that will entail as a result.

The Petitioner in HCJ 5597/13 is Ilya Rosenfeld, a Nazareth Illit resident and City Council member ("Rosenfeld"). He requests that we order Gapso to refrain from running for mayor or to remove his candidacy in the event it has already been submitted. Alternatively, Rosenfeld requests that we order the

"Uri Ir" faction to refrain from placing Gapso at the top of its candidates' list, or to remove him from the top of the list. Alternatively, Rosenfeld request that the Court order the Minister of Interior, the Northern District Supervisor at the Ministry of Interior and the Attorney General to declare that Gapso is unfit to serve as mayor and cause his candidacy to be removed, as authorized in section 143 of the Municipalities Ordinance. Rosenfeld argues that elected officials are subject to a higher standard of integrity. Yet the conduct associated with Gapso infringes public trust and clean public governance, and he should therefore be prohibited from running for mayor. He maintains that administrative evidence, such as an indictment, is sufficient to disqualify Gapso from serving as mayor, and a conviction is unnecessary.

The Respondents' Arguments

22. In its response, the Nazareth Illit City Council relied on HCJ 6749/12, *Hayat v. Mory*, (November 22, 2012) ("the *Hayat* matter") for the proposition that the challenges to Gapso's continued service should be aired out in the Court of Administrative Affairs. However, because of the matter's importance, the City Council stipulated that it did not object to this Court's jurisdiction to address the case at hand.

23. The Nazareth Illit City Council conceded that once the Mayor had been indicted, it was obligated to evaluate the consequences of that indictment and to consider whether the Mayor should be removed from office. However, the City Council argued it did not have a *duty* to remove the Mayor from office. It maintained that the City Council's discretion in the matter is wide and the scope of intervention in its decisions – as a political-collegial body – is limited. Additionally, the City Council argued that an indictment alone must lead to removal from office nullifies the statutory rules of fitness for service and infringes the will of voters. Further, since it is impossible to prevent the Mayor from running in the coming elections, there is no justification to require the City Council to remove him from office now, so soon before the elections. The City Council also argued that there was no procedural flaw to the City Council's conduct, as it did convene and consider all relevant factors. However, the City Council did not rule out the possibility that the Mayor himself could be ordered to resign or that the Minister of Interior may be required to remove the Mayor from office.

24. In his response to the Petitions (one of which was filed jointly with Gapso's faction "Uri Ir"), Gapso maintained that his matter is distinct from the *Zvi Bar* case. He claimed that the Attorney General's opinion in *Zvi Bar* was submitted with awareness of the existence of additional indictments against serving mayors, and thus the Attorney General emphasized the severity of the particular case that his opinion addressed. In Gapso's view, the offenses attributed to him are not as serious as the offenses of which Zvi Bar was accused, as they carry no moral turpitude, and given the considerations expressed in the Attorney General's opinion – such as, the scope of the

offense, the number and severity of offenses in the indictment, and each offense's impact on the fabric of life at the local municipality. Gapso added that he should enjoy the presumption of innocence. Therefore exercising administrative discretion regarding his removal from office should include a deep review of the administrative evidence and its weight. He claimed that the weight of the administrative evidence in his case, that is the indictment, indicates that removing him from office is unwarranted. He further argued that with the election fast approaching, exercising authority under the mentioned section 22 is unjustified at this time.

25. As for Gapso running for elections, he and his party "Uri Ir" maintained that there is no justification to bar him from running, as there is no statute that deprives him of that right.

26. The State's normative position in these Petitions regarding the scope of section 22 of the Election and Tenure of Head and Deputy Heads Law's application matches its position in response to the Petition regarding Ramat HaSharon. The State believes that for now, Nazareth Illit City Council's decision not to remove Gapso from office is within the range of reasonableness, because the alleged offense is not overly egregious. They support this by explaining that since it was only a single act and the compensation, seemingly, was "not to the extent that the seriousness of the offense became overly egregious." Therefore, the State argues that the City Council was permitted to remove Gapso from office but it did not act outside the range of reasonableness when it failed to do so. This is distinguishable from the second *Zvi Bar* matter, which under the concrete circumstances there, the City Council's decision not to remove the mayor from office was unreasonable in light of the nature and extent of the alleged offenses and their link to public office.

However, the State also argued that the scope of section 22 of the Election and Tenure of Head and Deputy Heads Law's application should be ruled upon now, as it is a significant and widely-applicable matter that is highly likely to become relevant after the elections.

27. As for Gapso's running in the coming elections, the State argued that the Elections Supervisor was not authorized to exclude anyone from candidacy beyond the statutory causes for disqualification. However, an absurd situation where a mayor has been removed from office but is not barred from running again may arise. Therefore, it argues, it is possible to consider placing that duty on the candidate himself, but such construction presents challenges, because no actual decision was made by the City Council regarding removing Gapso from office, it is inappropriate to rule on his specific case. The State even reiterated that, in the year leading up to elections, it is impossible to order the Minister of Interior to exercise the authority under section 143 of the Municipalities Ordinance.

On September 10, 2013 we held a hearing in the Petitions. With the Petitioners' consent, we discussed the Petitions as if orders nisi had been granted. On September 17, 2013 we handed down the Judgment without reasons.

Reasons for decision

28. At the center of the Petitions before us is, as mentioned above, the issue of the status of a head of local authority who has been indicted in connection with their public activity. At the heart of the first discussion (removing a head of local authority from office after an indictment) and at the heart of the third discussion (removing a head of local authority from office after elected when an indictment is pending) is the issue of the interpretation and scope of application of section 22 of the Election and Tenure of Head and Deputy Heads Law (a different, but similar, statute applies to regional council). At the heart of the second discussion (barring a candidate from running for office) is the issue of whether it is legally possible to require a candidate, against whom a serious indictment was filed, to refrain from running or to require those authorized to nominate a candidate not to do so because of an indictment against the candidate.

The First Situation: Removing a Head of Local Authority Because of an Indictment Filed While in Office

29. Primary legislation establishes conditions for ending or suspending a head of local authority's service. In terms of city councils and local municipalities, these rules are set in the Election and Tenure of Head and Deputy Heads Act (see definitions for "local municipality" and "head of authority" in section 1 of the Act). Section 20 of this Act details the circumstances for ending or suspending a head of authority's service due to a criminal conviction.

> "Ending and Suspending Service for Moral Turpitude:
>
> 20. (a) Once a court sentences a head of authority for a criminal offense, whether the offense or conviction occurred while in office or before the head of authority began serving in office, the court will determine in its sentence whether the offense is one of moral turpitude. The court's decision regarding moral turpitude is subject to appeal as if it were a part of the sentence.
>
> (b) In the event that the court did not determine as established by sub-section (a), or the head of authority began serving between the date of sentencing and the date the decision becomes final, the Attorney General or its representative may, as long as the decision has yet to become final, approach the court and request a determination regarding moral turpitude. The request will be

submitted to the sentencing court or if an appeal was filed – the appellate court. […]

(d) Once the court determines according to this section that the offense of which the head of authority was convicted is one of moral turpitude, the head of authority will be suspended from office until a final judgment is given in the matter.

(e) The head of authority's service will end on the day that the judgment establishing the offense as one of moral turpitude becomes final.

(f) (1) When a head of authority is sentenced to imprisonment in terms of section 7 of the Elections Law [The Local Authorities Law (Elections), 5725-1965 – Naor] and has failed to declare truthfully or has failed to submit notice or request under section 7a of the above statute, his term will end and he will cease serving as head of authority."

30. Under this section, a head of authority's service ends upon conviction and a determination included in a final judgment that the offense is one of moral turpitude (section 20(e) of the Election and Tenure of Head and Deputy Heads Law), or if the head of authority was sentence to imprisonment in terms of section 7(b) of the Local Authorities Law (Elections), 5725-1965 ("Local Authorities Elections Law").

Similar conditions for disqualification of service due to a conviction for an offense of moral turpitude exist in regards to head of regional council (section 6b of the Regional Councils Law (Electing Head of Council) 5748-1988 ("Electing Head of Regional Council Law")) and in regards to local authorities' council members (section 120(8) to the Municipalities Ordinance; section 101(7) to the Local Councils Order (a) 5711-1950 ("Local Councils Order (a)); section 7b of the Local Councils Order (b) 5713-1953 ("Local Councils Order (b)); section 19(b) of the Local Councils Order (Regional Councils) 5718-1958 ("Regional Councils Order")).

The provisions detailed above thereby establish when the service of a head of local authority implicated in a criminal proceeding automatically expires. The two indicted mayors' service did not expire under these provisions. However, this is not the end of the story. A city council is authorized to discuss and decide whether under certain circumstances, including – in my view – an indictment, the head of authority could be removed from office. This authority is grounded in section 22 of the Election and Tenure of Head and Deputy Heads Law. We quote it once more:

"Removing from Office Owing to Conduct:

> 22. (a) Should the Council find that the head of authority is engaging in conduct unbecoming the status of head of authority and thus believes the head of authority is unworthy of the office, it may, after providing an opportunity to be heard, remove the head of authority from office.
>
> (b) A decision to remove the head of authority from office will be reasoned and will be made in a special, closed meeting of council members. The decision will be made by a majority of three fourths of council members. The decision shall require approval by the Minister.
>
> (c) Should the head of authority fail to convene a special meeting as within 14 days from the day a majority of council members called upon him to do so, the majority of council members may convene such a meeting and they shall select a chairperson to lead the meeting."

Under section 24A of the Election and Tenure of Head and Deputy Heads Law, should a city council remove a head of authority from office according to section 22 over a year before elections, a special election for head of authority will be held. Should a city council remove a head of authority from office a year or less before elections, the council will elect one of its members to serve as acting head of authority.

Recall, that in our case, the Nazareth Illit City Council convened under the advice of Advocate Fisch and decided not to remove the Mayor from office, while the Ramat HaSharon City Council removed the issue from its agenda. In my opinion, there is a dutiful consideration regarding whether to remove an indicted head of authority from office. I will come back to this regarding Ramat HaSharon, but first we come back to the interpretation of the mentioned section 22.

31. Section 22 of the Election and Tenure of Head and Deputy Heads Law authorizes a local authority council to remove the head of authority from office, if it is convinced the head of authority has committed conduct unbecoming a head of authority and it believes that the head of authority is therefore unfit to serve in office (for more on the legislative history behind section 22, see HCJ 689/81, *Ben Abraham v. Arbili*, IsrSC 36(2) 389 (1982)).

My view is that even if a head of local authority's term has not automatically disqualified by force of statute, the city council is obligated to consider other factors in its decision concerning whether to remove someone from office, including – and this factor alone requires ruling in this matter – an indictment against the mayor. This is within the discretion afforded to an authoritative council under section 22. My conclusion is based on the distinction, which is

settled in our jurisprudence, between unfitness to serve and statutes that establish discretion in removing from office.

32. The distinction between statutory disqualification and discretion over removal from office is an old one. It was applied in cases as early as the *Deri* and *Pinhasi* matters. The question in *Deri* (HCJ 3094/93, *Movement for Quality Government in Israel v. The Government of Israel*, IsrSC 47(5) 404 (1993) ("the *Deri* case")) was whether Rabbi Deri should continue serving as a member of the government and Minister of Interior. Deri was indicted for offenses of bribery, breaching a public servant's fiduciary duties, and receiving benefits through fraud, among others. The issue was whether the Prime Minister was statutorily obligated to exercise the authority under Basic Law: The Government and remove Minister Deri from office, in light of the indictment against him. This Court ruled that an indictment – in which Minister Deri was alleged to have taken hundreds of thousands of shekels in bribes and misuse, in other manners, governmental positions – requires removing the Minister from office. This was despite the absence of any express statutory requirement that the Prime Minister remove the Minister from office due to an indictment.

In HJC 4267/93, *Amitai – Citizens for Proper and Clean Governance v. The Prime Minister of Israel*, IsrSC 47(5) 441 (1993) ("the first *Pinhasi* case"), the issue at hand was whether following an indictment that alleged Deputy Minister Pinhasi had committed offenses of false registration in corporate documents, making false statements, and attempts to receive benefits through fraud, Pinhasi could continue serving as deputy minister. The Court discussed the meaning of fitness laws and refined the distinction between the laws of eligibility applicable to a minister or deputy minister and the discretion afforded to a competent authority to remove a minister or deputy minister from office:

> 25. Indeed, the laws of fitness were designed to create 'threshold bars' for serving in office. The legislature itself balanced the different factors and considerations and found that under certain circumstances, a person is unfit to take position or office or continue serving in this position or office. At times, objective existence of certain conditions is sufficient to achieve the effect the legislature desired ('Whoever was convicted of an offense of moral turpitude, and ten years had not yet passed since that person completed serving their sentence: section 16(b) of the new Basic Law: The Government, which takes affect starting the election for the fourteenth Knesset (section 63(a), shall not be nominated as minister). From time to time exercising discretion by a competent authority is necessary to achieve the desired effect ('The Knesset is authorized, in a decision, to remove a Knesset member from office if it has found that member to be unfit for service due to a conviction of

> a criminal offense in a final judgment and a verdict of one or more years' imprisonment: section 42A(a) of Basic Law: The Knesset). When such discretion in this context is required, it addresses whether the conditions for fitness (or unfitness) exist. It does not address whether it is appropriate to appoint one for service or end their service under these conditions, and it is not designed to balance the different considerations in the matter. The Legislature itself did the balancing and found that, under certain conditions, there is no place for appointment for service or for continuing service. In this matter no governmental authority has discretion, aside from that which the legislature has granted under certain circumstances. This is not so in the matter of discretion in appointment, election for office, or ending one's service. In the absence of fitness laws there is no 'threshold bar' to an appointment or its expiry. The competent authority should exercise discretion. It should balance the different considerations that should be taken into account. A criminal indictment or a conviction are among the important considerations. They are not the only considerations."

In light of this distinction, the Court made clear that though an indictment is lesser to a conviction, and though the elected official enjoys the presumption of innocence, when the indictment is serious, the Prime Minister is obliged to remove a minister or deputy minister from office. At the base of this conclusion was, among others, the Court's finding that the presumption of innocence does not prevent ending the service of a public official, when the authority deciding to end the service is in possession of administrative evidence – that is, evidence that "any reasonable person would see as having evidentiary value and would trust" – that would justify ending a term of service (p. 468). I come back to this issue below. Due to the serious allegations against Deputy Minister Pinhasi, the Court ruled it was unreasonable not to end his term, and the Court ordered as such.

It should be noted that the distinction between statutory fitness rules and exercising discretion was applied in other contexts even prior to the *Deri* case and the first *Pinhasi* case. For instance, in the *Eizenberg* case, in regards to the appointment of Yosef Genosar to General Director of the Ministry of Construction and Housing despite his involvement in the "route 300" and the Napso affairs, the Court ruled that the appointing authority must weigh a candidate's criminal history, even if there is no explicit statutory regulation that bars a candidate with a criminal history to be appointed. This ruling relied on the distinction between the issue of fitness for office and discretions in appointments:

> We must separate questions of fitness (or authority) from questions of discretion. The absence of explicit statutory instruction regarding the disqualification of a person with a

> criminal history allows for the candidate's fitness, but does not prohibit consideration of that history within the scope of administrative discretion granted to an appointing authority. Indeed, a candidate's criminal history is a relevant consideration, which the appointing authority is permitted and required to take into account before the appointment." (HCJ 6163/92, *Eizenberg v. the Minister of Construction and Housing*, IsrSC 47(2) 229, 256-257 (1993) ("*Eizenberg* case").

See also HCJ 4668/01, *Sarid v. Prime Minister*, IsrSC 56(2) 265 (2001) ("*Sarid* case"); HCJ 5853/07, *Emunah – National Religious Woman's Organization v. Prime Minister*, IsrSC 62(3) 445 (2007) ("*Emunah* case").

33. In the years following the *Deri* case and the first *Pinhasi* case, different parties have repeatedly requested that the Court follow the precedent of those cases and remove public officials from office. The Court has not always done so. For example, the Court held that the Prime Minister's decision not to remove Minister Tzahi Hanegbi from office was reasonable. Minister Hanegbi's conduct in the appointment of Advocate Roni Bar-On as Attorney General was inappropriate, but was not criminal. (HCJ 2533/97, *Movement for Quality Government in Israel v. The Prime Minister*, IsrSC 51(3) 46 (1997) ("The first *Hanegbi* case"); see also HCJ 1993/03, *Movement for Quality Government in Israel v. The Prime Minister*, IsrSC 57(6) 817 (2003), where a petition against Hanegbi's appointment and for his removal from office in light of his involvement in the affair mentioned above, as well as others, was rejected ("the second *Hanegbi* case"). Additionally, where a criminal investigation against a public official was conducted but before an indictment was filed, the Court preferred to wait and see whether an indictment indeed would be filed. Such were the circumstances, for instance, in the first *Zvi Bar* case, discussed above. This was also the case in HCJ 1400/06, *Movement for Quality Government in Israel v. The Acting Prime Minister* (March 6, 2006), where it was held that there was no room to intervene in a decision not to remove Minister Hanegbi from office due to the political appointments affair, because – among others – the Attorney General's decision whether to indict him was not final ("the third *Hanegbi* case").

There are additional examples, but I shall not belabor the point. All that matters is that even when this Court did not intervene in a decision to remove or not to remove a public official from office in the cases mentioned above, it avoided straying from the distinction between statutory fitness rules and exercise of discretion by a competent authority. In other words, these decisions flow from the premise that statutory fitness rules do not constitute an exhaustive list, and, under the proper circumstances, even cases that are outside the scope of the statutory conditions for disqualification will require ending the term of a public official. Therefore, the opinions mentioned above may be relevant as to whether intervention in an exercise of discretion in a

specific case is appropriate, but not to whether such discretion or authority to remove a public official from office despite statutory fitness themselves exist.

To conclude this part, it seems Justice Procaccia best described the existing jurisprudence regarding the distinction between statutory disqualification rules and discretion regarding removal from office in her opinion (panel of one) in CrimApp 5816/09, *The State of Israel v. Zaguri* (September 9, 2009) ("the *Zaguri* case"). She held:

> The view that a list of disqualifications to serving as a public official, detailed in a statute, should be seen as an exhaustive, all inclusive list was rejected in our case law. A string of decisions applying to different contexts held that the causes for disqualification of service for public officials as detailed in different statutes are not exhaustive and that there may be conditions and circumstances additional to the statutory causes for disqualification that render the ongoing service of a public official inconsistent with principles of public law, thus requiring ending the term of service. Disqualifying one from office due to general causes based in public law may rely on principles such as reasonableness, decency, and the duty to preserve the public's trust in its elected officials. These principles may also justify, in specific cases, ending the term of a public official that has been indicted for criminal offenses, even if the official has yet to be convicted and the offense has yet to be declared as one of moral turpitude.
>
> Thus, for instance, in the context of exercising the authority to appoint to public office, this Court ruled that in the absence of an explicit statutory cause for disqualification, a person is eligible for office. However, fitness for office does not negate the possibility or the need to consider different factors within the scope of administrative discretion afforded to the appointing authority that may disqualify the appointment (HCJ 6163/92, *Eizenberg v. The Minister of Construction and Housing*, IsrSC 47(2) 229, 258 (1993) ("*Eizenberg* case")). When a statute does not stipulate the causes for disqualification of appointing a candidate with a criminal history to serve as the member of a religious council, it was held that despite his conviction for an offense involving moral turpitude he was not disqualified as fit to be appointed as a member of a religious council, then fitness should be separated from discretion regarding the appointment. However, not disqualifying a candidate in terms of fitness does not inherently give rise to the appointment as proper, when the appointment is contingent upon the appointing authority exercising its discretion. A conviction for an offense of moral turpitude is a relevant consideration that any appointing

> authority must take into account. However, this consideration is neither exclusive nor determinative, and there may be additional considerations to take into account under the circumstances (HCJ 727/88, *Awad v. The Minister of Religious Affairs*, IsrSC 42(4) 487, 491 (1989); HCJ 58/68, *Shalit v. the Minister of Interior*, IsrSC 23(2) 477, 513 (1967)).
>
> This approach, that the statutory disqualification conditions are not an exhaustive list, was applied regarding both to public office appointments and to elected services (HCJ 5853/07, *Emunah – National Religious Woman's Organization v. The Prime Minister*, para. 24 (unreported, December 6, 2007)). Even in the absence of any statutory bar, an authorized appointing body should exercise discretion where the candidate's criminal history and the nature of that history are important and relevant considerations. However, the statutory fitness rules do reflect to some extent the standards aimed at one's normative threshold for taking or remaining in office (HCJ 1993/03, *Movement for Quality Government in Israel v. The Prime Minister*, IsrSC 57(6) 817, 851 (2003)).

And she continues:

> 30. The above principles generally apply to procedures of appointment or removal from office of state employees or public officials who have been criminally convicted, or when there is administrative evidence that they have committed a serious criminal offense. <u>These considerations may exist to the same extent even when an elected official has been indicted of serious offenses</u> (the *Pinhasi* case, p. 467-68) (emphasis added – Naor). As said in *Pinhasi*: "We are concerned with a governmental action of ending a term of office. A criminal offense is not necessary in order to provide a foundation for such action. The presumption of innocence, which all defendants enjoy, does not prevent ending the term of a government public official, so long as the deciding governmental authority is in possession of evidence which under the circumstances 'a reasonable person would see as holding evidentiary value and would trust . . ."
>
> The existence of administrative evidence about one's involvement in criminal offenses goes directly to the public office and the public's trust in the official, and may carry significant weight in terms of the continued realization of their right to serve in public position as an elected official.

> These principles apply not only to elected officials in central government, but also to elected officials in local government. In some such circumstances an indictment against a council member may lead to ending their term, even while they enjoy the presumption of innocence, see APA 3911/05 *Tzion Hava v. Azur Local Council* (unreported, October 23, 2006) (Justice Joubran). Indeed, "the public administration cannot stand if norms of public hygiene do not prevail, and the public's trust in elected officials will be lost unless these are honest and clean people" (then Deputy President Cheshin, EA 3/01, *In re Section 6 of Basic Law: The Knesset and In re Former Knesset Member Mr. Samuel Plato Sharon – His Right to be Elected to the Knesset*, IsrSC 56(5) 14 (2002)).

The present issue to be decided on a normative level is whether section 22 is an appropriate source for considering an indictment leading to the removal from office. We have ruled, as mentioned in the Judgment without reasons, in the affirmative.

34. The language of section 22, which considers "conduct unbecoming", is broad; many different cases may fall within it. In this spectrum of possibilities we must opt for the meaning that would realize the statute's objective (FH 40/80, *Koenig v. Cohen*, IsrSC 36(3) 701, 715 (1982)). "The test is not whether to interpret a statute broadly or narrowly, but to interpret it to fit the legislation's objective and goal" (HCJ 636/87, *Assaff v. The Minister of Interior*, IsrSC 43(1) 177, 181 (1988) ("the *Assaff* case"). The basis for section 22 of the Election and Tenure of Head and Deputy Heads Law is, on the one hand, the interest in guaranteeing "public hygiene", public trust, the rule of law and clean governance, and, on the other hand, protecting the status of a head of authority elected to office in personal elections, protecting the right to elect and to be elected, and ensuring the proper operation of local government. Given these competing interests, the case law has found that cause for removing a head of authority from office should be unusual and extraordinary conduct by the head of authority (the *Assaff* case, above).

Indeed, removing a head of authority from office for a light transgression ignores the importance of the right to elect and to be elected and the need to prevent a prevalence of removals or threats of removals of heads of authorities, since such looming threats significantly hampers the function of a local government system (see HCJ 299/88, *Abu Hijley v. The Head of Local Council of Jaljulia*, IsrSC 43(2) 862 (1988)). However, the authority to consider removal from office in the context of an indictment against a serving head of authority, though outside of the statutory disqualification criteria detailed above, still exists. According to the case law, the authority and the matter of how the discretion is exercised, are distinct questions (see and compare the second *Hanegbi* case, where Justice Rivlin distinguished fitness rules from discretion regarding removing a minister from office, though the

new Basic Law: The Government included a statutory disqualification provision under which a minister's term would end (pp. 833-34).)

The jurisprudence established by the case law to distinguish the fitness criteria was limited to cases surrounding the removal of a public official or an elected official that was appointed by virtue of an administrative decision rather than through elections. However, in our case, we are dealing with the removal of a public official who has been elected directly and personally to serve as a head of local authority. Still, in my view, this fact does not lead to a conclusion that the statutory fitness rules define the scope of section 22. The limits of this authority are set by the goal that underlies the authority. The goals that underlie a city council's authority to remove a head of authority from office are, as mentioned, interests of the rule of law, public trust, and clean governance. It is undeniable that in the context of an elected public official who was appointed through elections, the significance of the right to elect and to be elected is reinforced. However, I believe, that the right to be elected cannot stand as an obstacle to removing a head of authority from office. Indeed "[a]n elected official is not like a public servant. The former is elected by the people and is subject to their judgment. The latter is chosen by elected officials and is subject to the *elected officials'* judgment. But this difference does not mean that the elected public official stands to be judged by the people alone . . . The voter's judgment does not substitute the judgment of the law and may not replace it." (The first *Pihnasi* case, p. 470; see also the *Zaguri* case, para 29) The importance of the right to elect and to be elected could be reflected in the way the discretion is exercised and in weighing the competing rights and interests. This approach has been expressed in the opinions of this Court (the first and second *Zvi Bar* cases, CrimApp 2841/13, *Hadija v. The State of Israel*, para 28 of Justice Barak-Erez's judgment (May 6, 2013); the *Zaguri* case, above; HCJ 6749/12, *Hayat v. Mori*, para 14 of Justice Joubran's judgment (November 22, 2012); Justice Joubran's position in APA 3911/05, *Hava v. Azur Local Council* (October 23, 2006) ("The *Hava* case").

35. It was argued before us that mayors, who are public elected officials, should be treated as similarly situated to Knesset Members. We were referred to the second *Pinhasi* case here (HCJ 7367/97 *The Movement for Quality Government in Israel v. The Attorney General*, IsrSC 52(4) 547 (1998) ("the second *Pinhasi* case")). There, the Court held, though it was not even in dispute there, that even a criminal conviction for offenses of moral turpitude for which one had only received a suspended sentence of imprisonment, does not compromise the fitness of a Knesset Member from continuing to serve. It was held there that in the absence of explicit legislation there should be no distinction between one's fundamental fitness to serve as a Knesset Member under Basic Law: The Knesset, and fitness to fulfill duties of a Knesset Member position. This includes fitness to serve as chairperson of a Knesset committee. The Court distinguished there between the issue at hand in the first *Pinhasi* case, where it was decided that the Prime Minister must remove

Pinhasi from his position as deputy minister, from the matter of removing a Knesset Member from serving as chairperson of a committee, which is part of the duties of the Knesset Member position.

In my opinion, we must distinguish the ruling on the issue of Knesset Members' service in the Knesset and their service as chairpersons of committees, from the issue of heads of local authorities. Heads of local authorities indeed are public officials elected through direct elections, but they are not the same as Knesset Members. There are similarities between heads of local authorities and the Prime Minister, specifically, at times when the Prime Minister was elected in direct elections. The authority's council, headed by the mayor, functions – for the purposes of secondary legislation – like a mini-legislative authority, but the primary function of a local authority council is to serve as an executive authority. The mayors lead public municipal service. They make individual decisions, often decisions that heavily impact the pockets of voters and others. The decisions that mayors face put them in a sensitive spot, one that causes their clean governance to be vulnerable to damage. Moreover, the authority to remove mayors from office for conduct unbecoming is one of discretion (as granted by section 22, mentioned above), which is subject to judicial review. Recall, that this authority is not unlimited, but in light of its language and purpose, it may be used as a source for removing head of authority from office due to a serious pending indictment against them. There is no parallel legislation that would apply to Knesset Members or chairpersons of Knesset committees. I will note that, even in terms of a local authority council's function as a "mini" legislative authority, there are fundamental differences between it and the Knesset. The emphasis in regards to the local authority as a legislative authority is on the word "mini", because under Israeli law the local government is not based on an independent model, and the local authority is subordinate to the central government in a host of matters. The central government may dissolve the local authority's council – its "parliament" – and even appoint a committee to govern it. Indeed, even the local authority's legislative activity – passing secondary legislation – is subject to approval by the central government's executive authority (the Minister of Interior). Another illustration of the difference between the status of the Knesset and the status of a local council as legislative authorities is the immunity granted to a Knesset Member in light of their sensitive role of representation in the national parliament; such immunity does not apply to members of local authorities' councils. The fundamental difference between the Knesset and a council of a local authority is also reflected in the scope of judicial review: while the Court exercises great restraint in intervening in decisions by the Knesset, this restraint stems from the unique status the Knesset holds among the three authorities of government. This self-restraint is special and does not apply to other governmental bodies, such as municipal councils (HCJ 953/87, *Poraz v. the Mayor of Tel-Aviv-Yaffo*, IsrSC 42(2) 309, 321 (1998) (the *Poraz* case)). At the end of the day, the fact that a head of a local authority is a public elected

official is insufficient to prevent the Court from intervening in a decision not to remove the head of a local authority from office.

In the *Deri* and the first *Pinhasi* cases, which I discussed above, the Court addressed removing from office public officials that had served in an executive public capacity as a result of an administrative decision. In our matter we are concerned with public service as a result of direct elections. Under these circumstances, the weight of the right to elect and to be elected, against other relevant considerations and primarily public trust in government authorities, may be even greater. However, sadly, the phenomenon of indictments against heads of authorities has very much so been proliferated. At the end of the day, accounting for considerations of rule of law, clean governance, public trust in its elected officials, and that the differentiation in treatment of the mayors and Knesset Members, it seems we should apply standards similarly to those in the *Deri-Pinhasi* cases, even to elected public officials in local authorities.

36. Again, fitness is a separate consideration from discretion. However, similar to the decision in the second *Hanegbi* case, there is a link between the limits of fitness and the exercise of discretion:

> . . . The limits of fitness as defined by the constituting authority are not irrelevant to examining the Prime Minister's discretion. The farther away we move from the statutory limits, the more difficult it may become to find a reason and justification to intervene in the Prime-Minister's discretion under his authority. Indeed, if the legislature determined that convicting a minister of an offense of moral turpitude requires a removal from office, the Court would not easily hold that, where a minister was acquitted, or was not even prosecuted, removal from office is similarly required.

Our case does not concern ministers of government but heads of local authorities. The fitness rules were not established in Basic Laws, but in "regular" legislation. Still, I accept that these statutes are also relevant to the way administrative authority applied its discretion in terms of removing a head of authority from office. It is of course possible to remove a mayor from office for behavior that is not criminal, if it is extreme and uncommon behavior. However, where a less serious indictment is concerned, usually the head of authority would not be removed from office. Serious offenses or offenses of corruption are different.

Therefore, there is a discretionary power for the local authority's council to remove from office a head of authority involved in criminal proceedings, even where the statutory rules of disqualification do not apply. We turn to examine the way this discretion should be exercised. I will review the spectrum of

considerations that ought to be accounted for, without the intention to exhaust such considerations.

37. I have discussed that in a number of decisions we held that, under the appropriate circumstances, a criminally indicted public official should not continue to serve in public office or position, should the administrative evidence gathered warrant as such. As I said, when the city council considers whether to remove a criminally indicted mayor from office a variety of considerations should be weighed. The above distinction between fitness and removal from office should be considered, as should the relationship between discretion in removal from office and the scope and limits of statutory fitness. The severity of the offenses of which a head of authority is accused should also be accounted for. In this context, the value the offense is designed to protect should be considered with special severity associated with offenses that have protected values regarding clean governance, public trust in government authorities, and ensuring the integrity of public servants at their core. The duration and scope of the offenses, the number of counts in the indictment, and the time that has elapsed since the offenses were allegedly committed should all be considered as well. Another important consideration is the link between the offenses of which the head of authority was accused, and the authorities accorded to him and his status as head of authority. In other words, the council must address two questions: was the public office used in facilitating the offense, and was there moral turpitude caused by the link between the office of the head of authority and the offense? In the matter of *Sarid*, this Court explained that when there is a direct and clear link between the offense and the office of the elected official, it might be possible to conclude that a criminal history would disqualify the official from serving in certain public offices:

> And so, for instance, when a direct and clear connection exists between the offenses the candidate committed and the office he is expected to take, the conclusion that his criminal past excludes him entirely from taking that particular office is possible. Under such circumstances, considerations that may have been taken into account as supporting the appointment had he been a candidate for a different position (such as the time elapsed since the commitment of the offenses, contrition, the quality of service during the time since the commitment of the offense and professional skills) would not avail, and the candidate would be disqualified. In establishing such connections, not only the type of offenses and the circumstances for their commitment, not only should the office in which the candidate committed the offenses and the office he is now intended for be considered, but also the level of moral turpitude associated with the candidate in light of the offenses must be addressed. That is, the existence of a link that may amount to disqualifying the candidate is not merely an outcome of how his

> criminal past may impact his professional ability to perform in his new office, but also his moral fitness to perform. When such a link exists between a candidate's criminal history and the office for which he is intended, it is legally appropriate to disqualify his candidacy, unless there is a real and urgent emergency that requires his appointment as he is the single qualified candidate.

In our case, there is no conviction, but there is an indictment. Additionally, we are not concerned with appointment but with removal from office – still the considerations are similar. There may be serious offenses, such as murder or rape, God forbid, where, even in the absence of a connection to the office, continued service must not be permissible. Therefore, there is no mandatory connection between the office and the decision to remove from office.

38. Another consideration is that regarding the presumption of innocence. Each person enjoys the presumption of innocence so long as they have not been found guilty. A person enjoying the presumption of innocence cannot be subject to criminal sanctions. I have no doubt that removal from office harms a serving head of a local authority or a re-elected head of a local authority both of whom maintain their innocence. However, as a general rule, balancing other concerns for clean governance, rule of law, and the duty to protect the public's trust, the presumption of innocence is outweighed in the context of appointment to or removal from office. As ruled by Justice Barak as early as the first *Pinhasi* case:

> Indeed, the weight of the consideration regarding the public's trust of public authorities where a public official was convicted of or pled guilty to the offense is not the same as the weight of this consideration in terms of a mere indictment and when the defendant maintains innocence. However, this is not a determinative consideration. We are concerned with governmental action of removal from office. To justify such action, a criminal conviction is unnecessary. The presumption of innocence – enjoyed by each and every defendant – does not bar the termination of a public official's service as long as the deciding government authority is in possession of evidence, which, in light of its circumstances, is such that "any reasonable person would see as holding evidentiary value and would trust . . ." (President Agranat in HCJ 442/71, *Lansky v. the Minister of Internal Affairs*, [25] page 357). President Shamgar discussed this, while noting that administrative findings may be founded on " . . . material whose evidentiary value is such that reasonable people would see sufficient foundation for the conclusion regarding the character and conduct of those in question . . ." (EA 2/84,3 *Neiman v. Chairman of the Central Elections Committee for the 11th*

Knesset; *Avneri v. Chairman of the Central Elections Committee for the 11th Knesset* [26], on page 249). And, in this similar vein, Justice Zusman noted: " . . . the mentioned rule that places one as innocent in the absence of evidence to the contrary, does not establish – and I am not aware of any other legal rule that does – that an administrative authority required to consider one's past is not authorized to find that person to have had a criminal history unless the person was convicted by a court . . . Shall we rule against the Commissioner's refusal to appoint a candidate as a state employee when the refusal is based on evidence that reasonably proves a criminal history, because this evidence does not include a conviction? Let us assume that the moving party here wishes to be admitted into the public service and the Commissioner refused for such a reason, would we compel the Commissioner to hire that person and rule against refusal for lack of a conviction? . . . Had the authority to decide on one's history been granted to an administrative body that has no power to swear in witnesses or take evidence in the way gathered by a court of law, it must suffice that the administrative body's decision is based on evidence that may persuade a reasonable person of the moving party's history, even had the evidence been inadmissible in court and even had their weight been lacking in a judicial proceeding." (HCJ 94/62, *Gold v. Minister of Interior* [27], pp 1856-1857.)

I too addressed this in the *Genosar* case [1], on page 268: " . . . for the purposes of the reasonableness of a decision by the appointing government authority, the determinative factor is the candidate's alleged commitment of the criminal acts. A criminal conviction is, of course, appropriate "proof", but there may be other means of proof… The rule that applies here is the 'administrative evidence rule.'

In the latter case, the matter of appointing one for governmental office was at issue. In the case at hand, we are concerned with terminating one's office. The two are significantly different. However, the weight of this difference is light. (pages 467-469.)

These words apply equally to our case, too. We see that it has long been under the jurisprudence of this Court that there is no conflict between the presumption of innocence in criminal proceedings and the administrative finding, on the basis of administrative evidence, that one was involved in criminal activity. This administrative evidence does not constitute a conviction. It does not turn an innocent person into a convicted one. However,

such evidence may lead, in the right circumstances, to an administrative conclusion against the continued service of an elected public official.

An indictment constitutes administrative evidence for the criminal activity of which the mayor is accused. This has also already been determined in the first *Pinhasi* case (pp. 467-469, see also the second *Hanegbi* case, para 22 of Justice Rivlin's judgment, as well as para 31 of Justice Cheshin's dissention opinion in that case in terms of an indictment being a "vessel revealing its content"; *Zaguri*, paras 30-31.) As explained, an indictment does not automatically lead to the disqualification of office. There may be instances where an indictment does not necessitate removal of a minister from office, which always depends on the entirety of relevant circumstance (third *Hanegbi* case, para 12.)

An additional consideration that relates to our matter, upon which I wish to elaborate somewhat, is the closeness in timing between the election date and the date of the decision whether to remove a head of authority from office. In the third *Hanegbi* case, the Court stated that when the question whether to remove an elected public official from office is being considered, the fact that the elections are fast approaching must also be considered, insofar that the current term of that elected official would shortly be coming to a close. We quoted the words of Justice Rivlin, who found there that "we believe, that precisely at this time, coming up to elections, the Court too should exercise restraint. This is a politically sensitive time and the Court must examine the possible ramifications of its rulings on the public opinion and mood" (para 17.) It should be noted that, in the third *Hanegbi* case, the consideration of closeness to elections was not the central consideration, as in that matter Minister Hanegbi had not yet been indicted. In any event, in my opinion, the consideration of closeness to the elections is relevant, but its weight depends on the circumstances of the case at hand. Under circumstances where there is indeed reason to remove an elected public official from office in light of an indictment at the beginning of or during service – when there is still a substantial amount of time until the next elections – the considerations that warrant removal from office require the termination of office because they may not be compromised for a long period of time. Should the issue of removal from office come up soon before an elections period, I believe there should be more weight given to whether the elected public official intends on running as candidate in the coming elections. If there is no intention of running, and a binding declaration to that effect is given, the practical implication of terminating service only shortly before the elections, in which that official shall not participate is reduced, as, in any event, the elections are near, so that the close timeline may tip the scale toward not exercising the authority to remove from office. In contrast, if the elected official does intend to participate in the elections, or, at the very least, does not declare not to do so, similarly to the case of an indictment filed early in a term or during it, the closeness to elections becomes less significant. Among others, the length of the potential term must be considered, as it is not necessarily the same as the

time left until the elections. This is how the Cohen Commission for the Sabra and Shatila Incidents operated when it decided not to recommend the termination of then Chief of General Staff Refael Eitan, despite finding him responsible, because he was about to conclude his position anyway. And this is what we did in the second *Tzvi Bar* case. In that matter, the Mayor of Ramat-Gan, Tzvi Bar, declared, according to the panel's recommendation, as a binding declaration that he would abstain from running in the coming elections. Additionally, the remainder of his time in office was short. In those circumstances, the practical implication of immediate termination was insignificant and it was possible to avoid requiring immediate removal from office. The considerations we presented here, including the length of the expected term, therefore comport with our recommendation that Tzvi Bar agrees not to run once more. In our Judgment without Reasons, we explicitly note that the decisions made were extremely unreasonable, especially in light of the fact that the elections for local authorities were near, because of these mayors' declared intentions to run again.

39. I have listed a set of considerations which, weighed against each other in the particular circumstances of each case, would result in a determination as to whether a head of local authority ought to be removed from office. As I have said before, this is not an exhaustive list of factors. The issue of removing a head of local authority from office is still developing. We must examine the entirety of the circumstances of each and every case. This examination, in future cases, may result in a conclusion that there are additional factors that tip the scale in one direction or another. It is precisely because, as it is discretionary, the entirety of the circumstances of the situation at hand must always be considered. However, and this must be said clearly, alleged corruption is significantly weighty in my view, and its weight may surpass all other factors.

The Range of Intervention in A Local Authority Council's Discretion

40. Recall that the Law explicitly stipulates when a sitting mayor is automatically removed from office. Additionally, the law grants a local council discretion as to whether conduct unbecoming of a head of authority, prior to a criminal conviction of moral turpitude, is sufficiently egregious to warrant removal from office. The local authority council's discretion to remove from office is subject to the standards of administrative law and to judicial review. This is undisputed.

41. However, the question of the scope of this judicial review over a local authority council's decision in the matter still remains. As a rule, the scope of judicial review derives from the characteristics of the administrative authority subject to review and of the decision being reviewed (see, the second *Hanegbi* case, pp. 839-840 and the sources cited therein; see also HCJ 3975/95, *Kaniel v. The Government of Israel*, IsrSC 53(5) 459,493 (1999)).

A local authority's council is an elected body, which holds executive-governmental powers. Moreover, the decisions made by an authority's council are, at times, decisions of a political nature. Yet these characteristics do not make decisions by a local authority's council non-justiciable, nor do they require in each and every case unique restraint from a court reviewing them. I shall explain.

Judicial review over decisions made by a local authority's council, including a decision to remove (or not to remove) a mayor from office, is not like review of decisions by other government authorities (for more on the scope of review of government authorities see the second *Hanegbi* case, pp. 834-839.) As it was decided in the *Poraz* case, while the Court exercises great restraint in intervening in the Knesset's decisions, a restraint that stems from the Knesset's unique position among the three authorities of government, such restraint is particular to the Knesset and must not be exercised in regards to other governmental bodies such as a city council. Second, it was ruled before that political decisions of a municipality's council are not immune to judicial review:

> The political background of a governmental decision does not make it immune to judicial review. Any governmental decision, taken according to the law, is subject to judicial review as to its legality. The Court examines the legality of each decision – political or otherwise – under the legal tests and standards… Politics, too, is subject to the rule of law, as are politicians. It is true that the Court exercises great restraint insofar that decisions by the Knesset are concerned. This restraint stems from the Knesset's unique position among the three authorities of government (HCJ 652/81). Such restraint is particular to the Knesset and must not be exercised in regards to other governmental bodies such as a city council. Indeed, a decision by a municipality's council is justiciable, both on the norm level (i.e. there is a legal rule in terms of which the decision's legality would be examined) and on the institutional level (i.e. this Court would examine the decision's legality,) and an argument of non-justiciability is doomed to be rejected (There, para 13 of Justice Barak's opinion).

(See also, HCJ 11298/03, *Movement for Quality Government in Israel v. The Knesset Committee*, IsrSC 59(5) 865 (2005); HCJ 4733/94, *Naot v. The City Council of Haifa*, IsrSC 49(5) 111 (1996)).

42. Finally, a local authority's council is a collegial-political body. Generally, the local authority's council is authorized to account for political and coalition-based factors in its decisions (APA 584/11, *The City Council of Nazareth Illit v. Sposnik* (August 5, 2012), para 11 of my colleague Justice Zilbertal's judgment). When the nature of the decision being reviewed is primarily

political, the Court will take extra precaution, while weighing the fact that the council is a collegial-political body (there, paras 11-12; see also the *Emunah* case para 6 of my colleague Justice Grunis' judgment). However, in my view, a decision regarding the removal of a head of authority from office under section 22 is not a primarily political decision, indeed because of such a decision political or coalition-based considerations should not account for much. Recall, that the authority's council holds the power to remove a head of authority from office only when his behavior is unbecoming. In this framework, the dominant factors that the council must consider are clean governance, rule of law and public trust, as we have detailed above. In these circumstances, applying judicial review for a decision by a local municipality's council does not constitute intervention in the "games of politics," but intervention in a decision that has clear moral and legal aspects. It cannot be said, in my opinion, that in applying judicial review over such a decision the Court must exercise any particular restraint (compare *Sposnik*).

In conclusion, it must be emphasized: politicians, too, must consider substantive factors. A politician must ask himself whether, in the absence of any political interest in either direction, as a civilian fulfilling a public duty, he would have accepted that a person who conducted themselves as described in an indictment of a candidate from his faction would remain in office. When the answer is in the negative, he must support removal from office. Morality and clean governance cannot be taken apart because of political considerations. We must aspire to votes, even by politicians, being "clean" votes that do not disgrace the voter.

We have discussed the principles that apply in the first situation – a decision by a local authority's council as to whether to remove a head of local authority from office due to an indictment filed during term in office. As to the application of these principles in the two concrete cases at hand, I elaborate further below.

The Second Situation: The Issue of Preventing a Candidate from Running in Elections

43. So far, as mentioned, we have discussed the principles that apply to a decision of a local authority's council as to whether to remove a head of local authority from office. Now we turn to the second situation, which examines whether a person who has been indicted for serious offenses can be barred from running in elections for head of local authority. This issue may arise when considering a candidate who is the current head of authority at the time or when considering a candidate who is not serving as head of authority, but wishes to run for such office, despite a serious pending indictment against them. I will say now: from a public perspective the primary factors for removing a sitting head of authority from office should apply also to this office's candidacy phase. In our judgment-without-reasons we noted unanimously, that, from a public perspective it is inappropriate for the two mayors to run in the coming elections. However, we clarified in that decision that, although we do not

believe their candidacies to be appropriate, it is impossible from a legal standpoint to prevent them from running. I shall now explain.

44. The law regulates the conditions for fitness when running for head of local authority in local elections. Section 4 of the Election and Tenure of Head and Deputy Heads Law sets the fitness rules that make one eligible to become a candidate for head of authority. The section stipulates:

> The Right to Elect and to Be Elected:
>
> 4. (a) Whomever is eligible to vote in elections for council (hereinafter: "voter") is eligible to vote in elections for head of authority.
>
> (b) Subject to sub-sections (c) and (d), a citizen of Israel who may be elected as council member and is at the top of the list of candidates for the council may be elected head of authority.
>
> (c) An officer in the Israeli Defense Forces who is ranked as Major General and above as well as a police officer ranked as Superintendent and above may not be elected as head of authority unless their service as such officers had ended at least a hundred days before the elections.
>
> (d) Whoever served as head of local authority and their term ended under section 20(e) [a conviction for an offense of moral turpitude], for an offense committed during their term as head of authority or related to their election as head of authority, shall not be eligible to be elected as head of authority in the first elections held at that same local authority after their term has ended.

45. An additional condition is that the candidate is eligible to be elected as council member. Section 7(a) of the Local Authorities Elections Law details several, primarily technical, conditions for a candidate's eligibility for elections as a city council member. Section 7(b), which we quoted above, adds that a person who has been sentenced in a final verdict for a period of over three months actual imprisonment, and that on the day of submitting the candidates' list seven years have yet to elapse from the day the imprisonment ended, is also ineligible to be elected as council member unless the Chairman of the Central Elections Committee found that the circumstances surrounding the offense for which the candidate was convicted do not include those of moral turpitude.

46. Under these conditions, Gapso and Rochenberger are eligible to participate in the elections as candidates. We discussed above in depth that the fitness rules for service are not the end all be all, and that, occasionally, there is no choice but to remove a candidate from office. However, it should be examined

whether anyone is authorized by law not to approve a legally eligible candidate's candidacy, when the candidate has been criminally indicted. Should examining all the relevant regulations reveal that this authority does not exist then no authority has the power to prevent a candidate from running.

Discretion of Legally Authorized Bodies in terms of Elections

47. The Knesset Elections Law [Combined Version] 1969 (hereinafter: "Knesset Elections Law") and the Local Authorities Elections Law authorize certain bodies to act in terms of managing elections in municipalities and local councils (in regards to elections for heads of these local authorities , see section 7(b) of the Election and Tenure of Head and Deputy Heads Law which subjects them, with the necessary changes, to the provisions of the Local Authorities Elections Law; in regards of regional councils see the Regional Councils Order and the Heads of Regional Councils Law.) These bodies include the Chairman of the Central Elections Committee (who is elected under section 17 of the Knesset Elections Law; section 1 of the Local Authorities Elections Law), the elections director (the elections director is appointed by the Minister of Interior to serve as director of elections in a local authority; section 29 of the Local Authorities Elections Law) and the Minister of Interior.

48. These statutes do not establish a discretional power to any of the mentioned bodies to bar an eligible candidate from running in elections. The elections director examines fitness of a candidate and is limited to this purpose; however, he is not the proper body to determine whether any candidate's candidacy is lawful or not (compare, the *Hayat* case, para 17 of Justice Joubran's judgment). Still, that the bodies responsible for elections were not granted a discretionary power is not the bottom line. The arguments in the petitions before us raise other possibilities – such as, preventing a candidate from running, and ordering the bodies authorized with nominating a candidate not to nominate them. We shall explore these options.

May A Person Be Barred from Running for Elections as Mayor?

49. Several of the Petitioners in the Petitions before us have argued as mentioned that we must bar the mayors themselves from running in the election or require them to resign from their candidacies (see section 6(a) of the Election and Tenure of Head and Deputy Heads Law, which regulates the issue of a head of authority's resignation). I will say explicitly: the idea was appealing to me, and I indeed mentioned it – in *obiter dicta* – as a possibility to be considered. Ultimately, I concluded that, legally, one cannot be barred from running for mayor where there is not an automatic disqualification rule.

According to some of the Petitioners, when a mayor is removed from office there is little point in him running in the next elections. They assert this because, should the mayor be elected, the local authority's council would be

required to remove the mayor once again (this argument applies to the third situation, which will be discussed below). I will not deny that this argument makes a lot of sense. Removing a head of authority from office immediately after elections, in circumstances where this outcome is almost known from the start in light of the head of authority's previous removal, does not comply with interests of efficiency and conserving public resource, and might even be seen as inconsistent.

50. The fact that a head of authority that had been removed from office would be entitled to participate in the next elections after termination is not satisfactory from a value standpoint, either. We discussed a similar difficulty in HCJ 2658/06, *Hazima v. Mishlav* (April 3, 2006) (hereinafter: "*Hazima* case".) There, we heard the matter of the head of the local council of Abu-Snan, Mr. Eli Hazima. His term ended due to his conviction of an offense of moral turpitude (under section 20(e) of the Election and Tenure of Head and Deputy Heads Law). Still, Hazima registered as a candidate in the special elections scheduled because his term had ended. The Court of Administrative Affairs disqualified Hazima's candidacy. Hazima appealed to this Court, but during the proceedings agreed to remove his candidacy. Justice Rivlin considered whether the High Court of Justice had discretion to intervene in a decision by the Court of Administrative Affairs and held that, in that case, such intervention was unwarranted. The rationales for this were discomfort with Hazima's wishes to present himself as a candidate for public vote after his service ended due to a criminal conviction and the fact that Hazima declared his intention to remove his candidacy:

> We considered whether such considerations [that justify the HCJ's intervention in a judicial decision which was lawfully determined to be final] indeed do not exist here because of the difficult outcome that stems from the Court of Administrative Affairs' decision, mainly because this outcome infringes the right to elect and to be elected. However, in this case, the conclusion we reached is based not only on the discomfort with finding in favor of Mr. Hazima's Petition, as he wishes to participate in the special elections held, but because of his conviction of an offense of moral turpitude. This is an important consideration in itself and it does not comport with our duty to be strict with those who fail to uphold clean governance. This consideration does not stand alone in this case: our conclusion is additionally supported by the fact that Mr. Hazima himself expressed to us during the hearing his willingness to accept the proposal for him to remove his candidacy for head of the council in the coming special elections, and that the elections would be delayed for a period that would allow nominating a different candidate in his stead.

51. I joined in Justice Rivlin's judgment and added:

> Hazima's consent to remove his candidacy makes redundant the need to determine whether there was no other way to prevent the difficult outcome of him running again in the special elections scheduled due to his conviction. It is possible – though this possibility was not raised in the case before us – occasionally, under the appropriate circumstances, to require a candidate to remove his own candidacy (compare HCJ 1262/06, *Movement for Quality Government in Israel v. Shas Faction and others*, para. 33 to Justice Barak's judgment).

52. In the judgment to which I referred at the end of the quoted part above, and which I cite below as the *Avidan* case, President Barak discussed public authorities' duties in the Knesset in terms of removing the deputy chairman of the Central Elections Committee, Mr. Yehuda Avidan, from office due to his conviction of breach of trust. The President further held that:

> The various duties we detailed – and the need to balance between them in our decision – apply also to his [Mr. Yehuda Avidan – Naor] own considerations as to whether to go on in his service . . . or not. He should have resigned from his membership in the Elections Committee when he was convicted . . . (para. 33.)

53. As mentioned above, though the idea of ordering – under appropriate circumstances – a candidate no to run or to remove his candidacy is appealing to me, I have concluded that it is not possible to do so in the case before us.

Recall that the case at hand does not concern, as the *Avidan* case did, a deputy chairman of the Knesset's Central Elections Committee who is, as generally agreed, a person fulfilling a statutory public role, but candidates for heads of local authorities. When a head of local authority acts as a candidate for elections, he is not acting – for the purposes of the elections – within the capacity of an "elected public official" but within the capacity of a "candidate." An "external" candidate, who is not a sitting head of authority, has not the capacity of a sitting head of authority, but only the capacity of a candidate in elections. Within the capacity of a candidate, can one be barred from running in the elections? I have contemplated this quite a bit. Though I would be glad to reach a different outcome, I have concluded, as mentioned, that there is no other choice, legally, than to answer this in the negative.

I believe a candidate, within such capacity, does not constitute a public authority and is not subject, for the purposes of candidacy, to this Court's review or that of the Court of Administrative Affairs. This candidate is not considered "other persons occupying public office under any statute" (see the definition of "authority" in section 2 of the Courts of Administrative Affairs Law, 5770-2000; section 15(d)(2) of Basic Law: The Judiciary; as for the phrase: "other persons occupying public office under any statute" as a general

definition for an administrative authority, see Yitzhak Zamir THE ADMINISTRATIVE AUTHORITY, Vol. 1, 361, FN 1 (2nd ed., 2010)). Indeed, candidacy for a local authority is a statutorily regulated "status," and which can apply to a person only when the statutory conditions exist (see and compare the issue of candidacy being a "status" for the purpose of the criminal offense of bribery: CA 3575/99, *Deri v. the State of Israel*, IsrSC 54(2) 721, 771-772 (2000)). Though the candidate acts within the context of elections, which is clearly a public context, however – in my opinion – it is difficult to determine that the "players" acting within this public context hold a statutory public office. The role of a candidate is not a role generally encompassed within the purview of government authorities or local authorities (see and compare HCJ 160/72, *Sherbat Brothers, Construction Company Ltd. v. The Society for the Elderly in the Valley Regions of Israel*, IsrSC 27(1) 620 (1973)), and they are not even considered to be providing a service to the public. Moreover, a candidate has no statutory authority to carry out any acts (see and compare HCJ 4363/00, *Representatives of Poriyah Illit v. Minister of Education*, IsrSC 56(4) 203 (2002)). Indeed, one becomes a candidate if they meet the conditions detailed in statute. However, these conditions do not confer upon them duties and powers. All they do is permit participation in the elections. The candidate, in this capacity, does not exercise any authority. Therefore, there is difficulty in holding that a "candidate" in elections holds a statutorily proscribed public office. As a result, the candidate is not, for the purposes of candidacy, considered a public authority and a court, even if the High Court of Justice (or the Court of Administrative Affairs), has no power to apply judicial review over a decision made by a person in his capacity as a candidate for elections, even when this decision is not appropriate.

Can Political Factions Be Required Not to Nominate An Indicted Candidate?

54. Recall that the parties in some of the proceedings before us request that we bar candidacy in another way – restraining orders directed at the political factions who have nominated the two mayors as candidates. Nominating candidates for mayor is regulated in section 5(a) of the Election and Tenure of Head and Deputy Heads Law. The section stipulates:

> Nominating a candidate:
>
> 5. (a) Any group of 750 voters or of 3 percent of the registered voters on the relevant date, under section 16(a) of the Local Authorities Elections Law, according to the fewer thereof, any one faction or more of the Knesset, any party as defined in the Local Authorities Elections Law, or another faction or more of the incumbent council approved under section 25(a) of the Local Authorities Elections Law, may nominate a candidate for head of authority a person entitled to be elected for head of authority under section 4(b) . . ."

I will remind here that, though a candidate may resign under section 6(a) of the above Law, there is no parallel provision authorizing a nominator to remove the candidate. However, it should be noted, that at the time that our judgment-without-reasons was handed down, the issue of whether the authorized nominator may also be barred from nominating a candidate who has been indicted was a relevant question.

55. Section 5(a) details the various bodies and persons who may nominate a candidate. Are these persons or political factions considered a public entity or people serving a statutory role? Just as I found it difficult to answer this in the affirmative in terms of the candidate itself, I find it similarly difficult to reply in the affirmative in terms of the nominators. The role of nominating candidates is to present candidates (and at times, when the position is available due to a resignation or death of a candidate, to propose an alternative candidate). I am hard pressed to view a group of 750 people who are tied to each other only vis-à-vis their combined nomination of a candidate as "persons occupying a role under any statute." The status of political factions in the context of nominating candidates is precisely as that of the 750 people who have together presented a candidate. The nominators, like the nominees, do not occupy a public office under any statute.

56. At the end of the day, my conclusion is that it is legally impossible to intervene in the matter of a candidate's decision to run, or the nominators' decision to present any candidate. It seems that, in terms of nominating a candidate for local authorities, the Legislature privileged the basic principle regarding the right to vote and to be elected. As held by Justice Or:

> It is precedent . . . that the right to elect and to be elected, both to the Legislative authority and to local authorities, is a basic right. As observed by (then) Justice Barak in HCJ 753/87, *Burstein and Others v. the Minister of Interior and Others* . . . , on page 474:
>
> "The right to vote and to be elected to local government is one of the unwritten basic rights, according to which all statutes must be interpreted."
>
> The disqualification of a council head or an elected city council member is an extreme step that severely infringes the fundamental right. This infringement must be interpreted, when possible, to comply with protecting the basic right. (HCJ 3090/97, *Cohen v. Southern District Director, Ministry of Interior*, IsrSC 52(2) 721, 735-736, (1998)).

Similarly, this Court held in *Hayat*, albeit beyond the necessary scope, that in addition to the existing statutory disqualification rules of service, there is no provision that explicitly denies one's right to be elected as head of regional

council. In this context, too, the Court reiterated the importance of the right to elect and to be elected (there, in para 17).

Still, even the right to elect and to be elected, as significant as it is, must at times yield to other considerations, and it is not an absolute right (see and compare HCJ 5663/13, *Paz v. Ministry of Interior* (September 9, 2013); HCJ 6057/07, *Hajj Yihye v. Minister of Interior*, Para. 10 of my colleague Justice Hayut's judgment (December 23, 2007)).

As mentioned above, the outcome where a candidacy in elections that may ultimately become "redundant" cannot be barred is a difficult one. This outcome is not desirable, both on a practical level and on a value level. However, in my opinion, the alternative where the Court will be satisfied with merely lecturing a candidate without having any impact on the candidate is even worse. Therefore the Court must work to bridge the gap between the given and the desirable, within the boundaries of the law. The issue of whether a candidacy must be prevented in such a case must, to me, be resolved by appropriate legislation. In this regard, I will remind, that after our decision in *Hazima* was given, the Legislature added section 4(d) to the Election and Tenure of Head and Deputy Heads Law, as quoted above, which mandates that a person who served as head of local authority and but was convicted for an offense of moral turpitude (under section 20(e) of the Law), and had to terminate his service as a result, shall not be entitled to be elected as head of authority in the first elections in that local authority after the term has ended. Without setting anything in stone, it is possible that such solution is in order here as well, in terms of a mayor who has been removed from office under section 22 of the Law (while considering, of course, the option of an acquittal during the elections period) (compare the Municipalities bill, 5777-2007, Government Bills, 360.)

The Third Situation: The Issue of Removing a Head of Authority Indicted Before the Elections

57. We have so far discussed the two first situations. In light of the fact that we cannot prevent, through a judicial order, one from running for elections (the second situation), the issue of the third situation arises: the service of a head of local authority or elected "external" candidate while an indictment against them is already pending. The question in terms of the third situation is this: is there room, despite the voter's will as reflected in the elections, while an indictment was pending, to consider whether to remove from office whomever the public chose, under section 22 of the Election and Tenure of Head and Deputy Heads Law? As I already mentioned, in our case, the question of the third situation is premature. Still, in light of the close timing of the elections, the Court should pronounce, even generally, on this matter. According to the language of the statute, nothing prevents applying section 22 even after the elections. The question this situation presents is the issue of honoring the voter's wishes. Once the voter has spoken, is this the end-all-be-all, and the

voter's decision must be accepted without second-guessing or further consideration? My answer is in the negative.

I have discussed above the importance of the right to elect and to be elected. In my view, the will of the voter is one of the considerations that must be accounted for in the third situation, but the will of the voter cannot be a super-consideration which trumps all other considerations. The will of the voter can be one of several relevant factors.

58. In support of the position that the will of the voter must be preferred, we were referred to the decision given in CSA 4123/95, *Or v. the State of Israel, Civil Service Commissioner*, IsrSC 49(5) 184 (1996) ("*Or* case"). This is a decision given by one Justice – where Justice Zamir rejected an appeal of a conviction of an appointed (as opposed to elected) state employee of the disciplinary offense due to a conviction of a criminal offense of moral turpitude. The criminal offense upon which the disciplinary offense was based was an offense of fraud and breach of trust. While discussing the factors that may inform a determination as to whether a particular offense committed under certain circumstances is one of moral turpitude, and in terms of considering the context of the offense, Justice Zamir presented this example, as follows:

> Indeed, there should be a distinction between, for instance, the question of whether a person who has been elected for public office in a local authority should be disqualified due to a criminal conviction and the question of whether a state employee should be penalized through a disciplinary proceeding due to a criminal conviction. In the case of electing a person for public office, it cannot be ignored that that person had been elected by the public to represent it, even with awareness of the offense for which that person was convicted. Disqualification, after elections, is an infringement of the right to vote, in addition to the severe infringement of the right to be elected. This is a harsh and serious outcome. It, therefore, requires extreme caution. The court must consider, among other things, the reality of life, which may at time lead the public to wish to be represented by a person who is not a role model of proper behavior. Therefore the moral turpitude that brings upon the disqualification of an elected public official must be clear and obvious. For more on this see the split between the justices in HCJ 436/66 . . ." (There, pages 190-191.)

These words by Justice Zamir are not a case law according to which it is not possible to remove an elected official from office who had already been accused or convicted of a criminal offense while running for office; rather, Justice Zamir's words were, as mentioned above, written as a single Justice decision, in a case that did not at all deal with an elected official, and they

must be understood within their context. His words on the necessary caution in light of the right to elect and to be elected and the need for "clear and obvious" moral turpitude must be understood against the background of the split in opinions from the justices that Justice Zamir referred to – HCJ 436/66, *Ben Aharon v. the Head of the Local Authority, Pardessiya*, IsrSC 21(1) 561 (1967) ("*Pardessiya* case"). The split in the justices' opinions there revolved around the question of whether there was or was not room to intervene in the decision to remove a local council's members from office in light of their convictions under section 6 of the Defamation (Prohibition) Law 5725-1965, for expressions made in a council meeting about the councils' deputy chairman in regards to a transaction he signed. In other words, the conclusion that moral turpitude must be "clear and obvious" was based on a conviction that relatively is not highly egregious and also involves considerations of free political expression in the context of council discussions. In both the *Pardessiya* and the *Or* matters, the requirement for "clear and obvious" moral turpitude was not mentioned in relation to offenses that indicated severe corruption or a serious flaw in clean governance.

In support of the mayors' position, the *Hava* case was also mentioned. The Court of Administrative Affairs ruled there that there was no place to intervene in the head of local council's decision to remove a council member from office. This Court, sitting as a court of administrative appeals, rejected the local council's member's appeal. In his opinion, Justice Joubran held that the removal from office was justified both because the local council's member did not reside in the council's jurisdiction, and because he was indicted for serious construction offenses. My colleague Justice Grunis believed that the appeal should be upheld. In Justice Grunis' view, the reason given in the head of the council's letter was the lack of residence within the jurisdiction of the council rather than the indictment. Still, Justice Grunis addressed the indictment as well, holding that:

> . . . this is not a case of a person appointed to the position by a political body or entity, but rather elected by the public. In terms of the elected, words said in a similar context are apt: "Not everything our eyes see is pleasing. However – this we should keep firmly in mind – the eyes of the public are also open" (HCJ 1993/03, *Movement for Quality Government v. the Prime Minister*, IsrSC 57(6) 817, 857).
>
> It is needless to say, and this is an understatement, and that the conduct and behavior of the Appellant is questionable, precisely because this is an elected public official. Still, this alone does not qualify the notice the head of the council sent to the Appellant in which he ended the Appellant's service as council member" (there, para. 9).

My colleague, Justice Arbel agreed with Justice Joubran that the appeal must be rejected, as the Appellant did not reside in the council's jurisdictional area. However, she agreed with Justice Grunis that the reason for the indictment was not mentioned in the notice the head of council sent to the Appellant. Justice Arbel left the issue of disqualifying a council member against whom an indictment is pending for future decision. However, in her opinion she observed:

> When I come to examine the circumstances of the case before us, I cannot overlook the image before us and leave the task only to the open eyes of the public; the public at times seems to have one eye covered and would accept phenomena and behavior that a court presented by the matter could not allow (there, para 8 of her judgment).

As we can see from the analysis of the justices' positions, the *Hava* judgment did not set a precedent that an elected official could not be removed from office if elected while a serious indictment against him was pending. First, as detailed above, the decision did not at all consider the issue of an elected official elected precisely when indicted, and comments on the "eyes of the public" were made in relation to the question of whether the public would prevent another term in the future. Second, we have seen that, even in the majority's opinion, the appeal was rejected because of the lack of residence in the council area, when my colleagues Justices Grunis and Arbel believed that the matter of the indictment was not a reason for the removal from office in that case. Therefore the discussion on that issue was *obiter dicta*. I will add that the comments about "the open eyes of the public" to which Justice Grunis referred were written in the context of a case where it was decided not to indict a minister (the second *Hanegbi* case).

And now, the future opportunity Justice Arbel mentioned has arrived.

For myself, I agree with my colleague Justice Arbel's approach, that at times it seems that the public has one eye covered when it accepts conduct and phenomena that the court cannot accept. I write these things not knowing the "decision of the public". In an ideal world, if the candidate cannot himself recognize that he or she must step down from running, their party would remove them for fear of the voter's decision. In an ideal world, should a candidate and their nominators fail to act as they should, the public would make its conclusion known through the ballot box. In an ideal world, it may have been appropriate to find that the Court must not intervene. From the perspective of the basic right to elect and to be elected, we should leave the decision to the voter. However, in light of the great harm to clean governance and the fundamentals of democracy and the rule of law, we cannot establish a rule that an elected official is "immune" to removal from office because a serious indictment against them was filed before the elections, and the public still elected them. Such a rule might result in corruption that the State of Israel

cannot afford to allow. Again, in our case deciding the third situation in terms of removal when a serious indictment was filed before the elections and the candidate was still elected is premature. However, these comments are meant to allow future candidates for heads of local authorities to plan ahead. They should know that, should they be indicted before the elections, they would not be "immune" from removal from that office. In conclusion: in my opinion it is possible to remove a head of authority from office under section 22 even after the elections, including when the indictment was filed before the elections. In my view the "voter's decision" is a factor that may be considered, among other factors, but it cannot be determinative (see and compare, *Zaguri*, para. 29; the first *Pinhasi* case, page 470).

In light of the above, we shall turn to examine the circumstances of the concrete cases at hand.

The Matter of Nazareth Illit

Is there Room to Intervene in the City Council's Decision Not to Remove Gapso from Office?

59. As mentioned, the petitions in HCJ 5126/13 and HCJ 5597/13 revolve around the service of the Mayor of Nazareth Illit, Gapso. As described above, on June 17, 2013 Gapso was indicted for allegedly accepting a conditional bribe, under sections 290, 294(a) and 29 of the Penal Law 5737-1977.

60. I shall not repeat the facts detailed in the indictment against Gapso. We detailed those in our judgment-without-reasons. Gapso was accused of taking a bribe (under section 294 of the Penal Law, requesting a bribe or making such bribe contingent, even without it coming to fruition, amounts to taking a bribe.)

61. The State argues that the seriousness of the conduct attributed to Gapso in the indictment is aggravated by his connection to public office. However, as the State maintains, since it is a single act and in light of the consideration he received, his conduct is not extremely serious in a manner that results in a legal requirement to remove Gapso from his office as the Mayor of Nazareth Illit.

In our opinion, the State's position should not be accepted.

62. The offense of which Gapso is accused of is taking a bribe (by conditioning a bribe). This is an offense categorized as a felony, punishable by up to ten years imprisonment. The victim of the offense of bribery is not an individual, but the public as a whole. In regards to the severity of this offense, the words of Justice Dorner in CA 2083/96, *Katav v. the State of Israel*, IsrSC 52(3) 337, 342-343 (1997) are fitting:

> The bribery offense is among the offenses where the victim is not an individual but the public and one of the goals of penalizing this offense is marking the committer of the offenses with disgrace and expressing society's disdain from bribery offenses in a way that deters the many . . . Hence the rule that, generally, the penalty appropriate for a committer of bribery is imprisonment, even in relatively minor cases where the defendant was solicited and the benefit they derived from the bribe was insignificant . . . Exceptions to this rule are those extreme cases where the entirety of the circumstances related to the defendant and the offense committed justifies not marking the defendant with that disgrace attached to criminal actions.

Therefore, the offense of bribery is egregious. It is an offense that goes to clean governance and whose severity warrants, usually, actual imprisonment. Additionally, the bribery of which Gapso is accused, under its unique circumstances, allegedly points to his conduct involving moral flaws that potentially carry turpitude (see and compare the first *Pinhasi* case, page 467). The offense was allegedly committed in the course of Gapso's office and was connected to his position as Mayor of Nazareth Illit. As reflected in the indictment, Gapso allegedly took advantage of his status and clout in the halls of the Economic Corporation (which is a corporation owned by the Municipality of Nazareth Illit) in order to allegedly terrorize another city council member. Had his request of a bribe been accepted, the city council member would have resigned from serving in the city council. This would have brought Gapso political influence in such a way that was impossible to achieve through elections themselves, which is a change to the list of nominees by another faction in city council. The conduct of which Gapso is accused directly harms the principles of democracy, and, specifically, the right to vote and be elected – the very right upon which Gapso relies before us. In light of the fact that Gapso holds the highest office in the local authority, the harm such conduct causes to the public's trust in the institutions of local government is even greater.

Indeed, that Gapso is accused of a single act of bribery may work to his advantage. Additionally, it remains unclear whether the interest that motivated the conduct detailed in the indictment was a personal interest or the desire to advance his faction. In any event, the weight of such consideration is not high enough, to me, as whether Gapso allegedly acted for the benefit of his faction or for his own, is insufficient evidence to reduce the alleged harm to clean governance and the rule of law (see and compare the first *Pinhasi* case, page 469).

Gapso explicitly declared his intention to run for office as mayor of Nazareth Illit in the coming elections. Therefore, it is a real possibility that his service will go on. In my view, in these circumstances, it is important to clarify the

Court's position about continuing in office even at this stage, which is before the elections.

In light of the considerations detailed above, my position is that we must intervene in the Nazareth Illit's City Council's decision and determine that Gapso must be immediately removed from office as mayor, and so we had ordered in our decision without reasons. The continuation of service of a head of authority indicted for bribery, particularly factoring in the extreme circumstances of the conduct, would desperately harm the public's trust in the institutions of local government, as well as the general principles of democracy. Indeed, should Gapso's service be permitted to continue, "the example and model of leadership would be dimmed" (the first *Pinhasi* case, page 469). The circumstances surrounding the offense and its potential infringement on basic rights aggravate the severity of Gapso's alleged conduct, which the members of Nazareth Illit's City Council were not permitted to overlook in their decision not to remove him from office. And, as we held in our judgment-without-reasons, the decision of Nazareth Illit's City Council not to remove Gapso from office is inconsistent with the principle of ensuring clean governance and preserving the rule of law, and is extremely unreasonable. Therefore, our decision includes an absolute order, which removes Gapso immediately from his office as the Mayor of Nazareth Illit.

The Matter of Ramat HaSharon

Should the Removal of the Issue from the Agenda Be Viewed as a Decision Not to Remove the Mayor from Office?

63. In the matter of Rocherberger, as opposed to that of Gapso, the Authority's Council did not decide whether to remove Rocherberger from office or not. Under section 22(b) and 22(c) of the Election and Tenure of Head and Deputy Heads Law as cited above, the decision to remove or not to remove the head of the authority from office shall be taken in a special meeting ("the special meeting"). Should the head of the authority him or herself fail to call for the special meeting, a majority of city council members may call for such a meeting, and they will determine who shall chair it. In our case, the head of council did not call for a special meeting, and there was even no majority as required to call for it. The Council additionally chose, actively, not to discuss the removal of the head of the authority from office for conduct unbecoming under section 22. In a regular meeting held on July 14, 2013, the proposal for such discussion was removed, at Rocherberger's request, from the agenda.

An indictment against a mayor is a dramatic event in a municipality's term. Such an event requires in itself assembly and discussion of the question of continuing a head of the authority's term. As mentioned in the *Deri* case, and as us appropriate here, conferring an authority goes along with the ". . . duty to consider whether it [the authority – Naor] should be exercised, and the appropriate avenues to take in this context" (page 419). Moreover, in *Hayat*,

this Court discussed the importance of assembling the city council and having a discussion regarding the continued term of a criminally indicted head of the authority. The Ramat HaSharon City Council did not act according to this Court's ruling in *Hayat* – it did not explore the need for exercising its authority to remove the head of the authority from office, and avoided discussing this.

Under the circumstances, removing from the agenda the matter of Rocherberger's removal from office because of a lack of a majority to hold a discussion, amounts to a decision by a majority of council members not to remove Rocherberger from office. It appears the decision not to discuss the matter of Rocherberger's removal from office was an attempt to "buy" time until the elections date.

Should We Intervene in the Ramat HaSharon City Council's Refusal to Remove Rocherberger from Office?

64. We answer the question whether to intervene in the Ramat HaSharon City Council's refusal to remove Rocherberger from office in the affirmative, as this holds great similarity to what we have decided regarding Gapso.

We opened by detailing the specifics of the indictment against Rocherberger, and we shall not repeat. Rocherberger is accused of many offenses ranging from false registration of corporate documents to many more offenses of fraud and breach of trust in a corporation between the years 2003-2007. It maintains that during his term, and despite the statutory prohibition on receiving compensation for work performed in terms of the fund, Rocherberger fraudulently and systematically submitted documentation on personal expenses or others' expenses where details were falsified. In addition to the indictment, which serves as alleged administrative evidence is the fact that Rocherberger paid back his gains per his attorney's advice.

Rocherberger's alleged conduct was motivated by a desire to circumvent the statutory prohibition imposed upon him and to be compensated in addition to the salary he received as head of authority. The actions happened over a long period of time and were done through forgery. Rocherberger was in the habit of submitting to the fund receipts and invoices that had nothing to do with his activity for the fund, including purchasing groceries and household items, his daughter's travel expenses abroad, and her English lessons. Falsifying the details resulted in the receipts being considered expenses for which he was able to receive reimbursement from the fund. These are acts of corruption. Indeed, a long time has passed since the offenses were committed, and we received no explanation on the course of the events that caused the indictment to only recently be filed. Indeed, Rocherberger returned the money some time ago. However, these cannot sufficiently counter the weight of the seriousness of the offenses described and them constituting conduct unbecoming the status of a head of a local authority. This behavior is inconsistent with the principle

of ensuring clean governance and preserving the rule of law. The Ramat HaSharon City Council's decision not to discuss, which amounts to a decision not to remove Rocherberger from office, is extremely unreasonable. Therefore, we held in our judgment-without-reasons to remove Rocherberger immediately from his office as Mayor of Ramat HaSharon.

The Venue for Adjudication: High Court of Justice or the Court of Administrative Affairs

65. It is common knowledge that the jurisdiction of the High Court of Justice is parallel to the jurisdiction of the Court of Administrative Affairs (see, for instance: HCJ 2208/02, *Salame v. the Minister of Interior*, IsrSC 56(5) 950, 953 (2002)). Generally, where there exists an alternative remedy through the Court of Administrative Affairs, the High Court of Justice will not adjudicate a petition. Still, this is discretionary. Under the circumstances, we did not see it necessary, at the time of adjudication, to look into whether alternative relief is available, and we have chosen, at the request of some of the parties, to consider the matter on its merits, in light of the urgent need to establish rules on the issue of removing a head of local authority against whom an indictment in pending, under section 22 of the Election and Tenure of Head and Deputy Heads Law. We therefore leave deciding the issue of the alternative relief to future cases.

Conclusion

66. As we decided in our judgment-without-reasons, under the circumstances of the cases at hand, there is no escape from terminating the offices of the mayors Gapso and Rocherberger. In my reasons, I discussed the principles at the basis of the decision. I also discussed the severity of the cases at hand and their circumstances, which tipped the scale in favor of removing the mayors Gapso and Rocherberger from office. I did not overlook the presumption of innocence. Undoubtedly, removing from office harms a sitting mayor or a re-elected mayor, who maintain innocence. I am hopeful that at the end of the day, it will come to light that the mayors Gapso and Rocherberger are as clean as a whistle and that their actions were flawless. I am aware that mayors have enemies and competitors and that they are vulnerable to false accusations. Still, for the time being, as long as the detailed indictments hang as shadows over them, their continued terms in office cannot be accepted. This conclusion, which was correct in the *Deri* case and the first *Pihnasi* case, is warranted on an administrative level in our case as well. To emphasize: I am aware of the public sensitivity around the issues at hand, particularly because of the closeness in time to the date to the elections. Generally, the state attorney must make every effort to conclude the investigation and file – when appropriate – indictments at a time as distant as possible from the date of elections. The uncertainty during the period building up to elections harms, first and foremost, the public. It is also undesirable for the Court to find itself involved, against its best interest, in the political hotbed of the days before the elections. Still, I do not believe there is an alternative to a judicial decision.

The Court's role is to "ensure that the other branches of government conduct themselves according to the law, this is the law of the rule of law in governance…" (the first *Pinhasi* case, page 474). Our duty is to rule also in difficult situations, on the basis of the principles of the law. The outcome is, therefore, as decided in the decision without reasons.

Post Script

67. I have read the opinion of my colleague the President. Because I believed the need to urgently give reasons for the decision should take precedence in light of the nearing date of the elections I will not respond to the holdings one by one. To do so would be to repeat, just in other words and added emphasis to words both my colleagues and I wrote, that our position is different than that of the President. I wish to respond to my colleague the President briefly, and only to the issue of the Minister's approval (para 9 of the opinion).

In my opinion, it is unthinkable for the Court to first hand overturn a decision that is the same as the one the local authority should have made; that is that, in an appropriate case, the Court would intervene after which the Minister would consider, as my colleague the President proposes, whether to "approve" the Court's decision. After all, the Minister and his decisions are also subject to judicial review by the High Court of Justice and there is no point in useless and futile proceedings. Where and in what order would the Minister's voice therefore be heard? The Petitions before us were filed with the High Court of Justice, while joining the Minister of Interior– who is subject to the High Court of Justice's judicial review – as a respondent in three of the petitions, that is in regards to each of the councils. Therefore, his position to the matter of whether the mayors should be removed from office is conveyed to the Court through the State's Attorney, which represents the Minister before us, as early as in the stage of the petition against the local council's decision. The position reflected in my colleague the President's opinion, that after the Court hands down a decision, the Minister's decision is then to be given, when that decision is also subject to Court's authority, was not raised by the State's attorney representing the Minister, for good reason, since the State's Attorney urged us to resolve the matters on their merits.

Deputy President

Justice N. Hendel

1. I join the opinion of Deputy President Naor, which is firmly built, stone by stone, and constructs a comprehensive and solid legal structure. Due to the general aspects that the issues at hand raise, I see it fit to add four additional comments.

A. The Timing of the Indictment

At the heart of the Petitions before us sits a complex and sloppy factual and legal reality. Two mayors were indicted for serious offenses. The indictments were filed during their terms, in the build up to the local authorities' elections. Is it within the authority of the Court to exercise administrative judicial review regarding city council's decisions and to remove from office according to section 22 of the Election and Tenure of Head and Deputy Heads Law? And if so, is there authority to bar them from running for mayor in the elections' processes that have already begun? The majority opinion, which I join, answered the first question in the affirmative and the second in the negative. The difficulty posed by this outcome is that a mayor who has been removed from office due to an indictment against him may be re-elected. What should be his fate? This issue may arise in our cases very soon. My colleague the Deputy President held that in such a case, the city council would be obligated to convene after his election in order to discuss the mayor's term under section 22. This holding is acceptable to me. It is possible that the city council or the court exercising administrative judicial review over the council's decision will find that the mayor must be removed from office after having been elected. This possible outcome certainly is not desirable. But notably, it is not a product of the court's decision, but of the current state of the law. I will clarify.

The Election and Tenure of Head and Deputy Heads Law authorizes the city council to remove the head of authority from office for conduct unbecoming. Should the council make such a decision while the elections are fast approaching, the candidate is not barred from participating in the elections. This would have been the case should the Nazareth Illit City Council had decided of its own accord to remove Mr. Gapso from office. The statute does not authorize any and every entity to prevent a candidate who has been removed from office from running in previously scheduled elections due to an indictment against them. This teaches us that the Legislature established a way to end a term for conduct unbecoming the office of head of authority, but did not blaze a trail to prevent their candidacy in the next elections. The difficulty that comes from joining the authority to remove a mayor from office and the lack of authority to prevent running in the elections is in full force when the city council's decision (or the court's decision in exercising judicial review over the council's decision) is made shortly before the elections.

Indeed, this problematic outcome should be resolved by the Legislature. In addition, there is another factor that in many cases may mitigate the clash at the intersection between removal from office and running in the elections. That factor is the State Attorney, which is charged with indicting a head of authority for the serious offenses with which we are dealing. In regards to the two mayors in the Petitions before us, the indictments were recently filed, only several months before the local elections that are to be held on October 22, 2013. The indictment against Mr. Gapso, the Mayor of Nazareth Illit, addresses events that took place in 2008 after the prior elections, but was not filed until June 17, 2013 – only four months before the elections. The

investigation into the case of Mr. Rocherberger, the Mayor of Ramat HaSharom, commenced in 2009 for offenses allegedly committed between the years 2003-2007. The indictment against him was filed on May 12, 2013. Even the *Zvi Bar* case, which stands at the background of these petitions, pertains to offenses committed in the period of time between 1989-2008. The investigation began as early as 2010, but the serious indictment was filed less than a year before the next elections.

We assume that the State Attorney operates in good faith and with great investment in order to handle the heavy workload placed on its shoulders. Yet, setting priorities among the piles of cases on its desk is a necessity of reality. Cases must be prioritized according to public interests. When we are dealing with criminal investigations against mayors, the State Attorney must constantly be aware of the timing of the next elections, which is known well in advance. It must make efforts to reach a decision regarding the filing of indictments at the earliest opportunity before the elections. Surely it is undesirable to indict soon before the elections. Clearly, when the offense was committed or investigated only close to the elections, the State Attorney does not control time. But, as mentioned, this was not the case in the two cases here. The information was available long in advance. In such cases, the State Attorney must take measures to avoid unnecessary delays such as delays in the date of a hearing, even if the delay is at the request of the defense. As an entity that represents the public interest, the role of the State Attorney is also to facilitate decisions in terms of indictments against candidates in elections, which hold great importance for voters and the rule of law more broadly. This way it would have been possible to prevent the additional legal complication we are facing in these petitions.

B. Conduct Unbecoming and the Will of the Voter

The Deputy President addressed the third situation where a head of local authority is elected while an indictment is already pending. The question posed is whether, despite the will of the voter, section 22 should be triggered and the mayor should be removed from office? My colleague explained that in her opinion, the will of the voter is not a super-consideration, but one factor that may be considered among all other relevant factors. I, too, shall not establish rules on this issue, which does not require any determination under the facts of the petitions before us. I will add that I am uncertain as to the amount, if any, of weight that should be attributed to the fact that the public elected in regularly scheduled local authorities' elections, a candidate whose term ended due to a serious indictment. The conclusion that a head of authority should be removed from office according to section 22 under the circumstances described, is a clearly normative holding. Once a serious indictment is filed against a mayor in connection to this office, the language of section 22 "conduct unbecoming the status of a head of authority" becomes normative in nature. Once this happens, it is the duty of the city council – despite being a political body – to examine whether the mayor is worthy of

such service in light of the principles of clean administrative governance and the rule of law. The judicial review the court exercises over the decision of the city council focuses on whether there was conduct unbecoming. The Court takes no position as to which candidate should be elected. It is charged with interpreting the Election and Tenure of Head and Deputy Heads Law. In this role, it must come to normative conclusions as to whether a person, under serious offenses indictment, is worthy of continuing in their office as mayor.

C. An Indictment as Administrative Evidence

Considering the high level of power and autonomy a mayor holds, there is no wonder the city council is authorized to remove a mayor from office if the mayor conducted themselves inappropriately. This standard does not depend only if there was an alleged commitment of a criminal offense or an indictment. The authority to remove a mayor from office under section 22 is based on administrative evidence.

In the two affairs addressed in our decision, this authority was applied based on indictments. In the case of Ramat HaSharon, the City Council avoided any discussion of the matter under section 22, and in the Nazareth Illit case, once it had discussed the matter, the City Council decided against removing the Mayor from office. This background resulted in the Petitions before this Court. It is a rule in our system that the Court may exercise administrative judicial review over administrative decisions. Judicial review exercised in light of the possibility of a criminal offense committed by a mayor is a delicate task. The Court is called upon to achieve a careful balance, which I believe has been correctly accomplished in the cases before us. Only once the investigation into the matters of the mayors had ended and ripened into the serious indictments related to their public service, did the city council's authority under section 22 of the Election and Tenure of Head and Deputy Heads Law trigger – albeit by means of a judicial decision. Let us not forget that an indictment marks the beginning of a trial and is a constitutive fact even when it clearly cannot determine the outcome of the trial. The condition for filing an indictment is a sufficient evidentiary foundation that creates a reasonable possibility of conviction (HCJ 5699/07, *Jane Doe (A) v. the Attorney General*, para. 15 of Justice Procaccia's judgment (February 26, 2008)). An indictment reflects the determination of a professional entity after the defendant was granted the right to a hearing. In terms of the offenses here, the indictments serve as exceedingly strong administrative evidence.

D. Removal from Office and the Presumption of Innocence

My colleague emphasized there is no conflict between the presumption of innocence enjoyed by a mayor criminally indicted and an administrative determination that the mayor must be removed from office on the basis of administrative evidence, such as an indictment. The presumption of innocence is a right in the context of a criminal law that derives from the basic rule

regarding reasonable doubt. Each defendant is entitled to be considered innocent until his guilt is proven beyond a reasonable doubt. There is great distance between an indictment and a conviction. The goal of criminal law is to examine that distance.

I would add that even within the criminal procedure itself, the presumption of innocence does not prevent interim proceedings on the basis of initial evidentiary foundation that is diminished compared to that necessary for a conviction. For instance, the presumption of innocence is not harmed due to holding a defendant under arrest for the duration of the proceedings once an indictment was filed (CrimApp 8087/95, *Zada v. the State of Israel*, IsrSC 50(2) 133,144). This point is highly important because imposing the sanction of arresting a defendant in effect resembles the severe penalty a conviction may bring. That being said, a defendant's arrest is not inconsistent with the presumption of innocence. Before a defendant is marred by a criminal conviction and is penalized for it, the State is burdened with proving his guilt beyond any reasonable doubt. However, it is common knowledge that sanctions that restrict that liberty of the individual may be imposed prior to a conviction – such as posting bail, travel restrictions, detention and even limits on different occupations, including taking public office. Therefore, whereas removal from office due to an indictment involves harm to the sitting head of authority, their reputation and their livelihood, this harm does not infringe upon the presumption of their innocence.

2. It is interesting to note, however briefly, that similar issues of public law presented by the Petitions before us were discussed in Jewish law as well. We refer to the Rambam, who emphasized that in order to take public office, a person must be of clean conduct and worthy, and it is insufficient that they have formal permission (akin to the statutory fitness rules) to fill the post: "When a person is not fit to act as a judge, … because he lacks proper character, and an exiliarch transgressed and granted him authority or the court erred and granted him authority – the authority granted to him is of no consequence unless he is fit" (*Yad HaHezka*, Sanhedrin D, 15.) The Halacha did not distinguish the requirements for the "Public Benefactors" (a local council of sorts, charged with the interests of the community) and the strict requirements of clean conduct that applied to judges (*Shulhan Aruch, Choshen Mishpat* 37, section 22 of the Rema commentary). In some communities, the public benefactors or the city benefactors were elected by the public (see, for example, Pinkas *Va'ad Arba Aratzot*). The Jewish sources reveal that we were strict about them even when committing the wrongful behavior based on a suspicion alone and not the determination of judges according to a lawful testimony (*Teshuvot HaGe'onim* (*Shaarei Tshuvah*) 178; *She'elot U'Teshuvot Aharon*, Yud, 30.)

Sadly, this optimal standard does not always fit the behavior on the ground. "It is proper to appoint as public official only one who is known to be modest, humble and patient, because he must deal with different people in different

and ever-changing ways. He must love each of them according to their characters" (HaMeiri (of the first who lived in France in the 13th century,) Yoma 22, B). Still, the reality may at times be different. For instance, when elections were held for the position of a rabbi and teacher of a European community during the 19th century, the winner was disqualified for bribery and his voters were denied the right to vote in the repeat elections (*She'elot U'Teshuvot Hatam Sofer*, *Choshen Mishpat*, 160). The described gap between reality and the aspirational does not warrant leniency in standard, but instead requires effort to bridge that gap.

3. I reviewed the opinion of my colleague President Grunis. My colleague presents the disagreement between him and the majority justices' opinion as a reluctance on his part to impose the aspirational law on the current law and to use the Court's power heavy-handedly. Even such presentation reveals our disagreement. The point of departure in our position is, as discussed, that section 22 grants the administrative authority – the authority's council – the authority to remove a mayor from office. This, in turn, gives rise to the Court's authority of administrative review. The legal standard the Legislature established in section 22 is "conduct unbecoming the status of a head of authority." According to the section, if it is found that the standard was met in a particular case, the city council has the power to remove the mayor from office.

A legal standard dictates a defined legal situation (HCJ 6280/07, *Legal Forum for the Land of Israel v. the President of Israel*, para. 14 of the decision (December 14, 2009)), its literal meaning is "a set standard" in the field of law ("norm" – EVEN SHUSHAN DICTIONARY, UPDATED FOR THE 2000S, 623 (Moshe Azar, ed., 2004)). Clearly, the general norm in section 22 needs to be given content, for which purpose "the Court is granted significant interpretive range insofar as legislation is concerned . . . " in the words of my colleague the President. In my approach, the finding that in the circumstances of the petitions before us – where indictments allege that the mayors committed serious offenses of corruption in the context of their public duties – amount to "conduct unbecoming the status of a head of authority", is a desirable normative finding on both the existing law level and the desirable one. Such interpretation of the norm stipulated in section 22 fits the language of the law and strengthens the established purposes of clean governance and rule of law. By its very nature, the legal norm that relies on written statutes is not subject to the will of the voter in local councils' elections. It appears the President's primary contention stems from the practical challenges arising from the proximity in time of our adjudication under section 22 to the elections date. Though this is unfortunate, and see above my first comment regarding the timing of the State Attorney's indictment, the obligatory legal norm does not yield. In this context, I will note that I do agree with the President that the factor of the public's trust – certainly as an empirical factor – is irrelevant to the decision.

Finally, it should be emphasized that there is agreement among all members of the panel that the Legislature should contemplate this sensitive matter, particularly insofar as the lack of legislation regarding the intersection of removal of a sitting mayor from office by the authority's council or by court and their right to run in pre-determined and pre-scheduled elections. I will note that precisely because the majority justices are sensitive to the limits of this Court, we refrained from deciding on the matter of the Nazareth Illit and Ramat HaSharon mayors' running in the coming elections. We focused on our authority to rule on the matter of their removal from office, which is sourced in section 22 of the Election and Tenure of Head and Deputy Heads Law – the current statute.

4. Finally, I join the opinion of my colleague the Deputy President. My comments above are additions to the main.

Justice

Justice E. Rubinstein:

A. The reasoning by my colleague, the Deputy President, for our decision dated September 19, 2013 in her comprehensive opinion, which covered all that is legally necessary is acceptable to me. But I will add for the sake of background and clarification. The British are familiar with the expression: it is not done. Some things are inappropriate and shall not be done in a civilized society and a proper government. This is probably what she was getting at referring to "an ideal world" in paragraph 58. Only that the governmental and public culture in Israel has not developed in that direction, and what is seen in some point to any decent person does not necessarily fit the current Israeli reality. This is not to only stress the negative, but also to explain how, inevitably, we reached the outcome of this judgment, as the political system – by its own failures – compelled us to.

Of the Questions Arising

B. Indeed, it is possible to argue that had the Legislature desired, it could have mandated that a head of local authority indicted for a certain serious offense must resign. The Legislature did not do so and did not include such provision in the statutory disqualification rules. And indeed, it may well be that, under the outcome of this case, the post-conviction statutory disqualification rule will never be exhausted, though this is not necessarily so, in a variety of cases and with the relevant discretion. Second, it is possible to question in this context what about the presumption of innocence – has it been forgotten and eroded to put the defendant and the convicted in the same boat? Indeed, these are not simple questions. No less complex is the question my colleague addressed in paragraph 58 when referring to the words of Justice Zamir in

CSA 4123/95, *Or v. the State of Israel – civil Service Commissioner*, IsrSC 49(5) 184, 190-191 and distinguishing it from the case at hand: what of the ousted mayors, who have been indicted for serious offense, who are re-elected resulting in the new city council's duty to assemble and discuss their removal from office, would this also be a process subject to judicial review (para. 9 of her opinion)? After all, the public is already aware of the indictments and, in re-electing them, it has once more expressed faith in the heads of authorities or any of them. All these questions are far from easy. How do we measure them in light also of our colleague Justice Arbel's comment in *Hava* (APA 3911/05, *Zion Hava v. Azur Local council* (2006), para. 8; see para. 58 of the Deputy President's opinion) regarding the public's "open eyes" that in reality may actually have one eye "covered"? The *Talmud Bavli* (Bava Kama 52, 1) writes that "when the shepherd is angry at the flock, he blinds the leading goat." And Rashi has said, and I quote without any intent for offense to anyone, "her eyes shall be gouged out, and she shall fail and fall into the pits and the herd follows, such that God redeemed the haters of Israel (refined language for the people of Israel – Rubinstein) by appointing them dishonest leaders." The questions after the elections will become what the Court's position might be when the public continues to elect a head of authority, as if the world keeps on turning, and what the weight of the outcome of those elections ought to be. However, we have yet to reach that point.

On the Reasoning for the Solution

C. Indeed, the solution we have come to is not elegant, and it has pitfalls. But the reader must ask herself beyond the legal analysis, what is the alternative? How can it be that a head of authority placed under the cold shadow of a serious indictment, be it for offenses related to the office – such as bribery, or be it for other extremely serious offenses, go on as usual? Justice Potter Stewart, of the United States Supreme Court, once said he could not define pornography, but he would know it when he sees it. Reprimanding the public is insufficient. We have made such comments in the egregious case of *Zvi Bar*, the Mayor of Ramat Gan (HCJ 5141/11, *Lilian v. The Mayor of Ramat Gan* (2013)). "At the end of the discussion and even before a legal decision is rendered, we expressed in the courtroom our opinion that, from a public standpoint, it is extremely difficult that the First Respondent go on serving as the Mayor of Ramat Gan after being indictment for serious offenses…" And even in the case at hand, we have commented (para. 8) that "we are uncomfortable, in the public sense, with the two running for mayors in the coming elections despite the indictments against them . . . However, we see no way, in the legal sense, to prevent them from running." Even President Grunis, in his opinion here, has noted:

> Indeed, those who have been indicted for offenses along the lines of those for which the mayors of Nazareth Illit and Ramat HaSharon have been indicted, are unworthy on a public level to serve as a head of local authority. I believe that, from the

public aspect, the two heads of authorities should have resigned from office immediately after they were each indicted. Similarly, on a public level it is inappropriate for either of them to run in the coming elections, and my position on this matter is as that of my colleagues.

On the Public Level

D. However, it seems these words of public reprimand are of no use. During my service as Attorney General, when deciding to close high-profile investigations against public figures for lack of sufficient evidence, I would often write a reasoned decision so that it would be widely understood why it was closed – after the noise of the investigation followed a quiet hush. I saw this as my duty to the public, rather than closing with a simple "there is insufficient evidence." I also assumed that a decision that was lacking in explanation would invite a petition to the High Court of Justice, and better that what would inevitably be written as a response in the HCJ would be written to begin with as a service to the public. Ultimately, I may have hoped that such comments would facilitate correction of the improprieties. The decisions have been criticized for chastising public figures without indicting them. I will comment, that, on a formal level, this may be true, but substantively, these public figures had the opportunity to respond in depth to everything that was alleged against them during the police investigation, which was conducted by highly ranked investigators who closely studied the materials, and – in some cases – had a hearing before the State Attorney. In any event, my replacement in that position has also produced such decisions, simply because there is no other way. Yet the purpose of correction through them was not achieved, or certainly was not achieved satisfactorily. I have concluded that the Israeli reality requires teeth. Similarly to the State Comptrollers who for years lamented the lack of sufficient "teeth" (this was slightly fixed), the sad conclusion is that what cannot be achieved through admonishment, must be corrected through judicial decisions. This is very much the case here. On the public level, we expressed our opinion two months prior, in the *Zvi Bar* case, yet we went unheard – as if the guard dogs bark yet the convoy moves on – followed by empty promises for the future, one in the mouth and another in the heart, as said by Rabbi Yehuda Halevi (*Kuzari*, 2, 24). We therefore must ensure that the convoy does not move on. "Where people do not exist, try to be a person," as Hatna Hillel said (*Avot* 2, 5). This is nothing new. As my colleague demonstrated, this opinion directly continues a string of decisions such as in the cases of *Deri* and *Pinhasi* (HCJ 3094/93, *The Movement for Quality Government in Israel v. The Government of Israel*, IsrSC 47(5) 404 (1993); HCJ 4267/93, *Amitai – Citizens for Proper and Clean Governance v. The Prime Minister of Israel*, IsrSC 47(5) 441 (1993)) from two decades ago. Section 22 of the Election and Tenure of Head and Deputy Heads Law, which we have applied, is a statutory tool that enables examining issues as the one before us, even though the Legislature did not explicitly and fully consider the "interim period" between the indictment of a head of a local authority and the

conclusion of the trial. Ideally, it would have said that there is a cloud above the head of a head of authority who has been indicted for serious offenses. But not all clouds are the same, some are dark and some are as light as a feather. Not every offense triggers the sanction of removal. The Attorney General presented in its notice in the *Zvi Bar* case several parameters for examining this. It said there that the balance involves, among others, the nature of the offenses and, particularly, how closely tied they are to the public office. Other factors are the level of harm to the public's trust and clean governance, the level of infringement on the right to elect and to be elected, the scope of the offense, the seriousness of the allegations, the offense's impact on the fabric of life, and so on. These parameters are essentially acceptable to me (I will address the public's trust further bellow), but here the Attorney General did not support intervention and the outcome we have reached is different. This is not like the Rabbi who told his student, as my late father's story goes, that rumor has it the student read secular literature. Said the student: "This is not true." The Rabbi's response: "You wish it to be true? It is bad enough it is rumored." Not so is the case at hand.

E. Indeed, we are not dealing with media reports against the relevant heads of authorities, but an issue that was investigated by the police and produced an indictment by the State Attorney, after which a hearing was held – in other words, all the possible screening processes short of a court. It is of course regrettable that the indictments were only recently filed, a significant amount of time after the incidents. I wholeheartedly and emphatically join my colleague Justice Hendel's comments in this regard. The indictments constitute what is called in legal terminology "administrative evidence." This term, which means that this evidence is serious material that has been rigorously studied, may serve as the foundation of an administrative decision, even though it was not screened by the court. Thus, for instance, decisions by ministers and different administrative authorities are made on the basis of the material before them, that has not always passed (though it may in principle do so) judicial muster. Granting citizenship or residency, entrance into the country, a driver's license or a gun permit, business license and the like are all a product to administrative decisions. In the cases before us, the level of screening was high, performed by the Attorney General, because of the public sensitivity involved. It must be considered with the appropriate weight, and in this regard, too, I join the comments by Justice Hendel.

On Section 22 and the Difficulty It Raises

F. Section 22 is a tool that the legislature granted to the municipal government to protect its integrity, through decisions made by the city council. Employing this tool is seemingly contingent upon the political will of those who were publicly elected. Its application depends (section 22(a)) upon "the City Council's realization that the head of authority is engaging in conduct unbecoming the status of head of authority . . ." The term "conduct unbecoming" is vague and open to interpretation. It is impossible that the term

only targets drunkenness in the streets. But beyond this it is clear that "realized," means in this case "political realization," which is tenuous, because the head of authority generally holds strong political standing in and around the authority council, and thus there will often be a "good" chance, however unfortunate, that even conduct outrageously unbecoming would not lead to the head of authority's removal, in light of their political capital and power.

G. This was the case here, whether because the authority council purposefully did not convene (Ramat HaSharon), or did convene pursuant legal advices (Nazareth Illit) – but made a decision that did not properly account for the serious indictments.

H. We cannot disaggregate here the ethical-moral aspect and remove it from our consideration. Administrative law, as a whole, very much revolves around rules of ethics and morality. This becomes clearer when a head of local authority is concerned, who in many ways holds extreme power in matters of finances, appointments, construction, planning and so on. The oversight by the Ministry of Interior, despite its best efforts, cannot address all that is necessary. The head of authority must be exceedingly wary of hubris and "power intoxication," as those lead to transgressions and can get to the point of criminal behavior. The law cannot facilitate this, hence our position.

On the Presumption of Innocence and the Public's Trust

I. Theoretically, the argument that the presumption of innocence is threatened when an indictment is sufficient for removal is appealing. However, what would proponents of this argument say if a head of authority is accused of murder, rape, killing someone in the course of a road accident, beating his wife or children, or stabbing a neighbor? Why does the offense of bribery – one of the most maligned of all corruption offenses – not warrant the same treatment?

J. Moreover, following Justice Arbel's metaphor regarding the "open eye and the covered eye," is the public capable of forming an opinion with complete information regarding the meaning of the indictment, or is the public subject to certain biases? Indeed, a city council's members are fully informed. But is it reasonable to accept their indifference regarding a serious indictment? I will admit, I am not a fan of the expression "public's trust." After all, it was said that the public includes the good, the mediocre, and the evil - so who is this public whose trust we seek? This expression has come up frequently regarding the judicial authority, and Justice Haim Cohen has warned us from becoming slave to it in his article "Thought of Disbelief in Public Confidence" in Safer Shamgar, 365 (A. Barak et al. (eds), 5763-2003), as well as in a collection of his selected essays (A. Barak and R. Gavizon eds.), 5761-2001, p. 367. I shall not go into the discussion regarding the expression "the enlightened public" that was coined with the best of intentions and has since become controversial

(see Id., 375-378), but we are dealing with the Israeli society (p. 379), who is split and divided into secular and religious groups, Jews and Arabs, those who hold political views to the right and those to the left, native Israelis and new immigrants, and, therefore, as Justice Cohen wrote, "the existence of the public's trust cannot be proven" (p. 387). He even went as far as writing "chasing after the public's trust is like chasing after honor and respect . . ." (Id.) But even without this definition, it is very difficult to quantify this concept, not just in terms of the judicial authority, which is seemingly regarded quite differently by various sectors of the population. I remember that as Attorney General, when we held discussions in my office about the public's trust, I would say: Who exactly is the public? The Arabs of Salach-A-Din Street, where the Ministry of Justice sits? The Hassidic people of the Beit-Israel neighborhood beyond Highway No. 1? The residents of French Hill, a kilometer or two further to the north? I would have been overjoyed were we able to come together around "an agreed public trust" (on this term see also HCJ 5853/07, *Emunah – National Religious Woman's Organization v. The Prime Minister*, IsrSC 62(3) 445, 469-470 (Justice Procaccia) and 494-495 (Justice Arbel)) as an "objective public trust" of sorts, but ultimately this goal simply falls under the trust of the Court who is setting the standard – and what if the public should re-elect the person in question, can we then continue to speak of the "public's trust?" I, myself, would, therefore, avoid using the expression regarding public trust in our case, but for under the common legal parameters of administrative law, which emphasize the public administrative action rather than an external angle. Indeed, there have been critics (expressing a principally appealing critique) of the expressions "unreasonableness" and "extreme unreasonableness" employed by our administrative jurisprudence for difficulties in quantifying and measuring them, and for the concern about a lack of clear standards by the "measure of the Court's foot", similarly to the opposition to the laws of equity in England, as if they were defined by the foot of the Lord Chancellor. Still, this is not the case. We are not concerned with righteous "purity" but with layers of law that have been developed over decades, since the cases of *Deri* and *Pinhasi*, and were only to the benefit of public service. Though the outcome of section 22 is aggressive, it is inevitable.

On the Gap between Applying Section 22 to End a Term and to Prevent Running in Elections

K. My colleague, the Deputy President, explained why, under the circumstances, we cannot bar the mere running in the elections, and that creates the "entanglement" of our "in between situation": the duty of the council to examine the indictment before the elections and the new council's duty to reexamine it after the elections. The answer is not only important in light of the right to be elected, which ought not to be taken lightly, but ultimately and simply, because of the lack of a section similar to section 22 in terms of nominations. In my opinion, the legislature would do well to consider the entire issue before us in this case, and all of its aspects.

Conclusion

L. To conclude, our Jewish law sages said (Bavli, Yoma 22, 2), by Rabbi Yohanan as representing Rabbi Shimon Ben-Yehotzedek, "A public representative shall not be appointed without a box of snakes hanging behind, for, if he becomes arrogant, he shall be told to turn back." Rabbi Menahem Hameiri (13th Century, Provence) said: "It is proper to appoint as public official only one who is known to be modest, humble and patient, because he must deal with different people in different and changing ways. He must love each of them according to their characters". And what was said regarding the box of snakes – "should he become smug and conceited over the people for unholy reasons, he should be instructed to self-reflect and look behind him." Jewish administrative law, as I have occasionally termed it, requires clean public administrative ("And you shall be clean of God and of Israel", Deuteronomy 32, 22); see my opinion in APA 7357/03, *The Port Authority v. Tzomet Engineers*, IsrSC 59(2) 145, 173-175. The municipal political system in the authorities with which we are concerned, by virtue of insisting on closing its eyes in terms of section 22 to the indictments at the core of the head of authority's conduct, imposed upon us what we would have liked to avoid. The drastic step taken is necessary under the circumstances, as the Rambam said in EIGHT CHAPTERS (his introduction to Masechet Avot), chapter 4, that "like the body out of balance, we shall see to which side it leans and we shall stand against the opposite until it gains equilibrium, and, when it is balanced, we remove our hands from the opposite and do to it what would put it to balance, so will be done to character." In other words, in order to achieve balance in the conducts field, it may be necessary at times to take drastic measures that overly swing the pendulum until it returns to its center.

M. Finally, I join my colleague the Deputy President.

Justice

Justice Z. Zilbertal:

1. I agree with the comprehensive and instructive opinion by my colleague the Deputy President M. Naor, which includes discussion of all the necessary questions, and join her reasoning and conclusions. I have found it appropriate to briefly address several matters that are, to me, worth emphasis.

2. Like my colleague the Deputy President, I, too, was troubled by the fact that a head of authority, removed from office due to conduct unbecoming that precludes him from continuing to serve, would be entitled to run as a nominee in elections held soon after his removal. This outcome creates moral, logical and practical difficulties. Still, it should be noted, as my colleague also noted in paragraph 57 of her opinion, that the will of the voter should be considered

as one of the factors when a head of authority was elected while an indictment against that head of authority is pending and the voting public was aware of this fact.

3. Still, as was also mentioned by some of my colleagues, we should keep in mind that "the judgment of the voter does not replace the law and it may not substitute for it" (Then Justice Barak in the first *Pinhasi* case, HCJ 4267/93, *Amitai – Citizens for Proper and Clean Governance v. The Prime Minister of Israel*, IsrSC 47(5) 441, 470 (1993)).

Therefore, among its other roles, the Court must serve, at times, as a last line of defense in protecting and preserving fundamental values, including the rule of law (in its substantive sense) and clean governance by a public authority. This is not a reflection of distrust toward the voters, but that, naturally, and particularly in municipal elections, the attention of part of the public is given mainly to the work and achievements of the head of authority facing re-election insofar as the ongoing running of municipal services is concerned, and less to their moral behavior. Thus, when a head of authority has been indicted, the authority council is obligated to discuss the issue of their removal from office, and must consider the ethical and moral considerations that would reflect fundamental principles "expressing the spirit of the state" (Yitzhak Zamir, THE ADMINISTRATIVE AUTHORITY, Vol 1, 29 (2nd ed. 2010)), as these principles constitute "relevant factors that any administrative authority must take into account when fulfilling any role" (Id., p. 30). These include considerations stemming "from the general purposes of the legal system" (Id. p. 31). Should the authorized authority fail in its decision in an unreasonable manner, for example by not attributing sufficient weight to those value-based considerations that reflect general purposes, the Court then must speak out.

Justice Cheshin also addressed this in his dissenting opinion in the second *Hanegbi* case (HCJ 1993/03, *The Movement for Quality Government in Israel v. The Prime Minister*, IsrSC 57(6) 817, 903-904), as follows:

> And so, when raising a certain incident before the Court, and when a heavy suspicion arises, a serious suspicion, that, due to a certain act or failure to act the public trust in its leaders will be lost or gravely harmed, the Court may not sit idly by, and maintain its hands that did not shed blood and its eyes did not see. To a certain extent, the Court's intervention in these matters is an intervention of self-defense, self preservation by a governmental system in its entirety, including even the judicial authority. For what would the Court reply when it is argued against it that it saw transgression with its own eyes and did nothing?

4. A head of local authority indicted for serious offenses, especially offenses that go to the core of public office, is one who displays "conduct unbecoming the

status of head of authority" in terms of section 22 of the Election and Tenure of Head and Deputy Heads Law. It seems this cannot be disputed. The expression "conduct unbecoming" is a general term that is designed to "reflect the fundamental views at the basis of public service" and it reflects "the values and principles that exist in public service" (these words were said in a slightly different context by then Deputy President Barak in HCJ 7074/93, *Swisa v. the Attorney General*, IsrSC 48(2) 750, 779 (1994), but they are apt in our case, too). The conclusion regarding the unbecoming "conduct" of a head of authority is based on administrative evidence that hold special force – an indictment that followed significant reflection by decision makers in all levels of the state attorney. For the purposes of section 22, it is unnecessary to prove "conduct unbecoming" to the same extent required in a criminal procedure itself, and, in any event, a decision in the matter does not compromise the presumption of innocence that remains fully intact as long as the head of authority has not been convicted. In my view, it is unreasonable to decide that a person indicted for offenses similar to those here could continue serving as head of local authority, when it is primarily a highly powerful executive office, which includes many authorities such that integrity is a prerequisite for service:

> Indeed, precisely because one is an elected official, he is bound to higher standards of conduct and higher ethics than a "regular" public servant. Anyone elected by the public must serve as a role model for the people, must be loyal to the public, and worthy of the trust given to him. Therefore, when a government authority is conferred with the authority to end a term it must use it when the official harms the public's trust in governance, whether the official was elected (…) or is a public servant (…) (HCJ 4267/93, Id., p. 470).

I therefore join the opinion of the Deputy President.

Justice

Justice E. Hayut:

I join the opinion of the Deputy President, Justice M. Naor, and all of its reasons, as well as her conclusions regarding the extreme unreasonableness of the Nazareth Illit City Council's decision and the Ramat HaSharon City Council's conduct, as well as the obligations that would be imposed upon both city councils should Shimon Gapso and Yitzhak Rocherberger be re-elected for another term as mayors. I also accept her conclusion that under the current

state of the law we cannot bar these candidates from running in the coming municipal elections.

The Deputy President clarified at great extent and depth the considerations leading to these conclusions, and I shall therefore comment only briefly.

1. The argument that the voting public must be allowed to decide whether it wishes to elect mayors who have been indicted, particularly because of the close timing between the indictments and the elections, is weaved throughout the positions of Rocherberger, Gapso and the City Councils. This argument was also presented as a central reason by the majority of the Nazareth Illit City Council members who opposed Gapso's removal (see for instance words by city council member, Mr. Alexander Gdalkin who justified his support by saying "Who are we to decide today the fate of a person? The public, 40,000 voters, will go and determine on October 22 what is best for Nazareth Illit", p. 21 of the Nazareth Illit City Council's meeting minutes, dated August 13, 2013). This approach means that, as long as the public is aware of the corrupt conduct attributed to its elected officials in a pending indictment, the public's will must be respected and intervening in it must be avoided, both before and after the elections. This approach, though it has its reasons, is inappropriate because it does not correctly balance the right to elect and to be elected with other important rights and interest, which are no less legally significant. In the *Pinhasi* case, the Court reasoned in this context that "the judgment of the voters does not replace the law and cannot substitute for it . . . therefore, when a governmental authority holds the power to end a term, it must employ it when the public official in question harms the public's trust in government, whether the official has been elected or is a civil servant" (HCJ 4267/93, *Amitai – Citizens for Proper and Clean Governance*, IsrSC 47(5) 441, 470 (1993)). Thus the right to vote and to be elected in local elections, as important and constitutional as it is, should not eclipse other important principles that are fundamental to our legal system, including the rule of law and clean governance by both the central and local governments. Therefore by exercising its authority under section 22(a) of the Election and Tenure of Head and Deputy Heads Law, and by considering whether to remove the head of the authority from office according to this provision, the local city council cannot rely on the right to vote and to be elected as an exclusive consideration. I will add and note that according to the quote above, and, in contrast to the Respondents' claims, in order to balance the "judgment of the people" and the "judgment of the law," the Court has not created a dichotomy between an elected official and a civil servant. In any event, we must remember that the head of the local authority, though elected in direct elections, also holds significant executive powers. Among others, the head of the local authority serves as the head of the local committee for planning and construction and is authorized to approve any and all of a municipality's expenses (for a detailed list of the various executive powers granted to the head of local authority, see para. 41 of HCJ 5126/13).

2. On the need to balance the conflicting rights and interest in the specific context of the local government, then Justice Beinisch noted in HCJ 10769/05, *Almakays v. the Minister of Interior* , paragraph 10:

> Despite the primacy of the democratic right to representation, we must remember that this right is not absolute, but of relative weight. In determining its scope and weight in general, and when it comes to local government in particular, consideration must also be given to other public values and interests, whose realization is vital to the ordinary function of a society.

Support for the conclusion that the voter's decision in the ballot is not meant to be the central or exclusive factor for evaluating a head of local authority's conduct in terms of a city council's decision under section 22 can be found in the limitations the Legislature saw fit to impose on elected officials of local government to run that locality's affairs, as well as the supervisory powers granted to the central government. Without exhaustingly detailing these restrictions and supervisory powers, I will note that a bylaw enacted by a city council may be voided by the Minister of Interior (section 258 of the Municipalities Ordinance), that the Minister of Interior may push back the date of local elections in a particular local authority (section 5 of the Local Authorities Elections Law) and that the Minister is authorized to remove a head of authority or city council from office and appoint other office holders in their stead (section 143 of the Municipalities Ordinance). Therefore, the right of local voters to vote and the right of their representatives to be elected is significantly limited for public interests that involve all citizens of Israel. It appears that the main rationale for the extensive supervisory powers granted to the central government is that a significant portion of Israeli local authorities' budgets is funded by the central government (Ishai Blank, *The Location of the Local: Local Government Law, Decentralization and Spatial Inequality in Israel*, MISHAPTIM 34, 197, 226-230 (2004); Yitzhak Zamir, ADMINISTRATIVE AUTHORITY 1, 452 (second ed., 2010)), and thus, the way a local authority's conduct already impacts each and every one of the citizens of Israel who may shoulder, even if indirectly, the burden of financing its activity (see and compare HCJ 9882/06, *Shavit v. The Minister of Interior*, para. 6 of then Justice Grunis' judgment (August 15, 2007)). To the extent that a recent illustration of this issue is necessary, it may be found in section 6-15 of the Changes in National Priorities Law (Legislative Amendments to Achieve Budgetary Goals for Years 2013-2014), 5773-2013, which require 57 local authorities (detailed there) to pay NIS 450 million to the Ministry of Interior, which will then in turn be paid to by Ministry to other local authorities in need of grants.

3. Therefore, the appearance of the local governance in Israel is not the private matter of the residents of Nazareth Illit, Ramat HaSharon, or any other local authority which may be entitled to vote and be elected in that authority. The election of a mayor indicted for offenses against public clean governance,

regardless of the mayor's election by voters in that authority, may cause real harm to the status of all governmental authorities in Israel. The status of all these authorities is based on the public's trust in their integrity and clean governance, and we must guard against the dangerous destabilization and chipping away at their status in the eyes of the public because people whose public conduct and integrity is put on criminal trial hold high public office and are charged vis-à-vis that office with public funds and public resources and interests.

4. Finally, I wish to add several words on the rules regarding fitness to run in local elections. Section 120 of the Municipalities Ordinance, section 4(c) and 4(d) of the Election and Tenure of Head and Deputy Heads Law, section 7 of the Local Authorities Elections Law 5725-1965 and the Local Authorities Law (Limiting the Right to Be Elected) 5724-1964, establish various conditions for barring one from being nominated and running for head of local authority or member of a city council. Among these conditions are insolvency, candidates whose permanent place of residence is not within the local authority's jurisdiction area, police men and women or prison guards, candidates who have been sentences for over three months' actual imprisonment in a final verdict, and others. The case where an indictment against a candidate for head of authority is not among these statutory reasons for disqualification – though it is problematic, on a public level, to nominate a person who is criminally indicted for offenses related to the office for which that person is nominated – is no less problematic, in my opinion, from the difficulties that inspired some of the other conditions set by the Legislature in this context. For example, the explanatory notes of the Law Amending the Law of Local Authorities (n. 4) 5733-1972 reveals that the restriction regarding insolvent people was designed to "emphasize the integrity and honesty of public figures." Indeed, under criminal law, a defendant who has yet to be convicted enjoys the presumption of innocence, but insofar that we are concerned with a public office, and similarly to the considerations detailed in terms of removing an incumbent head of authority by the city council according to section 22 of the Election and Tenure of Head and Deputy Heads Law, I believe that we must set a stricter standard. For these purposes, it is sufficient, to me, that there is administrative evidence in the form of an indictment filed by the Attorney General detailing offenses that are related to the office for which one is running (or other serious offenses, even in the absence of such connection) to negate the right to be nominated. In this context, I join my colleague the Deputy President's urging that the law be amended and that such a condition be added to the relevant statutes. Additionally, I accept her conclusion that, in light of the absence of such cause from the current law books and without the authority of any administrative body to exercise discretion over the right of a criminally indicted nominee to run, we cannot revoke the right of Gapso and Rocherberger to run in the coming elections.

Justice E. Arbel:

1. On September 17, 2013 we handed down our ruling (by majority) in the petitions, where we decided that two serving mayors, who had been recently indicted, would be immediately removed from their offices. We noted that the city councils' decisions not to remove them from office, in each of these cases, is inconsistent with the principle of ensuring clean governance and preserving the rule of law (as discussed in the opinion of my colleague, regarding Respondent 1 in HCJ 5598/13 we are concerned with the city council's refusal to convene). In both cases, we held that the conduct associated with each of them in the indictments against them constitutes conduct unbecoming under section 22 of the Election and Tenure of Head and Deputy Heads Law, and that the city council's decision was extremely unreasonable also in light of the relevant mayors' intention to run once more for the office of mayor in the upcoming local elections. We noted that, though on a public level we are uncomfortable with this state of affairs, we do not see a legal possibility to prevent them from running. Still, we held that should one of them be elected for another term, the relevant city council would be obligated to convene soon after the elections in order to examine removing the elected mayor from office, according to section 22.

   Now that the time to give reasons for our decision has come, I join the well founded and comprehensive opinion by my colleague, Deputy President M. Naor, including its reasons and rationales, and add to them several of my own.

2. There are three issues that required our decision: first, the removal of a head of a local authority from office due to an indictment filed during the term in office; second, preventing the candidacy of a person – whether a serving head of local authority or a candidate that is not serving as one – for the office of head of local authority due to an indictment against that person; and third, the removal of a head of local authority from office after the local elections in light of an indictment filed against the head of local authority before the elections. Though, as mentioned by my colleague, these are three issues that warrant separate consideration, their resolution has a common value-based and legal foundation.

3. What are the impacts of criminally indicting a serving head of local authority? My colleague's response was that once a sitting head of local authority has been indicted, and even when his term does not automatically end under section 20 of the Election and Tenure of Head and Deputy Heads Law, the city council is obligated to examine whether any weighty considerations or circumstances exist in his case to warrant removal from office according to section 22. This position, which is acceptable to me, is based on the distinction between one's eligibility and fitness to be elected or appointed to public office or service and the discretion afforded to those voting for or

electing the candidate. Indeed, as I will discuss, the mere fact that an indictment is a meaningful event, that requires the local authority's council to evaluate whether one is worthy of office and whether this event does not warrant the council's exercise of its power under the law. It is clear that an indictment in and of itself does not mean the head of authority is not fit to serve. Thus, for example, we may imagine a situation where an indictment for certain negligence offenses would not lead to a conclusion that the head of authority is not fit to serve. Yet, the mere existence of an indictment requires the city council to convene and consider whether removal from office is justified under section 22, in light of the conduct attributed to the head of authority in the indictment.

4. The Petitions before us paint a picture that is far from satisfactory. They reveal that public officials, like the bodies that appoint them or are authorized to remove them from office, see nothing wrong with a person who has been criminally indicted for serious offenses – or at the very least not trivial offenses – holding high public office. We are witness to a desire to disaggregate the criminal proceedings from the public sphere, as if a criminal proceeding is not taking place. In my view, the Court cannot concede to such an approach, which causes grave harm to the principle of the rule of law, to the proper function of public authorities, and to the public's trust in the system. I shall explain.

On the timeline of a criminal proceeding, an indictment is a highly meaningful event. It is a constitutive event, which means that when a prosecutor concluded reviewing the evidence, and in cases such as the one at hand – after a suspect was granted the right to a hearing, as well – the prosecutor was persuaded that the evidence it holds will likely lead to a conviction (HCJ 2534/97 *MK Yahav v. The State* Attorney, IsrSC 51(3) 1, 11-12 (1997)). This is true in the matter of any defendant, certainly that of anyone holding high public office. In the specific matter of head of local authorities, we must note that the decision to indict is made by the head of the general prosecution, led by the Attorney General. An indictment is therefore tantamount to a declaration by the general prosecution, as the professional body entrusted with evaluating evidence in this stage about the sufficiency of its evidence to base a criminal conviction.

5. It is well known that even once an indictment has been filed, and as long as the criminal proceeding has not ended in a conviction, the defendant may enjoy the presumption of innocence. The presumption of innocence is a fundamental principle in our legal system, which is designed to ensure that the defendant is not unduly and unnecessarily burdened with the most difficult infringements of their rights – their liberty, their property, their good reputation – that follow from a criminal conviction, as long as guilt has not been proven. It is of the central foundations of the right to a fair trial, and, as such, is tightly linked with the constitutional value of human dignity.

The status of the presumption of innocence is high and mighty. However, the petitions before us speak to the impact of an indictment against a head of local authority on the public level. In my view, the fact that the criminal proceeding has yet to be concluded does not allow for ignoring it on the public level, and does not allow treating the defendant as if clean of all wrongdoing, when candidacy for public office is at stake or when the continuation of their service is examined.

As mentioned, the grim picture has been revealed in the past several years where holders of public office who have been indicted seem not to see any problem with holding onto their office despite the proceedings against them, and their conduct is *de facto* endorsed by the bodies authorized to remove them from office. Worse yet, it often appears that holding onto the office serves an effect, sometimes reported by the media, of "business as usual," as if no criminal proceeding is taking place, in an attempt to send a message that the accusations are bogus and empty, and therefore they do not, nor should they, have any impact on the public office. As if to say: there is an indictment but the world keeps on spinning. This is even more so in our case, where not only do the mayors here not see any problem with continuing to hold their office, and neither do the city councils in those local authorities, but they also seek to present themselves as candidates for public vote once again.

6. In my opinion this Court cannot accept the conduct described, which disregards the indictment and its implications, because such disregard harms the foundations on which Israeli society stands, and its values – first and foremost – the rule of law.

As mentioned, this Court reiterated once and again, in a long line of decisions, that the fact that a person may by eligible for office under the fitness rules does not absolve the authorized body – be it the voter or the appointer – to consider a person's suitability and worthiness of office. Where fitness requirements end, discretion begins. This fact, it was held, must account for a candidate's criminal history or that the candidate is a defendant in a criminal proceeding (see e.g. HCJ 4267/93 *Amitai – Citizens for Proper and Clean Governance v. The Prime Minister of Israel*, IsrSC 47(5) 441, 457-458 (1993); HCJ 1262/06 *Movement for Quality Government in Israel v. Shas Faction*, IsrSC 61(1) 185, 199-203 (2006); HCJ 5853/07 *Emunah – National Religious Woman's Organization v. The Prime Minister*, IsrSC 62(3) 445, 492-493 (2007) ("*Ramon*" case) and the references therein.) This duty stems from the view that the public authority is a fiduciary of the public. The public figure is the fiduciary – "he does not act for himself, but for the interests of the public" (HCJ 669/86 *Rubin v. Berger*, IsrSC 41(1) 73, 78 (1987)). The fiduciary duty of the public official is important beyond the academic or theoretical. This is not lip service to be paid and we cannot accept a reality where this fiduciary duty takes up residence only in scholarship and judgments. It is a duty in practice which must be clearly reflected in the manner in which public officials and servants conduct themselves:

> Indeed, the fiduciary duty requires integrity, and integrity requires practicality, honesty, equality and reasonableness. This list of principles deriving from the fiduciary duty is not an exhaustive list, and the list of values rooted in the duty of integrity is not frozen. As common for principles and values, they are both stable on the one hand and evolving on the other hand. They are planted in the soul of the people, and do not bend with the winds of time. They are living ideas that develop in order to provide fitting solutions to new problems. (Then Justice Barak, HCJ 1635/90, *Jarjevski v. the Prime Minister*, IsrSC 45(1) 749, 841 (1991)).

The fiduciary duty of an elected or appointed official to the public, and the values deriving from it, are fundamental to the public's trust in the authorities. They are the basis for the public's trust that its officials operate with only the public interest in mind, that they are guided by principles of fairness, integrity, and honesty, that they perform their duties properly, and that they hold reverence for the law. It would not be an exaggeration to say that the elected officials and public servants design with their behavior, the way the individual sees the entire public administration and its trust in the state authorities. Their conduct affects the public's perception of the value of respect for the law. I have addressed this before in the matter of *Ramon*, and what I said there is apt here as well:

> Realizing the fiduciary duty is not accomplished only through decisions in matters of policy, initiative, planning and executing, but also through maintaining a proper and clean image of public service and those who lead it (Id. p. 493).

Like my colleague the Deputy President, I, too, believe that these principles apply, with the necessary adjustments, to a decision regarding ending a term or removal from office.

7. Where a public official who is accused of serious offenses – and such are the offenses in our case – remains in office despite the proceeding against him, as if the criminal proceedings is not taking place, where the body authorized to end or suspend the official from service finds that, under the circumstances, the official is still worthy of office, a problematic message is sent to the public as a whole. It is a message of disregard for the rule of law, and sometimes even ignoring it, as well as a message of disrespect for the work of state authorities – primarily law enforcement agencies. This state of affairs is a destructive message to the way the public understands the meaning of initiating criminal proceedings against a person and the weight it attributes to the prosecution's decision to indict. After all, the public sees its elected officials disregarding these, as if they were not. This harms the public's trust in the authorities, while sending out a harsh message to employees in the public service about the standards required of them (compare my position in

Ramon, p. 505). And what is lacking here? Recognition of the value of the rule of law and a commitment to preserve the public's trust in the authorities. There is no mutual respect between State authorities to their work here, and no taking a clear stance regarding the standards required of public servants and elected officials.

That the jurisprudence of this Court in matters of elections and appointments for public office, and regarding the duty of an appointing or authorized body to consider criminal history prior to election or appointment, or for the purposes of ending or removal from office, dates back so long. Still, since the city council of each of the relevant local authorities did not see fit to remove the head of authority from office despite the serious indictments against them, indicates more than anything that the principles leading these issues have not been understood or internalized. After all, these things are not new to us (see, e.g., HCJ 3094/93 *Movement for Quality Government in Israel v. The Government of Israel*, IsrSC 47(5) 404 (1993); HCJ 4267/93 above). It is a clear and unmistakable indication of an improper culture of government that does not encompass an understanding of the meaning of public office and commitment to the public. It does not leave the Court any choice but to intervene in the authority's decision in order to protect the rule of law and the public's trust in the authorities.

8. The response to the argument that under the presumption of innocence an indicted head of local authority continues to be worthy of public office, particularly when we are concerned with offenses against clean governance, has several components:

First, it is true that not every indictment warrants a conclusion that the head of authority must be removed from office, and each case must be closely and responsibly examined. Still, the mere indicting of a person holding such high office requires discussion among the council as the body authorized to take the step of removal from office. The more the attributed charges are of corruption, exploitation of office's power, severe harm to clean governance, or reveal any other alleged moral flaw, so too is the conclusion that the head of authority is not worthy of office solidified, at least for the duration of clarifying the facts in the trial and until the court gives its ruling.

Second, that a defendant, and a head of local authority at that, enjoys the presumption of innocence in a criminal proceeding does not mean that he is unblemished, even allegedly. The presumption of innocence does not make right an appointment nor continued public service. A head of local authority facing serious indictment – certainly for offenses of corruption or fraud – continuing to serve can be seen as ignoring the indictment pending against him. It reflects an attitude of dismissal and contempt toward law enforcement agencies in particular, and toward the public in general. It expresses concession to a reality where breaking the law is no longer cause for scorn and

shunning (see also opinion by Justice Levi, HCJ 5699/07, *Jane Doe (A.) v. the Attorney General*, IsrSC 62(3) 550, 662 (2008)).

9. What I have said above targets the city council as the body granted discretion and authority to decide upon removal from office, but addresses to great extent those in the eye of the storm – the indicted heads of authorities – as well. At this point I wish to emphasize the second issue the Deputy President discussed in her opinion – the possibility of preventing a criminal defendant from running for elections. As we noted in our decision, the current state of the law does not allow for barring the candidacy of a criminal defendant. Like my colleague, I too believe that the cases before us, and other cases (HCJ 5141/11 *Lilian v. the Mayor of Ramat Gan and the Chairperson of the Ramat Gan Economic Corporation*, (July 14, 2013)), indicate how pressing the need is for legislative intervention. The current arrangement gives rise to difficulties, particularly in the third situation my colleague had discussed, which concerns an indicted person who is elected to be the head of the local authority and is soon after removed from office by the city council. This difficulty is not merely moral or budgetary. It also diminishes the efficiency of the local government and its proper operation.

Additionally, a wide examination of the fitness rules and the legislative arrangements in terms of ending a term or removing from office should be conducted, following the guiding principles laid out in the Court's jurisprudence, particularly in light of the growing number of indictments against heads of local authorities and the need to ensure the public's trust in government authorities.

Along with the need for intervention by the legislature to prevent candidacy from defendants standing criminal trial, I wish to reiterate that there are matters that should not be determined within the walls of a court, but through one's own self-reflection. An elected public official, certainly one who holds such high office as head of local authority, is expected to recognize his own responsibility not only in matters over which he is charged when holding or running for public office, but also the responsibility in maintaining and advancing public trust in authorities. It is important that elected public officials understand that they must serve as role models to the public at large as well as for public servants in particular, and that in their official capacity they represent the entire public. They must acknowledge that, as long as the cloud of an indictment hovers over their head, their holding or running for office is troubling.

10. The voters' judgment.

Another argument that was raised before us time and again was that the voters must be given the opportunity to weigh and evaluate the significance of an indictment. This issue somewhat touches on the first situation discussed by the Deputy President in her opinion, but clearly arises in the third situation the

Deputy President discussed – that of removal from office of one who had just been elected for mayor while an indictment is pending against them.

I agree with the resolution the Deputy President offered in this context and with the relevant comments by my colleague Justice Hayut, the main point of which is that the judgment of the voters cannot substitute for the law. Rather, the judgment of the voter is one of the considerations that a city council must take into account when convening under section 22, and, in any event, this consideration cannot overshadow the principles of the rule of law and clean governance.

The head of the local authority is elected to this office in direct elections. Winning elections amounts to a vote of confidence by local residents in the head of the local authority. It can therefore be said that where an indictment against an elected head of authority was common knowledge even prior to their election, and that the head of the authority still won votes, a decision to remove the head of the authority from office constitutes gross intervention in the will of the voters and an infringement of their right to vote. A possible response to this could be that the right of the voter, as important as it may be, is not absolute. It must be balanced and weighed against other interests when it is necessary to ensure clean governance and the public's trust in public service.

Moreover, the judgment of the voter – which is indisputably important – cannot substitute the law and judicial review, and the tasks resting on the shoulders of the voters and the courts are significantly different. Each and every individual holds the right to give their vote to whomever they deem fit to stand at the head of the local authority. It is a right that is also a duty. When coming to a decision, the voters are entitled to weigh a wide range of considerations and interests according to their own personal views. An election is a single event that takes place once every five years, and, as such, it is assumed that it reflects the voters' position at the point in time of the elections. The court, however, has a different perspective. The causes a court has to intervene are more limited and the court must exercise restraint while invoking them. That said, the court also has a broader point of view. In our case, for instance, the Court is guided by jurisprudence on issues of appointing and ending a term in office, as well as by the foundational principles of our system. Indeed, a court carries the unique function of protecting a set of values enshrined in our Basic Laws and of advancing them, as they are the constitutional framework of our system and they reflect the core of Israeli society's values (see also Aharon Barak, THE JUDGE IN A DEMOCRACY, 77-80 (2004)). The court must guard the values of Israel as a Jewish and democratic state and promote them (Id. 83). In this context the words of then Justice Barak are apt:

> Indeed, 'it is our role and our duty as judges' (id.). We are a branch of the government. Our rule – within the principle of

> the separation of authorities – is to ensure that the other branches of government operate within the law. This is the rule of law over government. The branches of government are high, but the law is higher than us all (see HCJ 428/86, *Barzili v. the Government of Israel*, IsrSC 40(3) 507, 585). In our judicial decision we operate according to constitutional standards. We give expression to the statute and to the law. We follow the fundamental values of our constitutional regime. We reflect the manifesto of our state life. Our approach is not guided by passing fads, but by the basic state views regarding our existence as an enlightened state, whose government is built upon the public's trust and upon the integrity of our public servants. (HCJ 4267/93 above).

The principles of the rule of law and clean governance of public service derive from Israel's democratic character and are of the primary building blocks of our system. The duty of the Court to ensure the public's trust in state institutions also derives from protecting the rule of law. Without public trust, public authorities would be hard-pressed to perform their duties and the entire democratic structure would be eroded.

To conclude this point, the voter's role in the democratic process is wholly different than the role of the Court. Both are essential to the proper function of the democratic system. One does not trespass against the other. This is also what I meant in APA 3911/05 *Hava v. Azur Local Council*, (2006), where we were called upon to examine the decision to remove a council member:

> When I come to examine the circumstances around the case before us, I cannot ignore the picture before us and leave the task only to the public's watchful eye, when it sometimes seems one eye is covered and the public concedes to phenomena and conduct that the court, when presented with the matter, cannot accept.

These words are more appropriate today, when we are confronted with a wave of cases tying elected public officials to alleged criminal offenses, and even more fitting in terms of defendants indicted for serious offenses of corruption, or offenses that scream out with violations of clean governance.

Remarks Before Conclusion:

11. The Attorney General's position regarding the Third Respondent in HCJ 5126/13, the Mayor of Nazareth Illit Mr. Shimon Gapso, was that, at this time, the decision of the Nazareth Illit City Council not to remove Mr. Gapso from office is within the range of reasonableness. To support this position it was noted that:

> ". . . The offense for which Mr. Gapso was indicted is indeed serious due to its connection with public office. However, it does not reveal heightened severity because there allegedly was a single act (as opposed to a series of incidents taking place over time) and the benefits or compensation allegedly given in return is not of such scope that increases the level of severity to heightened.

The matter of Gapso is pending and we must take great care not to express our opinion about the merits of the charges. Still, Gapso is standing trial for bribery. Without expressing an opinion as to his guilt or innocence, rivers have being drawn in this Court's jurisprudence discussing the seriousness of this offense. The moral aspect is inherent in the offense of bribery since its inception, by its very dependence on exploiting public office in order to receive benefits. This severity would have been sufficient, particularly when it is coupled with the fact that the conduct of which he is accused allegedly relates to the public office he holds to lead to a conclusion that under the current state of the law the city council's decision is outside the range of reasonableness.

The reasons detailed in the Attorney General's position, and particularly the level of compensation and the number of crimes committed, are relevant mainly for purposes of evaluating the severity of the attributed offenses on the criminal level. They generally pertain to the sentencing phase, after a conviction – insofar that there is a conviction – and are not necessarily relevant to the council's discussion, in circumstances where the indictment against the head of the local authority accuses him of a serious offense of corruption, especially in light of the fact that the bribery charge reflects an undermining of the will of the voters and a disregard to their rights. As mentioned, when the offenses of bribery are concerned, the wrongdoing – even of a single act – is clear, obvious, and severe in and of itself. I will reiterate that these words are said as a matter of principle and they do not, even as an insinuation, express a position on Gapso's criminal matter.

Another matter I wish to address relates to the timing of the indictments. I am aware of both the complexity that characterizes some investigations into local authorities, and the workload shouldered by the investigating authorities and by the police. I also factor in the care taken by the prosecution authorities before they decide to indict, particularly in cases such as the ones before us, where the decision holds immediate consequences for the defendant. And still, given that the timing of the local elections is known in advance, there should be special effort to reach a decision in these cases as early as possible so that adequate preparation for local elections can be made both from those wishing to run and from the voters.

12. I have read the opinion by my colleague the President and the comments by my colleagues the Deputy President and Justice Hendel on his opinion. I will

only add to their thoughts that the difficulty to which the President points, regarding the existing gap between the outcome of our decision and the current interpretive scheme, as illustrated by the situation of a conviction and a finding of moral turpitude before a judgment becomes final, only emphasizes the need which my colleagues and I discussed, for amended comprehensive legislation that would achieve harmony and coherence and would prevent, one would hope, situations such as those the President presents.

13. In conclusion, the questions raised by these petitions are complex, and relate to the very fabric of democratic life, and our existence as a state and as a society. A lenient approach to an indictment against a sitting head of local authority carries consequences for the conduct of city leaders and for the public as a whole – particularly its trust in the systems of government and its commitment to the value of respecting the law. A matter joins another matter to form a long chain that binds this Court to send out a strong and clear message, and so that is what we have done.

As said above, at the end of the day I join the position of the Deputy President.

Justice

President A. Grunis:

1. On September 17, 2013 an extended panel of seven justices handed down a decision, by a majority, to remove the Mayor of Nazareth Illit, Shimon Gapso, and the Mayor of Ramat HaSharon, Yitzhak Rocherberger, from office. The Mayor of Nazareth Illit was indicted for bribery, while the Mayor of Ramat HaSharon was indicted for offenses of falsifying registration in corporate documents, fraud, and breach of trust in a corporation. Due to the indictment, the Nazareth Illit City Council decided, by a majority, not to remove the Mayor from office. However, the Ramat HaSharon City Council made no decision at all as to whether to remove the Mayor from office, but instead decided to take the matter off of its agenda.

The decision of the Court was reached by six of the justices on the panel, whereas my position was different. I believed that it was not the place of the court to remove the two mayors from office. The opinion was handed down without reasons and it is now time to offer the rationales for my dissenting opinion. It should be noted at the outset, that elections for local authorities are scheduled to take place on October 22, 2013, and include the two relevant cities. At the hearing, both mayors declared their intent to run in these coming elections. In the decision from September 17, 2013, I presented the essence of my position as such:

> My view is that, in light of the fact that the elections for local authorities are to be held on October 22, 2013, which is in less than two months, the Court must wait for the voters' verdict. Indeed, those who have been indicted for offenses along the lines of those for which the mayors of Nazareth Illit and Ramat HaSharon have been indicted are unworthy on a public level to serve as a head of local authority. I believe that, from the public aspect, the two heads of authorities should have resigned from office immediately after they were each indicted. Similarly, on a public level it is inappropriate for either of them to run in the coming elections, and my position on this matter is as that of my colleagues. However, I distinguish the public level from the legal level. Since the elections are coming up, and will be held shortly, there is no room for the Court to put itself in these local authorities' voters' place. Hence, my position is then that the Petitions must be rejected.

At the outset, I will clarify how I diverge from my colleagues. My position is that, in light of the fact that the local elections are soon approaching, there is no justification for judicial intervention. The voter must have its say. My colleagues, the majority justices, intervened in decisions by the city councils. Under the circumstances of this case, and as will be explained below, this is intervention not only in the councils' decisions but also "decisions" by the Minister of Interior, as well as in the right of the voter to have its say. All of this is done, while attributing extreme unreasonableness to each of the mentioned decision-making parties. My colleagues, the majority justices, justify the decision to remove the heads of authorities from office with preserving public's trust in government authorities and the need to ensure clean governance by public authorities and the rule of law. I do not see why it is impossible to wait for the results of the elections, and to discover that way whether the public is willing to vote for candidates who have served as heads of local authorities and who have indictments hovering over their heads. What better way to test the public's trust than direct elections for the office of head of local authority, when it is widely known that the candidate is facing criminal prosecution? Additionally, my colleagues do not, in my view, give sufficient weight to the presumption of innocence. What is more, the position of the majority justices is challenged, in my opinion, by the existence of current legislative arrangements in terms of criminal proceedings against heads of local authorities.

2. The provisions relevant to ending a head of local authority's term (except for a regional council), in light of their involvement in crimes are included in the Election and Tenure of Head and Deputy Heads Law. The pertinent provisions are section 20 and section 22. Section 20, in relevant part, reads as following:

> a. Once a court sentences a head of authority for a criminal offense, whether the offense or conviction occurred while in

office or before the head of authority began serving in office, the court will determine in its sentence whether the offense is one of moral turpitude. The court's decision regarding turpitude is subject to appeal as if it were any other part of the sentence.

b…

c…

d. Once the court determined according to this section that the offense of which the head of authoritywas convicted is one of moral turpitude, the mayor will be suspended from office, until a final judgment is given in the matter.

e. The head of authority's term will end on the day that the judgment establishing the offense is one of moral turpitude becomes final.

g…

(3) Should the head of authority be acquitted through an appeal or should the appellate court find the offense of which the head of authority was convicted is not one of moral turpitude, the head of authority will resume office.

Section 22 stipulates as follows:

a. Should the Council find that the head of authority is engaging in conduct that is unbecoming the status of head of authority and thus believes the head of authority is unworthy of the office, it may, after providing an opportunity to be heard, remove the head of authority from office.

b. A decision to remove the head of authority from office will be reasoned and will be made in a special, closed meeting of council members. The decision will be made by a majority of three fourths of council members. The decision shall require approval by the Minister. (This refers to the Minister of Interior– Grunis.)

c. Should the head of authority fail to have convened a special meeting within 14 days from the day a majority of City Council members called upon him to do so, a majority of City Council members may convene such a meeting and they shall select a chairperson to lead the meeting.

I will already point out the two obvious difficulties that arise, in my view, from the position of the majority justices. First, the legislature established a specific arrangement in regards to a criminal procedure against a serving head of authority. According to this arrangement, a head of local authority who has been convicted of an offense of moral turpitude shall be suspended from office after sentencing and until the verdict becomes final. Only once the verdict becomes final shall the head of authority's term end. In our case, we are concerned, as mentioned, only with the stage of indictment against the two mayors. Second, the majority relies on section 22 in their decision. It should be noted that in order for the decision to remove a head of local authority to be made, a majority of city council members (a special majority) is insufficient, as approval by the Minister of Interior is required. In the two cases before us, there is no claim that the Minister of Interior ever decided on the matter.

The Eve of Elections

3. As mentioned, I attach great weight to the fact that the elections for local authorities are coming up. This fact can affect the measure of judicial restraint necessary before intervening in decisions such as those subject to our review. Of course, this means that the scope of judicial review must be narrowed (see HCJ 1400/06 *Movement for Quality Government in Israel v. The Acting Prime Minister*, para. 17 of Justice Rivlin's judgment (March 6, 2006)). First, from the outcome perspective, within a short period of time, once the elections take place, the two mayors' current terms will have ended on their own. This is relevant to the practical valued (as opposed to the moral value) of the relief we have been requested to grant, which goes to removing the mayors from office. Second, the fact that it is elections time should guide the Court to exercise restraint. Elections period is ". . . a politically sensitive time, and the Court must carefully examine the possible implications of its decision on the public's mindset" (Id.). Third, and most importantly, the issue of continued terms in office for the mayors is expected to be tested soon by the public (see and compare, HCJ 9223/10 *Movement for Quality Government in Israel v. The Prime Minister*, para. 32 (November 19, 2012.)) This factor is of crucial significance to my conclusion that there is no room for judicial intervention in the councils' decisions for reasons of extreme unreasonableness. As I will explain below (in paras. 6-8), taking such a step may cause difficulties even when we are not on the eve of elections. However, this timing exacerbates and heightens these difficulties to an extent that justifies, in my view, dooming the Petitions to fail.

Election by the Public for office Versus Appointment

4. The extent of the range of reasonableness is determined, among others, by the nature of the reviewed decision, the cause for intervention and the identity of the deciding body. The actions that are subject to review in the case before us are the City Councils' failure to exercise their power to remove from office elected heads of local authorities that have been indicted. An elected official is

just that, elected for office by the public in democratic elections. The elected official reports on his actions to the public, and the public's decision in the elections will impact continued service in office. Hence, removal from office in ways other than elections effectively means dismissing the will of the voter and altering an outcome that was reached through the democratic process (see APA 3911/05 *Hava v. Azur Local Council*, para 7 of my dissent opinion (October 23, 2006) (the "*Hava* case"). In light of the significance of the democratic process and out of respect for the will of the voter, the Court must take extra care when examining the reasonableness of a decision to remove from office an elected official. This is particularly true when the authority granted the power to do so opted not to take this sensitive step, and when the Court's decision to overturn its decision will cause the elected official to be removed from office. This takes on additional force when the removal of heads of local authorities is concerned, as they are elected for office in direct elections (see sections 2 and 9 of the Law; see HCJ 636/87 *Assaf v. the Minister of Interior*, IsrSC 43(1) 177, 182 (1988) ("the *Assaf* case")). Effectively, a head of local authority is the only one among the elected government authorities in Israel who is directly elected by the public. This distinguishes a head of local authority from, for instance, Knesset members who are elected as part of a list of candidates rather than by direct elections. Therefore, a judicial decision regarding removing a head of authority from office involves deep intervention in the explicit will of the voter. This decision compromises the principle of representation, that is the voting public's right to elect the candidate desirable to them for office of head of the local authority (see HCJ 4646/08 *Lavi v. the Prime Minister*, para 18 of President Beinisch's judgment (October 12, 2008) ("The *Lavi* case"); HCJ 2533/97 *Movement for Quality Government in Israel v. The Government of Israel*, IsrSC 51(3) 46, 63 (1997)). This may even be considered a certain infringement on the right of the elected official's to be elected. These are matters that are at the foundation of the democratic system and there is no need to elaborate on their significance. Therefore, out of respect for the democratic principle, the Court must take extra care when intervening in decisions as those in question here, particularly when we are on the eve of elections.

5. In this context, it should be noted that one cannot analogize the issue before us to the jurisprudence on limitations due to criminal involvement in cases of appointment to public office. Those lawfully elected to office by the public are not similarly situated to those appointed to public office by an administrative authority (see, e.g. CSA 4123/95, *Or v. the State of Israel – Civil Service Commissioner*, IsrSC 49(5) 184, 190-191 (1996) ("the *Or* case"); the *Lavi* case, paras 12 and 18 of President Beinisch's judgment; the *Hava* case, para 7 of my dissenting opinion). The distinction between the cases is significant and cannot be dismissed easily. Without exhausting this point, I will note that in the case of appointment to public office – including appointment of an elected official (for instance, appointing a Knesset member as a minister), the body authorized to appoint or remove from office is not the voting public. An appointing body, as opposed to the public, is obligated to

consider a range of factors when appointing or removing from office, including the candidate's or office holder's involvement in crimes or criminal proceedings. While precedents have established that the Court cannot set fitness requirements through judicial opinions, but it may intervene in the discretion of the appointing body (see HCJ 727/88 *Awad v. The Minister of Religious Affairs*, IsrSC 42(4) 487, 491-492 (1989); HCJ 6163/92 *Eizenberg v. the Minister of Construction and Housing*, IsrSC 47(2) 229, 256-257 (1993) ("the Eizenberg case"); for critique of the distinction between court-made fitness rules and the Court's intervention in an appointing authority's discretion, see Menahem Moutner, *Between Fitness and Reasonableness – After* HCJ 5853/07 *Emunah – National Religious Woman's Organization v. The Prime Minister, Mr. Ehud Olmert*, HAMISHPAT 14, 403, 405 (2001)). Additionally, there is no natural or constitutional right to be appointed for public office (*Eizenberg*, p. 257; *Or*, p. 191). As a result of these differences, the scope of judicial review over decisions regarding removing a public official from an office for which they were elected by the public should also be narrower than the scope of judicial review over decisions regarding the removal from office of those who were appointed to their office (*Lavi*, paras 12 and 18 of President Beinisch's judgment). Not for nothing does the case law take a broad approach toward the nature of conduct that warrants disqualification of an appointment to public office, even prior to a conviction (see HCJ 3094/93 *Movement for Quality Government in Israel v. the Government of Israel*, IsrSC 47(5), 404, 424 (1993); HCJ 4267/93, *Amitai – Citizens for Proper and Clean Governance v. The Prime Minister of Israel*, IsrSC 47(5) 441 (1993); compare HCJ 1993/03, *Movement for Quality Government in Israel v. The Prime Minister*, IsrSC 57(6) 817, 851 (2003)). However, in the past, this Court has exercised significant judicial restraint when adjudicating the issue of removing elected public officials from office due to causes not set in legislation regarding implication in criminal proceedings (see HCJ 7367/97 *Movement for Quality Government in Israel v. The Attorney General*, IsrSC 52(4) 547, 559 (1998) (the "*Pinhasi* case"); HCJ 6050/94, *Amitai – Citizens for Proper and Clean Governance v. Nitzan* (May 22, 1995), where a petition to order a local authority's council to invoke its authority under section 22 of the Law and remove the head of authority from office after he was convicted of fraud and breach of trust in terms of conduct related to his duties at the municipality was rejected).

The Statutory Arrangement and the Interpretive Aspect

6. The approach of the majority justices causes, in my opinion, difficulty in light of the existing arrangement in the Law, as well. I am referring to those provisions that address the expiry of a head of local authority's term for implication in criminal proceedings. Thus, under section 20 of the Law (as quoted in para. 2, above), a term ends after the criminal process has been exhausted, the head of the local authority has been convicted, and the issue of moral turpitude has been resolved. Recall, that in the case before us, the mayors have been indicted but the criminal process is in its early stages. In

other words, we are quite a whiles away from a conviction and a finding regarding the existence of moral turpitude, and certainly from a final judgment establishing this (compare HCJ 3090/97 *Cohen v. The Ministry of Interior, Southern District Supervisor*, IsrSC 52(2) 721 (1998), where the Court ruled against disqualifying a head of authority from office though a court found he committed criminal offenses, but avoided conviction; HCJ 6790/08 *Lanciano v. the Minister of Interior*, where the Court rejected a petition against the service of a city councilmember who had been convicted and sentenced to suspended sentence of imprisonment and a fine; see also the *Hava* case, para. 8 of my dissenting opinion). In these circumstances, the question of whether this is a negative arrangement may arise. That is, as the Law regulates the provisions in matter of criminal proceedings, is it impossible to remove a head of authority solely due to an indictment, because the Law does not consider this option? In light of my finding that in the case before us we must not intervene in the councils' decisions as to their powers under section 22 since the elections are coming up, I do not see it necessary at this time to express a firm position regarding how to act when an indictment is filed during a term. A few comments will suffice.

7. Let us consider that, at the end of the criminal process against the two mayors, they were acquitted. The provisions of the Law clearly mean that even had they been convicted in the first instance and that the court found the offenses to be of moral turpitude, this would have resulted, at most, with suspension from office (sub-sections 20(d) and 20(e) of the Law, as quoted in para. 2, above). In other words, the approach of the majority justices leads to an indictment bringing about the end of a term, while a conviction and finding of moral turpitude before the judgment becomes final only brings about a suspension. How is it that an event less serious than a conviction and finding of moral turpitude – that is, an indictment – incurred a more severe sanction? The position of the majority justices also causes that provisions regarding the relevance of conviction and moral turpitude are never applied, because the head of authority had already been removed from office upon indictment. This is true also in the context of section 20(g)(3) of the Law (as quoted in para. 2, above). This section mandates that, should a head of authority win an appeal or the appellate court find the offense of which a head of authority was convicted is not of moral turpitude, the head of authority "shall resume the office of head of authority." This provision, too, becomes meaningless, as the head of authority had already been removed from office upon indictment. Put differently, the outcome of my colleagues' decision is to effectively vacate provisions 20(d), 20(e) and 20(g)(3) of the Law.

8. The majority justices find basis for the local authority council's authority to remove a head of authority from office, despite the instruction of section 22 of the Law (quoted in para. 2, above). Section 22(a) provides that when the head of the authority "displays conduct unbecoming the status of head of authority" the council may remove the head of authority from office, should it believe the head of authority is unworthy of office. My colleagues believe that the

conduct described in the indictments may constitute "conduct unbecoming." Recall, that the Nazareth Illit City Council decided not to remove the mayor from office, despite what the indictment alleged about him. As for the Ramat HaSharon City Council, it has removed the issue from its agenda. My colleagues' position is that, in both cases, the city councils' decisions not to remove the mayors from their offices are extremely unreasonable. In other words, the decision not to remove the mayors from office in the concrete cases before us, although my colleagues view it as "conduct unbecoming," is flawed and must be struck down. Therefore, my colleagues decided to remove the two mayors from their offices. In this context, too, the question is whether the arrangement in section 20 of the Law, which addresses criminal procedures against a head of authority constitutes a negative arrangement insofar that it covers the entire framework of the criminal process from start to finish. The different position may be that the arrangement in section 20 is limited in the sense that it addresses only a situation where the head of authority is convicted and it has been found that the offense is one of moral turpitude. It seems there is no room for such a narrow definition of the scope of the arrangement in section 20. In any event, I do not find it necessary to decide the matter. Following the path of section 22 of the Law is, in my opinion, fundamentally flawed for another reason that my colleagues seemed to have not contemplated. I shall discuss this flaw now.

9. Because of the importance of the issue I again quote section 22(b) of the Law:

> b. A decision to remove the head of the authority from office will be reasoned and will be made in a special, closed meeting of council members. The decision will be made by a majority of three fourths of council members. The decision shall require approval by the Minister.

It is clear from this provision that the removal of a head of local authority from office depends on two decisions: one made by the authority council, and the second by the Minister of Interior. In other words, a decision by three quarters of council members is insufficient; rather, an approving decision by the Minister is also necessary. In the case of Nazareth Illit, the City Council decided to reject a proposal to remove the Mayor from office. The majority justices found that this decision is inappropriate because of extreme unreasonableness. There is no claim that, prior to filing these Petitions, the Minister of Interior was called upon to exercise the authority under section 22(b). Indeed, arguably, there is no point in approaching the Minister of Interior before the City Council decides to exercise its authority under the mentioned section. But even so, my colleagues disregard the section's requirement for approval by the Minister of Interior. In my colleagues' opinions there is no examination of the Minister's discretion, probably because the Minister was not even called to consider the matter. The absence of this is especially highlighted because the Minister must exercise independent discretion, and the set of factors that the Minister may consider

are different than those the council may consider (see *Assaf*, p. 182; Daphne Barak-Erez ADMINISTRATIVE LAW vol.1, 319-320 (2010)). In other words, even had the city council's decision been extremely unreasonable, it does not necessarily follow that that the Minister of Interior's decision (were such a decision made) is similarly flawed. In my opinion, the correct move – even according to my colleagues – would have been this: first, granting an absolute order in regards of the two city councils, then referring the matter to the Minister of Interior in order to decide whether to approve. Of course, the Minister's decision would be subject to judicial review as well.

It may be argued against me that the timetable does not permit this, as the elections are scheduled for October 22, 2013. This Court is known for being "the Court that never sleeps." Under the circumstances, there is ample time, both to call upon the Minister of Interior and to file an additional petition in the matter (insofar that such a step were necessary). Therefore, it is unclear to me how it is possible to reverse a "decision" by the Minister when such has not at all been made.

The Public's Trust and the Coming Elections

10. As we have seen, similar questions to those we are concerned with here have come up in the past in the context of appointment (as well as elections) to public office. This Court justified its intervention in issues of appointment, even when the appointee met the statutory fitness requirements (or when no such fitness requirements were established by legislation), in the need to ensure the public's trust in government authorities. In other words, one's appointment to high public office, despite a serious indictment against them, may harm, it was held, the public's trust. In our case, we are now about a week away from the elections. The hearing in the Petitions was held on September 10, 2013. This means the relevant dates are incredibly close to the date of the elections. In light of the interpretive difficulties I discussed in terms of sections 20 and 22 of the Law, I believe it is appropriate to await the voter's verdict. Undoubtedly, the fact that an indictment was filed against each of the mayors, who face re-election, will serve as a major issue in the elections campaign. Therefore, my opinion is that we must allow the voters to have their say. The justification for the Court's intervention for fear of compromising public trust may be weighty had the indictment been filed during a term rather than soon before the elections. The public's trust in this regard is not founded on a tested empirical finding, but on the Court's estimate as to what the public's position is. This is reminiscent of the term the "reasonable person." Clearly, it is fiction. The Court establishes for itself according to its evaluations how it must act, and it attributes the demands it set to that fictitious figure – the reasonable person. Despite its similarity with the term "the public's trust" there is a clear difference between the two terms. The "public's trust" can be measured empirically through elections, when it is expected that one of the major issues in the elections would be the indictment. Let us assume that, in the coming elections, Shimon Gapso and Yitzhak

Rocherberger are elected for second terms as mayors while indictments hang over their heads. How can we say the public's trust was harmed by their election, when it is the public who elected them?

11. As mentioned above, the local elections are to be held in several days. The two mayors that have been removed from office are running in the elections. There is a chance that both or one of them will win and be re-elected for mayor. All of my colleagues raise the possibility that indeed this will be the case. It is likely that should both or one of them is elected, the matter will be brought to the city council for a decision under section 22 of the Law. Some of my collages intimate that, should either of the councils fail to remove them from office, the Court would intervene if any petitions are filed in the matter (and there is no doubt that such petitions would indeed by filed). Should the Court actually intervene, it would cause the removal of those who had just been elected. As a result, special elections for mayor (under section 24A(a)(3) of the Law) would be held. According to my colleagues' approach, either of the two could be a candidate in the special elections. And in this way, the futile step would repeat and the two would again be removed from office, special elections would be held, and over and over again. This is an extreme example, but reality proves it is not entirely hypothetical (see HCJ 2658/06 *Hazima v. Mishlav* (April 3, 2006) where the Court considered the candidacy of a head of authority who had been removed from office under section 20 of the Law in the special elections held because of his removal. Ultimately, the head of the authority agreed to remove his candidacy). Indeed, one understands the approach that distinguishes the removal of a head of a local authority from office and preventing running for office. This is because that, to the extent a candidacy is concerned, there is no statutory provision parallel to section 22 of the Law. However, the odd outcome itself of repeated removal from office and holding elections must, in my view, influence the interpretive approach. In other words, this outcome too reflects how problematic it is to rely on section 22 of the Law in terms of an indictment.

Let us assume that the local authority council that has just been elected in the same elections where the mayor was elected decided to remove the mayor from office because of an indictment against the mayor. Let us further assume that the voting public was aware of the indictment. How could a decision by the council to remove a head of authority from office immediately after being elected in direct elections because of an indictment be justified when the voting public voted for that head of authority? Even if external intervention in the public's will can at times be justified, and I shall address this below, I cannot accept that the city council would act consciously and purposely against the will of the voters whom the council should be representing, particularly when the will of the voters had just been made clear. The approach of several of the majority justices effectively requires city council members to act in contrary to the express will of the voter.

Judicial Intervention in the Will of the Voter

12. I now see fit to address the rationale that warrants, according to the majority justices, intervention in the councils' decision not to remove the two mayors from their respective office. Recall, that the rationale was extreme reasonableness. I do not see it necessary to repeat things I have written elsewhere as to the problematic nature of "unreasonableness" as a cause for the Court's intervention in the decision of an administrative authority (see HCJ 5853/07 *Emunah – National Religious Woman's Organization v. the Prime Minister*, IsrSC 62(3) 445, 521-525 (2007)). In that case, I did not rule out the possibility to invoke, when appropriate, the rationale of extreme unreasonableness. This rationale allows the Court to intervene in administrative decisions. The current case is different. Should indeed the two removed mayors be once again elected, then the voter will have had their say in the matter. Clearly, to accept the approach of several of the majority justices would mean that a future decision by the city council not to remove the mayors from office would be tainted by the same flaw of extreme unreasonableness. Since the council's decision would come shortly after the elections, the inevitable result of this approach is that even the direct election by the public is flawed for being extremely unreasonable. It seems to me that, in light of the fundamental principles of the democratic system, such statement about the voting public goes too far.

13. This should not be understood to mean that I disagree with the fact that, in our legal system, the Court is authorized to reject, in some instances, the will of the voter or that of its elected officials' will. When it comes to central government, the Court has the power to strike down legislation by the Knesset that is inconsistent with a Basic Law (CA 6821/93 *United Bank Hamizrachi Inc. v. Migdal Cooperative Village*, IsrSC 49(4) 221 (1995)). As I pointed out elsewhere, the theoretical justification for such intervention exists, in my view, where the primary legislature infringes upon a basic right, a minority right, or the democratic rules (HCJ 6427/02 *Movement for Quality Government in Israel v. The Knesset*, IsrSC 61(1) 619, 800-804 (2006); see also Oren Gazal-Eyal and Amnon Reichman, *Public Interests as Constitutional Rights?* MISHPATIM 41, 97, 128-135 (2011) ("Gazal-Eyal and Reichman")). A good example for judicial intervention of this kind can be seen in a decision handed down the same week as the decision (the judgment-without-reasons) in the Petitions here (HCJ 7146/12 *Adam v. the Knesset* (September 16, 2013)). That decision considered a statute by the Knesset that allowed placing an "infiltrator" in custody for three years. The statute violated the constitutional liberty right to an extent greater than necessary. Additionally, the group harmed there was a minority group. In my view, one cannot equate this example to the case before us.

14. My colleagues repeatedly emphasize two over-arching principles that justify their approach, which are the rule of law and clean governance. Of course, I do not dispute the great import of these two principles. However, in this case alongside these principles, two additional over-arching principles apply, in my opinion, and they are the democratic principle and the presumption of

innocence (about the presumption of innocence in this context, see Rinat Kitai Sangaro, *Harming A Person's Position due to Suspicion of Committing A Criminal Offense*, ALEI MISHPAT 2, 107, 109 (2002)). In mentioning the democratic principle, I am referring to the fact that, in general, and subject to exceptions which I have discussed above, it is mandatory to accept the decision of the voters that was made in a democratic manner and the decision of its representatives – members of the legislature (a clear distinction must be drawn between intervention in the will of the voter and the will of its elected representatives and intervention in decisions of administrative authorities.) Invoking over-arching principles is not meant to give a simple and clear answer for concrete situations, as very often principles conflict and must be reconciled (about the importance of distinguishing rights from public interests, see Gazal-Eyal and Reichman). Indeed, often the solution will be found in setting a hierarchy of over-arching principles. If this is done in this case, then, in my view, the prevailing principles are the will of the voter and the presumption of innocence. The following, which was said in a similar context regarding the service of a Knesset member who had been convicted of an offense of moral turpitude, is appropriate here as well:

> . . . Against preserving the public's trust in government authorities stands the interest of realizing the will of the voters, which is of the foundations of the democratic system. The law must balance these two principles. This balance, that is struck in Basic Law: The Knesset, clearly prioritizes the will of the voter. (*Pinhasi*, Justice Dorner, p. 555-556)

15. It seems the disagreement between my colleagues and me is rooted not in one interpretive approach over another, but in different views as to the limits of the Court's power. I believe that we both aspire to making the desired law into the existing law. The gap between us goes to the question of how far the Court may walk down the path that leads to a convergence between the desired law and the existing one. Our system is a common law system. In this system, the Court has significant interpretive leeway as far as the letter of the law goes, alongside which it has an important creative role, also with wide range, where there is no legislation. The more the legislation does cover, the smaller the parameter in which the Court may act. In our case, there is a clear statutory arrangement. Indeed, it is not the optimal arrangement in terms of the indictment phase when a head of local authority is concerned. It is certainly desirable for explicit provisions to be set regarding this stage, as part as the general arrangement. Thus, for example, it is conceivable that the indictment for offenses that are not particularly minor would require suspension of a head of the authority. According to my approach, this is not the existing law.

At this point, I see it fit to slightly diverge from the proper order of things and address a term that appears repeatedly in the case law. This is the term "normative" (on the difficulties in using this term in case law, see Moshe Landau, *On Wording Judgments*, TAMIR BOOK 187, 193-194 (1999)). This

term appears at times in judicial opinions as part of a heading – "the normative framework." In this context, it refers to, generally, a description of the provisions in the legislation that address the issue at hand. It, therefore, bears a positive-descriptive meaning. Alongside this meaning, within the discipline of philosophy, the term "normative" bears a different meaning. There it means what it ought to be. At times, not enough thought is given to the different meanings. According to the approach of my colleagues, the majority justices, the existing and the desirable converge when it comes to removing a head of authority from office, while merging the two different meanings of the term "normative."

Conclusion

16. The local elections will take place on October 22, 2013, that is just a few days away. In a decision dated September 17, 2013 it was decided, by a majority and against my position, that the Mayors of Nazareth Illit and of Ramat HaSharon shall be removed from office, as each of them has been indicted for serious offenses. The majority reversed the decisions by each of the City Councils. Since the elections will be held in the next few days, I believe judicial intervention should be avoided and the voters must have the opportunity to have their say, as each of the mayors is running for re-election. My view, that we must not intervene when the matter arises so close to the date of the elections, is supported by the interpretive challenges that stand, as I see it, in the way of the majority justices. It is sufficient to reiterate that under section 20 of the Law, a head of authority's term expires only once there is a final judgment that convicts and finds the offenses to be such of moral turpitude. Even after handing a conviction in the first instance along with determining moral turpitude, so long as the verdict is yet to be final, the statutory sanction is limited to suspension. How, then, can we accept that, at a point as early as an indictment, the head of authority is removed from office? According to the position of the majority justices, the basis for intervening in the councils' decisions not to remove the mayors from office is in section 22 of the Law. This section authorizes a local authority council to remove a head of authority from office under certain conditions. Even if these conditions are met, a council's decision is insufficient. A decision regarding removing from office materializes only at the approval of the Minister of Interior. In both cases before us, there is no hint that the matter had been brought to the contemplation of the Minister before the Petitions were filed. How, therefore, is the Court permitted to "overrule" a decision by the Minister of Interior, that was not at all made?

The coming elections will allow the voting public to express their opinion as to whether those with indictments hanging over their heads ought to be re-elected. Against this backdrop, I believe judicial intervention in these two cases cannot be justified by way of reasoning of preserving the public's trust in governmental authorities. The elections are the ultimate test of public trust, certainly when the public is aware of the indictments and when it is safe to

assume that the issue of the indictments would become a major issue in the elections campaign. Even if we rely, as we are obligated to do, on the over-arching principles of the rule of law and of clean governance, they are joined by two additional equally important over-arching principles – the democratic principle and the presumption of innocence. Indeed, in some instances, such as infringement of a basic right, of minority rights, or the harming of democratic rules, the Court is authorized to and indeed must strike down a piece of legislation that was passed by the general public's elected representatives. This is not the case before us.

As I have written in my dissenting opinion to the decision dated September 17, 2013, we must, I believe, distinguish the public aspect from the legal one. It is not appropriate for a person indicted for offenses such as those here to serve as head of local authority. However, in light of the provisions of the legislation and the proximity to the elections date, the Court may not, in my opinion, intervene. Under the circumstances, the court must yield to the will of the voter, as it will be reflected in the coming elections. Even if that will is not to our liking, we must respect it, as long as the law has not been amended. The law should be amended, for example, to establish that an indicted head of local authority should be suspended (unless the indictment is for particularly minor offenses). It is certainly acceptable to me that the Court must aspire to making the desirable law the existing law. However, the Court must be aware of the limits to its power. In my view, in the current matter it must consider the existing statutory arrangement and the fact that the voting public is about to have its say in the coming days. Due to all this, there is no other way, in my opinion, than distinguishing the desirable law from the existing law in our case.

President

Given today, October 14, 2013.

President	Deputy President	Justice	Justice
Justice	Justice	Justice	