HCJ 98/69

A. BERGMAN
v.
MINISTER OF FINANCE AND STATE COMPTROLLER

The Supreme Court Sitting as the High Court of Justice

Before Agranat P., Sussman J., Landau J., Berinson J. and Manny J.

Editor's synopsis -

Section 4 of Basic Law: The Knesset, requires that elections to the Knesset shall be "general, nationwide, direct, equal, secret and proportional". Sections 4 and 46 of this Law require that any amendment to section 4 be approved by an absolute majority of the Knesset. In 1969, the Knesset passed a Law providing public financing of the election campaign for the seventh Knesset, scheduled to be held in 1970. According to the provisions of this Law, which was not passed by an absolute majority, such funding is granted solely to party factions which are represented in the outgoing Knesset.

The Petitioners contend that the funding provisions of the new Law are void for two reasons. The Law was initiated by several members of the Knesset as a private bill, whereas legislation that imposes a financial burden on the Treasury must be initiated by the government. By providing public financing only for existing party groups, the Law infringes upon the requirement in section 4 of the Basic Law that elections be "equal" and is therefore invalid since it was not passed by the absolute majority required under section 46 of the Basic Law, i.e., a majority of the members of the Knesset, at each stage of the legisation.

The court issued an order *nisi*, calling upon the Minister of Finance and the Government Comptroller, to show reason why an order should not be issued directing the Minister to refrain from making any expenditure under the election financing Law and directing the Comptroller to refrain from performing any act which the said Law authorises or requires him to perform. The Respondents appeared in opposition to the order *nisi.*

The court ruled that the order nisi be made absolute, holding:

1. Whatever may be the law in England, there is no rule in Israeli law that forbids members of the Knesset from initiating a private bill that imposes a financial burden on the Treasury.

2. All of the other terms in section 4 of the Basic Law, "general, nationwide, direct, proportional", relate both to the right to vote and to the right to be elected. There is no reason not to give the word "equal" a similarly broad meaning.

3. The absolute denial of any funding to new party groups is a substantial violation of the principal of equality established in section 4 of the Basic Law, and therefore requires the support of an absolute majority of the Knesset at each stage of the legislation.

Note - The Knesset thereafter amended the Law to include financing for new party groups. The amendment was passed by an absolute majority of the Knesset members, although it is possible that such a majority was not required since, arguably, the new Law, as amended, satisfied the requirement of equality. At the same time, the Knesset enacted a second Law, also by absolute majority, which retroactively confirmed the validity of all legislation concerning election procedures that had been enacted previously. The effect of the Confirmation Law was to prevent judicial review of all such legislation previously enacted, even if it violated one of the entrenched provisions.

For a later case dealing with the requirement of equality as it relates to public financing of elections, see the *Rubinstein* case, *infra,* p. 60. For a case dealing with the implications of the requirement that elections be "equal" with respect to public broadcasting time allowed each party, see the *Agudat Derekh Eretz* case, *infra,* p. 21. Both cases concerned legislation passed after the Confirmation Law, though the effect of the Confirmation Law was considered by the court in the *Agudat Derekh Eretz* case.

Israel case referred to:

[1] E.A. 1/65, *Yeredor v. Chairman of the Sixth Knesset EIections Committee* 19 P.D.(3)365.

The Petitioner appeared in person.

M. Shamgar, Attorney-General, and *Z. Terlo,* Director-General of the Ministry of Justice, for the Respondents.

JUDGMENT

LANDAU J.: On April 30, 1969 this court issued an order *nisi* against the Minister of Finance, to show cause why he should not refrain from any expenditure under section 6 of the Knesset and Local Authorities Elections (Financing, Limitation of Expenses and Audit) Law 1969 (hereinafter: the Financing Law); and against the State Comptroller - why he should not refrain from any act which he is directed or authorised to implement pursuant to sections 11 and 12 of the Financing Law. The order *nisi* was issued on the petition of Advocate Dr. A. Bergman, on two principal grounds: one related to the manner in which the Financing Law was initiated and the other to the manner in which this Law was passed in the Knesset.

The first argument is that since the Financing Law imposes a monetary burden on the Treasury, it could only have been initiated by the Government. In fact the Law was initiated by six Knesset members as a private bill (see H.H. 807). The Petitioner bases this argument on the English constitutional practice that finds expression in section 87 of the Standing Orders of the House of Commons, of 1958 (Halsbury-Simonds, vol. 28, p. 442). The Petitioner argues that these directives embody an important and necessary constitutional principle that the legislative branch may not decide on a monetary expenditure on its own initiative, as it does not bear the responsibility for finding sources of revenue to balance the new expenditure.

The Petitioner's second argument is that the passage of the Financing Law was invalid and in violation of the principle of the equality of elections as provided in section 4 of Basic Law: The Knesset (hereinafter: the Basic Law). According to section 46, which was added to the Basic Law in 1959:

> The majority required under this Law to amend sections 4, 44 or 45 will be required for resolutions of a plenary meeting of the Knesset at every stage of the legislation, other than the debate upon a motion for the agenda of the Knesset. For the purpose of this section "amendment" - either express or implied.

And section 4 of the Basic Law reads:

> 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.

The first reading of the Financing Law was passed by the Knesset by a majority of 24 to 2 (D.H., Sixth Knesset, Fourth Session, p. 1377), that is, by less than a majority of the number of Knesset members (61). As for the third reading, the Knesset records (*ibid.*, p. 1674) state merely that the Law was "adopted", without a recorded count of the votes. The Petitioner argues that this session too was not attended by a majority of the Knesset members, and the Attorney-General, who appeared for both the Respondents, did not dispute that. In any event this is immaterial, since section 46 requires a "special" majority at every stage of the legislation.

This petition raises potentially weighty preliminary questions of a constitutional nature, relating to the status of the Basic Laws, and to the justiciability before this court of the issue of the Knesset's actual compliance with a self-imposed limitation in the form of an "entrenched" statutory provision, such as section 4 of the above-mentioned Basic Law. However, the Attorney-General relieved us of the need to deliberate the matter by stating on behalf of the Respondents that they "do not take a position on the question whether the legal validity of a legislative enactment is a justiciable matter before this court, since they are of the opinion that the petition must fail on the merits". He so stated in his heads of argument and repeated it in his oral argument on the return day, and when asked what position he would take if the court found the petition substantiated, he replied that in such event he would put himself at the court's disposal to make his submissions on the question of justiciability. It is therefore up to the court to decide whether it wishes to examine the question of justiciability of its own accord. We have decided not to do so because, for obvious reasons, the substantive problems raised here require urgent resolution, whereas clarification of the preliminary constitutional questions would entail separate, lengthy deliberation. We therefore leave the question of justiciability open for further consideration and, clearly, nothing in this judgment should be taken as an

expression of opinion on that matter. The Respondents have also not disputed the Petitioner's standing to file the petition, so that question also does not arise before us.

We now return to the Petitioner's two arguments. The first can be answered briefly. Whatever the law in England - and we find it unnecessary to delve into that question - our law has no statutory provision to prohibit members of the Knesset from initiating a private bill that imposes a monetary burden. Indeed, the Knesset Rules adopted by this body under section 19 of Basic Law: The Knesset indicates the contrary. In the seventh chapter of the Rules, entitled "Debate on Bills of Knesset Members", rule 105(a) provides: "Every member of the Knesset may propose a bill". There is no limitation as to the content of the bill. Section 5 of the Law and Administration Ordinance, 1948, provides that

> the budget of the Provisional Government shall be fixed by an Ordinance of the Provisional Council of State

and again nothing is said as to the manner of initiation of such budgetary legislation on the part of the legislature. The Financing Law here considered is *sui generis:* it is not a budgetary law in the technical sense, since it does not *authorize* the government to expend money but rather *obliges* the Minister of Finance to put certain sums at the disposal of the Chairman of the Knesset. There are no special provisions in our positive law as regards the procedure for enacting a statute of this kind. The Minister of Finance will have to find sources of finance for the monetary expenditure involved in the implementation of this Law, and if he encounters difficulty in doing so that is a matter which, constitutionally speaking, pertains to the relations between the legislative branch and the executive branch, which does not concern this court.

That leaves the principal question: does the Financing Law contradict section 4 of the Basic Law? First, however, we wish to make it clear that this court ought not involve itself in the debate conducted in the Knesset and by the general public concerning the system of state financing of the general activities of the political parties and their specific activity in the elections campaign. Much has been said and written about the deficiencies of this system from the public perspective, while respected members of the Knesset representing a large majority of the House, including the initiators of the Law, have defended this system

as necessary in our political reality. They stress, on the one hand, the improvements brought about by this Law compared to the previously prevailing state of affairs, especially as regards limitations on election expenditures and their auditing - two subjects that have no necessary connection with the matter of state funding; and they endeavour, on the other hand, to appease the critics by pointing to the experimental character of the entire Law which is intended to apply only to the seventh Knesset elections.

This entire public debate falls outside the range of our judicial interest - the problem before us is confined within its legal framework. What is the Petitioner's legal argument? He argued, half-heartedly, that "it is doubtful whether the allocation of funds to political parties is an allocation for purposes of state", citing an opinion of the Massachusetts Supreme Court that such is not an expenditure for a "public purpose" in the sense of that state's constitutional law (197 N.E.2d 691). We have no similar provision in our law, which suffices to dispose of this argument. For us, therefore, the question is framed within the context of section 4 of the Basic Law alone. In this respect the learned Attorney-General argued that there is no contradiction between equality in the elections as secured under section 4 of the Basic Law and the provisions of the Financing Law. He contended that the entire section 4 deals only with the elections system in its technical sense, as evidenced by the marginal heading of the section, and that the principle of equality it embodies means only that each voter has one vote of equal weight - that and no more. In support of this argument he referred us to the legislative history of this provision, which has its origins in the Mandate period, in rule 4 of the Knesset Israel Elections Regulations of March 1, 1930, and also to the constitutions of other countries in which the principle of "one man one vote" finds explicit recognition. He argued that this technical principle should not be confused with the fundamental principle of equality for all before the law, which is likewise expressed in various constitutions. But we do not have a written constitution. It is true that we too recognize the equality of citizens before the law as a fundamental principle of our constitutional regime, yet that principle has not been embodied in a written constitution or even in a provision of a basic law that requires a special majority for amendment. Hence there is nothing to prevent the legislature from deviating from this principle even in a law passed by an ordinary majority. The Financing Law should be seen as part of the Elections Law, and section 4 of the Basic Law itself says that the Knesset shall be elected "by general elections in accordance with the Knesset Elections Law". In

any event, if the Financing Law deviates at all from the principle of equality, it is but a minor deviation which is to be accepted so that other important goals are achieved, such as preventing the undue fragmentation that could result from too rigid an application of the equality principle in financing.

With all due respect we must dismiss this argument because it does not answer adequately the Petitioner's main complaint: that limitation of the funding to parties represented in the present, sixth Knesset exclusively, is prejudicial to equality of opportunity for those new candidates lists that seek to take part in the campaign for the seventh Knesset elections but were not represented in the sixth Knesset.

We do not accept the argument that section 4 of the Basic Law merely prescribes technical directions regarding the conduct of the elections. We are prepared to assume that the draftsmen of this section envisaged primarily the principle of "one man one vote" when they prescribed that the elections should be "equal". But we do not believe that this exhausts the full meaning of the programmatic provision in the Basic Law. Each of the adjectives "general, national, direct, relative" has two facets: they address both the right to elect and the right to be elected, and there is no reason why the word "equal" should not be given the same broad meaning. This is indicated by the order of the sections: first section 4 with its general significance, and then the more specific provisions in section 5 regarding the right to vote, and in section 6 - regarding the right to be elected. Were it otherwise, and the word "equal" referred only to the right to vote, it would have been more natural to include the idea of "one man one vote" in section 5.

If the principle of equality in section 4 extends to the right to be elected, it must also find expression in an equality of opportunity for the various candidates lists that contend in the Knesset elections. For in our elections system the election candidates join in candidates lists that are submitted either by a party group of the outgoing Knesset or - in the case of a new list - by 750 voters (section 4 of the Knesset Elections Law [Consolidated Version], 1969). In this way the individual candidate aspires to achieve his set goal, and by the same token the will of the individual voter is realized in voting for the list.

This interpretation of the equality provision in section 4 is consistent with the fundamental principle of the equality of all persons before the law. To be more precise, it applies as an emanation thereof in the specific area of the law of elections. But it can also exist independently without resting upon a provision in a written constitution that expressly declares the principle of the equality of all persons before the law. We do not have such an express provision, neither in a written constitution nor in an "entrenched" provision of a basic law. Nevertheless this unwritten principle is the soul of our entire constitutional regime. It is therefore only right - precisely in the borderline cases, where a statutory provision can be construed in two ways - that we prefer the construction that upholds the equality of all persons before the law over one that sets it at naught. This fortifies our construction of the equality provision in section 4.

After all, what is the simple meaning of the words "equal elections"? What would we say, for example, about a statutory provision that allowed only one list of candidates? Could such elections be called "equal" because each voter still has one vote? Or, assuming the Financing Law determined that only the largest party was entitled to state funding - we would certainly regard that as a glaring violation of the equality principle in section 4. In other words, this section has the potency to prevent violations of equality also beyond the narrow confines of "one man one vote".

Before we examine the Financing Law in light of our above-mentioned comments, we wish to note three preliminary points. *First,* 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 (and it is stressed again that everything here said presupposes that the matter is justiciable before this court). *Second,* we 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. Thus, for example, in the *Yeredor* case[l] this court affirmed a decision to disqualify a list of candidates whose purpose was to undermine the existence of the State of Israel. Likewise, with regard to the

matter of state funding for the elections: all 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. It was not argued here that for this reason they are invalid. *Third*, and related to the preceding point, the issue before us - state financing of elections - is complicated and complex by its very nature and its legislative solution entails diverse practical considerations that require special expertise, which this court lacks.

Without overlooking all this, we have concluded that the absolute denial of funds to new lists of party candidates substantially prejudices these lists' equality of opportunity, thus violating the equality principle in section 4 to an unjustifiable degree that goes beyond a minor deviation from that principle. We have already mentioned the provision in the Knesset Elections Law that allows any 750 voters to submit a candidates list. This opens the doors of the Knesset to new party groups. Such opportunity is one of the hallmarks of our democratic regime in general and our elections system in particular. It might be argued that the situation of a new list in the elections to the seventh Knesset is no worse than it was in the elections to the sixth Knesset, since such a list can still finance its election expenditures from private sources. We would answer that this is not the correct comparison to make; rather the *current* situation of such a list should be compared with the *current* situation of the existing party groups, and, if so, it is clear that the new list is at a real disadvantage compared to the others, because these are entitled to receive substantial sums from the state coffers to finance their expenditures whereas the new list is denied that right.

In the Knesset debates on the Financing Law, the merits of a method of finance based on the balance of party power in the outgoing (sixth) Knesset was contrasted with a method

based on the new party balance in the incoming (seventh) Knesset. The Knesset preferred the first method and one of its main reasons for so doing was the danger that short-lived lists would be formed because of the temptation to receive an advance on the funding allocation. This danger can be countered without causing the inequality that we have found to be unlawful, by promising a new list funding without an advance payment and only retrospectively after it has stood the test of the elections and gained at least one seat. All this on condition that the list has consented in advance to the audit by the State Comptroller in accordance with the Financing Law, and has met all the other conditions specified in the Law. It appears to us that provisions of this nature could still be added to the Financing Law without undue difficulty, without changing the existing provisions as regards the parties represented in the sixth Knesset and without overturning the entire situation, so as to avoid the apprehended inequality. It need hardly be said that in making this suggestion we in no way presume to encroach upon the sovereignty of the Knesset as the legislative authority.

The Knesset accordingly has two courses from which to choose: it can reenact the financing provisions in the Financing Law, despite their inherent inequality, if the majority required under sections 4 and 46 of the Basic Law is mustered; or it can amend the Law so as to remove the inequality, and we have indicated above a possible way of doing so.

We therefore make absolute the order *nisi* in the sense that the first Respondent, the Minister of Finance, is to act pursuant to section 6 of the Financing Law only if the financing provisions in the Law are reenacted with the required majority, or if the Law is amended so as to remove the inequality contained therein. We see no need to issue any order against the State Comptroller. Respondent no. 1 shall pay the Petitioner his costs in the petition.

Judgment given on July 3, 1969