HCJ 246/81

HCJ 260/81

"AGUDAT DEREKH ERETZ" ET AL.
v.
BROADCASTING AUTHORITY ET AL.

The Supreme Court Sitting as the High Court of Justice
[July 28, 1981]
Before Landau P., Shamgar J., Ben-Porat J., Barak J. and Bejski J.

Editor's synopsis -

The Elections (Modes of Propaganda) Law, 1959, provides free radio and television broadcasting time for each of the party lists participating in the Knesset elections. Until 1981, that Law provided that each such party shall receive 25 minutes on the radio and 10 minutes on television, and that each party represented in the outgoing Knesset shall receive an additional four minutes radio time and four minutes television time in respect of each of its members in the outgoing Knesset. An amendment of that Law in 1981 reduced the time allotted to each party participating in the election to 23 minutes on radio and eight minutes on television, while it increased the allocation of radio and television time per member of the outgoing Knesset to six minutes. The effect of this amendment was to decrease the radio and television time allocated to new party lists while it increased considerably the time allocated to the large parties represented in the outgoing Knesset. The amendment was not passed by an absolute majority of the members of the Knesset, as is required in the case of legislation that concerns elections and that deviates from the principle of equality.

The Respondents appear in response to orders *nisi*, issued at the request of the Petitioners who argue that the amendment violates the principle of equality in elections and is therefore void, not having been enacted by the required absolute majority. The court, composed of five Justices, ruled unanimously that the order be made absolute. The five Justices delivered five separate opinions, each setting forth his reasons for the decision.

The President of the court, Justice Landau, repeated his assertions in the Bergman case, *supra,* p. 13, to the effect that equality of opportunity in elections cannot be measured mechanically. Therefore, the substantial discrepancy in the broadcasting times allocated to the various lists under the amendment is not in and of itself determinative of the issue. Although there is a presumption in favor of the validity of

legislation enacted by the Knesset, examination of the legislative history in this case reveals that at no point did the Knesset give any consideration to the impact of the amendment on the rights of new party lists, but rather, it completely disregarded this issue. In these circumstances, the presumption of validity fails and the amendment is invalid.

Justice Barak thought that the amendment fails to meet the requirement of equality since it does not allow small parties and new parties the time minimally necessary to enable them to present their views before the public while it gives the large veteran parties more than such minimal time. Although he agreed that the issue could not be determined mechanically, he was of the opinion that the judge's common sense, experience and sense of expertise enable him to distinguish between the permitted and the forbidden. In this respect, the decision is no different from judicial decisions frequently made concerning the fairness and reasonableness of acts done by government officials.

Justice Shamgar reaffirmed his preference for as simple and basic a standard of formal equality as is possible. Agreeing that there are circumstances and considerations which would justify deviations from such formal equality, he expressed the opinion that Basic Law: The Knesset provides for such contingencies but requires that the deviation be voted by an absolute majority of the Knesset. This approach is preferable, in his opinion, to the alternative, which waters down the concept of equality by taking into account other ideals and which results in the loss of any clear constitutional standard to serve as a guideline to the legislature.

Justice Bejski thought that all that could be demanded was relative equality, not absolute equality. surveying the solutions adopted in many countries, he concluded that even relative equality entails no small amount of problems. In his opinion, the principal fault of the new Law lies in the large and unreasonable gap that it creates between the broadcasting time allocated to large existing parties and that allowed new parties. This gap violates even the relative equality required by the Basic Law and, therefore, must be approved by an absolute majority of the Knesset.

Justice Ben-Porat pointed out that the allocation of equal time to each party is not a *sine qua non* of formal equality, since such formal equality might be achieved by means of some other criterion, such as one based on the relative sizes of the parties. The equality of opportunity to which the new parties are entitled requires allocation of time that is sufficient for their need to present their platform and special message before the viewing public in order to justify their presence in the Knesset. This standard was not met in the Amending Law.

Note -As indicated in the opinions, the supreme Court handed down its decision shortly after the argument but did not give its reasons at that time. The Knesset responded to this decision by re-instating the wide gaps in the allocation of broadcasting time with some slight changes. The new legislation was enacted by the required absolute majority in all three readings, all in a single day, just seventeen days after the court's decision to invalidate the Law, and was made effective retroactively in order to legalize the broadcasts that

had been made under the Law that was invalidated. Only six weeks later, after the elections had taken place, did the court give the reasons for its decision. It has been suggested that had the Justices revealed their reasons earlier, perhaps the Knesset might have been more impressed by the court's high regard for the value of equality. see Klinghoffer, "Legislative Reaction to Judicial Decisions in Public Law", 18 *Israel Law Review* 30, 31-34 (1983). Compare, however. the legislative developments after the *Rubinstein case (infra,* pp. 60-62).

Israel cases referred to:

[1] H.C. 98/69, *Bergman v. Minister of Finance* 23P.D.(1)693; S.J. vol. VIII, *supra* p. 13.

[2] H.C. 60/77, *Ressler v. Chairman of Knesset Central Elections Committee* 31P.D.(2)556.

American case referred to:

[3] *Regents of the University of California v. Bakke* 438U.S.265(1978).

Y. *Leshem, A. Ramot* for the Petitioners in H.C.246/81.

M. Corinaldi for the Petitioner in H.C.260/81.

R. Yarak, Senior Deputy State Attorney, for the Respondents.

JUDGMENT

LANDAU P.: On May 29, 1981 the orders in these two petitions were made absolute, in these terms:

> We are of the opinion that for the passage of the Elections (Modes of Propaganda) (Amendment No. 6) Law, 1981, a majority of Knesset members was required in accord with the concluding portion of section 4 of Basic Law: The Knesset, and for that reason it cannot be acted upon unless its provisions are adopted by the required majority. In this sense we make absolute the order *nisi* in the two petitions against the Broadcasting Authority, the first Respondent. There is no order as to costs in the two petitions.

And these are my reasons for making the orders absolute:

Sections 15 and 15A of the Elections (Modes of Propaganda) Law, 1959 (pursuant to the Elections (Modes of Propaganda) (Amendment No. 3) Law, 1969) provide that each of the parties participating in the Knesset elections shall receive for the broadcasting of election propaganda, 25 minutes on the radio and 10 minutes on television and, in addition, each of the parties represented in the outgoing Knesset shall receive 4 minutes on the radio and 4 minutes on television in respect of each of its members holding office in the outgoing Knesset.

On March 16, 1981 a private bill proposed by Knesset members Ben-Meir, Virshuvsky, Hashai and Corfu was published in *Reshumot* (Elections (Modes of Propaganda) (Amendment No. 6) Bill, 1981). The bill proposed that section 15 of the Elections (Modes of Propaganda) Law allow with respect to the radio, a broadcasting time of 23 minutes instead of 25 minutes for each party and each candidates list and, in addition, 6 minutes for each Knesset member of each party represented in the outgoing Knesset; with respect to television it was proposed to amend section 15A so that each party and candidates list be given 8 minutes of broadcasting time instead of 10 minutes and, in addition, each party represented in the outgoing Knesset would be given 6 minutes instead of 4 minutes for each of its Knesset members. In the explanatory notes to this private bill it was said:

> The present version of the Law creates an unreasonable situation concerning the time allotted to a party group with one Knesset member as distinguished from the time allotted to a party group with a larger number of Knesset members.
>
> The present bill is intended to temper slightly the ratio of the two time quotas but it continues to give a party group with a single Knesset member an amount of time which is larger than that given to a single Knesset member in a large party group.

This private bill passed the preliminary reading on March 4, 1981 and it was decided to refer it to the Constitution, Law and Justice Committee for preparation for the first reading. It passed the first reading on March 23, 1981 and the second reading on April 1, 1981, after a reservation of Knesset member Shulamit Aloni to section 2 of the bill,

concerning television broadcasts, was rejected by a majority of 5 votes against 4, and thereafter the entire bill passed the third reading. The proceedings of the session do not note by what majority the bill passed each of the three readings, but it is not disputed that no more than a dozen Knesset members were present at the session of the second and third readings - a number that is far from a majority of the Knesset members.

The Petitioners in the two petitions before us, "Agudat [Association] Derekh Eretz" (H.C. 246/81) and "Shorashim [Roots]..." (H.C. 260/81) -both Ottoman societies that intended to submit new candidates lists for the elections to the tenth Knesset but were not represented in the outgoing ninth Knesset - argued that the above mentioned Elections (Modes of Propaganda) (Amendment No. 6) Law, 1981 (hereinafter "the Amendment No. 6 Law") is invalid because it contradicts the requirement of equality in section 4 of Basic Law: The Knesset, and that the Amendment No. 6 Law did not pass by the required majority, that is, a majority of the Knesset members, as provided in the conclusion to section 4 of the Basic Law. Orders *nisi* were issued against the Broadcasting Authority and the Chairman of the Central Elections Committee for the Tenth Knesset and the Central Elections Committee itself.

As in the case of *Bergman v. Minister of Finance* [1], which dealt with the Knesset and Local Authorities Elections (Financing, Limitation of Expenses and Audit) Law, 1969, this time, too, complex constitutional issues could have arisen concerning justiciability and the power of a later Knesset to deviate in ordinary legislation from an "entrenched" provision in a basic law adopted by an earlier Knesset. There the court refrained from dealing with these issues, and we shall act likewise this time - and in the present case we have before us an explicit written statement on behalf of the Attorney General, in paragraphs 4 and 5 of his arguments in response to the order *nisi*, that he does not intend to raise those issues since he wishes the court to decide on the merits of his arguments concerning the Amendment No. 6 Law, to the effect that this Law does not contravene the equality principle in section 4 of the Basic Law and, therefore, an ordinary majority was sufficient for its adoption. This was the issue upon which we deliberated in these two petitions.

Before examining this question we must dispose of a procedural argument made by Mr. Yarak, who represented the Respondents in an intelligent and dignified manner as

befits the weighty matter before us. He argued, in passing, that the large party groups in the outgoing Knesset should have been summoned to the hearing of these petitions since they will lose the additional broadcasting time that the Amendment No. 6 Law gives them if that Law is declared void. I do not intend to delve into the general issue of the parties to whom a petition of prime constitutional character, such as the two present petitions, should be addressed, and whether any person who might argue that the subject of a petition affects his interests should indeed be summoned to the proceedings. In any event the argument must be dismissed in the present instance because, as already mentioned, the Central Elections Committee was made party to the hearing and, therefore, the fact that these petitions are being heard before the court was brought to the attention of the party groups represented in the Committee. Anyone interested in participating in the proceedings could have applied to the court by motion to be joined as a Respondent and to make himself heard. Apparently the large party groups believed that they could depend on the representative of the Attorney-General to present an argument to the court that would adequately protect also their interests - and indeed that has been the case.

Another contention made by Mr. Yarak, which must be dismissed immediately, is that the provision in section 4 of Basic Law: The Knesset, that the Knesset shall be elected by "equal ... elections ... *in accordance with the Knesset Elections Law",* should be read to include the Elections (Modes of Propaganda) Law. Such a construction is incongruous with the statutory language, since "the Knesset Elections Law" (in the singular) clearly refers to the Knesset Elections Law and no other Law, even if its subject is related to the Knesset elections.

Mr. Leshem, on behalf of the "Derekh Eretz" Association, and Dr. Corinaldi, on behalf of the *Shorashim* movement, who endorsed Mr. Leshem's arguments and supplemented them, made the *Bergman* case [1] the point of departure for their arguments. Indeed, the two matters - the funds that the parties receive from the state treasury to finance the Knesset elections, a significant (if not the greater) part of which are spent on election propaganda, and the matter of election propaganda by way of radio and television - are closely related. In *Bergman* the equality principle in section 4 of Basic Law: The Knesset, was construed to extend to equality of opportunity for the lists competing in the Knesset elections, including the new candidates lists unrepresented in the outgoing Knesset. That principle should also be applied to the use of state-controlled media, which

have forceful impact on the public - a captive audience to the television (this being the primary concern) which broadcasts on a single channel leaving the viewer no refuge (unless he is resolute enough to turn the set off). Two points should nevertheless be emphasized: first, the Financing Law, which *Bergman* held to be invalid, purported to give nothing to the new lists, whereas the Amendment No. 6 Law leaves something for the new lists (8 minutes on television and 23 minutes on the radio); second, and no less important, no one argues that equality in this matter means mechanical equality. The *Bergman* judgment itself intimated as much, with reference to the subject of financing ([1], p. 699):

> ... [W]e are in an area that is far removed from the idea of equality before the law in its simple classic meaning, that is, equality of rights for the citizen as an individual. ... This equality must be guarded without compromise. However, as we draw away from this fundamental meaning of the principle of equality before the law, so it clashes with other important principles to which it must defer. ... [A]ll agree that the political parties should not be equated absolutely with each other by being allocated equal funds, regardless of the party's size, although the campaign needs of a small party might require as much of these means as a larger party. And all agree furthermore that the principle of equality in financing should not be applied in such a way as to encourage the submission of candidates lists that would not have formed at all were it not for the temptation that they would receive an advance against the funding. We also know of phenomena of inequality in the general election laws, primarily the minimum percentage of votes required in order to gain representation in the Knesset, and similarly the requirement that a new list must deposit a bond, and the fact that its representatives do not participate in the election committees except as observers after publication of the list. All these restrictions inevitably derogate from absolute equality.

The same applies to the election propaganda broadcasts, and perhaps even more so. The large "historical" parties that are vying with each other for primacy in the next Knesset, naturally require far more time than a newly created list so as to give an account to the voter of their actions in the near and far past and to criticize the shortcomings of

their opponents. Mechanical equality of the thirty-one lists submitted in the elections for the tenth Knesset, in the allocation of equal time slots to each of them, would cause serious distortion in the sense of *summa aequalitas summa iniuria.* Mr. Yarak also rightly pointed out that the large parties alone are subject to a special statutory limitation, since their leaders may not appear in the frame of the general television broadcasts even if they take part in events that are suitable material for coverage as daily news. If the large parties insisted on their full quota and every other list also received an equal time allocation, one can easily imagine the flood of verbiage that would descend on the public to a degree that renders all of this propaganda valueless to the stupefied viewers drowning in the spate of colorful propaganda sent forth by thirty-one lists. That, clearly, would fail to realize the lofty idea of equality before the law, but rather would create a caricature of the democratic process of elections.

It follows, necessarily, that the equality mentioned in section 4 of the Basic Law, as applied to election propaganda, need only be substantive equality with due consideration given to the factors that distinguish a new list from a large party, and even a new list from an existing small party. But where should the permitted line be drawn upon these considerations? It is pointless to seek an exact formula for guidance in this matter. All that can be said is that the equality principle in this sense is violated when a new list is wholly denied a fair opportunity to present itself and its platform to the public. All agree that they may not be silenced nor denied a right of appearance, free of charge, on the electronic media. But what is the minimal time required for that purpose, below which their appearance before the viewer becomes substantially ineffective?

At first I was of the opinion that we would find guidance in this matter from the Elections (Confirmation of Validity of Laws) Law, 1969. This Law, which was enacted, as will be recalled, as a result of the *Bergman* decision [1], provided "for the removal of doubt" that the provisions in the election Laws are valid for the purpose of any Law and any matter from the date of their coming into force, and "election Laws" also include the Modes of Propaganda Law in its version at the time the above Confirmation Law came into effect. I thought that this Confirmation Law set the line of equality as regards broadcasting time in accord with the provisions of sections 15 and 15A in their original version, the validity of which was confirmed in that Law. It should be noted here that in the Knesset debate on the Elections (Modes of Propaganda) (Amendment No. 3), Law,

which introduced the original arrangement, the then chairman of the Constitution, Law and Justice Committee, Knesset member Moshe Una, voiced the opinion that the time allotted to the small parties and to the lists appearing for the first time was insufficient for them to present their concerns in a complete manner (see D.H. 55 (5729-30) 3661, right column). I am persuaded, however, that this Law should not be referred to for guidance in resolving the issue before us. This court discussed it in the *Ressler* case [2]. The conclusion from the discussion there is that the Confirmation Law indeed ratified "the election Laws" mentioned therein by virtue of the absolute majority with which it was passed consonantly with the concluding portion of section 4 and section 46 of Basic Law: The Knesset. But it says nothing with respect to the question whether the validity of the election Laws or any of their provisions, that were confirmed for the removal of doubt", was in any event consistent with the equality principle in section 4, or whether they were confirmed despite their inconsistency with the equality principle.

The question, therefore, remains: is the allocation of 23 minutes on the radio and, especially, of 8 minutes on television beneath the limit of tolerance? In this respect learned counsel for the Petitioners emphasized the huge gap between the time slots allotted to the large parties and those allotted to the new lists. Not only was "the poor man's lamb stolen"* from the small ones, in reducing their already meager time slots (8 minutes instead of 10), but the large ones received additional broadcasting time, beyond that which they were entitled to previously. Mr. Leshem calculated that in this way a party numbering 30 Knesset members gained 58 more minutes on television, and that the difference in percentage between such party and a new list rose from 1200% to 2350%.

I admit that I was not much impressed by these calculations, for having found that mechanical equality between an existing large party and a new list is immaterial as regards broadcasting times, there is no reason to hang the decision on this or that algebraic ratio, but rather, as aforesaid, the new list must be assured of the minimal time required for effective propaganda on television and radio. Whoever wishes to invalidate a law of the Knesset bears a heavy "burden of proof', for the Knesset is presumed to have acted within the framework of section 4 of the Basic Law. As stated in the *Bergman* case (at p. 699):

---

* Samuel 12:4-Ed.

> [A] Law of the Knesset is presumed to be valid as adopted. Therefore this court's primary inclination must be to uphold the law and not to strike it down, even when the argument against it is that it contradicts an "entrenched" statutory provision ...

As for myself, I would be prepared to go far in accepting the decision of the Knesset, as expressed in the Amendment No. 6 Law, since we do not have any substantiated data that ten minutes (according to the original Law) is a sufficient and reasonable time for a new list's television propaganda, whereas eight minutes is less than sufficient and reasonable. Eight minutes might suffice for one person to succeed in his efforts at persuasion, whereas another would not succeed in twice that period of time - all according to the speaker and the audience.

When does this apply? When we have some indication that the Knesset indeed considered the rights of new lists. I found no such indication in the short "legislative history" of the Amendment No. 6 Law. I have already cited above the explanatory notes to the private bill that was initiated by the four Knesset members. There the issue is presented as a matter of doing justice to the large party groups as opposed to a one-member party group. The small ones are entitled to the basic time slot of 10 minutes for the party group and 4 more minutes in respect of the personal time slot of the single Knesset member, while the large party group is entitled only to the same basic time slot and the personal time slot in respect of each of its members. Thus in the final account the Knesset member from the one-man list is entitled to a larger time slot than the individual Knesset member from the large party group. That wrong is rectified by reducing the basic time slot and enlarging the personal time slot. One could challenge this explanation on the ground that the contestants in our system of Knesset elections are the lists, and not the individual candidates on the list. But the. main shortcoming is that there is also a third side to the problem, that is, the new lists whose equality of opportunity in the elections must be preserved, as explained in the *Bergman* case. They are principally prejudiced by the new arrangement because their basic time slot is reduced without any increment with respect to their personal time quota. The explanatory notes totally ignore their position, advertently or otherwise. The concrete result of the new proposal, in the overall account, was to add four hours of television broadcasts with respect to the personal quota, mostly to the benefit of the large lists, against a saving of two minutes in respect of each of the lists on account of

the basic quota of the party groups as such, including the new lists whose interests, it seems, were totally overlooked.

This was the case throughout the debates on the bill. At the preliminary reading M.K. Yehuda Hashai repeated the explanatory notes on behalf of the proposers without any mention of the new lists. Similarly, at the first reading M.K. Hashai again explained the bill as an issue between an existing large party group and an existing one-person party group, without further ado. During the debate on this reading M.K. Shulamit Aloni, in passing, mentioned new lists together with existing small lists, but her statement evoked no response. This situation recurred at the second and third readings, when M.K. David Glass, chairman of the Constitution, Law and Justice Committee, again presented the issue without mentioning the amendment's effect on new lists. M.K. Aloni commented again on the situation of a new party group "which, in any event, is in a Procrustean bed; and here its time is reduced even more", but her words fell on deaf ears, and the proposers of the bill did not attempt in any way to discuss the matter.

In view of all this I am constrained to conclude that the Amendment No. 6 Bill was presented to the Knesset, in all its readings, in complete disregard of the important issue of preserving the new lists' equality of opportunity - the issue that was raised before us in these two petitions. This issue was not given any parliamentary consideration. Therefore, it should not be considered in these petitions on the presumption that the Knesset did not deviate from the provisions of an entrenched statutory enactment - the presumption that ordinarily applies to every Law adopted by the Knesset, even by a simple majority of a small number of Knesset members who voted for it. I am of the opinion that in these circumstances the Amendment concerned constitutes a violation of the equality principle that cannot be tolerated. For this reason I voiced the opinion, together with my esteemed colleagues, that the Amendment No. 6 Law should not be acted upon unless its provisions be adopted by a majority of the Knesset members as required under section 4 of Basic Law: The Knesset.

BARAK J.: The equality principle determined in section 4 of Basic Law: The Knesset does not mean merely "one man one vote" but also "equality of opportunity for the various candidates lists that compete in the Knesset elections" (in the words of Landau P. in the *Bergman* case ([1], at 698). This equality does not mean merely equality as between the

large lists or as between the small lists or as between the lists that are represented in the outgoing Knesset. Equality of opportunity means equality of prospects and opportunity as between all the lists participating in the elections. Therefore, equality of opportunity must be attained between a large list and a small list; between a list represented in the outgoing Knesset and one unrepresented in the outgoing Knesset. The need to attain this equality raises two inherent questions: *first*, what are the legal standards that determine equality of opportunity among all the competing lists? *second,* did the Knesset adhere to these standards when it enacted the Elections (Modes of Propaganda) (Amendment No. 6) Law (hereinafter - the Amendment No. 6 Law)? I shall deal with each of these questions separately.

The standard with regard to equality of opportunity

2. The starting premise, in my view, in determining equality of opportunity between the various lists, large and small, old and new, is that one should not adhere to a standard that equates equality with identity. Granting the same time to each list certainly results in identity ("formal equality") but does not create equality ("material equality"). The reason is that the starting positions of the various party lists are not uniform. The large, veteran list, which takes a stand on a broad range of topics, must naturally spend more time on explaining its positions, platform, personalities, acts and omissions, failures and successes, than a newly formed list which takes a stand on defined, specific topics. Therefore, to secure equality of opportunity for these two lists at the finishing point they must be given different amounts of time at the starting point. Indeed equality of opportunity is often secured by non-identical allocation of resources. In the words of Professor J. Stone ("Justice in the Slough of Equality", 29 *Hastings L.J. (1978)* 995, *at 1012):*

> Equal treatment can and often does mean, especially in the welfare state, treatment by a differentiating rule which yields a greater residual equality between the subjects.

By varying the measure of the time allocation one can lead lists that start from unequal points to equality of opportunity at the finishing line. There is no paradox in acting differentially so as to achieve equality. Blackmun J. expressed this well in *Regents of the University of California v. Bakke* ([3] at 407):

... in order to treat some persons equally, we must treat them differently.

Indeed, granting the rich and the poor an equal opportunity to sleep under a bridge does not create equality between the two as regards the chance of a good sleep.

3. We have said that identity in allocating broadcasting times does not ensure equality of opportunity to the competing lists. How can we ensure equality of opportunity? For that one must ponder the meaning of equality of opportunity. What is the purpose of the equality that we want to achieve? In the present context it appears that equality of opportunity means equality of opportunity to compete for the voter's ballot. To maintain this equality of opportunity, two requirements must be satisfied:

First, one should not allow a situation to develop in which some of the lists have adequate time to explain to the voting public their platforms, personalities and distinguishing features, while other lists do not have such adequate time. Equality of opportunity does not exist where the time at the disposal of one list allows it to present itself properly while the time at the disposal of another list does not so allow.

Second, one should not allow a situation to develop in which some of the lists have time that is sufficient only to show their "identification card" to the public, while other lists have time that is not only sufficient to explain their positions but is also left over for additional use, not given to the first lists, in competing for the voter's ballot. The existence of this additional time for some of the lists creates an inequality of opportunity, since some of the lists can only explain their platforms, whereas other lists can undertake additional functions. These additional activities find external expression mostly in the fact that in the voter's consciousness, the list which does not have additional time becomes blurred and absorbed in the additional "residual" time that allows the other lists to dominate the media.

It follows that in order to secure equality of opportunity in the elections each list should have at its disposal the amount of time - no more and no less - that allows it to present its platform and positions to the voting public in proper fashion. If some lists receive time that is not sufficient to present their platforms properly then, in order to secure equality of opportunity, one of two measures must be taken: either to bring about a similar

"deficiency" with the other lists or to fill in the deficiency of the lists that are short. Similarly, if some lists get "additional" time beyond what is necessary for proper presentation of their platform then, in order to secure equality of opportunity, one of two measures must be taken: to give additional time to the remaining lists as well, or to abolish the additional time itself.

4. One could say - and it has been argued before us - that the effect of allocating election broadcasting time according to the above-mentioned standards would be the devotion of considerable broadcasting time to the various lists. Naturally this time would come at the expense of alternative use, such as news coverage, culture and art shows, and the like. Moreover, the provision of a minimum broadcast time for each new list, might be an incentive for ephemeral lists to take part in the election process, which could in turn cause fragmentation of the political map and prevent a stable regime. These arguments are all very well, and perhaps right, but they have nothing to do with the equality principle. Whoever argues that too much time is spent on election propaganda and that it should be reduced to prevent political fragmentation etc., is not making an argument about equality, but rather about other principles that are more important in that person's eyes than the equality principle. It is true that equality is not the only principle that ought to be considered. Often an unequal effect can be justified on other grounds, such as national security, political stability, and similar considerations that appear to the person weighing them more important than the equality principle. Professor I. Berlin said in this respect ("Equality", 56 *Proceedings of the Aristotelian Society* (1955-56), 301, at 317):

> ...in considering what kind of society is desirable, or what are "sufficient reasons" for either demanding equality or, on the contrary, modifying it in specific cases, ideals other than equality conspicuously play a vital role.

Therefore, if the Knesset wishes to prevent the allocation of time as required under the principle of equality, because it wants to achieve other goals that it regards as more important, it has the power to do so by modifying the principle of equality as determined in section 4 of Basic Law: The Knesset, in a legislative act that is passed by a majority of the members of the Knesset. The legitimacy of that Law would not derive from the equality

principle but from the special majority that adopted the Law, despite its incompatibility with the equality principle.

5. In the *Bergman* case, Landau P. said the following with respect to equality of opportunity:

> [W]e are in an area that is far removed from the idea of equality before the law in its simple classic meaning, that is, equality of rights for the citizen as an individual. ... This equality must be guarded without compromise. However, as we draw away from this fundamental meaning of the principle of equality before the law, so it clashes with other important principles to which it must defer.

I respectfully agree with these words, so long as it is made clear that this "retreat" from the equality principle can be maintained only if the other important principles find expression in a statute that is adopted by a majority of the Knesset members, and that otherwise the equality principle must prevail. One cannot - in logic or law -justify a deviation from the equality principle in its substantive sense on grounds of the same equality principle. Any deviation from the equality principle, whether in its "primary" sense (one man, one vote) or in its "secondary" sense (equal opportunity), must be effected in the manner determined in the Basic Law, that is, through legislation adopted by a majority of the Knesset members. Of course this relates to a significant and substantial deviation from the equality principle and not a trivial deviation.

Equal opportunity in the Amendment No. 6 Law

6. Does the Amendment No. 6 Law secure equality of opportunity, as defined by us? It would appear that in order to answer this question one must define the standards that determine the differences and the differentiation between the various lists. According to these standards one can consider whether the allocation of time in the Amendment No. 6 Law realizes the principle of equal opportunity. Determining these standards is very difficult. Aristotle defined justice as equal treatment of equals and unequal treatment of unequals, all this being relative to the relevant difference between them. But how are we to determine such relevant difference? Is the size of the list determinative? Is the range of the

issues dealt with by the list the decisive factor? These and other questions are difficult because one must take into consideration the new lists, whose size is an unknown, and who wish to compete for the voter's ballot. It seems that all agree that the standards should not merely perpetuate the existing situation, since the opportunity for change lies at the core of elections. But what are the proper standards? (See E. Katz, "Platforms and Windows: Reflections on the Role of Broadcasting in Election Campaigns", 48 *Journalism Quarterly* (1971) 304 at 311.)

7. I have reached the conclusion that we do not need to answer these hard questions in the present case and that we can leave them open for further consideration, since whatever the proper standard may be, the time allotted to the various lists in the Amendment No. 6 Law is unable to bring about equality of opportunity. This for two reasons:

First, the time slot of eight minutes allotted to the new lists for television broadcasts does not allow (all or some of) the new lists to present their position to the public in a proper way. In this respect one should bear in mind that neither new nor veteran lists can buy additional broadcasting time, and all they have - in view of the Broadcasting Authority's monopolistic status - are those same eight minutes spread over a period of one month. In my view this short time is not sufficient for (all or some of) the new lists properly to present their platform and candidates, while attempting to clarify their distinguishing features and to give a satisfactory reply to the criticism leveled against them by other lists during the course of the election broadcasts.

Second - and, in my view, more important - the veteran large lists were given broadcasting time that is far longer than the minimal time required to present their positions properly. This additional time is generally used by them for ongoing response to election events, for broadcasting news items that cannot be covered in the regular news programs because of restrictions in the Elections (Modes of Propaganda) Law, and for other activities. This additional time is not given to the new lists or the small veteran lists. Indeed, it appears that the result- which is a side effect of the difference in broadcasting times - is that the public finds the new as well as the small veteran lists submerged in the large amount of time at the disposal of the large veteran lists. It appears that the impression made by the new and the small veteran lists is blurred, and that only the large veteran lists remain in the voter's consciousness. Indeed, in my research I did not find any state in the

world where the gap between the time designated for new or small veteran lists and that designated for large veteran lists is as great as in Israel (see Hand, *European Electoral Systems Handbook (1972)* 39, 70, 107, 205).

8. In light of this approach, I do not need to resolve the troublesome question whether the very fact that each new list receives the same time does not violate the equality principle, since the new lists differ in the number of their members, the range of issues that concern them and their modes of propaganda. A similar problem arose also in the *Bergman* case, with respect to party financing, but the available solution in that situation is that after the elections the new lists that pass the minimal percentage of votes are entitled to funding which reflects their success in the elections. Retrospectively, therefore, the funding for each new list is not identical. A similar arrangement is not possible with respect to propaganda time, because it is not an asset that can be borrowed and compensated for after the elections. It is indeed possible that the very fact that new lists take part in the elections prevents equal application of time allocation because of the special nature of the matter. If that is so, there may be no solution in this matter other than the enactment of a special Law that is passed by a majority of the Knesset members, and which allows for a suitable arrangement that is not compatible with the equality principle.

9. I have expressed my opinion that the Amendment No. 6 Law contradicts the principle of equality in that it fails to grant new as well as small veteran lists the minimal time required for proper election propaganda, while it grants the large veteran lists additional time beyond the minimal requirement. One might ask what grounds there are for this conclusion? The answer is that the tools at the disposal of the judiciary in this matter are limited, and the task difficult. Ultimately one can only resort to common sense, life experience and the lawyer's expert sense. In principle this decision is no different from judicial decisions frequently made as to the reasonableness and fairness of acts done by state officials. Indeed, if we do not have the tools to decide whether a reduction in the new lists' television broadcasting time from ten to eight minutes violates the equality principle, then neither do we have the tools to decide whether a reduction to six or four or two minutes violates the equality principle. Is such a result conceivable? And if common sense, life experience and the sense of expertise can set a boundary between the forbidden and the permitted, between equal and unequal, then why should it be possible to distinguish between four and two minutes (for example) and not between ten and eight minutes (for

example)? I am indeed aware that in exercising judicial discretion we are not acting in an exact scientific manner, but I fear there is no better alternative.

10. I have reached the conclusion that the Amendment No. 6 Law violates the equality principle without referring at all - with respect to resolving the equality issue - to the legal situation that prevailed before the amendment under the Elections (Modes of Propaganda) Law, the validity of which was confirmed "for the removal of doubt" in the Elections (Confirmation of Validity of Laws) Law, adopted by a majority of the Knesset members. Is this the right path? Should it not be said that the legal situation in effect before the Amendment No. 6 Law, in light of its confirmation by a majority of the Knesset members in the Election (Confirmation of Validity of Laws) Law, constitutes an arrangement that is consistent with the equality principle, and therefore all that needs to be examined is whether the change effected by the Amendment No. 6 Law is substantive - and forbidden, or minor - and permitted?

In my view the only issue before us concerns the relationship between the Amendment No. 6 Law and the principle of equality as determined in section 4 of Basic Law: The Knesset. We need not deal at all with the relationship between the Amendment No. 6 Law and the arrangement concerning radio and television propaganda in the Elections (Modes of Propaganda) Law, as confirmed in the Elections (Confirmation of Validity of Laws) Law. The reason is that there is no assurance that the earlier Law was not itself tainted with a violation of the equality principle. Even if that were so - and this question is not before us in any way - it is clear that one deviation from the equality principle cannot be justified by an earlier deviation from that principle. The time allocated prior to the Amendment No. 6 Law, determines a standard for the legality of the broadcasts. It does not determine a standard for equality in them. The broadcasts might be legal, even though they violate the principle of equality.

11. As noted by the esteemed President, the Elections (Confirmation of Validity of Laws) Law determines that the provisions contained in the Knesset Elections Laws - including the Elections (Modes of Propaganda) Law - are valid for any purpose or matter. It follows, in my view, only that the broadcasting times determined in the Elections (Modes of Propaganda) Law (before its amendment by the Amendment No. 6 Law) are legal and valid. I am not prepared to say - without further examination - that those

broadcasting times are adequate and reasonable. Moreover, I am prepared to assume that the majority of the Knesset members assumed that they were not exploiting the new lists. But I am not prepared to assume, without further examination, that the new lists were not in fact exploited. Ultimately the question before us is not whether the time allotted in the Elections (Modes of Propaganda) Law is adequate or reasonable, and whether it exploits the new lists or not. The only question before us is whether the allotted time is consistent with the equality principle. It is possible that the time is reasonable according to various criteria of reasonableness, but does not create equality according to the rules of equality. Equality and reasonableness are not one and the same thing. To give each of ten guests an identical portion of cake might be an act of equality, but it would be unreasonable if one of the guests dislikes cake. It all depends on the standard according to which equality is determined, and upon the standard according to which reasonableness is determined. These standards are not necessarily identical.

12. My esteemed colleague, the President, points out that the legislative history of the Amendment No. 6 Law shows it was enacted in total disregard of the question of equal opportunity for the new lists. This legislative history is indeed instructive, and it supports my conclusion that the Amendment No. 6 Law violates the equality principle. However, I am not willing to rest the entire decision on this legislative history. I myself would have reached the same conclusion even if it transpired that Knesset members had expressed the view that the change does not affect the new lists and maintains their equality of opportunity. Ultimately the decision must be made upon analysis of the law and not upon psychoanalysis of the legislature.

SHAMGAR J.: 1. Section 4 of Basic Law: The Knesset provides:

> The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset.

This provision in the Basic Law delineates the constitutional principles that determine our electoral system. Some of these principles are an inalienable part of *every* democratic system of elections, since no system worthy of that title can take shape and exist without them - e. g., the principles that determine general, equal and secret elections. Other such

principles are the statutory expression of a choice between alternatives that are optional in democratic regimes, e.g., the principle that determines national and proportional, as opposed to regional, elections.

2. The introductory part of section 4, as cited above, also refers to the Knesset elections "in accordance with the Knesset Elections Law". These words do not serve to modify or interpret the constitutional principles with which section 4 opens, nor do they determine that anything provided in the Knesset Elections Law, as amended from time to time, automatically validates the constitutional aspects of such statutory provision as regards its compatibility with the foundations of the elections system laid down in section 4. The meaning of section 4 is that the Knesset shall be elected by general, national (etc.) elections, *in accordance with the processes and specified procedures* determined in the Knesset Elections Law. In addition, therefore, to the determination of principles, there is also a complementary reference to the procedural element. These two main components in the opening portion of section 4, i.e., the constitutional elements on the one hand and the referral to the particularization in the Elections Law on the other hand, are separate but cumulative substantive provisions that relate to different areas: the one, as aforesaid, to the guiding principles, and the second to their translation into concrete processes; but that translation cannot, by its very nature, override the duty to maintain the principles.

The reference to the Knesset Elections Law is governed by the rule of interpretation found in section 41 of the Interpretation Ordinance [New Version], since there is no provision that limits its application with respect to basic laws, and also since there is nothing in the context or substance of the matter from which one could infer otherwise; that is, the above mentioned phraseology of section 4 does not, as it were, refer at any given time to the Knesset Elections Law in its *current* form, as opposed to the said Elections Law in its version at the time that Basic Law: The Knesset was enacted. There is nothing, therefore, in the wording of the section that limits the phrase "in accordance with the Knesset Elections Law" to any initial version. Likewise, there is nothing in the wording of the opening portion of section 4 in general, or in the phrase "in accordance with the Knesset Elections Law" in particular, that limits the effect of the *closing* portion of section 4, according to which any variation with respect to the constitutional elements enumerated in the opening portion of the section requires a special and specific procedure, as provided there.

To summarize this point: the principles embodied in the above-mentioned section 4 are self-sustaining and independent, and constitute a binding guideline that cannot be varied by way of an amendment to the Knesset Elections Law unless the legislation is passed in the manner determined in the concluding portion of section 4. The reference to generality, nationality, equality and the other elements determines guiding principles that reflect upon the system and fashion its character. The words "in accordance with the Knesset Elections Law" refer to specific procedures, as opposed to the said principles, but one may not infer from the text of section 4 that a statutory provision in the Knesset election Laws can in itself modify those principles without having been passed by the required majority, or that such was the legislature's intention in formulating the principles and the words "in accordance with the Knesset Elections Law" in one textual sequence.

3. And now we come to the principle of equality, the meaning of which has been examined by us in these petitions.

According to the mode of interpretation that commends itself to me, the words "equal.. .elections" relate to formal equality, that is, to as simple and basic a standard as is possible, any deviation from which requires passage by a majority of the Knesset members. I have used the words "as is possible" because even the determination of formal equality entails no small degree of theoretical and practical problems.

Equality of rights has the aura of an absolute standard, as if it concerns the result of a mathematical calculation (J. Stone, "Equal Protection and Search of Justice" [1980] *Ariz.L.Rev.* 1), but its actual application frequently illustrates that formal equality does not necessarily and in all circumstances coincide with the just and fair, as where equal portions are given to both needy persons and those not in need. Furthermore, the Aristotelian point of departure mentioned by my esteemed colleague, Barak J., according to which equality means equal treatment of equals and unequal treatment of unequals, still leaves open the determination of attributes and components that measure equality, and their evaluation and measurement in the concrete case. The difficulty in determining the complex of relevant attributes and components that create the "badge of entitlement" (see Stone, *ibid.*, at 6) is not the only factor that makes it difficult to actually apply the standard of equality, and the theoretical offshoots of the problems that are formed in this area are innumerable. One

ensuing question is, for instance, whether immediate equality achieves a just result, or whether there are circumstances in which equality can be achieved only by adopting measures of unequal treatment, as in the application of reverse discrimination (see, *inter alia,* the deliberation of this issue in the decision of the U. S. Supreme Court in the *Bakke* case [3], at 272).

I have raised these matters to illustrate that equality, too, as a formal concept resting on a uniform and quasi-mathematical index or yardstick, is not necessarily easy to apply, but an attempt to adopt standards of substantive equality would impede tenfold a clear definition of the boundaries. Moreover, any attempt to make substantive distinctions resting on the characteristics and features of those receiving the allocation, that seek to add a dimension of justice or fairness to the mathematical distribution, will be influenced inevitably by subjective evaluations or variable normative assessments and will create a full range of possibilities with blurred and undefined lines and boundaries.

4. As explained by the learned President in the *Bergman* case [1],

> [T]he principle of equality has two facets: the first expression of equality concerns *the right to vote,* and this element is the concise translation of the rule "one man, one vote"; secondly, the element of equality also relates to the right to be elected, finding concrete expression in *the right to equal opportunity* of the various candidates lists competing among themselves in the elections to the Knesset.

My esteemed colleague, the President, related in the *Bergman* case to the theoretical origins of the equality principle that finds expression in our electoral system, and referred in this respect to the elementary principle of equality for all before the law, which is, according to him, at the very essence of our entire constitutional regime.

The learned President, proceeding to analyze the concrete forms that the equality principle ought to take in relation to elections, distinguished between equality before the law in its simple classic meaning and equality as expressed in the right to be elected (*ibid*., at 699):

> [A]s we draw away from this fundamental meaning of the principle of equality before the law, so it clashes with other important principles to which it must defer. ... [A]ll agree that the political parties should not be equated absolutely with each other by being allocated equal funds, regardless of the party's size, although the campaign needs of a small party might require as much of these means as a larger party. ... We also know of phenomena of inequality in the general election laws, primarily the minimum percentage of votes required in order to gain representation in the Knesset, and similarly the requirement that a new list must deposit a bond... All these restrictions inevitably derogate from absolute equality.

It follows from these statements that sometimes there are reasons, grounded in the welfare of the democratic regime, for deviation from the absolute formal equality under which each contestant is entitled, *prima facie,* to the very same portion, and according to which it would be forbidden to prescribe any restriction that is not imposed at the same time on all those competing for the voter's ballot.

The recognition that absolute equality must at times defer to other interests, which, too, have evolved and were fashioned in order to protect liberty and the democratic regime, is not unique to the election system practised in Israel, and the question how to divide broadcasting time among the parties while preserving the principle of equality has arisen in the case law of other democratic countries too. Thus, for example, the Constitutional Court of West Germany noted in a decision on the petition of the Free Democratic Party of Nordrein-Westphalen (BVR. 158/62 of May 30, 1962, *Entscheidungen des Bundesverfassunggerichts,* vol. 14, p. 121) that in light of the principle of equality in competitive opportunity, the broadcasting networks must, indeed, conduct themselves in a neutral manner with respect to the political parties, but the securement of equal opportunity need not express itself in the allocation of *absolutely identical* time to each party and it is possible to maintain distinctions between the broadcasting times given to the various parties for "especially important reasons". Thus the following should be considered (*ibid*., at 134):

> The elections in the parliamentary democracy are not designed merely to bring about the election of a parliament that reflects as faithfully as possible the various popular opinions, but also to form at the same time a parliament that can establish a government capable of acting. In a system of proportional elections, a meticulous application of equality in rights might allow small groups with meager constituencies or organizations with specific interests to gain parliamentary representation, and thereby increase the risk of excessive party fragmentation, and also - as the experience of the Weimar constitution has taught - to make it difficult or even impossible to form a government. In the face of this state political danger the decisions of the Constitutional Court always found important reasons to empower the legislature, as an extraordinary measure in narrowly defined and specific areas, to digress from the principle of formal equal rights while consolidating the details of the right to vote. This explains, for example, why there are no constitutional grounds for complaint against a provision in the elections law which fixes a reasonable minimum percentage of votes for representation.

For these reasons, the constitutional court there was of the opinion that different parties could be granted broadcasting times of varying durations for election propaganda, taking into account to a certain degree their present strengths (cf. the same court's decision in 2 BVR 7/57, at vol. 9, p. 100).

The above remarks indicate that the search for absolute formal equality is subordinate to other decisive factors that outweigh it. My esteemed colleague, the President, said as much in the *Bergman* case ([1] at 699):

> [W]e are in an area that is far removed from the idea of equality before the law in its simple classic meaning, that is, equality of rights for the citizen as an individual. There is no better example of this classic meaning than the rule of "one man one vote". This equality must be guarded without compromise. However, as we draw away from this

fundamental meaning of the principle of equality before the law, so it "clashes with other important principles" to which it must defer.

The other important principles are, for example, principles of fairness and justice (see Stone's above-mentioned article) or the aspiration to safeguard the existence of a democratic regime that has the power to survive.

5. The theoretical question that arises in this context is whether, contrary to the opinion expressed in paragraph 3 above, the concept of equality should be regarded as a broad concept that extends beyond its plain formal sense to include an entire range of circumstances in which full equality is not maintained for various, seemingly justified, reasons; or, whether the concept of equality should not be given a flexible meaning, amenable to the influences of other constitutional or state needs. In other words, are we to say that equality is preserved even when we do not meticulously maintain the principle of full formal equality, but the deviation from perfect equality is done on justifiable grounds rooted in the existential interest of the democratic regime? The alternative, as we said before, is not to distort the plain sense of the principle of equality, but to acknowledge that deviations from that principle are allowed if effected in the way provided in the conclusion to section 4 of the Basic Law - when it appears just and fair to do so, or if there are grounds to do so for the maintenance of a stable democratic regime, such as those mentioned by the esteemed President in the *Bergman* case [1] or by the German Constitutional Court, as described above.

I am aware that those who prefer the method of broad and flexible construction to its alternative, do so because in constitutional parlance it appears to preserve the equality principle. A contrary view is that the concept of equality is distorted if the mantle of equality is thrown over circumstances which are not such. Furthermore, the effect would be to negate the existence of any clear standard for determining the border posts of equality. Mathematical or simple formal equality could be quite clear, for instance, if it found expression in the allocation to each party of equal and identical broadcast time. Needless to say, such equality is neither reasonable nor just, especially in a country in which 31 lists are competing in the Knesset elections.

If one decides to determine an unequal standard, one that is anchored only in general evaluations as to what is just and fair, it is better to admit clearly that it is just or even necessary, as explained above, to deviate from the equality principle. When the Elections (Modes of Propaganda) Law has provided up to now that each party receives 10 minutes for television broadcasts and 4 extra minutes for each Knesset member, it means that a party with one Knesset member has a total of 14 broadcasting minutes whereas a new party has 10 broadcasting minutes. The result is inequality which might indeed be justified on the merits but still remains an instance of formal inequality between those competing for the voter's ballot, although there is good reason for its creation and actual perpetuation.

Awareness of the fact that circumstances create inequality would require legislative action in accordance with the concluding part of section 4 and would also alert the legislature to the nature of the action required from it.

In light of the text of section 4, caution in making constitutional changes will be promoted if the point of departure is absolute equality and any variation requires a legislative process as befits an entrenched statutory provision; that is to say, it is effected with awareness of the substance of the act and, consequently, with due consideration to the justification for such measure. If, on the other hand, one adopts a flexible method, under which deviations from equality are still named as equality so long as the court considers the deviation to be reasonable, then one loses any useful constitutional standard to serve as an *a priori* guideline for the legislature.

As mentioned above, until now each party had 10 broadcasting minutes and 4 additional minutes for each Knesset member, and thus the difference was between 14 minutes for a single Knesset member and 10 minutes for a new list that did not yet have a Knesset member. The statute amending the Elections (Modes of Propaganda) Law, discussed here, varied the times, allotting to a new list only 8 minutes and a list with one Knesset member 6 additional minutes for that member. The question is, therefore, where to draw the line between the reasonable, that can still be regarded as within the range of substantive equality, and the unreasonable, which goes beyond substantive equality. Will 9 minutes suffice to maintain equality, or perhaps, only the existing quota of 10 minutes sanctify the circumstances and stamp them with equality? The difficulty is compounded when we consider the radio broadcasts. Each list was entitled to 25 minutes, and now that

time has been reduced to 23 minutes. Where is the line beyond which substantive equality is absent, and what standard can be applied in a way that is clear, open and understandable to every citizen now, and also when the statute is amended next time?

6.(a) As explained above, I accept the idea that there are times when fairness, justice and even the democratic regime's existence necessitate deviation from absolute equality, be it by determining a blocking percentage, by requiring a bond, or by distinguishing in terms of broadcasting time between a body that has already taken part in elections and has passed the test, and a newly established list. The determination of a non-identical standard, or the deference of equality to more important values, as mentioned in the *Bergman* case, must be done consciously and expressly as a variation on the principle of full equality, that is, in the manner prescribed in the concluding part of section 4 of the Basic Law. We will thus preserve constitutional clarity, which is important *inter alia* because of the educational element it embodies and addresses to the general public. It is good that the citizen know when a deviation from the equality principle has been effected, and its purpose. In my view it is preferable not to blur the concept of equality with numerical manipulations that rest, ultimately, only on the intuition of the person making the calculations and that lead to a dead end in which there is no clear standard, open and known in advance.

(b) The previous deviations from the principle of equality, as in effect at the time the Knesset adopted the Elections (Modes of Propaganda) (Amendment No. 6) Law, and which also failed to give identical and equal times to all the lists, were confirmed, albeit retrospectively, in the manner prescribed in section 4 of the Basic Law, by the Elections (Confirmation of Validity of Laws) Law.

The adoption of the 1969 statute established that the deviation from absolute equality was effected lawfully and in accord with the course designated in our Basic Law. On the other hand, it did not give a stamp of full and perfect equality to the existing time distribution, as prescribed in sections 15 and 15A of the Elections (Modes of Propaganda) Law, until the enactment of Amendment No. 6.

Any *further* variation of the provisions regarding broadcasting times, that would derogate in any way from the rights granted to the various lists under the prevailing law

and widen the deviation from the principle of full formal equality, required a vote in accord with the concluding part of section 4 of the Basic Law, which must be read, naturally, together with section 46 of the Basic Law.

Since it transpired that the Elections (Modes of Propaganda) (Amendment No. 6) Law was not passed by the majority required under section 4 of the Basic Law, I decided to concur in the decision of May 29, 1981, as cited in full in the opinion of my esteemed colleague, the President.

BEJSKI J.: 1. The attempt to formulate principles for the notion of "equality" in our instant context, raises difficult problems of the kind of squaring a circle. Apparently all agree that for this purpose no schematic-arithmetic equality is envisaged, such as according equal broadcasting time to each of the lists appealing to the voter. Even though this simplistic construction would follow strictly from a *prima facie* reading, yet, having regard to the subject-matter, no greater inequality could be created than would result from such a construction. For that reason it was rejected in the *Bergman* case [1], and the Petitioners in the present case do not urge it either. But that in no way facilitates the search for other principles that would lead to an appropriate construction, with due consideration given to the range of diverse aspects that the democratic regime weighs in order to grant every list or candidate an equal opportunity to take part in parliamentary life. This objective itself exists and is expressly sanctioned, but the aspiration to attain it requires the erection of barriers to prevent over-fragmentation of power concentrations as a result of ephemeral lists - whether or not they pass the blocking percentage, which would make it difficult to form a government and to maintain orderly parliamentary life. At the same time one must consider budgetary problems entailed in realizing the objective, the sum of broadcasting hours that can be allotted, and also the citizen who must forgo viewing and listening to other programs that interest him in favour of propaganda broadcasts on the same, single, television channel.

2.But the truth is that already at the basic point of departure there is a lack of equality between the lists represented in the legislature and the new ones seeking to gain representation. The former are more or less known and familiar to most of the voting public, for better or for worse, from their activity in the legislature before the elections; all the media provide ongoing coverage of such activities over the years of the Knesset term.

Not so with respect to the new list, which for the first time addresses the voter, who usually knows nothing about it. As regards equality of opportunity, one might claim with a degree of logic that a list of this kind needs not only the minimum time it requires to present its platform and creed, but also time in order to challenge the parties represented in the Knesset in a debate on its advantages over the veteran parties, which would obviously also include criticizing their past activities, emphasizing their faults, and so on. As regards equality of opportunity, therefore, the new lists are in an inferior position from the very start of the contest, and the disadvantage grows with the difference in the allotted time. I doubt whether the inequality in the allocation of broadcasting time as between the veteran or large lists and the new ones, can be justified on the ground that the former need more time to explain their acts and omissions during their term in office. It appears to me that as much time is required to challenge the acts and omissions of the large and veteran parties and to call them to account, which is, after all, the only chance to persuade the voter to prefer a new, as-yet-unknown list to the others. One cannot, therefore, deny that the differentiation in allotted broadcasting times is also a differentiation in equality of opportunity. While the new list consumes its small time quota merely to introduce itself, the large list has abundant, ten-fold time, both to defend and justify itself and to attack and discredit other lists, and the small list might become lost in the extra verbiage and photography of the large lists to the extent that its presence is not felt at all. From this point of view, the explanatory notes to the bill of the Elections (Modes of Propaganda) (Amendment No. 6) Law are not at all persuasive and, in fact, underline the inequality of opportunity. It is said there:

> The present Bill is intended to temper slightly the ratio of the two time quotas, but it continues to give a party group with a single Knesset member an amount of time which is larger than that given to a single Knesset member in a large party group.

This commentary is possibly pertinent and meaningful with respect to regional elections or in a presidential regime, where a single candidate opposes a single candidate. But in proportional elections, such as ours, the contestants are the lists and not the persons who comprise them, and the equality that is aspired to relate to the lists *inter se*. A 30-member list in the outgoing Knesset still has only one common platform, and its presentation does not require 30 times longer than the platform of a one-person party

group. Likewise with respect to the acts and omissions that the individual member of the party group wishes to explain and attribute to the group. It is not the individual in the large party group who is running for election but a political party, a list, a party group; that is why any attempt to equate the single candidate with the individual in a large party group does not promote equality, but has the opposite effect.

3. Counsel for the litigants brought to our attention the situation in various countries in which the principle of equality in elections is a cornerstone of the parliamentary democracy. In some of these, the arrangements regarding broadcasting times are determined by legislation, and in others the arrangement is reached through a parliamentary committee, or even by means of an agreement between the political parties on the one hand and the broadcasting authority on the other. Obviously, one should not adopt any specific system from a given country, and it is even hard to draw analogies, because in each country the relevant arrangement, whether legislated or otherwise established, evolved from its particular political history and parliamentary tradition and is adapted to them. One cannot compare a state which has constituency elections - and usually a small number of candidates lists - to a state with a different elections system and a larger number of political parties. As for us, the circumstances, background and tradition are essentially different: we are blessed with more than 30 lists at the starting line; the television, which is apparently the focus of the main battle, broadcasts on only one channel. And there is no possibility to purchase radio and television broadcasting times beyond those allocated under the law.

Although one cannot draw analogies or copy a system from another state, it is interesting to note that most countries practise a system of relative equality which gives a clear advantage to parties represented in the outgoing parliament. The mode of time distribution - even between the represented parties, whose strength is known - is not necessarily arithmetic and proportional. In other words, the quest for this relative equality is the lesser of evils, and the relativity is determined (whether through legislation or other means) in accord with local considerations that appear to ensure reasonable opportunity for all participants in the elections.

In England, where there is no legislation on the subject, the arrangement is made before the elections between the broadcasting networks and the principal parties, and the

main allotment of time goes to the parties represented in Parliament, some time being allotted to other groups as well. For instance, in the 1966 elections the Liberal party had an 11.2% representation in the outgoing Parliament and was allotted 35 minutes of television and 30 minutes of radio time, whereas the Labour party, with a 44.4% parliamentary representation and the Conservative party with 43.4%, received one hour on television and 55 minutes on the radio. All the remaining groups were allotted 5 minutes on radio and television. In this case the relativity was effected clearly in favor of the small Liberal party.

In the U.S.A. where the broadcasting and television networks are private and cannot be compelled to offer their services to the political parties, section 315 of the Federal Communications Act provides that if any network allows a candidate for public office to use its station, it must allow the same to other candidates for the same office under the same conditions. This provision appears to reflect absolute equality. but it is doubtful whether that is the effect in practice - because only candidates who are backed by parties capable of bearing the heavy expense of buying broadcasting time would benefit from this equality right.

In Italy the broadcasting time is distributed by a parliamentary committee with each party and the government receiving a uniform basic time, while the large parties are allotted additional time in proportion to their size. In the Federal Republic of Germany the broadcasting time is divided among the parties represented in the parliament, and as can be gleaned from the decision of the German Constitutional Court of 30 May 1962, which has been mentioned by my esteemed colleague, Shamgar J. (2 BVR 158/62), the internal distribution was not proportionate to the parliamentary representation. The Constitutional Court did not regard this as a shortcoming affecting equality of opportunity. Only since the 1965 elections has the television broadcasting time been divided under an agreement between the parties represented in the parliament on the basis of their representative strength.

In Holland the broadcasting time is divided equally among all the parties and groups represented in the parliament.

In France the matter was statutorily arranged in 1966, and the broadcasting time is divided among the parties and groups represented in the Conseil d'Etat, without taking into

account the Senate's composition. Without dwelling on the details of the arrangement, which has its origin in a presidential regime, the practical result was that in the elections at the time the majority ruling party gained 36.26% of the votes and received the same broadcasting time as all the remaining opposition groups which gained 63.7% of the votes (taken from Ch. Debbash, *Traite du Droit de la Radiodifusion Radio et Television* (Paris, 1967); Ch. Debbash, "Le droit a l'entenne a propos de l'organisation de la campagne electorale" (Chronique III, BBC Handbook 1963; 1967).

4. These particulars are not mentioned for analogy, but to illustrate that although the principle of equal opportunity is avowed in each of the states mentioned - and there is no doubt that it is their genuine objective to maintain democracy and orderly parliamentary life in their countries - there are no common principles for a solution that satisfies the wishes of all the groups taking part in the election campaign. Absolute equality is clearly not the solution, as Debbash points out, *supra:*

> To give the same broadcasting right to a party that embraces several million voters and a group of a few visionaries creates a wrong exercise of equality. As already said elsewhere, on the authority of the Conseil d'Etat, one cannot treat equally persons or groups that are situated differently. Absolute equality would contradict the democratic principle, whereas relative equality satisfies it.

Relative equality also entails no small amount of problems, and suffice it to point to the many differences between the various solutions reached in the various states. The only common denominator that can be pointed to is the sincere will to grant a reasonable opportunity to all the groups seeking to participate in the elections, while granting advantages to those that have already proven themselves in parliamentary life, yet safeguarding at the same time its orderly functioning. However, the means to achieving these purposes are different and removed from one another.

5. I do not believe that we can formulate guidelines as to where the limits should be drawn. Is the allocation of 10 broadcasting minutes for a small party within the range of reasonable equal opportunity, and would a reduction of 2 minutes constitute an intolerable

infraction? What about a further cut in the few remaining minutes? In the present case, however, we are not called upon to answer these difficult questions.

Even if the times determined in the original statute transgressed the limits of relative equality, they were nevertheless determined in a statute adopted by a special majority of the Knesset, as required under section 4 of Basic Law: The Knesset. The Elections (Modes of Propaganda) (Amendment No. 6) Law introduces change on two points: in reducing the basic broadcasting times for the parties and candidates lists from 25 to 23 minutes on the radio, and from 10 to 8 minutes on television, and in allotting an additional 2 minutes on both media to every party represented in the outgoing Knesset, in respect of each of its Knesset members. As for myself, I regard the main violation of equality in the second part of the provision, which creates a large and unreasonable differentiation, beyond what is acceptable. As regards the broadcasting time at their disposal, even previously the small and new lists were in a Procrustean bed in competing with the large parties. I, for one, was indeed impressed by Dr. Leshem's calculations with respect to the gap created in favor of a 30-member party as against a new list, and I view this as a conspicuous violation of the relative equality established under the original statute, to the extent that even the relative equality of opportunity is eroded and violated. And since I too am convinced that this violates equality, a special majority was required under section 4 of Basic Law: The Knesset.

For these reasons I agreed to the absolute orders made on May 29, 1981.

BEN-PORAT J.: Although at the time I had no hesitation in concurring in the result we reached unanimously, I must admit that I deliberated much before deciding upon the meaning of the equality principle in section 4 of Basic Law: The Knesset. There is much reason, with all due respect, in the approach of my esteemed colleague, Shamgar J. , that it concerns formal equality grounded in an a quasiarithmetic, basic, uniform, and absolute standard, and that whenever important principles justify deviation from such equality only a special majority, as required under section 4, can determine the solution that is acceptable to it. *Formal* equality that allocates identical time to each list can probably be justified, *materially* speaking, in only one case: when a state is electing for the first time its Knesset members according to an election system of competing lists. I said "probably" because there is always a theoretical possibility that the parties in the outgoing Knesset are all equal

in strength and there are no new lists. But, *identical time for each party group and list is not a conditio sine qua non for the existence of formal equality,* since one can determine a yardstick or uniform indicator of *another* kind, such as a progressive time measure in accord with the relative size of the parties. This too is a quasi-arithmetic calculation that can be regarded as formal equality and *perhaps* even material (on condition that it is based on a reasonable coefficient and initial allotment). By extending the equality principle in this way, it is also possible to reconcile my view with the ruling given in the *Bergman* case [1], by Landau J.- as he then was, today the honorable President of this court. It was stressed there, rightly and justly so (at p. 698) that "[this equality] must ... find expression in equality of opportunity" among both the existing parties and the various candidates lists competing in the Knesset elections. Likewise, it was stressed there - and it is also acceptable to me - that "the parties should not be put in an absolutely equal position by allocating funds equally without considering each party's size...". In short, equality that finds expression in equal time allocation to each party and list regardless of its size, is inherently incompatible with the decisive principle that is equality of prospects or (I would prefer to say) opportunity. In applying a progressive standard as suggested above, one comes across an initial difficulty, which is the existence of new lists that should not be deterred from testing their strength, despite the legitimate wish to prevent their excessive proliferation. As said in the *Bergman* case (at 699), the prospect of a new list to become a party group in the Knesset is one of the clear identifying marks of a democratic regime, and the new list should not be put at a disadvantage *vis-a-vis* the old party groups. However, not knowing in advance whether a new list will pass the blocking percentage, and if it does, how many Knesset members it will elect, we lack an indicator for applying the uniform progressive measure, and this calls for a suitable independent solution by way of a special majority of the Knesset members.

The Elections (Modes of Propaganda) Law (hereinafter - "the Main Law"), that was confirmed *inter alia* by the Elections (Confirmation of Validity of Laws) law (hereinafter - "the Confirming Law), provided an arrangement that is *not* based on a *uniform* standard, but is composed of two cumulative elements, the one fixed and the other progressive: (1) 25 minutes of propaganda broadcasting on radio and 10 on television for every party of the outgoing Knesset and every new list; (2) 4 additional minutes on radio and television for each member of a party in the outgoing Knesset. I do not believe that this complies with *formal* equality. It is possible that this arrangement is ultimately just and fair, but it is

enough, in my opinion, to conclude that it constitutes a deviation from the equality principle (according to my construction) so as to require the sanction of a special majority. It was therefore clearly necessary, in my opinion, that the Confirming Law give effect to such arrangement. The same applies, obviously, to the Elections (Modes of Propaganda) (Amendment No. 6) Law (hereinafter - "the Amending Law") under discussion here. This latter Law *reduced* the broadcasting time of the parties and lists by two minutes (that is, substituted 23 for 25 minutes on radio and 8 for 10 minutes on television), and at the same time *increased* by two minutes the additional time for each member of the outgoing Knesset (that is, substituted 6 for 4 minutes on radio and television). The *technical* nature of the arrangement remains as it was, applying a twofold measure, the one static and the other progressive, but the gap in time allocation between a new list (or small party) and the large parties, has grown incomparably. If we regard the *overall outcome* of this situation (and not merely the difference in minutes as an *isolated* factor) there is no escaping the conclusion, in my opinion, that the equality principle has been violated, even if we *assume* (contrary to my own view) that it was preserved in the Confirming Law.

Incidentally, a look at the explanatory notes to the bill of the Amending Law (which related only to the increment for each Knesset member) reveals an admission that the bill deviates from equality, although on grounds that I, with all due respect, find unacceptable. To clarify my position I shall cite the text:

> The present version of the Law creates an unreasonable situation concerning the time allotted to a party group with one Knesset member as distinguished from the time allotted to a party group with a larger number of Knesset members.
>
> The present bill is intended to *temper slightly* the ratio of the two time quotas but it *continues to give a party group with a single Knesset member an amount of time which is larger than that given to a single Knesset member in a large party group.*

(Emphasis added -M.B.P.)

This is, therefore, support for the view that the main Law deviated at the time from the principle of equality, to the disadvantage of the large parties, because an arithmetic

calculation for each member shows that the time (per member) at the disposal of the small parties is longer than that for the large ones; and this "wrong" (which, in my humble opinion, is an illusory wrong) grows incrementally with the number of members belonging to the party. In our present matter it is important that the Amending Law was regarded as a *partial removal* of the distortion. It appears that they used a uniform measure (the time quota for each party member), that is, progressive equality which I accept as formal equality, so as to examine whether the result was just, and that they reached the conclusion that it was *not* so. I have said that this reasoning is unacceptable to me, because under the existing conditions the application of the said formal equality would necessarily lead to an unjust result with respect to the new lists, which were wholly overlooked, as clarified in the opinion of Landau P. The opportunity to which they are entitled, requires an allocation of time that suits their need to present to viewers and listeners the platform and special message that might justify their presence as a party group in the Knesset. I do not have the tools nor the expertise to express an opinion as to how much time is required, considering all the aspects of the problem, but the fact that the distortion *as between the existing parties* was *also* rectified at the expense of *the new lists,* points to a deviation from the principle of equal opportunity. It might be noted, in passing, that the *total* abolition of the "distortion" referred to in the explanatory notes, is possible only *if the fixed time allotted to every party is entirely abolished* (which is further proof that the combination of these two factors is incompatible with equality).

I have not surveyed the situation in other countries, because that was done in a comprehensive and painstaking manner by my esteemed colleagues, to which I could not add much.

Judgment given on July 28, 1981