HCJ 141/82

AMNON RUBINSTEIN M.K. ET AL
v.
CHAIRMAN OF THE KNESSET ET AL

The Supreme Court Sitting as the High Court of Justice
[June 16, 1983]
Before Kahan P., Shamgar D.P., Barak J., S.Levin J. and Sheinbaum J.

Editor's synopsis -

The Elections Financing Law set limitations on the amounts which the various party groups were allowed to spend. as a condition of their obtaining public funding of their election expenses. A party that exceeded the established amounts, was denied part of such public funding. to an extent determined by the degree of such excess.

In the course of the elections for the tenth Knesset, in 1981, several party groups exceeded these limits, some by substantial amounts After the elections, the Knesset amended the above Law, retroactively, raising the allowable spending limits and reducing the sanctions applicable to those parties which exceeded the new higher limits, so that these changes in the financing Law applied to the elections previously held. This amendment was passed by an ordinary majority of the Knesset members participating in the vote, rather than by an absolute majority of all Knesset members, required by Basic Law: The Knesset, in the case of an amendment that infringes the principle of equality in elections. See the Bergman case, *supra.* p. 13.

The individual Petitioners are members of the Knesset who represent the *Shinui* party, the third Petitioner. They assert - and this assertion is not contradicted - that the *Shinui* party adhered to the spending limits as fixed in the original legislation which was in effect at the time the elections were held. They contend that the retroactive amendment of the Law raising these limits violates the principle of equality in the elections and is void because it was not voted by the absolute majority of the Knesset required in such cases.

The court issued an order *nisi.* directing the Chairman of the Knesset and the Minister of Finance to show cause why it should not declare that the amendment is of no legal validity and should not be acted upon. The Respondents, in opposition to the order, argue that the Law satisfied the requirements of equality

before it was amended, and that the amended Law, judged on its own, also meets these requirements. The retroactive application of the Law, whatever else might be said about it, does not violate the principle of equality and its enactment did not require an absolute majority.

The court, composed of five Justices, ruled unanimously that the order *nisi* be made absolute, on the ground that the amendment violated the requirement of equality. The lead opinion was delivered by Justice S. Levin, who was joined by two additional Justices. He held:

1. Equality does not have a single unitary meaning. It is a substantive, not a formal concept, which cannot be weighed without taking into account other values, which may differ from one society to another. It is a derivative concept, and one may sometimes replace it with other terms, such as reasonableness, justice and rationality. One must examine in each case the nature of the rights, in the broad sense, which the legislature has required to be applied equally, and judge what is the most reasonable, fair and just way in which they can be applied, taking into account the particular social conditions prevailing.

2. With regard to elections, equality means not merely "one man, one vote", but also equality of opportunity to be elected.

3. Legitimate expectations that are worthy of protection create protected rights. Retroactive legislation violates the principle of equality when it changes the relative rights of those entitled to share benefits. The amendments to the Election Financing Law, which altered the rules of the game retroactively, violated the Petitioners' legitimate expectations, which are entitled to legal protection, and must be enacted by an absolute majority as set forth in Basic Law: The Knesset.

Justice Kahan, the President, concurred in the decision in a separate opinion. He pointed out that a party that receives public financing of its election expenses but exceeds the amount of expenditure permitted by the Law may have contravened section 286 of the Penal Law, 57371977, which makes it an offense to deliberately violate a legislative provision, by doing an act forbidden under that enactment, if the matter concerns the public. Each party list participating in the elections is entitled to assume that the limits fixed by the Law for the public financing of the elections will be observed by all of the lists, and that any list which violates such limitations will suffer the consequences of such violation, whether these be the criminal sanctions set forth in section 286 or the financial sanctions provided in the financing Law itself. When the parties that have the power to do so, amend these limitations retroactively, they nullify these sanctions, which is a violation of the principle of equality, in its broad sense.

The Deputy President, Justice Shamgar, also concurred in the result, in a separate decision. There is no need in this case, he writes, to consider the abstract and theoretical meanings of the term equality. In the

context of elections, as set forth in section 4 of Basic Law: The Knesset, equality means formal equality, to be determined by as basic and simple a standard as is possible. There is no reason to assume that such formal equality, as it relates to both the right to vote and the right to be elected, is always optimal from the viewpoint of a democratic regime. It may occasionally conflict with other significant social interests, equally important. Section 4 of Basic Law: The Knesset provides the framework for the solution in such situations, by permitting a deviation from such formal equality upon the vote of an absolute majority of the Knesset.

This approach is preferable, in Justice Shamgar's opinion, to one that subordinates the equality principle to other values and treats as equal that which is not equal, in order to serve such other values. The latter approach runs the danger that, in the long run, the judges may approve inequality because in their judgment, such inequality is necessary in order to protect other democratic values.

In this case, the amending legislation violated the requirement of equality by converting that which was forbidden to that which was permitted with respect to those parties that exceeded the limitations. It is not the retroactivity of the legislation that renders it unequal, but the fact that it set different limitations for some of the parties. Legislation setting such different limitations would have been no less unequal had it been prospective.

Note - Professor Rubinstein reports, in the most recent addition of his book on Israeli constitutional law (vol. 1, p. 377), that the party lists which exceeded the permitted spending limits arranged to return the excess to the Treasury. However, after the elections to the Twelfth Knesset, the Knesset once again amended the Law retroactively to increase the permitted spending limits. By a series of legislative enactments, the Knesset confirmed the validity of this retroactive change by an absolute majority.

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. 246,260/81, *"Agudat Derekh Eretz" v. Broadcast Authority* 35P.D.(4)1; S.J. vol. VIII, *supra* p. 21.

[3] H.C. 306/81, *Flatto Sharon v. Knesset Committee* 35P.D.(4)118.

[4] H.C. 652/81, *Sarid v. Knesset Chairman* 36P.D.(2)197, S.J. vol. VIII, *supra* p. 52.

[5] Cr.A. 5/51, *Steinberg v. Attorney-General* 5P.D.1061; 6P.E.26.

[6] C.A. 2/77, *Azuggi v. Azuggi* 33P.D.(3)1.

[7] A.L.A. 232/75, *Atabe v. Razabi* 30P.D.(1)477.

[8] H.C. 632/81, 19/82, *Migda Ltd. v. Minister of Health* 36P.D.(2)673.

[9] H.C. 688/81, *Migda Ltd. v. Minister of Health* 36P.D.(4)85.

English case referred to:

[10] *Winter v. I.R. Comsr.* (1961) 3 All E.R. 855; (1961) 3 W.L.R. 1062(H.L.).

American case referred to:

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

M. Cheshin for the Petitioners.

M. Shaked, Senior Deputy State Attorney, for the Respondents.

JUDGMENT

S.LEVIN J.: 1. The Political Parties (Financing) Law, 1973 provided, in its original version, that every "party group" represented in the Knesset was entitled, under certain conditions, to financing for its election expenses incurred during the election campaign and for its running expenses. According to section 4 of the Law, the financing is to be given in three parts: a) a 60% advance on "one financing unit" in respect of each Knesset Member belonging to the party group; b) 85% - after deduction of the advance - immediately after publication of the election results; c) the balance of 15% - immediately after the State Comptroller submits to the Chairman of the Knesset a report certifying that the party group has fulfilled the statutory duties imposed on it. A party group may not receive the balance of 15% if the State Comptroller notes in his report that it did not keep a proper system of accounts as directed by him, or if its expenses incurred or income received exceeded the limits prescribed in the Law. In that event the Chairman of the Knesset must return such balance to the Treasury (section 10 of the Law). It follows from section 7(a) of the original Law that a party group is not entitled to receive the 15% balance if the amount of its election expenses exceeded one and one third financing units in respect of each Knesset Member belonging to the party group on the determining day, or one and one third times three financing units, whichever is more. In anticipation of the elections for the tenth Knesset, the ceiling was raised from 1-1/3 to 1-1/2 financing units, as regards the first part, and from 1-1/2 to 1-4/5 as regards the second part of the section (Political Parties (Financing) (Amendment No. 2) Law, 1980).

The original Law made special provision for the financing of party groups that were not represented in the outgoing Knesset but gained representation in the new Knesset. Such a party group is entitled to receive immediately 85% of the election expenses according to the prescribed rate and on conditions that are immaterial here. It is entitled to receive the 15% balance on condition that its incurred election expenses do not exceed by more than one third one financing unit for each seat it obtained, or three financing units, whichever is more (section 16 of the Law). This section was not amended in 1980.

2. On March 15, 1982, the State Comptroller submitted a report to the Chairman of the Knesset, as statutorily provided, noting that

> in this election campaign there was a very substantial overrun of the expenditure ceiling prescribed under the Financing Law, as in effect during the election period; five party groups - *Likud, Alignment, Tehiyah, Telem* and *Tami* - exceeded their prescribed ceilings by a total amount of 80,617.621 shekels.

On March 11, 1982, after the elections to the tenth Knesset, the Knesset passed the Political Parties (Financing) (Amendment No. 5) Law, 1982 (hereinafter - "the Amending Law"), section 2 of which amended section 7(a) of the original Law to read as follows:

> 7(a). A party group shall not incur elections expenses of an amount exceeding the larger of these:
>
> > (1) twice one financing unit for each Knesset member belonging to the party group on the determining day; (2) twice one financing unit for each Knesset member belonging to the party in the incoming Knesset; (3) an amount exceeding by more than 1/2 three financing units;...

Section 7(a) as amended raised the ceiling of allowable expenses from 1-1/2 to 2 financing units for each Knesset member, and an alternative was added in subsection (2) which permitted the ceiling of allowed expenses to rise according to the number of Knesset

members belonging to the party group in the incoming Knesset. However, even if the party group exceeds this ceiling of expenses it is no longer denied the full 15% financing balance. Section 6 of the Amending Law added subsection (2) to section 10(e), reading as follows:

> (2) Notwithstanding the provision of paragraph (1), if the election expenses of a party group exceed that mentioned in section 7(a), the Chairman of the Knesset shall return to the Treasury -
>
> > (a) for the first 15 million shekels of such excess or any part thereof - 12% of the balance mentioned in section 4(b)(2);
> >
> > (b) for the next 15 million shekels of such excess or any part thereof - 15% of the said balance;
> >
> > (c) for the next 5 million shekels of such excess or any part thereof - 22% of the said balance;
> >
> > (d) for the next 5 million shekels of such excess or any part thereof - 25% of the said balance.

It follows that even if the party group exceeds the allowable election expenses by more than 40 million shekels, it is not denied with respect to the excess more than 74% of the [financing] balance. Once again, section 16 of the Law, relating to new party groups, was not amended. In section 9 of the Amending Law, sections 2 and 6 of this Law, relating to the election expenses for the tenth Knesset, were given retroactive effect.

It transpired that notwithstanding this retroactive provision, three party groups had exceeded their allowable expenses. The State Comptroller wrote in the above mentioned report:

> Even after the passage of Amendment No. 5, according to which the ceiling of allowable expenses was raised retrospectively in significant

> measure, the expenses of three of the said party groups still exceed the ceiling by a total amount of 43,951.388 shekels...

3. Petitioner no. 3, the *Shinui* Party, was a party group in the ninth Knesset and is such in the tenth Knesset. Petitioner no. 1 is chairman and Petitioner no. 2 a member of this party group. Both were members of the ninth Knesset and are members of the tenth Knesset. In an affidavit in support of the petition, it was claimed (in par. 16) - and not disputed- that "the Shinui party group observed the provisions of the Financing Law and did not spend on election propaganda for the tenth Knesset any sums beyond those prescribed in the Financing Law, even though there still remained considerable sums of money in its fund ..." On the Petitioners' motion an order *nisi* was issued against the Respondents, who are the Chairman of the Knesset and the Minister of Finance, respectively, to appear and show cause:

> a. Why the High Court of Justice should not declare that the provision of section 9 ... (of the [Amending] Law), insofar as it concerns the amendment of section 7(a)... and the addition of section 10(e)(2) of the Law, is void of legal effect and should not be acted upon;
>
> b. Why the above mentioned Respondents should not exercise their powers and discharge their duties according to law ... and as provided in section 9 of the [Financing] Law.

The Petitioners do not put in issue the public aspects of the amendments under deliberation here, in respect to which the State Comptroller wrote in his report:

> 6. Amendment No. 5 also contains far-reaching retroactive provisions which raise significantly the ceiling on expenses applying to the election campaign just concluded, and which lighten the sanction imposed on party groups exceeding the ceiling, so that some party groups are effectively released from the original sanction, and others are subject only to a nominal sanction.

> Since the scrutiny of the State Comptroller in relation to the Financing Law focuses mainly on ascertaining whether the election expenses of the party groups were kept below the ceiling known and set at the time of the expenditures, the raising of that ceiling retrospectively, after the expenses were incurred and known, and the easing of the sanction in cases of excess, render the statutory limitation and review void of content.

The Petitioners' grievance is a purely legal one. Section 4 of Basic Law: The Knesset provides that

> the Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law.

This section further provides that it cannot be changed except by a special majority of 61 Knesset members, which majority is required at all the stages of legislation (section 46). The Amending Law passed its first reading by a vote of 32 to 5, and the condition of a special majority was not met at the second reading.

The Petitioners also do not complain that sections 7 and 10 of the Law as amended violate *per se* the principle of equality or any other principle embodied in the above mentioned section 4, and they do not question the distinctions made in the mending Law between the old and the new party groups represented in the incoming Knesset. Their sole complaint is against section 9 of the Amending Law, and their argument is that its provisions-which change retrospectively the financing norms in force before the elections - violate the principle of equality and are null and void because they were not passed with the requisite majority. Their submission is that the equality in section 4 of the above Law is not limited in duration to the day of the elections; that the Amending Law discriminates against party groups that observed the financing limitations in the expectation of being paid the balance under the Law, and in favour of party groups that acted without restraint before the elections, now to be rewarded under the Amending Law. Had the Petitioners anticipated the enactment of the Amending Law before the elections, they would have planned to act differently, and in the circumstances the Amending Law prejudiced their legitimate

expectations. It is further contended that the Amending Law also violates the principle of equality between the various party groups with respect to the next Knesset, since parties which exceeded the expenditure ceiling under the original Law would face a deficit towards the next scheduled Knesset elections; and funding of these party groups would reduce the deficit and fortify them, as compared with party groups like Petitioner no. 3, which received nothing.

4. As in previous cases where the question of equality under section 4 of Basic Law: The Knesset was deliberated (see *Bergman v. Minister of Financ*e [1] and *Agudat Derekh Eretz v. Broadcast Authority* [2], the Attorney-General has not raised a plea of non justiciability, and does not seek any judicial pronouncement upon the relationship between a basic law and an "ordinary" law - although "retaining the right to raise these and similar questions in future cases" (par. 5 of the notice of legal arguments on behalf of the Respondents). We have accordingly been asked to dismiss the petition on its merits. It should be noted, in parentheses, that the more the cases in which this court discusses on their merits petitions involving constitutional issues of the stated kind, the less the prospect that this court will refuse to hear them in the event that the Attorney-General decides in the future to raise "these and similar questions" (cf. Shamgar J. in *Sharon v. Knesset Committee* [3], at 141; and, more recently, Barak J. in *Sarid v. Knesset Chairman* [4], at 201-202).

The Respondents argue that the determining time for purposes of the equality mentioned in section 4 of Basic Law: The Knesset, is the time of the elections; that the Basic Law does not promise equality in expectations, and since the original Law applies equally to all party groups, as does the Amending Law, there is accordingly no violation of the principle of equality. And if you wish, so it is argued, perhaps the principle of equality is violated but not the principle of equal opportunity to be elected, and only the latter violation requires a special majority under section 4 of the Basic Law. Ms. Shaked, on behalf of the Respondents, further argued that the *Bergman* case [1] should be distinguished from the present one. The former concerned a violation of equal opportunity in relation to payment of public funds to the party groups, whereas this case concerns the independent expenses of the party groups, the sum of which merely rises in consequence of excessive expenditure, and this matter is unrelated to the principle of equality. Finally, Ms. Shaked reiterated the court's warning in *Bergman* [1] that a Law should be presumed to be valid, so as not to be

voided except for weighty reasons which, so she argues, do not pertain in the present instance.

5. There is no single definition for the term equality. We use it in mathematics, ethics, philosophy and law, and it has no uniform meaning in any one of these areas. One researcher has found 108 different connotations of equality (see P. Westen, "The Empty Idea of Equality" 95 *Harv.L.Rev.* 537 (1982), at 539, note 8). Here, in this petition, we are concerned with the meaning of the term "equal elections" in Basic Law: The Knesset. First, however, we must make some preliminary remarks on the general legal import of the notion that a legal rule or a complex of legal rules should be applied in equal fashion.

To start with, I am in agreement, with all due respect, with the majority opinion in H.C. 246, 260/81[2] that the equality in question is substantive and not merely formal. Formal equality is possible only in relation to geometrical forms, and not human beings, for no two persons are absolutely alike. In *Steinberg v. Attorney-General* [5], a person subject to the duty of military service argued that the Security Service Law, 1949 should be held void because it discriminates between men and women, inasmuch as it exempts from military service a woman who declares that she is unable to serve in the army on grounds of conscience or religious conviction but does not extend the exemption to a man who seeks to make a like declaration. This argument was based on the Declaration of Independence, which promised "complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex...". In dismissing the argument this court held (*per* Sussman J., at 1068):

> When the circumstances of the two cases are different, the legislature may and sometimes must relate to them in different fashion, and any discrimination that originates from a difference in the circumstances should not be challenged. In order to disqualify an act on grounds of discrimination it must be made clear whether the discrimination is unjust or unfair, that is, whether *identical* circumstances were treated differently by the legislature. Distinction between cases involving different circumstances, on the other hand, does not constitute discrimination.

Thus, for example, where the law provides that income tax shall be imposed on an equal basis, can one say in a modern society that the imposition of a *per capita* tax, regardless of the taxpayer's income, subjects citizens to an equal tax obligation. Would a law be invalid if it entitled pregnant women to buy food they specially need for pregnancy at a discount price, contrary to a hypothetical governing provision against discrimination in granting discounts, since men -let alone women who are not pregnant - will not receive those benefits? The correctness of the majority view in H.C. 246, 260/81[2] is especially apparent in those cases where the law calls for distributing public resources in an equal fashion, but those resources are limited. Thus if two children fall sick, one suffering from a fatal disease and the other from a minor illness, and the public resources permit medication for only one of them, does the principle of equality dictate that we deny both the medicine, or that we divide it in two or give it all to one of them by way of lottery or in any other way? Is it relevant that the child who is fatally ill will die anyway? Is it relevant that one of the children is a genius? (See J. Stone, "Justice in the Slough of Equality", 29 *Hastings L.J.* (1978), 995 at 1012, note 31.) All these examples, and others too, illustrate that it is impossible to weigh considerations of equality without making value judgments. These judgments may change from society to society and from time to time.

Second, Kelsen and others have already pointed out that the principle of equality is essentially derivative, and one can often use other terms in its stead, such as rights, reasonableness, justice and common sense. Westen *(supra)* goes so far as to argue that "equality" is a superfluous term which can always be replaced by other terms; if you say that a legal rule must be applied equally, you have said nothing, because every legal rule must, by definition, be applied equally. He writes *(op. cit.,* at 548-9):

> To say that two people are "equal" and entitled to be treated "equally" is to say that they both fully satisfy the criteria of a governing rule of treatment. It says nothing at all about the content or wisdom of the governing rule.

Third, and flowing from the foregoing, one must examine in each instance the nature of the "rights" (in the broad sense) in respect to which the legislature wishes to act in equal

fashion, and consider the most reasonable, just and fair normative way to apply them equally, taking into account the prevailing social conditions. Indeed, the source of the rights matters little for purposes of the logical analysis; they might derive from express legislative provision or emanate from the courts, and they could be absolute or contingent rights (cf. Westen, *ibid.,* 554-5), so long as they merit protection and application.

6. The meaning of political equality in general and of equality in elections in particular, are questions that call for separate discussion. As the social, economic and technical concepts undergo change, so does the substantive content of the rights that are the subject of equality. More and more frequently we come across problems that arise from the behavior of a majority trying to adapt political norms to its needs (cf. Dickson, "Justice and Equality", *Nomos,* vol. IV, 44, 51). The development of the communications media and technological advances present to the lawyer new problems of justice and equality, unknown in the past.

That development is especially marked in relation to elections. We no longer speak of "one man, one vote", but of "equal prospects" or "opportunity" for the candidates lists (see H.C. 98/69[1] and H.C. 246, 260/81[2]), and we construe accordingly the term "equal elections" in section 4 of the Basic Law. There arises the normative question of how far we must reach in applying the principle of equality in this matter. One writer lists six different tests for establishing whether a given election system is equal (Still, "Political Equality and Election Systems", 91 *Ethics* 375 (1981): all have an equal right to vote (defined in section 4 of the Basic Law as "general" elections); each voter's ballot has the same weight as another's (termed in section 4 as "proportional" elections); an equal statistical probability for each voter to influence the election results; anonymity; the election results must reflect the will of the majority; proportional parliamentary representation of the groups competing in the elections. It appears, therefore, that some of the components of section 4 of the Basic Law, other than equality, are derivatives of that principle.

The development of the communications media has created a hitherto unknown predicament relating to the allocation of equal broadcasting time for all the party lists competing in the elections. This court faced such a situation in the case of *Agudat Derekh Eretz v. Broadcast Authority* [2]. There is a growing recognition that the different levels of

economic power held by the various lists might result in inequality. A list that is supported by a circle of wealthy sponsors may obtain electoral achievements surpassing those of an opponent of small means. The legal system can prohibit or restrict the receipt of contributions, either directly or indirectly, but in that case it must make available to the various lists reasonable economic resources for conducting an election campaign. That is how the idea of public financing for the election campaign was conceived, along with the concomitant question of how to distribute such financing "equally". One rule in this context was determined in *Bergman v. Minister of Finance* [1]: one may not discriminate between veteran party groups and new lists. In the instant case that question does not arise, but a more difficult one does: how is the public cake to be divided "equally" among the existing lists?

7. To start with, it should be noted that it is an indirect "incentive" which the Financing Law offers the various lists with respect to the allocation of public resources, in return for the limitation on elections expenses and contributions. Section 17 of the Law provides that its provisions shall not apply to a party group which notifies the Chairman of the Knesset that it does not wish to have its election expenses financed under the Law; but a party group that wishes to benefit from public funding must comply with the provisions of the Law, otherwise it will be denied a small portion of such funding under the original Law, and an even smaller portion under the Amending Law. The fact that this is an "indirect" incentive does not release the authority from the duty to apply it on an equal basis. Thus, for example, a provision exempting party contributions from taxation might be invalidated, if it has a disparate effect on the opportunity of "poor" parties to attain electoral achievements, compared to parties with wealthy sponsors (Leibholz, Rinck, *Grundgesetz-Kommentar, 6* Aufl. 637-639). For that reason we can dismiss outright Ms. Shaked's argument that one should distinguish between public funding given to the party groups, which must be distributed equally, and increased independent party expenses where there is no public funding - which does not affect equality. Also to be dismissed is Respondents' argument that even if the Amending Law affected equality, it did not affect equality in the elections. With respect to these two arguments, suffice it to say that even an indirect violation of the principle of equality mentioned in section 4 of the Basic Law, is still a violation by reason of which this court might invalidate a statutory provision as incompatible with the Basic Law, so long as the violation is substantial.

8. Since the concept of equality is a derivative of the right it is designed to protect, I must discuss another argument of the Respondents. They submit that the Amending Law did not affect any right of the Petitioners: all party groups are equal as regards financing under the original Law; all party groups are equal as regards financing under the Amending Law. If so, what is the Petitioners' grievance? The Petitioners argue that had they known in advance of the Amending Law they would have planned the financing of their election expenses differently. Ms. Shaked's reply is that the principle of equality in section 4 of the Basic Law was not intended to ensure equality in the expectations of the various party groups, but rather equality in rights, whereas no right of the Petitioners was violated; further, the question whether the pertinent statutory provisions meet the test of equality, should be examined prospectively and not retrospectively.

The term "expectation" or "hope" in the context of the Law has its origin in the Roman civil law. Only a concrete and defined right merits protection, which is not the case with an "expectation"- something that is not sufficiently defined and the realization of which is always uncertain. The term "expectation" has been used in the same sense in American law: a mere expectation of a future benefit, based on the assumption that the law will remain as it is, does not give rise to rights (see 16 C.J.S. 1173 (New York, 1959); cf. C.A. 2/77[6]). Thus it was held in A.L.A. 232/75[7] that the potential right of a statutory tenant to receive key money, not yet activated through the statutorily determined procedures, is not sufficiently certain to qualify it as attachable. On the other hand, we do find use of the phrase "reasonable expectation" or "legitimate expectation" in the case law (see, e.g., H.C. 632/81, 19/82[8], at p. 680). What distinguishes a mere "expectation" from a "reasonable expectation"? The former does not merit protection while the latter does. Thus with regard to the filing of a debtor's claim in bankruptcy proceedings, we see that the "expectation" of a debt creates rights (see the definition of "liability" in section 1 of the Bankruptcy Ordinance [New Version] 1980; cf. *Winter v. I.R. Comsr.*[10]). Accordingly, an "expectation" that merits protection generates a right or interest (in the broad sense) meriting protection. An expectation that does not merit protection does not generate any rights.

9. A retrospective provision might or might not violate the principle of equality. It might do so if it changed retrospectively the relative rights of those claiming a portion of the benefit, be it a general or a political one. It might not violate the principle of equality if it changed retrospectively the rights of only one claimant, or where the question of equalizing the rights of various claimants does not arise (although the retrospective character of a legislative enactment might violate another principle).

Take, for instance, the case of a public tender in which the authority decided retrospectively to change its conditions in a material way. We have held such a decision to be invalid.

> The participants in the tender made their calculations on the basis of data provided them by the public authority, and it is their reasonable expectation that the decision be made on the basis of that data (H.C. 632/81, 19/82[8], at p. 679; cf. H.C. 688/81[9]).

The same would apply to the hypothetical case in which the Knesset retrospectively raises the ceiling of expenses allowed to a new party group, which was a precondition to funding under the original Law, or retrospectively cancels altogether the financing for new party groups. In such cases there is no doubt that the legitimate "expectations" of the new party groups would be affected. Should the corresponding "expectations" of the Petitioners in the instant case be treated differently? Are we not to hear their argument that had they known about the provisions of the Amending Law they would have planned their actions differently? I am aware of the fact that the answer to these questions is a matter of legal policy. Likewise, I do not overlook the fact that if we recognise the Petitioners' interest as meriting protection, we are going beyond the ruling in *Bergman* [1], to recognise indirect inequality as a ground for declaring invalid a Law of the Knesset. As far as I am concerned there is no fault in this approach: provisions of law establishing an inequality in the distribution of public funds, create a financial inequality among the various party groups. Financial inequality among the various party groups creates inequality in political rights. Inequality in political rights is no less bad - perhaps worse - than inequality in other contexts.

I have reached the conclusion that the provisions of the Amending Law, which retrospectively changed the rules of the game as laid down in the norms of the original Law, substantially affected the Petitioners' legitimate expectations - which merit protection - in a way calling for this court's intervention. To the best of my understanding this petition must be admitted. In light of this conclusion I refrain from expressing an opinion on the Petitioners' weighty argument, that the Amending Law has a continuing discriminatory effect that extends also to the forthcoming elections.

Therefore, my opinion is that the order *nisi* should be made absolute, and the Respondents shall make every effort to return to the State Treasury all excess funds already paid.

The Respondents shall pay the Petitioners counsel's fees in the amount of 30,000 shekels.

KAHAN P.: I concur in the result arrived at by my esteemed colleague, Levin J., and wish to add the following reasons:

The Respondents' main argument is summarized in section 7 of Ms. Shaked's notice of arguments, as follows:

> 7. The Respondents will argue that a contest which offered equal opportunity before the elections cannot become unequal in opportunity consequent to an amendment enacted after the elections. For cautionary reasons, however, Respondents will argue that if elections, which offer equal opportunity at the time, can be rendered unequal retroactively, by later developments, that would be only in the most unusual circumstances, which the Petitioners have not illustrated by any example.

The difficulty facing the Petitioners here is that if the amendment had been passed before the elections, there is no dispute that it would not have constituted a violation of equality, but would have been completely valid without the special majority required under section 46 of Basic Law: The Knesset in order to change section 4 of that Law. The only

legal blemish the Petitioners have found in the amendment, is its retroactive effect. The question before us is, therefore, whether this retroactivity violates the principle of equality, despite the indubitable validity of such an amendment had it been adopted before the elections. It appears to me that this question should be answered in the affirmative. In section 7 of the Political Parties (Financing) Law (hereinafter-the Financing Law), which was fully cited in the judgment of Levin J., the Knesset forbade a party group from incurring election expenses in excess of the amount specified in the section. A party group expending amounts in excess of the prescribed ceiling acts in contravention of the statute, and such conduct might constitute an offence against section 286 of the Penal Law, 1977, which reads as follows:

> Where a person willfully contravenes an enactment by doing an act which it forbids or omitting to do an act which it requires to be done, and such act concerns the public, such person is liable to imprisonment for two years unless it appears from the enactment that some other penalty was intended for such contravention.

It is possible that the penal provision of section 286 should not be applied to a contravention of section 7 of the Financing Law, because the provisions of this Law concerning the withholding of public funds where the conditions of section 7 are not complied with, could be regarded as "some other penalty ... intended for such contravention." There is no need for us to express an opinion on this question, because whether or not section 286 applies, the prohibition in section 7 against the incurrence of excessive election expenses, still remains in effect.

We are guided by the precedent in *Bergman* [1], that the principle of equality in section 4 of Basic Law: The Knesset must be reflected in equal opportunity for the various candidates lists competing in the Knesset elections. And since this equality might be violated as a result of discrimination in state funding for the elections, it must be concluded that every list competing in the elections is entitled to assume that the prohibitions and restrictions imposed by the Financing Law as regards election fundraising and expenditures will be observed by all the lists, and that those violating those prohibitions will bear the consequences, whether as determined in section 286 of the Penal Law or only as determined

in the Financing Law itself. If party groups that hold enough power in the Knesset for the purpose, were free to change the Law retroactively without the special majority required under section 46 of the Basic Law, and used that power to remove retroactively the prohibitions imposed by the Financing Law or to dull the sting of the criminal provisions for violating the law, the prohibitions imposed by the Financing Law would become meaningless. And that would violate the principle of equality in its wide sense, as construed in the precedents, which are not challenged here. Take, for instance, the prohibition in section 8 of the Financing Law, according to which a party group "shall not ... receive any contribution from a body corporate in Israel". It is inconceivable that party groups should be able to violate this prohibition, and thus enjoy an advantage in financing the elections, in the expectation that subsequent retroactive legislation -without recourse to the provisions of section 4 of the Basic Law-will validate such violation. In my opinion, we cannot tolerate a situation that allows for amendment of the Financing Law with retroactive effect, as in the instant case, without meeting the requirements of section 46 of the Basic Law as to a special majority in every stage of the lawmaking.

In the report submitted by the State Comptroller, Mr. Y. Tunik, to the Chairman of the Knesset on March 15, 1982, following audit of the party group accounts for the period of the elections to the tenth Knesset, some critical comments were made concerning the retroactive effect of the Political Parties (Financing) (Amendment No. 5) Law. I shall not repeat those comments, which were cited in the opinion of Levin J., but will merely add that the State Comptroller went on to endorse the opinion of his predecessor, Dr. Nebenzahl, that retroactive legislation in connection with election funding "leaves no significant deterrent role to the Law or the audit prescribed under it, and this consequence in itself is a disservice to the standing and dignity of the Law". This criticism commends itself to me, with all due respect, and my opinion is that the retroactive provision of the Political Parties (Financing) (Amendment No. 5) Law cannot be validated in this case, but must be held legally void.

BARAK J.;

I concur in the opinions of my esteemed colleagues, Kahan P. and Levin J.

SHEINBAUM J.:

I too concur.

SHAMGAR D.P.:

1. Defining the Issue

The Political Parties (Financing) Law is one of the Knesset election laws, in the sense of this term in section 4 of Basic Law: The Knesset (H.C. 246, 260/ 81[2], at p. 17). It was passed by the Knesset on January 24, 1973, by a majority of the Knesset members (D.K. 66 (1972/3) 1360-1362). Section 7 of the Law sets a limitation on the expenses allowed a party group during the election period, and section 10 of the Law prescribes the measures to be taken against a party group in consequence of its failure to abide by the limitations set in section 7.

The Political Parties (Financing) (Amendment No. 5) Law (the "Amending Law") changed the provisions of sections 7 and 10, and section 9 of the Amending Law lent the amendments retrospective effect, i.e., applicable to the elections to the tenth Knesset, which had already passed at that time. The nature of the Amendment - which was adopted by a simple majority falling short of a majority of all the Knesset members - was such as to benefit retrospectively some of the party groups, specifically those that violated the provisions of section 7 concerning the limitation on expenditures, because the permissible limits were drawn a new retroactively, and the sanctions in case of breach were restricted in their scope of application. Since the Amending Law was adopted after the elections to the tenth Knesset, the question arises whether this retroactivity, which benefits only *a section* of the party groups that participated in the elections, does not offend the element of equality provided for in section 4 of Basic Law: The Knesset.

The essential question before us, therefore, is whether or not a retroactive change in the laws of political party financing, that retroactively benefits only *some* of the party groups, is devoid of legal effect if it was not adopted in the Knesset by a vote of a majority of the Knesset members as required under section 4 of the Basic Law?

2. Equality

(a) In H.C. 246, 260/81[2] I outlined my perspective on the nature of the equality principle that is among the attributes and elements of our election system included in section 4 of Basic Law: The Knesset (*ibid.* p. 18 ff.). I noted there that I interpret the words "equal elections" as importing formal equality, that is, they determine as basic and simple a standard as is possible, *any deviation from which* is contingent on the affirmative vote of a majority of the Knesset members. I would not return to this matter were it not for a growing apprehension that removing the subject of equality from its concrete constitutional context increases ambiguity and vagueness, and might create blurring of the normative boundaries that would devoid the constitutional norm, to a greater or lesser degree, of the content imparted to it by the legislature in formulating the two main parts of the stated section 4.

(b) The Basic Law provides, *inter alia,* that the Knesset shall be elected by *equal* elections and that this provision shall not be varied save by a majority of the members of the Knesset. A variation, in this respect, means either explicit or implicit (conclusion to section 46 of the Basic Law). In the provisions of section 4 the legislature did not lay down abstract principles, for all purposes or matters, as if its purpose was to supplement our Declaration of Independence, the preamble to the U.S. Declaration of Independence or the French declaration on human and civil rights, in all of which the principle of equality was emphasized as a primary political, social and moral point of departure. The matter before us concerns equality in its limited application to the election system and must therefore be examined as it impinges upon the stated conceptual framework. There is no need for us to delve into the verities concerning the eternal relativity of the abstract concepts. One does not need this court's rulings in order to understand that beauty, justice and equality are relative values. In the present context it is therefore best that we focus on the question as to what constitutes *equal elections* according to the Basic Law: The Knesset, and what was the legislative purpose in fashioning the stated constitutional principle.

(c) The decisions of this court recognize that equality, insofar as it concerns the election system, has a twofold implication. In H.C. 246, 260/81[2] it was stated (at p. 19):

> [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.

Equality in the two above main forms (which are not necessarily exhaustive), finds expression in an identity of substance and form, that is, its attire is formal: despite the different characteristics and capacities of human beings, each voter has *only one vote,* and that is the formal expression of equality in the right to vote. So too, it follows from the equality in the right to be elected, that is, equality of opportunity, that the legislature envisioned the adoption of an *equal* standard also in the distribution of resources among those competing for the voter's ballot. It is possible, of course, that with respect to such equal distribution there will be doubts or reservations in terms of its justness and logic, as Landau J. pointed out in *Bergman* [1], at p. 699):

> As we draw away from this fundamental meaning of equality before the law, so it clashes with other important principles *to which it must defer* ...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. ... 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.

(Emphasis added - M.S.)

This implies that the different perceptions as to application of the equality principle in its plain sense stem not from the relativity of equality but rather from the meeting, and at times collision, between the norm of equality and what appears to be just and fair in the special context of the election laws, i.e., other legitimate interests also designed to serve the good of our constitutional regime. There are those who argue, for example, that every party

list should be given identical broadcast time, because the new, still unknown, party list claims that it is making itself and its platform known to the public for the first time, and, in any event, the presentation of its views and personalities requires the same amount of time as is needed by an existing party. One of the counter arguments proffered is that total equality would unbalance the stability of the democratic government and foster harmful and excessive fragmentation. We need not take a position on these different approaches, because that is not the question before us. However, if at the time of choosing between the above alternatives a distinction is made between political bodies according to their existing relative power and greater rights are granted to party groups whose representatives were elected in previous elections, then matters should be stated as they properly are and the unequal should not be couched in the language of equality. In other words, we must abstain from an Orwellian substitution of concepts that leads to normative distortion, and rather conclude that under certain circumstances and in the way appointed in the Basic Law - the legislature sanctions a deviation from absolute equality.

Of course, it is not difficult to lay down an *identical* yardstick for both the above matters, i.e. the active as well as the passive election right. The many facets of the equality principle, in its various senses, mentioned by Westen and referred to by my esteemed colleague, Levin J., need not be a burden in the practical determination of the full formal equality of the right of election and of equal opportunity to be elected, if we indeed wish to adopt such yardstick. My approach is not to confuse the concepts of equality, justice and reasonableness, which are neither coextensive nor derivative, but different normative concepts, and the conclusion that formal equality would not achieve a just result still does not imply that it was technically impossible to formulate a plain standard of equality.

(d) As already indicated, the Israeli legislature anticipated a possible need for deviation from the statutory principles, and in an attempt to ensure that the deviation not be made arbitrarily but only under circumstances where it would be just and fair to do so, the legislature set the requirement of a special majority. This in turn arouses the attention of the general public and the special alertness of the elected representatives to the significance of their actions. When a majority of the Knesset members exercise their power and, in accord with sections 4 and 46 of the Basic Law, vary the plain application of the principle of equality, that does not mean that the statutory provision in its new form still represents

equality - substantive or formal - but quite the opposite; the variation that requires a special majority now constitutes a deviation from equality. In other words, the legislature provided a statutory arrangement that attains a twofold objective:

(1) the Basic Law *allows* change where necessary, if, for example, absolute equality impairs what is just, fair or reasonable;
(2) a deviation from equality should not be casually or inadvertently done, hence the requirement of the special majority.

As already noted, fostering the view of a constant and regenerating relativity of equality in all areas and matters, and especially of the impossibility of an *a priori* definition of its clear and simple scope, may open the door to attempts at manipulating the rule of equality to its limit, and at times, even beyond.

3. (a) My esteemed colleague, Levin J. , is of the opinion that formal equality is possible only with respect to geometrical forms, but not human beings, since no person is absolutely the same as another. If this argument is developed to its theoretical end, it would seem that even geometrical forms are not absolutely equal. However, the point is that equality in the right to elect and the right to be elected does not at all require as a prior condition that one person be absolutely the same as another. The constitutional directive merely prescribes that equality be ensured in the rules that are applied to those who elect and are elected as such, that is, with respect to the right to vote and, likewise, to actions that affect the right to be elected. The Law does not purport to create identity and equality in the attributes of the candidate or the voters - that is not the subject under deliberation. It is obvious that from a practical point of view there is no need for a candidate or voter to be "absolutely the same as another" for the purpose of extending publicity time or financing for elections. The lack of alikeness, as an expression of the diversity in human traits, does not create any practical difficulty in applying rules of equality in the above-mentioned areas, if that is what we desire, and if the rules are not considered unreasonable or unjust in the circumstances.

This is how the Knesset understood the purpose and objective of the above-mentioned section 4, in both its parts, and it accounts, among others, for the enactment of the Elections (Confirmation of Validity of Laws) Law, 1969.

The reference to Cr.A. 5/51[5] is also not in point. The question there was whether discrimination existed in a certain area, and the court noted, *inter alia,* that discrimination which stems from a difference in the background situation cannot be challenged. That is to say, it was precisely the absence of equality that was the reason for dismissal of the discrimination argument, and that is common knowledge.

With reference to another example brought by my esteemed colleague, I know of no general rule of law that requires an equal distribution of public resources; but if there were to be a provision in a Basic Law - along the lines of the example given by my esteemed colleague - that "every patient is entitled to an equal dose of medicine", one could only hope that the legislators would have the wisdom to reserve the possibility of a deviation from the set norm when the medical conditions so require. In the absence of legislative forethought - which is hardly reflected in an enactment of the above kind, and without the stated qualification - formal equality might indeed have an unjust effect.

As I have said, we need not digress to spheres that are remote from the matter before us, but should examine the question of equality within the contextual framework here defined, that is, the election laws. The difference between elections and any other context can be illustrated by a realistic example. Thus there are renowned egalitarian frameworks that distribute their available resources to their members *according to need,* and that too is one expression of equality; on the other hand, it is obvious that a similar approach in regard to the election laws, i.e. funding of each party group according to *its needs,* would not deserve the title of equality, even according to those who adhere to a material standard .

All one can learn from these examples is that in matters of the kind here discussed, as in any other, it is wise first to examine the principle in light of the substantive area in which it is to be applied; also that the existence of a flexible constitutional norm which allows for the preference of what is just, fair or reasonable in the specific circumstances - in those

cases where it is incongruent with total equality - is, at times, an imperative of the constitutional reality.

(b) My esteemed colleague, Barak J., writes in H.C. 246, 260/81[2] as follows (at pp. 15-16):

> 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.

I am of the same opinion, so far as concerns the capacity of this court to exercise its discretion in separating equal from unequal; but I doubt whether the delicate distinctions required in such matters - measured in the above example in terms of a few minutes - one way or the other - help to clarify the guiding constitutional principle. Furthermore, as we mentioned before, we are not removing an obstacle from before the legislature, because to

focus on the court's capacity to scrutinize a legislative act is to put the cart before the horse. The question is, primarily, whether the principle of equality is construed in a clear, straightforward and understandable way.

Of course it is not always possible to simplify constitutional rules, even where they concern the rights of the entire body of citizens - who are not initiated in the art of interpreting the law-but in those cases where it is possible to do so in accordance with the written word of the law, it is correct to take that course. When one takes a course that is blemished with inequality in the short term so as to attain equality in the long term *(Regents of University of California v. Bakke* [11]), or where formal equality is rejected for the good of the democratic regime (see the West German constitutional judgment, 2 BVR. 158/ 62 of May 30, 1982-referred to in H.C. 246, 260/81[2], at 20), one should name the choice for what it is in substance and follow the constitutional course thus indicated. One should not hide behind the relativity of the equality concept and thereby blur the constitutional import of a statutory enactment, with the result that the procedure laid down in sections 4 and 46 of the Basic Law will be circumvented. As stated in H.C. 246, 260/81[2], at 21-22:

> The theoretical question that arises in this context is whether ... 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 mentioned above. I am aware of the fact that proponents of the

method of broad and flexible construction prefer it to the other, because in terms of constitutional terminology it preserves the appearance of maintaining the equality principle. The 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 is 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, it could find expression in the allocation to each party of equal and identical broadcast time. Needless to say, such equality is neither reasonable nor just, especially when 31 lists are competing in the Knesset elections.

In summary: the abstractness and relativity of the principle of equality, in general, do not imply that formal equality in the election laws is meaningless and unattainable; but nor can one conclude that formal equality in the election laws is coextensive in each case with what is desirable according to the nature of the democratic regime. The resolution of this predicament is outlined in advance in the concluding part of section 4, as above mentioned.

4. Retroactivity

The complex of legal rules that governs the procedure and the ancillary arrangements in democratic elections (propaganda, financing, etc.) rests on the principle of equality, also as regards its application. Even where differences exist between various party groups as regards the scope of their rights, equal application of the law finds expression, *inter alia,* in the fact that once the rules have been determined they apply in identical measure to all the participants in the elections. Clearly, this extends not only to the positive directives but also to the prohibitions and qualifications. In terms of equal opportunity, it follows that whoever competes for the voter's ballot must act within the confines of the rules concerning what is permitted or forbidden, as prescribed in the pertinent laws.

The practical meaning of the retroactive change in the area under consideration is *a kind of amnesty* for part of the contestants; what was forbidden in the past now becomes permissible for them (and for them alone), and in particular, whoever acted in violation of the prohibitions and restrictions before the elections and offended equality in the sense of failing to observe the legally prescribed bounds, is now regarded as having acted within

permitted bounds because of the statutory amendment. In other words, the sanction that was to be imposed upon a party's failure to act in the same way as the other contestants, in transgression of a given prohibition, will not be applied against him.

The retroactive amendment concerns the functioning of the party groups prior to the elections and the conclusions required to have been drawn in their regard, had they violated a given rule. In this respect it is immaterial that the elections have meanwhile passed, because converting the forbidden into the permissible for only *a section* of the candidates or party groups, that is, only for those who deviated from the restrictions, does injury to the equality that should have governed the election contest.

From the aspect of equality as a binding norm, it is therefore irrelevant whether the statute was amended retrospectively, or prospectively, with reference only to some and not all of the party groups. Therefore, apart from the public and moral blemish pointed to by the State Comptroller and referred to by my esteemed colleagues, the retroactive amendment constitutes a violation of equality, and if the Amending Law was not adopted by the requisite majority prescribed in section 4 of the Basic Law, then it cannot have any legal effect.

Hence, I am in accord with the opinions of my esteemed colleagues with respect to the outcome of the deliberation.

We accordingly make absolute the order *nisi,* stipulating that if the excess sums have already been paid, the Respondents shall make all effort to return them to the State Treasury.

The Respondents shall pay the Petitioners counsel's fees in the amount of 30,000 shekels.

Judgment given on June 16, 1983.