

# CRIME AND PUNISHMENT IN POLITICS

How – and Why – Israel and the United States Differ in their Answer to the Question: Can Felons Stand for Election?

*A Shiur in Commemoration of the 2<sup>nd</sup> Yahrzeit of Moshe ben Shmuel (Martin K. Pear), z"l*

## 1) Basic Law: Knesset Article 6 (A) The Right to be Elected

Every Israeli citizen, who on the day of the submission of a list of candidates that includes his name, is twenty one years old or over, is entitled to be elected to the Knesset, unless a court of law has deprived him of this right by virtue of any law, or that he has been sentenced, in a final verdict, to actual imprisonment for a period of over three months, and on the day of the submission of the list of candidates **seven years have not yet gone by since he finished serving his term of imprisonment**, or if he has been convicted of a serious terror offence, or a serious security offence, as laid down by law, has been sentenced, in a final verdict, to actual imprisonment for a period of over seven years of imprisonment, and on the day of the submission of the list of candidates 14 years have not yet gone by since he finished serving his term of imprisonment – **unless the Chairman of the Central Elections Committee has determined that the crime for which he was convicted, under the circumstances of the case, does not carry moral turpitude (משום קליון)**.

## 2) US Constitution: Article 1, The Legislature; Section 2, The House

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

## 3) Powell v. McCormack 395 US 486 (1969)

“The office of representative in congress is a federal office created by the United States constitution. The qualifications of those who aspire to or hold this office are prescribed by the United States constitution, and the state may not enlarge or modify such qualifications. The provisions of U.S. Const. art. I, § 4, permitting the states to regulate the time, place, and manner of holding elections for members of congress, do not permit the state to add qualifications for such office not

contained in the United States constitution. Quoting the Congressional Research Service: “[S]ince a State does not have the authority to add qualifications for federal offices, the fact of conviction, even for a felony offense, could not be used to keep a candidate off of the ballot ... Once a person meets the three constitutional qualifications of age, citizenship and inhabitancy in the State when elected, that person, if duly elected, is constitutionally “qualified” to serve in Congress, even if a convicted felon.”

## 4) Flag of New England at Time of Constitution



## 5) Most Important Issue in '99 Election

Table 13.6 The Saliency of Issues in '99 Election News: First and Second Month

Issue	First month (%)	Second month (%)	Difference
Terrorism, terrorist acts	1.3	5.6	+4.3
Palestinians, negotiations	9.8	12.4	+2.6
Crime and <b>corruption</b>	28.3	22.8	-5.5
Jerusalem (split)	7.1	9.1	+2.0
Golan Heights + Syria + Lebanon	9.2	3.5	-5.7
Settlers, settlements	2.5	2.6	+0.1
Immigration and absorption	3.8	6.7	+2.9
Economy, finances	6.0	5.8	-0.2
Religion and state	4.7	6.1	+1.4
Education	0.9	0.6	-0.3
Israeli-Arabs	3.3	4.7	+1.4
Unemployment	1.8	1.7	-0.1
Ethnic gap	2.7	3.0	+0.3
Welfare and health care	5.4	4.1	-1.3
Unity of Israeli society	3.6	5.3	+1.7
Others	9.6	6.1	-3.5
Total	100% (N = 448)	100% (N = 659)	

**6) Thomas Jefferson, Response to the Citizens of Albemarle, 1790**

[I believe] in the will of the majority [as] the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived. Let us then, my dear friends, forever bow down to the general reason of society.

**7) Edmund Burke, Speech to Electors of Bristol 1774**

A voter should expect from [Burke's election] "his unbiased opinion, his mature judgment, his enlightened conscience ... and that he was duty bound not to sacrifice (these things) to you, to any man, or to any set of men living. ... Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.

**8) Zev Sternhull, on Beryl Katznelson**

All his life he stressed the values of social discipline, accepted the supremacy of the collectivity, and fought against individualistic tendencies, which he frequently described as anarchy. Values such as freedom, democracy, or the rights of the individual were not of primary interest to him... His basic outlook was rigid and puritanical: 'the individual was merely a soldier in the army of national liberation, and his duty was to accept the rules of the regimented Histadrut society.'

**9) Protexia**



**10) HCJ 11243/02 Faiglin v. Cheshin (Decided: January 9, 2003)**

MAJORITY: [His] attempts to dictate governmental activities by incitement conflicts with the democratic idea, which is built upon the rule of the majority acting within the bounds of the rule of law. These offences against the democratic public order are not mere breaches of the law – they find their foundation in the rejection of the democratic foundation of society, and the foundation of the structure of the government. Such offences provide sufficient reason to infringe an individual's right to be elected into the very institution he wishes to destroy.

MINORITY: "Our point of departure is that the freedom of speech should be granted even to those whose opinions seem mistaken and even dangerous." Given the importance of freedom of speech, Justice Levi then brushes aside the technical matters at hand, arguing basic individual rights require lenient not strict interpretation of the rules. Regarding moral turpitude itself, he dismisses his colleagues concern that Faiglin's incitement was such a threat to democracy that it required an additional attachment of moral turpitude. "I find it difficult to understand how there is dishonor in the offence of incitement. Under these circumstances, should we see the petitioner as one who was then, or is now, set upon destroying the foundations of democracy in Israel?"

**11) בבא מציעה נח:**

מתני' כשם שאונאה במקח וממכר כך אונאה בדברים לא יאמר לו בכמה חפץ זה והוא אינו רוצה ליקח אם היה בעל תשובה לא יאמר לו זכור מעשיך הראשונים אם הוא בן גרים לא יאמר לו זכור מעשה אבותיך שנאמר (שמות כב, כ) וגר לא תונה ולא תלחצנו

**12) קידושין מ:**

ר' שמעון בר יוחאי: אפילו רשע גמור כל ימיו ועשה תשובה באחרונה – אין מזכירין לו שוב רשעו, שנאמר "ורשעת הרשע לא ישל בה ביום שובו מרשעו

**13) רבינו גרשום**

כל המזכיר לחוזר בתשובה את מעשיו הראשונים יהיה בנידוי

**14) תקנת השבים**

סוטה לב

אמר רבי יוחנן משום רבי שמעון בר יוחאי: מפני מה תיקנו תפילה בלחש? שלא לבייש את עוברי עבירה

משנה אבות ה:

עֲשֶׂרָה נְסִים נַעֲשׂוּ לְאַבֹתֵינוּ בְּבֵית הַמִּקְדָּשׁ. לֹא הִפִּילָה אֲשֶׁה מְרִיחַ בֶּשֶׂר הַקֹּדֶשׁ, וְלֹא הִסְרִיחַ בֶּשֶׂר הַקֹּדֶשׁ מֵעוֹלָם, וְלֹא נִרְאָה זָבֹב בְּבֵית הַמִּטְבָּחִים, וְלֹא אָרַע קָרִי לִכְהֵן גָּדוֹל בְּיוֹם הַכַּפֹּוֹרִים, וְלֹא כָּבוּ גִשְׁמִים אֲשֶׁר שָׁלַח עֲצֵי הַמַּעֲרָכָה, וְלֹא נִצְחָה הַרוּחַ אֶת עַמּוּד הָעֶשֶׂן, וְלֹא נִמְצָא פָּסוּל בְּעֵמֶר וּבִשְׂתֵי הַלֶּחֶם וּבְלֶחֶם הַפְּנִים, עוֹמְדִים צְפוּפִים וּמִשְׁתַּחֲוִים רְחוּמִים, וְלֹא הִזִּיק נֶחֱשׁ וְעֵקֶרֶב בִּירוּשָׁלַיִם מֵעוֹלָם, וְלֹא אָמַר אָדָם לַחֲבָרוֹ צַר לִי הַמָּקוֹם שֶׁאֵלֵין בִּירוּשָׁלַיִם:

מאירי על אבות

עומדים צפופים ומשתחוים רווחים שהיו עומדים רווחים ד אמות בין כל אחד ואחד כדי שלא ישמע אחד וידויו של חברו ויתבייש

רמב"ם הלכות גזלה א:

כל הגוזל חייב להחזיר הגזילה עצמה, שנאמר והשיב את הגזלה אשר גזל (ויקרא) ... אפילו גזל קורה ובנאה בבירה, דין תורה הוא שיהרוס את כל הבניין, ויחזיר קורה לבעליה. אבל תקנו חכמים מפני תקנת השבים שיהיה נותן את דמיה, ולא יפסיד הבניין

#### 15) H.C. 301/66 EZRA v. DIRECTOR OF THE LICENSING AUTHORITY; Justice J. Cohn

Since the judgement was handed down nothing has occurred to give rise to any fear that he would resume his past deviations. That means that the respondent cannot, and in fact does not, base his fear on anything other than the fact that four years ago the petitioner committed offences of which he was convicted and for which he was punished. I am not saying that such conviction cannot serve as a basis for reasonable fears that the offender may return to his old ways. Possibly ... subsequent facts or circumstances might be revealed that justify such fears. But far be it from us to raise the presumption that person is wicked merely because he once or twice fell by the way or took the wrong path. If any presumption is to be raised at all, it is that he has presumably paid the penalty which has effectively rendered him fully repentant. As we have learned ...

“Lest thy brother shall be dishonored in thine eyes” – a quote from Deuteronomy 25:3 – means that after he has undergone flogging for his offence, he now is thy brother in all ways.

#### 16) Ch.A.A. 1/68, A. v. ATTORNEY GENERAL (1968); Justice Yitzchak Kister

The door is not to be bolted in the face of those who repent sincerely and honestly. Indeed, in the absence

of any weighty reason to the contrary, restoration to their previous way of life, their occupation and post should be facilitated for the penitent.

#### 17) רמב"ם, משנה תורה הלכות שכירות 10:7

... a ritual slaughterer of a village who rendered an animal unacceptable for consumption, a blood-letter who caused an injury, a scribe who erred in composing a legal document, a teacher who was negligent with the children and ... taught them in error, or any other professional who made an error that cannot be corrected. They may be removed from their positions without warning, for the warning for them to perform their work carefully is self-evident. They must faithfully apply themselves to their tasks, for they were appointed by the community to discharge this responsibility.

#### 18) משנה תורה הלכות רוצח 7:13-14

When a killer returns to his city after the death of the High Priest, he is considered to be an ordinary citizen. If the blood redeemer slays him, the blood redeemer should be executed, for the killer has already gained atonement through exile.

Although the killer has gained atonement, he should never return to a position of authority that he previously held. Instead, he should be diminished in stature for his entire life, because of this great calamity that he caused.

#### 19) משנה תורה הלכות סנהדרין 17:7-9

Whenever a person sins and is lashed, he returns to his original state of acceptability, as implied by the verse: "And your brother will be degraded before your eyes." Once he is lashed, he is "your brother." Similarly, all those obligated for kerait who received lashes are absolved for kerait.

When a High Priest sins, he is lashed on the basis of the judgment of a court of three like people at large. Afterwards, he returns to his position of eminence.

When, by contrast, the head of the academy transgresses, he is given lashes in the presence of a court of three, but does not return to his position of authority. He also is not reinstated as one of the other judges of the Sanhedrin. The rationale is that we ascend higher in matters of holiness, and do not descend.

## **20) Kister (continued)**

The reasons for this ruling are: A) that it is for his own benefit not to be restored in case his colleagues despise him (Kesef Mishneh); B) the fear that he may seek revenge on those who condemned him (Pnei Moshe); C) Desecration of God's Name (Radbaz); D) the function of the President is to guide the people in the right way, and this requires (Bava Metzia 107b) you be just yourself before requiring it of others.

## **20) Maimonides, The Guide for the Perplexed, 3:41**

Whether the punishment is great or small, the pain inflicted intense or less intense, depends on the following four conditions. A) The greatness of the sin. Actions that cause great harm are punished severely, whilst actions that cause little harm are punished less severely. B) The frequency of the crime. A crime that is frequently committed must be put down by severe punishment; crimes of rare occurrence may be suppressed by a lenient punishment considering that they are rarely committed. C) The amount of temptation. Only fear of a severe punishment restrains us from actions for which there exists a great temptation, either because we have a great desire for these actions, or are accustomed to them, or feel unhappy without them. D) The facility of doing the thing secretly, and unseen and unnoticed. From such acts we are deterred only by the fear of a great and terrible punishment.