HCJ 10203/03

"Hamifkad Haleumi" Ltd.

v

1. Attorney General

2. Broadcasting Authority

3. Second Authority for Television and Radio

4. National Labour Court

The Supreme Court sitting as the High Court of Justice

[20 August 2008]

Before President D. Beinisch, Justices A. Procaccia, E.E. Levy, A. Grunis, M. Naor, S. Joubran, E. Hayut

Petition for order *nisi* to the Supreme Court sitting as the Supreme Court of Justice.

Facts: The petitioner is a private company working for the promotion of political program to solve the Israeli-Arab conflict. It applied to the respondents for permission to expose the public to the central principles of its political program by way of advertisements on television and radio. Due to the political contents of the advertisements the Authorities rejected the applications, relying on, respectively, Broadcasting Authority's Rules - (Advertisements and Notifications on Radio) and the Second Authority Rules (Ethics in Advertising in Radio Broadcast) and (Ethics in Television Advertising) (hereinafter-the Rules).

The petitioner contested this refusal in the High Court of Justice, claiming that the Rules unconstitutionally infringed his right to freedom of political expression, which is a part of his right to human dignity, and was thus unconstitutional and invalid. The infringement did not comply with the conditions of the limitation clause because neither the Broadcasting Authority Law nor the Second Authority Law authorize any

infringement of the freedom of expression, and a prohibition on broadcasting a political advertisement would not serve any legitimate public interest, because there are no grounds for distinguishing between other media avenues in which political content is permitted, and the advertising media in which it is prohibited. Moreover, the Rules are disproportionate, in terms of its various subtests, specifically in terms of their ability to attain their purpose and of being the least harmful means of achieving the purpose of the violation.

\

The respondents claimed that the right to freedom of speech does not impose an obligation on the Broadcasting Authority to broadcast the political messages of the petitioners at the time, place, and manner requested by the petitioner, and the petitioner has no vested right to transfer information specifically by way of advertisements. The regular broadcasting framework is the appropriate framework for exercising freedom of speech, because the broadcasts must comply with the duty of balancing between different viewpoints, as opposed to the advertising framework which could be unfairly exploited by those with financial power. The law contains an express general authorization for prohibitions and restrictions on the broadcast of advertisements, leaving the specification of particular restrictions to the discretion of the administrative authority. Furthermore, channeling political speech into the appropriate framework of regular broadcasts, which is subject to the fairness doctrine and the duty of balancing, protects the equality of opportunity to present political opinions, and prevents a situation in which extensive dissemination of opinions is granted to those with financial means. Invalidation of the rules would undermine this doctrine which does not apply to the advertising framework, and enable the financially powerful bodies to purchase advertising time and be more effective in influencing social and political discourse without being subject to the restrictions attendant to the duty of balance prescribed by the Law. Moreover, imposing a blanket restriction is the most effective way of achieving the purpose, because invalidating the existing rules and imposing specific regulation would drag the regulator into the realm of political censorship.

Held: In a majority opinion, the petition against the legality and constitutionality of the Rules of the Broadcasting Authority and the Second Authority for Television and Radio, prohibiting broadcast of advertisement carrying political contents, was dismissed.

Per Justice Naor: The constitutionality of the Rules in this case must be decided based on the two stage examination: the first stage examines whether the Rules prohibiting political content in advertisements violate a right protected in the Basic law, and the second stage examines whether the Rules satisfy the requirements of the limitations clause.

In the case at hand, the Rules violate the freedom of political expression, which constitutes a violation of the constitutionally protected value of human dignity. With respect to the second stage however the Rules satisfy the requirements of the limitation clause, insofar as the authorizing sections of the relevant legislation authorize the regulator to restrict the contents of the advertising broadcasts by conferring the authority to establish content based "restrictions" and "prohibitions" on the broadcasting of advertisements. Despite the absence of primary legislation determining the limits of its powers, the legislative provisions establish requirements to ensure fair and balanced expression of all views to the public, and as such justify regulation of the communication marketplace and the Rules are consistent with that overall purpose and the fairness doctrine, that has been adopted in Israeli law, and they effectively achieve that purpose in a proportionate manner.

Per Justice Levy, The opposition to political advertisements is also and primarily supported by the fundamental consideration of the maintenance or at least the prevention of further deterioration, of the character of public discourse in Israel. Opening the broadcasting realm to political content poses a substantive danger to the quality of political discourse in Israel, and the relevant rules of the broadcasting authorities should be interpreted first and foremost with the goal of distinguishing between political expression and its commercial aspect. This form of analysis enables a synthesis between the purpose and the means adopted to achieve the appropriate purpose in a proportionate manner are satisfied by the ban on political advertising.

Per Justice Joubran, concurred with Justice M. Naor and held that enabling the broadcast of political expressions on disputed matters in the framework of paid advertisements would, in practice, spell the demise of the fairness doctrine in Israel, and given that the fairness doctrine is thoroughly anchored in the primary legislation, the rules satisfy the requirement of "explicit authorization".

Per Justice Procaccia – Having reference to the two stage examination for purposes of constitutional review, held that in the case at hand, the prohibition on political advertisements does not violate the constitutional right to freedom of speech, including the freedom of political expression. The existence of a constitutional right to

freedom of speech, including political expression does not necessarily mean that every possible means of expression is included in the right. According to its purpose, the scope of the right to political expression does not extend to expression in the form of paid advertisements by way of public media authorities. Political expression is given an extensive platform in the framework of the programs themselves, without special payment. Commercial and neutral expression was allocated a paid advertisements track, which does not affect or distort public discourse through the monetary purchase of the power to disseminate information. It is difficult to argue that this approach, with its particular distinctions, provides grounds for a claim of inequality and unlawful discrimination, in either the constitutional or the administrative realm, that warrants judicial intervention

Per President Beinisch (*dissenting view)* - The authorization to establish limitations on the contents of advertising broadcast in the Broadcasting Authority Law and the Second Authority Law are general. The immense importance of freedom of political expression for the individual and for society and its contribution to the democratic process affects not only its constitutional status, but also the scope and degree of the protection given to such expression, and given that the absolute violation under the Rules significantly and severely violates the freedom of political expression, the general authorization does not suffice. The establishment of that kind of prohibition requires an explicit authorization that determines the fundamental principles governing the particular prohibition, even if only in general terms. As such, the absolute ban on the broadcast of political advertisements in the Rules was established without the appropriate statutory authorization, and as such in contravention of the first condition of the limitations clause.

Per Justice Hayut – Concurs with the President's position that in the absence of an explicit authorization in primary legislation, rules restricting freedom of expression cannot stand, but in the case in point, section 86 (a) of the Second Authority Law satisfies the requirement of explicitness, and provides a statutory anchor for the Second Authority to prohibit political advertisements. The asymmetry thus caused between the Broadcast Authority and the Second Authority with respect to the same politically based advertisements is undesirable and points to the need for a standard statutory arrangement.

Petition rejected

Legislation Cited

Broadcasting Authority Law, 5725-1965, ss. 2,3,4,7(2) 25A (a)(1), 25A (b)2, 33, 85,

Broadcasting Authority (Amendment No. 8) Law 5753-1993,

Second Authority for Television and Radio Law, 5750-1990, 5, 5 (b)(7),5 (b) (10), 22, 24(a)(6). 46(a),46(a)(3), 47, 81, 86, 86(1), 88,

Basic Law: Human Dignity and Liberty, s.8

Basic Law: The Judiciary, s. 15 (d)(2)

Basic Law: Freedom of Occupation

Israeli Cases Cited

[1] HCJ 259/84 M.I.L *Israeli Institute for the Choice Product and Business Ltd v. Broadcasting Authority* [1984], IsrSC 38(2) 673.

[2] HCJ 1858/96 *Assam, Investments Ltd v. Broadcasting Authority* 1999], (not reported).

[3] HCJ 6032/94 *Reshet Communications and Productions Company (1992) v. Broadcasting Authority* [1997], IsrSC 51(2) 790.

[4] HCJ 226/04 *Neto M.A Food Trade Ltd v. Second Authority for Television and Radio* (2004), IsrSC 59(2) 519.

[5] HCJ 7012/93 *Shammai v. Second Authority for Television and Radio* [2004] IsrSC 48(3) 25.

[6] HCJ 869/92 *Zwilli v. Chairman of the Central Elections Committee* [2001], IsrSC 46(2) 701.

[7] HCJ 15/96 *Thermokir Horshim v. Second Authority for Television and Radio* [1996] IsrSC 50(3) 379.

[8] HCJ 4644/00 *Jaffora Tabori Ltd v. Second Authority for Television* [2000] IsrSC 54(4) 178.

[9] HCJ 7200/02 *D.B.C. Satellite Services (1998) Ltd v. Committee for Cable Broadcasts and Satellite Broadcasts* [2005], IsrSC 59(6) 21.

[10] HCJ 951/06 *Stein v. Commissioner of Israel Police* [2006] (not reported).

[11] HCJ 4541/94 *Miller v.Minister of Defense* [1995] IsrSC 49(4) 94; **[1995-6] IsrLR 178**

[12] HCJ 8070/98 *Association for Civil Rights in Israel v. Ministry of the Interior* [2004] (unreported)

[13] HCJ 1661/05 *Gaza Coast Regional Council v.Knesset* [2005], IsrSC 59(2) 481.

[14] HCJ 6427/02 *Movement for Quality of Government in Israel v. Knesset* [2006] (not yet reported).

[15] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 431; **[1995] (2) IsrLR 1**

[16] HCJ 2194/06 *Shinui- The Center Party v. the Chairman of the Central Elections Committee* [2006] (not yet reported).

[17] HCJ 4804/94 *Station Film Co. Ltd. v. Film Review Boar* [1997], IsrSC 50(5) 661.**[1997] IsrLR 23**

[18] HCJ 6962/03 *Media Most Company Ltd v. Council for Cable and Satellite Broadcast* [2004], IsrSC 59(3) 14.

[19] HCJ 806/88 *Universal City Studios Inc v. Films and Plays Censorship Board* [1989], IsrSC 43(2) 22; **IsrSJ X 229**

[20] HCJ 2245/06 *Dobrin v. Prisons Service* [2006] (not reported).

[21] HCJ 4593/05 *United Bank Mizrahi Ltd v. Prime Minister*

[2006] (not yet reported).

[22] HCJ 606/93 *Kiddum Yezumot v. Broadcasting Authority* (1981)[1993], (IsrSC 48(2) 1.

[23] HCJ 5432/03 SHIN, *Israeli Movement for Equal Representation of Women v. Council for Cable TV and Satellite Broadcasting* (2004), IsrSC 58(3) 65.

[24] CA 723/74 *Ha'aretz Daily Newspaper Ltd. and Others v. The Israel Electric Corporation Ltd. and Another* [1977], IsrSC 31(2) 281.

[25] PPA 4463/94 *Golan v. Prisons Service Authority* [1996]136, **[1995-6] IsrLR 489**

[26] HCJ 5016/96 *Horev v. Minister of Transport* [1997], IsrSC 51(4). [1997] IsrLR 149

[27] HCJ 6396/93 *Zakin v. Mayor of Be'er Sheva* 1999], IsrSC 53(3) 289.

[27] HCJ 11225/03 *Bishara v. Attorney General* -**[2006] (1) IsrLR 43**

[28] HCJ 6226/01 *Indoor v. Jerusalem Mayor* [2003], IsrSC 57(2) 157.

[29] CA 4534/02 *Shoken Network Ltd. v. Herzkowitz* [2004], IsrSC 58(3) 558.

[30] CA 105/92 *Re'em Engineers Contractors Ltd v. Upper Nazareth Municipality* [1993], IsrSC 47(5) 189.

[31] HCJ 2481/93 *Dayan v. Wilk* [1994] IsrSC 48(2) 456; **[1992-4] IsrLR 324**

[32] HCJ 2557/05 *Mateh Harov v. Israel* Police [not reported].

[33] LCA 10520/03 *Ben-Gvir v. Dankner* [2006].

[34] LCA 2687/92 *Geva v. Walt Disney Company* [1993], IsrSC 48(1) 251.

[35] HCJ 6126/94 *Szenes v. Broadcasting Authority* [1999], IsrSC 53(3) 817, **[1998-9] IsrLR 339**

[36] HCJ 6893/05 *Levy v. Government of Israel* [2005], IsrSC IsrSC 59(2) 876.

[37] HCJ 8988/06 *Meshi Zahav v. Jerusalem District Commander* [2006] (not yet reported).

[38] HCJ 953/01 *Solodkin v. Beth Shemesh Municipality* [2004], IsrSC 58(5) 595.

[39] HCJ 5118/95 *Maio Simon Advertising Marketing and Public Relations Ltd v. Second Authority for Television and Radio* [1996] IsrSc 49(5) 751.

[40] HCJ 4520/95 *Tempo Beer Industries Ltd v. Second Authority* (1995) (not published).

[41] HCJ 7144/01 *Education for Peace v Broadcasting Authority* (2002), IsrSC 56(2), 887. Peace Block v. Broadcasting Authority

[42] HCJ 213/03 *Herut National Movement v. Chairman of Central Elections Committee for Twelfth Knesset* [2003], IsrSC 57(1) 750.2117

[43] HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Public Security* [2004], IsrSC 58(2) 741.

[44] HCJ 5936/97 *Dr. Oren Lam v. Director General, Ministry of Education and Sport* [1999], IsrSC 53(4) 673.

[45] HCJ 3267/97 *Rubinstein v. Minister of Defense* ***שגיאה! הסימניה אינה מוגדרת.*** [1998], IsrSC 52(5) 481, **[1998-9] IsrLR 139**

[46] HCJ 6971/98 *Paritzky v. Government of Israel* [1999], IsrSC 53(1) 763.

[47] HCJ 11163 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel* [2006] (not yet reported) [2006] (1) IsrLR 105.

[48] HCJ 10338/03 *Wesh Telecanal Ltd v. Minister of Communications* [2006].

[49] HCJ 7052/03 *Adalah Legal Center for Rights of Arab Minority v. Minister of the Interior Adalah* [2006] (not yet reported**) [2006] (1) IsrLR 443**

[50] HCJ 4769/95 *Menahem v. Minister of T0ransport* [2002] IsrSC 57(1) 235.

[51] HCJ 2888/97 *Novik v. Second Authority for Television* [1997], IsrSC 51(5) 193.

[52] HCJ 6218/93 *Cohen v. Israel Bar Association* [1995], IsrSC 49(2) 529.

[53] HCJ 1/81 *Shiran v. Broadcasting Authority* [1981], IsrSc 38(3), 365.

[54] HCJ 399/85 *Kahane v. Managing Committee of the Broadcasting Authority* [1987], IsrSC 41(3) 255.

[55] HCJ 4915/00 *Reshet Communications and Production Company v. Gov't of Israe*l [2000], IsrSC 54(5) 451.

[56] HCJ 5933/98 *Documentary Creators Forum v. President of the State* (2000) IsrSC 54(3) 496.

[57] AAA 3307/04 *Kol Acher BeGalil v. Misgav Local Council* [2005],

[58] CrA 71/93 *Flatto Sharon v. State of Israel* [1984], IsrSC 38(2)757.

[59] HCJ 7833/96 *Melnik v. Second Authority for Television and Radio* [1998], IsrSC 52(3) 586.

[60] HCJ 73/53 *Kol Ha'Am Ltd. V. Minister of the Interior* [1953], IsrSC 7, 871.

[61] HCJ 316/03 *Bakri v. Film Censorship Board* [2003] IsrSC 58(1) 249 **[2002-2003] IsrLR 487**

[62] HCJ 5277/07 *Marzel v. Commander of Jerusalem Regional Police* [2007] (unreported).

[63] HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v Director of Sabbath Work Permits* [2005], (unreported).

[64] HCJ 1715/97 *Israeli Office of Investments Managers v. Minister of Finance* [1997], IsrSC 51(4), 367.

[65] HCJ 1893/92 *Reshef v. Broadcasting Authority* [1992], IsrSC 46(4) 816.

[66] HCJ 3434/96 *Hoffnung v. Knesset Speaker* [1996], IsrSC 50(3) 57

[67] HCJ 8035/07 *Eliyahu v. Government of Israel* [2008], (not yet reported) **IsrLR 2008**

[68] HCJ 757/84 HCJ 3420/90 *The Daily Newspaper Union in Israel v. The Minister of Education and Culture* [1987], IsrSC 337.

[69] CA 723/74 *Ha'aretz Daily Newspaper Ltd. v. The Israel Electric Corporation Ltd* (1977), IsrSC 31(2) 281.

[70] HCJ 9596/02 *Pitzui Nimratz, Experts for Realization of Medical Rights and Insurances v. Minister of Justice* (2004), 792.

[71] CA 506/88 *Shefer v. State of Israel* (1993), 87.

[72] HCJ 337/81 *Miterani v. Minister of Transport* **שגיאה! הסימניה אינה מוגדרת.** (1983), IsrSC 37(3), 337.

[73] CA 524/88 *Pri HaEmek Agricultural Cooperative Society Ltd v. Sedei Yaakov Workers S Settlement Ltd* [1991] IsrSC 48(4) 529.

[74] HCJ 144/72 *Lipevski-Halipi v. Minister of Justice* [1973], IsrSC 27(1) 719.

[75] CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* [2006], (not yet reported). **[2006] (1) IsrLR 320**

[76] HCJ 244/00 *New Dialogue Society for Democratic Dialogue v. Minister of National Infrastructures* [2002], IsrSC 56(6) 25, 25

[77] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel et al. v. Prime Minister of Israel* [2006] **[2006] (1) IsrLR 105**.

[78] HCJ 256/88 *Medinvest Herzliya Medical Center v. CEO of. Minister of Health* [1989] IsrSC 44(1) 19.

[79] HCJ 2740/96 *Chancy v. Supervisor of Diamonds* [1997]), IsrSC 51(4) 481

[80] HCJ 7083/95 *Sagi Tzemach v. Minister of Defense* [1999], IsrSC 53(5) 241, **[1998-9] IsrLR 635**

[81] HCJ 8276/05 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Defense* [2006] (not yet reported

[82] HCJ 3648/97 *Stemkeh . v. Minister of the Interior* [1999] IsrSC 53(2) 728.

[83] HCJ 5503/94 *Segel v. Knesset Speaker* [1997] IsrSC 51(4) 529.

[84] LAA 696/06 *Alkanov v. Supervisory Court for Custody of Illegal Residents* [2006] (not yet reported)

[85] CrimA 4424/98 *Silgado v. State of Israel* [2002] IsrSC 56(5) 529.

[86] CrimA 2831/95 *Alba v. State of Israel* [1996] IsrSC 50(5) 221.

[87] HCJ 1435/03. *A v. Haifa Civil Servants Disciplinary Tribunal* [2003] IsrSC 58(1) 529

[88] HCJ 326/00 *Municipality of Holon v N.M.C. Music Ltd* [2003], IsrSC 57(3) 658.

[89] HCJ 3420/90 *The Daily Newspaper Union in Israel v. The Minister of Education and Culture* [1991], IsrSC 48(2) 24.

[90] HCJ 1/49 Bajerno v. Minister of Polic [1949], 2 IsrSC 80,82)

[90] HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2002] IsrSC 56(5) 393.

[91] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [1988] IsrSC 42(2) 309

[92] HCJ 7111/95 *Local Government Centre v. Knesset* [1996] IsrSC 50(3) 485.

[93] HCJ 5394/92 *Hoppert v. Yad VaShem Holocaust Martyrs and Heroes Memorial Authority* (1994) IsrSC 48(3) 353

[94] HCJ 4806/94 D.S.A. *Environmental Quality Ltd v. Minister of Finance* [1998] IsrSC 52(2) 193

[95] HCJ 4513/97 *Abu Arar v. Knesset Speaker Dan Tichon* [1998], IsrSC 52(4) (1998).

[96] HCJ 2223/04 *Levi v. State of Israel* [2006] (not yet reported).

[97] HCJ 9722/04 *Polgat Jeans Ltd. v. Government of Israel* (2006) (not yet reported).

[98] HCJ 8487/03 IDF *Invalids Organization v. Defence Minister* (2006) (not yet reported).

[99] HCJ 11956/05 *Suhad Bishara. v. The Ministry of Construction and Housing* (2006) (not yet reported).

[100] HCJ 4513/97 *Abu Arar v. Knesset Speaker Dan Tichon* [1998], IsrSC 52(4) (1998).

[101] HCJ 10076/02 *Rozenbaum v. Prison Authority Commissioner* (2006) (not yet reported). **[2006] (2) IsrLR 331**

[102] HCJFH 4191/97 *Recanat v. National Labour Court* [2000] IsrSC 54(5) 330

For the Petitioner – Motti Arad, Hila Goldberg

For Respondents 1 – 2 Avi Licht

For Respondent 3 – Yair Eshael, Liat Benmelekh, Nachi Ben-Or

JUDGMENT

Justice M. Naor

Are the prohibitions on the broadcast of an advertisement with a political subject, as prescribed in the Broadcasting Authority (Radio Advertisements and Announcements) Rules 5753-1993, and in the Second Authority for Television and Radio (Ethics in Radio Advertisements) Rules 5759-1999, void in that they are an unconstitutional violation of freedom of speech? This is the question confronting us in this petition.

The facts

1. The petitioner is a private company that incorporated in Israel in 2002. It promotes an initiative for a permanent solution to the Israeli-Palestinian conflict. In the framework of this initiative, Mr. Ami Ayalon, who until 6.12.2004 served as the chairman of the petitioner's directorate, together with Mr. Sari Nusseibeh formulated a document entitled the "Declaration of Principles" (hereinafter: "the Document"). The petitioner sought to expose the Israeli public to the contents of the Document and to encourage the public to sign it. To that end, the petitioner prepared advertisements for radio. The advertisements directed the listeners to the petitioner's Internet site and to a telephone number from which they could obtain further details concerning the initiative (hereinafter: "the advertisements"). The wording of the six advertisements, all sharing a similar conception, was attached to the petition. One reads as follows:

> 'Ami Ayalon
>
> I say to you: the political reality in this region can be changed.
>
> A declaration of principles has been signed between Israeli and Palestinian citizens.
>
> It preserves our red lines, which are a Jewish democratic state without the right of return. We have partners on the other side and many of them have signed. Join us now .... Together, you and I can [bring about] change.

Hamifkad Haleumi – Citizens Sign an Agreement.

Telephone: 03-9298888 or Internet www.mifkad.org.il'

Respondent 2 (hereinafter: "the Broadcasting Authority"), which is responsible for broadcasting programs and advertisements on national radio stations, approved broadcast of the advertisements on channels B, C and 88FM from 14 – 28 September 2003. On 19 October 2003, respondent 3 (hereinafter: "the Second Authority"), which is responsible for the broadcast of programs and advertisements on the regional radio stations, announced its refusal to approve the advertisements, in that they dealt with a "political issue which is the subject of public controversy", and because their entire "purpose was to 'enlist support' for a particular position on an issue which is the subject of public controversy." The Second Authority directed the attention of the Broadcasting Authority to its decision, in the wake of which the Attorney General, on 29 September 2003, instructed the Broadcasting Authority to discontinue the advertisements because they dealt with "a political-ideological matter which was the subject of public controversy". On 21 October 2003, the Broadcasting Authority notified the petitioner that it could no longer approve the broadcast of the advertisements on national radio. On 23 October 2003 the petitioner lodged appeals against the decisions of the Broadcasting Authority and Second Authority. On 13 November 2003 the Second Authority dismissed the appeal, and on 16 November 2003 the petitioner received the answer of the Broadcasting Authority Appeals Committee, which likewise dismissed the appeal that had been lodged.

The original petition and the granting of order nisi

2. On 16 November 2003 the petitioner filed a petition (hereinafter: "the original petition") contesting the decisions of the Broadcasting Authority and the Second Authority prohibiting the broadcast of the advertisements, arguing that they were void due to their grave and unconstitutional violation of the petitioner's freedom of speech. The next day the petition was heard by the Court (President Barak, and Justices Türkel and Hayut) together with an additional petition. As noted by the petitioner (s. 154 of its summations), it was proposed at the hearing to separate the two petitions: HCJ 10182/03 *T.L. Education for Peace Ltd. v. Broadcasting Authority* (judgment in which was given on 25 November 2004 (hereinafter: HCJ 10182/03 *Education for Peace*)) would focus on the question of whether the specific advertisement

under discussion complied with the Rules; and the hearing of the present petition would concentrate on the question of the constitutionality of the Rules themselves, with the petitioner demanding to disqualify the Rules on the assumption that the specific advertisement does not comply with them as they currently stand. In the course of the hearing the petitioner therefore requested to limit the remedies sought in the original petition. Following receipt of the response to this request, on 29 July 2004 an order *nisi* was granted (Justices Cheshin, Rivlin and Hayut) as requested for the three heads of the original petition. The order was directed at the Broadcasting Authority and the Second Authority, ordering them to show cause why the Court should not issue the following declaration:

> 1. The refusal of respondents 2 and 3 to allow the broadcast of the petitioners' advertisements, as per the formulation requested in the application attached to this petition as appendix A ... is unlawful in view of its unconstitutional violation of the petitioner's freedom of speech. Accordingly, the decisions of respondents 2 and 3 should be reversed and the advertisements permitted.
>
> 2. Section 7(2) of the Broadcasting Authority (Radio Advertisements and Announcements) Rules, 5753-1993, which prohibits the broadcast of advertisements "on a matter which is the subject of public political-ideological controversy", is invalid, since it unconstitutionally violates freedom of speech.
>
> 3. Section 5 of the Second Authority for Television and Radio (Advertising Ethics in Radio Broadcasts) Rules 5759-1999 and s. 11 of the Second Authority for Television and Radio (Ethics in Television Advertising) Rules 5754-1994 which prohibit the broadcast of an advertisement "regarding a matter which is the subject of political or ideological controversy" are invalid by reason of their unconstitutional violation of freedom for speech.

The amended petition and the expansion of the bench

3. On 6 December 2004 Mr. Ami Ayalon resigned from his position as chairman of the petitioner's Board of Directors. Following this, the petitioner submitted a request to amend the original petition. On 26 January 2005 the Court (Justices Rivlin, Hayut and Adiel) granted the petitioner's request and

ordered that an amended petition be filed (hereinafter: "the amended petition"). On 27 January 2005 the same panel decided that the hearing should be held before an expanded bench, and on 1 February 2005 the amended petition was filed. On the same day President Barak ruled that the amended petition would be heard by an expanded bench. On 29 November 2005 the amended petition was heard by the expanded bench (President Barak, Deputy President Cheshin, and Justices Beinisch, Procaccia, Naor, Hayut and Adiel). The parties persisted in their request that the Court decide on the fundamental question of the constitutionality of the Rules. Following the retirement of President Barak and Deputy President Cheshin, and in view of the petitioner's request, on 29 April 2007 the petition was heard by a new bench (President Beinisch, and Justices Procaccia, Levy, Grunis, Naor, Joubran and Hayut). The petitioner again requested that a ruling be given on the fundamental issue of the constitutionality of the rules. The hearing focused on ss. 2 and 3 of the order *nisi* (regarding the constitutionality of the Rules). The petitioner no longer insisted on s. 1 of the order *nisi* (permitting the broadcast of the advertisements as specified in the petition), because the petitioner and the Broadcasting Authority had already agreed, on 25 November 2004, on a new format for the advertisement, which was approved for broadcast on the Voice of Israel.

This brings us to the decision on the issue of the constitutionality of the Rules, and we will begin with a description of the existing statutory arrangement.

The normative framework – advertising in broadcasts of the Broadcasting Authority

4. The Broadcasting Authority is a statutory corporation, established by virtue of the Broadcasting Authority Law, 5725-1965 (hereinafter: "Broadcasting Authority Law"). The Broadcasting Authority Law authorized the Broadcasting Authority to broadcast advertisements that are presented to the public as a government service (ss. 2 and 3 of the Law; see HCJ 259/84 *M.L.I.N. Israeli Institute for the Choice Product and Business Ltd. v. Broadcasting Authority* [1], at p. 673). As elucidated below, the Law explicitly authorized the Broadcasting Authority to broadcast advertisements on the Voice of Israel radio station; with respect to television advertising, the Law permitted only sponsorship advertisements, subject to certain limitations

(see Yuval Karniel, *The Law of Commercial Communication,* at p. 162 (2003)).

Regarding television broadcasts it has been held that "the Broadcasting Authority Law contains no provision, explicit or implied, authorizing the Broadcasting Authority to broadcast commercial advertisements, and according to the nature and the purpose of the Law, no such authority may be attributed to it. Nonetheless, this Court is not prepared to vacate the Broadcasting Authority's decision to broadcast service advertisements aimed at increasing public awareness on various national, public subjects, and sponsorship advertisements intended as an acknowledgement on the Authority's part of the assistance given by a particular commercial company in the production of the program, provided that it involves no direct advertising message" (see HCJ 1858/96 *Osem Investments Ltd. v. Broadcasting Authority* [2], para. 6).

Regarding radio broadcasts, the Broadcasting Authority (Amendment No. 8) Law 5753-1993 added Chapter Four A to the Broadcasting Authority Law. When that amendment came into force, Basic Law: Human Dignity and Liberty was already in force, though in fact, the petitioner did not challenge the amendment, but rather the rules of the Broadcasting Authority that were made by virtue thereof. In the said chapter, the Broadcasting Authority was granted explicit statutory authorization to broadcast advertisements and announcements on radio (only) for payment. Section 25A(a)(1) of the Broadcasting Authority Law provides as follows:

> 'The Authority may broadcast *on radio* advertisements and announcements for consideration (hereinafter: "advertisements and announcements"), and commission them, prepare them or produce them by itself or through one or more other people, as determined by tender.'

Accordingly, s. 25A(b)(2) of the Broadcasting Authority Law (hereinafter: "the Broadcasting Authority authorization section", and see also s. 33 of the Broadcasting Authority Law) authorized the Management Committee of the Broadcasting Authority to prescribe rules regarding prohibitions and restrictions on the broadcast of advertisements and announcements on radio:

> '25A. Advertisements and Announcements on Radio

….

(b) The management committee shall determine, in consultation with the Director General, rules concerning -

…

(2) *prohibitions and restrictions* on the broadcast of advertisements and announcements'.

This distinction authorizing the Broadcasting Authority to broadcast advertisements on radio but not on television has ramifications for the sources of funding of the Broadcasting Authority as a public broadcasting agency, since "broadcasts on Channel One are funded primarily by the television fees paid by all citizens of the State who own a television set" (HCJ 6032/94 *Reshet Communications and Productions Company (1992) v. Broadcasting Authority* [3], at p. 808; see also "Report of the Committee for Examining the Structure of Public Broadcasting in Israel and its Legal and Public Status" (1997) at p. 59 (hereinafter: "Structure of Public Broadcasting Report")). Accordingly, it was determined that to the extent that the Broadcasting Authority seeks to expand its funding sources through advertisements on radio and television, it must do so by way of legislation (see *Reshet Communications and Productions Company (1992) v. Broadcasting Authority* [3], at p. 809). Indeed, the authority to broadcast advertisements on radio and television is, as stated, grounded in legislation, and the prohibition on radio broadcasts of advertisements also has its source in legislation, i.e. in s. 25A(b)(2) of the Broadcasting Authority Law.

5. By virtue of s. 25A(b)(2) of the Broadcasting Authority Law, the Broadcasting Authority (Radio Advertisements and Announcements) Rules, 5753-1993 (hereinafter: "Broadcasting Authority Rules" or "the Rules") were laid down. Section 1 of the Broadcasting Authority Rules provides the following definitions of "advertisement" and "announcement":

'"Advertisement" – an advertising broadcast, sponsorship broadcast, or an announcement, broadcast on radio in consideration for payment to the Authority.

"Announcement" - the relaying of information to the public.'

Section 4 of the Broadcasting Authority Rules specifies those advertisements the broadcast of which is prohibited:

> 'The Director General will not approve the broadcast of an advertisement prohibited under Chapter C. In addition to the provisions of Chapter C, he is authorized to deny approval for the broadcast of an advertisement that is publicly or morally reprehensible or offensive to good taste or to public order, or damaging to the public.'

The relevant section in Chapter 3 of the Rules, referred to in s. 4 above, is s. 7(2) which establishes the prohibition on the broadcast of party propaganda or a matter that is the subject of public political or ideological controversy:

> '7.It is forbidden to broadcast an advertisement if, in the opinion of the Director General, it contains one of the following:
>
> …..
>
> (2) Party propaganda or *a broadcast on a matter that is the subject of public political or ideological controversy*, including a call for a change in the legislation concerning these matters.'

By virtue of the section of this rule relating to a broadcast on a matter that is the subject of public political or ideological controversy, the Broadcasting Authority disallowed the petitioner's radio advertisements, in accordance with the instructions of the Attorney General (see also s. 8 of the Broadcasting Authority Rules, which relates to sponsorship advertisements on radio).

In this context it is also important to mention s. 4 of the Broadcasting Authority Law, which establishes the principle of balance in programs of the Broadcasting Authority:

> '4. Ensuring Reliable Programs
>
> The Authority shall ensure that programs accommodate the appropriate expression of different approaches and points of view current among the public, and that reliable information is transmitted.'

The Normative Framework – Advertising in Broadcasts of the Second Authority

6. The Second Authority is a statutory corporation, established by virtue of the Second Authority for Television and Radio Law, 5750-1990 (hereinafter: "Second Authority Law"). Its role is the presentation and oversight of broadcasts in accordance with the provisions of the Second Authority Law (s. 5; see also I. Zamir, *Administrative Authority,* vol. 1 (1996) 395; and see HCJ 226/04 *Neto M.A Food Trade Ltd. v. Second Authority for Television and Radio* [4], at p. 522).

It will be stressed that as public corporations, both the Broadcasting Authority and the Second Authority are "subject to full judicial review, similar to any other administrative authority. As a body fulfilling a public function under law, in the words of s. 15(d)(2) of Basic Law: The Judiciary, the public corporation is subject to the review of the High Court of Justice and to the laws of public administration" (Zamir, *Administrative Authority,* at pp. 400-401). "The public media – television and radio - operate in Israel by virtue of legislation. From the perspective of Israeli law they are governmental bodies"(Aharon Barak, "The Tradition of Freedom of Speech and its Problems", *Mishpatim* 27 (1997), 223, 237).

Unlike the Broadcasting Authority, the broadcasts of the Second Authority are executed by broadcasting franchisees (hereinafter: "franchisees" and see s. 5 of the Second Authority Law). The franchisees are subject to the oversight of the Second Authority (s. 5 of the Law). The broadcasts themselves are at the franchisees' expense, and s. 81 of the Second Authority Law provides that the franchisee "is permitted to include advertisements within the framework of its broadcasts in consideration for payment at the rate that it determines" (hereinafter: "the framework of advertisements"). One of the franchisees' main sources of funding is the broadcast of advertisements (Hanna Katzir, *Commercial Advertising* (2001) at p. 168). In accordance with the recommendations of the Report of the Committee for Investigation into a Second Television Channel in Israel (1979), the framework of advertisements was likewise subjected to the statutory arrangement (see Report, at pp. 41-43).

The Second Authority Law states that the Second Authority is authorized to prevent "prohibited programs" (s. 5(b)(10) of the Second Authority Law) as well as prohibited advertisements, as stated in s. 86 of the Second Authority Law, which provides as follows:

'A franchisee shall not broadcast an *advertisement* –

(1) On subjects *the broadcast of which is prohibited under section 46(a);*

(2) On behalf of a body or organization the aims of which, all or in part, involve subjects as aforesaid in paragraph (1) or labor disputes.'

The relevant sub-section of s. 46(a) of the Second Authority Law, to which the said s. 86(1) refers, lays down prohibitions on broadcasts (that are not advertisements) involving party propaganda, and includes additional prohibitions prescribed by the Second Authority Council in its rules:

'A franchisee shall not broadcast programs that contain -

…

(3) party propaganda, except for election propaganda that is permitted by law;

(4) *a breach of a prohibition set by the Council in its Rules*, under another provision of this Law.

Sections 24(a)(6) and 88(2) of the Second Authority Law (hereinafter: "the authorizing provisions of the Second Authority") authorize the Council of the Second Authority to make rules concerning subjects of advertisements, the broadcast of which prohibited:

24. Establishing Rules

(a) The Council, on its own initiative or at the request of the Minister and subject to the provisions of the First Schedule, or the Second Schedule where applicable by virtue of the provisions of section 62C, shall make rules concerning broadcasts, their execution, and oversight thereof, as it deems necessary for realizing the purposes of this law, and including in matters of -

…

(2) Prohibited programs as stated in section 46;

…

(6) *The subjects, style, content, scope and timing of advertisements that are permitted under this Law;*

88. Rules for Advertisements

The Council shall make rules concerning the broadcast of advertisements, and *inter alia*, concerning the following matters:

(1) The format of advertisements and the mode of their presentation;

(2) *Subjects that are prohibited for broadcast as advertisements in general, or in specific circumstances, or by reason of being offensive to good taste or to public sensitivities.'*

7. Accordingly, the Second Authority Council enacted the Second Authority for Television and Radio (Ethics in Radio Advertisements) Rules, 5759-1999 (hereinafter: "Second Authority Radio Rules"), pursuant to ss. 24 and 88 of the Second Authority Law. Section 5 of the Second Authority Radio Rules establishes the prohibition on advertising that imparts a political, social, public or economic message that is the subject of public controversy:

'A franchisee shall not broadcast an advertisement *that imparts a message on a political, social, public, or economic matter that is the subject of public controversy.'*

The Second Authority disqualified the petitioner's advertisements under this rule (an identical rule appears in s. 11 of the Second Authority for Television and Radio (Ethics in Television Advertisements) Rules, 5754-1994). The Second Authority's decision, dated 19 October 2003, noted that indeed, "further to the above, and beyond that which is necessary, we feel that the said advertisement constitutes real party propaganda, which is prohibited under s. 46(a)(3) of the abovementioned Second Authority Law as well." However, as noted, s. 46(a)(3) was not the reason for the disqualification, and it was added only as an extra precaution (on the sanction against a franchisee who broadcast on a matter that was prohibited, see s. 49(a) of the Second Authority Law).

In this context it is important to mention s. 47 of the Second Authority Law, which establishes the obligation of balance in the Second Authority's programs:

'47. Providing the Opportunity for Response

(a) The franchisee shall ensure that in programs *on current affairs*, the contents of which are of public significance, *proper expression shall be given to the various views prevailing amongst the public.*

(b) The Council will make rules on providing an opportunity to respond in a manner fitting the circumstances, for those who are, or are liable to be, directly harmed by the programs.'

Regarding the duty of balancing, see also s. 5(b)(7) of the Second Authority Law, which determines that in the fulfillment of its obligations, the Second Authority shall act "to broadcast reliable, fair and balanced information"; s. 5(b)(6) sets one of its obligations as "giving expression to the cultural diversity of Israeli society"; and s. 46(c) of the Second Authority Law states with respect to franchisees that "a franchisee shall not, in its programs, directly, or indirectly, in writing or in any other form, give any expression to its personal views, and if it is a body corporate – the views of its directors or of interested parties therein."

The Question that Arises in the Petition: The Constitutionality of the Rules

8. As we have said, the amended petition seeks the invalidation of s. 7(2) of the Broadcasting Authority Rules and of s. 5 of the Second Authority Rules, on grounds of unconstitutionality. We will quote the Rules once more:

S. 7(2) of the Broadcasting Authority Rules:

'7. It is forbidden to broadcast an advertisement if, in the opinion of the Director General, it contains one of the following:

…..

(2) Party propaganda or *a broadcast on a matter that is the subject of a public political or ideological controversy*, including a call for a change in the legislation concerning these matters.'

Section 5 of the Second Authority for Television and Radio (Ethics in Radio Advertising) Rules, 5754-1994 and s. 11 of the Second Authority for Television and Radio (Ethics in Television Advertising) Rules, 5754-1994 are identical in their wording:

> 'A franchisee shall not broadcast an advertisement that imparts a message on a political, social, public, or economic matter that is the subject of public controversy.′

The parameters of the dispute – two clarifications

At the outset of our discussion, it is important to clarify two matters.

First, the concern of both this petition and the order *nisi* of 29 October 2004 is the question of principle – the constitutionality of the Rules, and not the applied question – whether and how the advertisements violate the Rules. As we said, in the hearing of 17 November 2003 the petitioner already agreed to a point of departure whereby the advertisements violated the Rules (and it will be noted that on 25 November 2004, the petitioners and the Broadcasting Authority reached an agreement regarding the wording of a new advertisement, which was approved for broadcast on The Voice of Israel).

It will be emphasized that the question of the constitutionality of the Rules was not decided in HCJ 10182/03 *Education for Peace* (by the panel comprising President A. Barak, and Justices Y. Türkel and E. Hayut), which dealt only with the interpretation and the application of the Rules. As stated there, "our assumption is that the prohibiting provisions that require interpretation were enacted for a proper purpose, and their violation of the freedom of speech does not exceed the proportionate violation that is required to achieve the underlying purpose of the prohibition" (*ibid,* para. 8). This assumption will be examined in the present petition.

Secondly, in our case the question is not whether an advertisement on a subject of public political controversy as defined in the Rules (hereinafter: "political advertisement") also constitutes party propaganda as per the opening section of s. 7(2) of the Broadcasting Authority Rules and s. 46(a)(3) of the Second Authority Law. The parties' pleadings focused on the "political" content element of the petitioner's advertisements and not on the petitioner's *prima facie* "party" character element. Furthermore, on the factual level, the Broadcasting Authority's decision did not rely on the grounds of "party propaganda", whereas reliance upon those grounds in the Second Authority's decision was only an added precaution. Accordingly, in the framework of the petition we are not required to consider invalidation on the grounds of "party propaganda". Consequently, we are not required to consider the factual aspects of the petitioner's apparent connections with political parties, nor need we

consider the nature and character of "party propaganda" by way of advertisements other than during the pre-election period or in the context of elections (for interpretation of the term "party propaganda", see HCJ 7012/93 *Shammai v. Second Authority* [5], at p. 33). In that case the Court did not adopt a position regarding the Second Authority Rules – see para. 7 of the judgment. On the other hand, regarding interpretation of the term "election propaganda", see HCJ 869/92 *Zwilli v. Chairman of the Central Elections Committee* [6], at p. 701). Indeed, the subject of propaganda broadcasts is regulated in separate legislation, which permits the broadcast of propaganda under certain conditions immediately prior to elections (See Elections (Modes of Propaganda) Law, 5719-1959, which *inter alia* imposes restrictions on radio and television broadcasts (ss. 5, 15, 15A, and 15B, and see also s. 16D(b); see also Elections (Modes of Propaganda) (Propaganda Broadcasts on Regional Radio in the Elections for Local Authorities) Rules, 5758-1998; see further in Katzir, *Commercial Advertising*, at pp. 257-259). In our case, as noted, the decisions of the Broadcasting Authority and the Second Authority were not based on these grounds of invalidation. In any case, in view of the wording of the order *nisi* that was issued, the question of the constitutionality or the interpretation of the provisions regarding propaganda does not arise here.

It will be emphasized that in HCJ 10182/03 *Education for Peace*, too, the Court did not consider the question of whether party propaganda can be attributed to a body that is not a "party" as defined in s. 1 of the Parties Law, 5752-1992, but some of whose members have a party-political identity (see HCJ 10182/03 *Education for Peace*, para 10).

10. We will therefore consider only those grounds of invalidation relating to "a broadcast on a matter that is the subject of public political or ideological controversy" (as per the wording of the Broadcasting Authority Rules)*;* or a broadcast "imparting a message on a political, social, public, or economic matter that is the subject of public controversy" (as per the wording of the Rules of the Second Authority). This is the focus of the discussion in the petition.

The petitioner's claims

11. The petitioner claims that the Broadcasting Authority Rules and the Second Authority Rules violate freedom of speech. Freedom of speech is not

merely a basic right, but a constitutional right by virtue of Basic Law: Human Dignity and Liberty. It is argued that by virtue of their political character, the advertisements are protected under the rubric of freedom of political, rather commercial expression, even though the means is advertising. The advertisement is a form of political expression, and as such is entitled to the highest possible degree of protection within the scale of protections of freedom of speech. It was further argued that the respondents are not intended to serve as a platform only for those views that enjoy public consensus; they must serve as a platform for the expression of the full spectrum of views and beliefs in a society, and this too – not only in the framework of the broadcasting of programs but also in the framework of the advertisements that are broadcast. In the words of the petitioner: "Advertising time [which] is a strip of transmission that constitutes, in effect, a free platform for the public, in the framework of which it can acquire "air time" for the airing of its opinions and beliefs…. Advertising time in the media is the modern town square in which any person who so wishes can set up his own soap-box, stand on it, and voice his controversial political opinions in an attempt to win over his audience (paras. 42 and 44 of the petitioner's summations).

The petitioner maintains that the Rules violate a constitutional right protected by Basic Law: Human Dignity and Liberty, and that they were enacted after the enactment of the Basic Law (in 1993 and 1999); therefore, they must satisfy the conditions of the limitation clause (s. 8 of the Basic Law).

The central argument in this context is that the first condition of the limitation clause is not satisfied, i.e. that the violation be "by law or according to said law by virtue of explicit authorization therein." The petitioners claim that neither the Broadcasting Authority Law nor the Second Authority Law authorize any violation of the freedom of speech, and that to the extent that such authorization exists, its interpretation must reflect the importance of the constitutional right. The petitioner raised no arguments relating to the second condition. Regarding the third condition of the limitation clause – that the violation be for a proper purpose – it was argued that the prohibition on the broadcast of a political advertisement would not serve any legitimate public interest. The public interest that might be relevant – equality of opportunity to present political opinions – does not merit protection. According to the

petitioner, there is no presumption that certain types of political views enjoy broader financial support than other views. It was also argued that in any case, economic equality between entities seeking exposure for their political views through other media, such as the printed press, the internet, billboards, notice-boards, and direct mailing to addressees does not exist; nevertheless, there is no prohibition on "political" broadcasts via such avenues. This indicates that a restriction specifically on radio and television advertising requires special justification, which would provide a satisfactory explanation for the distinction between radio and television on the one hand, and the other media mentioned above. At all events, our concern here is with a vertical balance between the applicant's freedom to publish a political expression and the interests of those with limited financial means who are not able to do so. Here, the balance tilts in favor of the applicant's freedom of speech in publishing his political expression. Another public interest that is arguably relevant – the interest of balance and objectivity in the state broadcasting media – does not merit protection either. According to the petitioner, this argument is not valid in relation to the Broadcasting Authority, because the advertisements are included in the broadcasting slot intended for advertisements and can be identified as such, so that the listener knows that the opinion expressed in the advertisement is not that of the Broadcasting Authority. The argument is similarly inapplicable to the Second Authority, because the regional radio stations are not owned by the State (even though they are subject to the oversight of the Second Authority). The petitioner also rejects the argument concerning the "captive audience" that is forcibly exposed to the advertisements, saying that in any case, political opinions are conveyed to the public via all the printed and electronic media, and this is the desirable situation which should be encouraged. Finally, the petitioner claims that the Rules do not satisfy the fourth condition of the limitation clause, i.e. the condition of proportionality. In this context it was argued that the Rules are sweeping and absolute to the extent that they disqualify any advertisement on a publicly controversial subject, without determining criteria for such disqualification and without specifying exceptions. The petitioner claims that "in order to protect the interests specified in the respondents' summations, it would be more correct to establish a framework for and restrictions on the broadcast of political advertisements, and not to ban them absolutely". There are three ancillary tests for proportionality, and the Rules fail the first and the

second of them. Regarding the first test (the test of suitability), it was argued that the means employed by the Rules fail to achieve their purpose, because the political opinions that are barred from broadcast are presented and disseminated to the public via all the other media. Regarding the second test (the test of the lesser harm) it was claimed that the means selected by the Rules do not represent the less harmful solution, since it would have been possible to formulate more specific rules that included criteria for disqualification and exceptions to disqualification, instead of the absolute and sweeping ban on all political advertisements.

The petitioner argues that invalidation of the Rules will enable a person holding a political opinion whose view did not receive exposure (or sufficient exposure) in regular broadcasts to express his views at his own expense in a recognized framework of political advertisements. In its absence, his access to the public is blocked and he is condemned to silence.

As for the concerns expressed by the respondents in their response (as elucidated below), the petitioner's response is that political advertisements in the overall framework of advertising broadcasts can occupy only a "minute percentage" of the air time of the broadcasting channels relative to total broadcasting time, so that the concerns expressed by the respondents are not as serious as claimed.

Therefore, according to the petitioner, the Rules violate freedom of speech and do not satisfy the conditions of the limitation clause. The obvious remedy is the invalidation of the Rules due to their unconstitutionality.

Arguments of the Broadcasting Authority

12. The Broadcasting Authority concedes that the "petitioner has a right of access to the media, as part of its right to freedom of speech" but argues that the right to freedom of speech does not impose an obligation on the Broadcasting Authority to "broadcast the political messages of the petitioners at the time, the place, and in the manner that the petitioner wishes." This is because the specific broadcasting slot for advertising (hereinafter: "framework of advertisements") was not intended to serve as a platform for voicing controversial political opinions. To constitute a framework for advertisements is not one of the functions of the Broadcasting Authority. It is strictly an ancillary power, intended to enable the Broadcasting Authority to enlist additional funding for its programs. "Its purpose is to improve the economic

balance" of the Broadcasting Authority. Hence, the Broadcasting Authority is authorized to broadcast advertisements, but is not obligated to do so. This is what distinguishes advertisements from the regular programs of the Broadcasting Authority (hereinafter: "the programs"). The Broadcasting Authority is both authorized and obligated to broadcast programs (see s. 3 of the Broadcasting Authority Law, which prescribes the functions of the Authority). As such, the programs themselves are the basic framework for realizing the petitioner's freedom of speech. The petitioner's material is actually political speech in the "guise" of commercial advertising, but the framework of advertisements "is totally inappropriate for political speech." Consequently, the petitioner's advertisements cannot be approved within that framework. As stated in the response: "The petitioner is entitled to have its message heard, but the respondents have the discretion to determine the mode of realization of this right, within the framework allocated for political speech in the programs of the Broadcasting Authority … [and not] in the framework of broadcasts intended primarily for commercial advertising. … The major avenue for the broadcast of expressions is in the programs of the Broadcasting Authority ... which is the marketplace of ideas and the locus of expression. The ancillary framework of commercial advertising has its own objectives."

Furthermore, the Broadcasting Authority argues that the programs are also the appropriate framework for exercising freedom of speech, because programs must comply with the obligation of achieving balance in the presentation of different viewpoints (see s. 4 of the Broadcasting Authority Law). Permitting the broadcast of advertisements of a political character within the (unique) framework of advertisements alongside the (regular) programs undermines that obligation. It may well transform the framework of advertisements into an alternative platform aimed entirely at circumventing the regular framework of programs, which is subject to the obligation of ensuring balance. This could confer an unfair advantage upon those with the economic power to advertise over those who are unable to do so: "Commercial advertising … allows the wealthy and the powerful to gain exclusive control of the message: not only the contents of the message but also its mode of presentation, the frequency of transmission, the broadcasting hours and the type of program." As such, the point of departure for the statutory arrangement as a whole is that "this is not an efficient marketplace of ideas in which all of the opinions vie for the viewer's heart … . The variety of

viewpoints, the complexity of the issues, the time constraint, and the importance of the medium require the establishment of rules that will assist in the creation of a marketplace of opinions that is efficient, reliable and fair." An efficient marketplace of ideas can be attained by way of "an obligation to ensure reliable and balanced broadcasting that reflects the entirety of opinions on a given issue." In this context it was further argued that the recognized exception to the principle of balance is the law governing the pre-election period, which permits the broadcast of political advertisements directly to the public. However, these party political broadcasts, too, are subject to regulation and oversight by the Chairman of the Central Elections Committee (see Elections (Modes of Propaganda) Law, 5719-1959).

In its summations, the Broadcasting Authority did not adopt a clear position on the question of whether freedom of speech is a constitutional right protected by Basic Law: Human Dignity and Liberty. Nevertheless, its position is that the Rules meet the conditions of the limitation clause. Regarding the *first condition,* it was argued that s. 25A (entitled "Radio Advertisements and Announcements") explicitly authorizes the Management Committee of the Broadcasting Authority to prescribe rules, *inter alia* on the subject of "prohibitions and restrictions on the broadcast of advertisements and announcements," and by virtue of that explicit authority the Rules were made. In this context it was argued that the contention that the Rules must be established in primary legislation should be rejected. An explicit general authorization that leaves the details of the particular restrictions to the discretion of the Broadcasting Authority as an administrative authority is sufficient. Regarding the *third condition* it was argued that the Rules were designed to protect the value of equality of opportunity to present political opinions and to prevent a situation in which a person with financial means could achieve more extensive dissemination of his political views than one who lacked those means. By the same token, they were designed to protect the value of objectivity of the state broadcasting media by subjecting programs to the obligation of ensuring balance. In this sense, the Rules separate the framework of advertisements from that of programs. This separation will lead to an efficient and equality-based marketplace of political views. As for the *fourth condition*, it was asserted that the first ancillary condition (the test of suitability) was fulfilled: the Rules channel the political speech into an appropriate framework, i.e. that of regular programs. Likewise, the

requirement of the second ancillary test (the test of the lesser harm) is met. The imposition of a uniform blanket restriction is the most effective way of achieving the purpose, and there is no way of creating any other effective regulation mechanism. A different mechanism which includes qualifications and exceptions is liable to drag the Broadcasting Authority into the political arena. In this context it was mentioned that other frameworks exist for such expression, whether in the Broadcasting Authority itself (in the programs) or external to it (in the other media, such as the print media etc.). Similarly, the third ancillary condition is also satisfied (the proportionality test, in the "narrow sense"). The benefit from the restriction exceeds the harm caused by the violation of freedom of speech, for our concern is not with preventing expression but rather with channeling it into the framework of regular broadcasts.

Arguments of the Second Authority

13. Naturally, the arguments of the Second Authority resemble those of the Broadcasting Authority. I will dwell briefly on these arguments to the extent that they differ from or add to the line of argument of the Broadcasting Authority.

The Second Authority claims that its Rules are justified and that they satisfy the criterion of constitutionality. In its summations the Second Authority addressed two main concerns in the event of the Rules being invalidated. The *first* is that invalidation of the Rules would undermine the obligation of ensuring balance in broadcasts, because it would be the financially powerful elements who would purchase advertising time and who could most effectively influence the social and political discourse, unburdened by the constraint of balance prescribed by the Law (which applies only to programs and not to advertisements). It is the obligation to ensure balance in programs that provides the response to the freedom of political expression. The *second* concern is that invalidation of the Rules will lead to bias in news coverage, since franchisees are liable to avoid publishing news items that may dissuade certain elements from advertising with them, and elements of this nature are even liable to exert pressure upon them in that context. In other words, an economic incentive may be created for franchisees to alter the contents of the programs themselves so as not to jeopardize potential income from advertisements on behalf of various political elements. Another concern,

shared by the Broadcasting Authority, was that invalidation of the existing Rules and a requirement of detailed regulation of the subject are liable to force the regulator to engage in political censorship. Hence the existing position, under which there is a general and uniform prohibition and which distances the regulator from the area of political censorship, is preferable.

According to the Second Authority, "any restriction on broadcasting violates freedom of speech to some extent." However, it believes that the principle of freedom of speech in advertising is weaker than in other forms of expression. The reason is that "expression" in the framework of advertisements, which is by nature a commercial framework, is accorded the (weak) protection of commercial expression and not the (strong) protection of political expression.

It was further argued that the electronic media in Israel constitute a limited resource. The advertisements that are broadcast over that media are an even more limited resource, in view of the regulatory restrictions on advertising time (see s. 85 of the Second Authority Law which deals with the scope of advertising broadcasts). This necessitates regulation in accordance with the principles of fairness and balance. In the framework of advertisements, however, it is impossible, on a practical level, to fulfill the obligation of ensuring balance, which is inherently linked to political expression.

The Second Authority further argued that its Rules satisfy the requirements of the limitation clause. Regarding the explicit statutory authorization, the argument is that ss. 24(6) and 88(2) of the Second Authority Law authorizes the Second Authority to impose restrictions on advertisements. The Second Authority contends that s. 88(2) of the Law (the section is entitled "Rules for Broadcasting Advertisements") authorizes the Council of the Second Authority to establish rules to regulate various restrictions pertaining to advertisements, *inter alia* regarding entire subjects in relation to which advertising is prohibited. By virtue of this explicit authorization, the Council of the Second Authority enacted the Second Authority Rules that impose restrictions on the broadcast of advertisements both on radio and on television. Regarding their purpose, it was asserted that the Rules were intended to protect the obligation to ensure balance and the objectivity of the broadcasts. They were intended to prevent a situation in which "money talks". The principle of balance is of particular importance in the context of a limited

public resource such as radio and television broadcasts which have a limited number of channels. As for proportionality, it was argued that the Second Authority Rules do not restrict freedom of expression in relation to a controversial matter *per se*, but rather, they restrict its transmission via the "platform" of commercial advertisements. The petitioner has no vested right to relay information specifically by way of advertisements; it may relay the information to the public in the framework of regular programs (subject to the obligation of balance) or in the framework of advertising in other media (such as the print media).

Deliberation and Decision

The test of constitutionality is also applicable to administrative guidelines

14. The Rules of the Broadcasting Authority and of the Second Authority (hereinafter: "the Rules") are in fact administrative guidelines (HCJ 15/96 *Thermokir Horshim v. Second Authority for Television and Radio* [7], at p. 403; cf: Y. Dotan, *Administrative Guidelines* (1996), at p. 45)). The Chairman of the Broadcasting Authority is signed on the Broadcasting Authority Rules and his signature is accompanied by the confirming signature of the Minister of Communications. The Rules of the Second Authority are signed by the Chairman of the Second Authority. These Rules too, which guide the exercise of administrative authority, are subject to judicial review of their constitutionality (see Zamir, *Administrative Authority,* at pp. 115-116; see also Aharon Barak, *The Judge in a Democracy* (2004) at p. 370). The criteria for judicial review are those set in the limitation clause:

> 'The criteria prescribed in the limitation clauses of s. 8 of Basic Law: Human Dignity and Liberty and in s. 4 of Basic Law: Freedom of Occupation also apply to a violation of basic rights by an administrative authority. In other words, an authority's violation of rights must be by law, or in accordance with the law by virtue of explicit authorization therein; it must be consistent with the values of the state, for a proper purpose and to an extent that does not exceed that which is required' (HCJ 4644/00 *Jafora Tabori Ltd. v. Second Authority for Television* [8], at 182A; and see also HCJ 7200/02 *D.B.C. Satellite Services (1998) Ltd. v. Committee for Cable Transmissions and Satellite Transmissions* [9], para. 26).

Indeed, "it goes without saying that that which is forbidden to the legislator under the limitation clause is likewise forbidden, *a fortiori*, to an administrative authority" (Zamir, *Administrative Authority* at p.115) and that "the administrative authorities must exercise those powers that allow them to violate constitutional basic rights - including powers rooted in laws that preceded the Basic Law – in accordance with the criteria established in the limitation clause" (HCJ 951/06 *Stein v. Commissioner of the Israel Police* [10]). There are two reasons for this rule: first, basic rights in Israel should be protected on the basis of like criteria, irrespective of whether the legal norm whose validity is being examined is a law or some other legal norm. Secondly, the arrangement set out in the limitation clause — which distinguishes, *inter alia*, between the purpose of the violation of the right and the extent of the violation — is fundamentally suited to all legal norms, and not only statutes" (HCJ 4541/94 *Miller v. Minister of Defense* [11], at p. 138, {232}; see also HCJ 8070/98 *Association for Civil Rights in Israel v. Ministry of the Interior* [12]).

The stages of the constitutional test

15. As we know, constitutionality is examined in three stages (HCJ 1661/05 *Gaza Coast Regional Council v. Knesset* [13], at 544-549): the *first* stage examines whether the rules violate a human right enshrined and protected in the Basic Law. If the answer is no, the constitutional examination ends. If the answer is yes, we proceed to the next stage. The *second* stage examines the question of whether the violation of the constitutional right is lawful. At this stage, the question is whether the rules that violate human rights satisfy the requirements of the limitation clause. If the answer is yes, the constitutional examination ends. On the other hand, if the answer is no, we proceed to the third stage. This *third* stage examines the consequences of the unconstitutionality. Let us therefore proceed to our constitutional examination.

16. *The first stage of the constitutional examination: the violation of a constitutional right*

The first stage of the constitutional examination examines whether the rule violates a human right protected by a Basic Law.

In our case, two questions present themselves at this first stage (see HCJ 6427/02 *Movement for Quality of Government in Israel v. Knesset* [14]): the

first is whether the Broadcasting Authority Rules and the Second Authority Rules violate freedom of speech. The *second* is whether the violation of freedom of speech is a violation of freedom of speech only as recognized in our common law, or whether it also constitutes a violation of human dignity as anchored in Basic Law: Human Dignity and Liberty. We will begin with the first question.

Do the Rules violate freedom of speech?

17. Judicial review will be required only if it is found that the rule substantially violates protected rights. A trivial violation [*de minimis*] is not sufficient:

> 'In principle, it seems to me that any violation or restriction of a basic right should be considered, and that the constitutional examination should move on to the second stage (in which the question of whether the violation or restriction was legal is examined). It should, of course, be assumed that if the violation or restriction is not substantive, it will be easy to show that the conditions of the "limitation clause" are satisfied' (Aharon Barak, *Interpretation in Law,* v*ol. 3: Constitutional Interpretation*, 469 (1994); see also CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [15], at p. 431 {236-237}).'

Both parties agreed that the Rules of the Broadcasting Authority and of the Second Authority violate freedom of speech. The petitioner sought to express itself via an advertisement to be broadcast on national and local radio. The respondents prohibited the broadcast of the advertisement on national and local radio. Expression – in the manner sought by the petitioner – was prevented, constituting a violation of freedom of speech. The violation in this case is not a trivial matter. Indeed, freedom of speech is "a right in the form of a 'liberty'. It includes the right to receive information and to respond to it, to listen and to be heard, to see and to listen… . The scope of freedom of speech extends to all the forms and modes of expression and to all of the contents of expression" (HCJ 2194/06 *Shinui - the Center Party v. Chairman of the Central Elections Committee* [16]). "'Expression' in this context is any activity seeking to convey a message or meaning. It extends to a political, literary or commercial expression" (HCJ 4804/94 *Station Film Co. Ltd. v.*

Films and Plays Review Council [17], at p. 674 {34-35}. This form of expression was prevented in the case at hand.

The answer to the first question is therefore in the affirmative.

18. Here it should be mentioned that the framework of advertising does not constitute a goal *per se*. It was created as a financial aid in the framework of distributing the funding sources amongst the media market (HCJ 6962 *Media-Most Co. Ltd v. Council for Cable and Satellite Broadcasts* [18], at p. 25). On the other hand, since "freedom of speech does not distinguish between the different means of expression" (HCJ 806/88 *City Studios Inc. v. Films and Plays Censorship Board* [19], at p. 36, {248} then in addition to the funding aim, the framework of advertisements also provides a means of expression for payment. In our case, the Broadcasting Authority Rules do not, *prima facie*, designate the framework of advertisements exclusively as a means of imparting a commercial message ("advertisement, sponsorship broadcast or announcement that are broadcast on radio as against payment to the Authority"). By contrast, the Second Authority Law apparently does designate the framework of advertisements for the imparting of an exclusively commercial message ("the broadcast of a commercial advertisement as defined in Chapter 6 of the Law", which prescribes, in s. 81, that "the franchisee is permitted to include in the framework of its broadcasts, advertisements for consideration at a rate that it determines"). However, the exclusive dedication of the framework of advertisements to the imparting of a purely commercial message is not sufficient in my view to negate the violation of freedom of speech in that framework.

For it to be possible to say that there has been absolutely no violation of the right to expression in the present matter, it must be said that this right does not exist in the case of a funding-related means of imparting a commercial message. However, freedom of speech does not distinguish between the different modes of expression, and "a person does not need a law to grant him freedom of speech. He has that freedom without a law" (Zamir, *Administrative Authority,* at pp. 50-51). It is the administrative authority that requires statutory authorization in order to restrict a human right and violate it (*per* Justice A. Procaccia in HCJ 2245/06 *Dovrin v. Prisons Authority* [20], para. 16). Thus, explicit authorization by law is required for any limitation or violation of freedom of speech, even in the framework of advertisements,

which are indeed a means of funding. Therefore, the *prima facie* exclusive dedication that I referred to above does not suffice as grounds for claiming that freedom of speech was not violated, and at all events there must be an explicit limiting rule, which will be examined in accordance with the criteria of the limitation clause as a condition for its validity and its effect.

19. My conclusion is that the petitioner's freedom of speech in the framework of advertisements has been violated. Is this a violation of political freedom of speech or rather, commercial freedom of speech? This question is important both at the *first stage* of the constitutional examination, which has just taken place, involving a demarcation of the constitutional parameters of the right itself, for "political freedom of speech is not the same as commercial freedom of speech" (*Station Film Co. Ltd. v. Films and Plays Review Council* [17]); *Jafora Tabori Ltd. v. Second Authority for Television* [8], at p. 181), and at the *second stage* of the examination which will be undertaken below, involving a demarcation of the extent of protection given to a constitutional right (HCJ 4593/05 *United Mizrahi Bank Ltd. v. Prime Minister* [21], para. 13; HCJ 606/93 *Kiddum Yazamut U-Molut (1981) v. Broadcasting Authority* [22], at p. 13; HCJ 5432/03 *Shin – Israeli Movement for Equal Representation for Women v. Council for Cable and Satellite Broadcast* [23], *per* Justice Dorner, at para. 13).

How then should we classify the "expression" that was violated – is it political or commercial?

20. My view is that the *content* of the expression that was prevented in this case is political, whereas the *framework* is commercial. The dominant components for classifying the expression are the contents of the expression (political or commercial), the character of whoever or whatever is making the expression (a political or commercial body), and the aim of the expression (political or commercial). On the other hand, I would attach lesser importance to the technical means or external framework via which the expression is conveyed. What must be examined is the dominant effect of the broadcast from the perspective of the viewer (regarding propaganda broadcasts, cf. *Zwilli v. Chairman of the Central Elections Committee* [6], at pp. 704-705; regarding the distinction between commercial and other forms of expression in which exceptional use was made of the regular format of commercial advertising, see Karniel, *The Laws of Commercial Advertising,* at pp. 321-

323). In my opinion, the conclusion that arises from weighing up all these components in the present case is that the petitioner sought to broadcast a political expression, not a commercial one. The Second Authority too, agreed that the petitioner requested to broadcast a "political expression in a commercial context."

21. Basic Law: Human Dignity and Liberty does not contain a separate and independent right entitled "freedom of political speech", but it does contain a separate and independent right entitled "human dignity". The claim is that the freedom of speech violated by the Rules – i.e. freedom of political expression – is part and parcel of human dignity. Is this claim justified? This is the second question confronting us, which we will now examine.

Does a violation of freedom of political expression constitute a violation of human dignity?

22. Freedom of speech is included among the basic human freedoms in Israel, as a foundational right and a prerequisite for the existence and faithful observation of most of the other basic rights (CA 723/74 *Ha'aretz Daily Newspaper Ltd. et al. v. Israel Electric Corporation Ltd. et al.* [24]; Zeev Segal, "Freedom of Speech from the Perspective of Meir Shamgar", *Shamgar Volume,* Pt.1, 111, 114 (2003); Eli Salzberger and Fania Oz-Salzberger, *"*The Tradition of Freedom of Speech in Israel" in *Be Quiet! Someone is Speaking: The Legal Culture of Freedom of Speech in Israel* (ed. Michael Birnhack, 2006), 27). Indeed, "recognition of the status of freedom of speech as a basic right existed in Israel long before the enactment of Basic Law: Human Dignity and Liberty" (PPA 4463/94 *Golan v. Prisons Service Authority* [25], at p. 157-158).

There are three reasons underlying freedom of speech: the first reason is based on the desire to expose the truth. The second is based on the need to enable human self-realization. The third reasons bases freedom of speech on the democratic regime (*Shin – Israeli Movement for Equal Representation for Women v. Council for Cable and Satellite Broadcast* [23]; Aharon Barak, "Freedom of Speech and its Limitations", *HaPraklit* 40 (1991), at pp. 5, 6 – 10; Ilana Dayan-Urbach, "The Democratic Model of Freedom of Speech", *Iyunei Mishpat* 20 (1996), at p. 377; Guy Pesach, "The Theoretical Basis of the Principle of Freedom of Speech and the Legal Standing of the Press", *Mishpatim* 31 (2000) 895, at pp. 897-911). Against the background of these

reasons it is possible to characterize different forms of freedom of speech, some of which are located at the very heart of the right, and others in its outer coating. A violation of the very heart of the right is not equivalent to a violation at its periphery (HCJ 5016/96 *Horev v. Minister of Transport* [26], at p. 49{202}).

23. Indeed, in our case law it has been ruled that freedom of political expression lies at the heart of the right to freedom of speech (*Shinui - the Center Party v. Chairman of the Central Elections Committee* [16], *per* Justice Rivlin, at para. 3). "Freedom of political expression warrants maximum protection, both because of its extreme importance from a social perspective as a basic foundation of the democratic regime, and because it is more exposed than any other form of expression to incursion on the part of the government" (HCJ 6396/93 *Zakin v. Mayor of Beer Sheva* [27], at p. 303). Indeed, freedom of speech "takes on special meaning in the context of political expression in general and in the context of political expression in the framework of the struggle for rights of the individual in particular …. One of the main reasons justifying freedom of speech is the upholding of the democratic regime. Without freedom of speech the democratic regime loses its soul. In the absence of democracy, freedom of speech is lifeless … freedom of speech guarantees the exchange of opinions between members of society, thus allowing opinions to be formed on issues that are on the national agenda (see *Zwilli v. Chairman of the Central Elections Committee* [6]; see also *per* Justice E. Hayut in HCJ 11225/03 *Bishara v. Attorney General* [27], para. 15). "Of all the various forms of protection, the protection given to political expression – which is an essential condition for the maintenance of a democratic process – is particularly broad (HCJ 6226/01 *Indor v. Mayor of Jerusalem* [28]).

This brings us to question of whether a violation of freedom of political expression is a violation of human dignity.

24. Resolution of this question involves interpretation of the nature of the right to human dignity and its scope. In the *Shin* case, which was heard by an expanded panel of eleven judges, the question was left pending ("Needless to say, the question of whether freedom of speech is included in the rights specified in Basic Law: Human Dignity and Liberty, regarding which differing views have been expressed by the justices of this Court, does not require a decision or consideration in this proceeding" (*Shin – Israeli Movement for Equal*

Representation for Women v. Council for Cable and Satellite Broadcast [23], at p. 83; but see *per* Justice Rivlin who ruled in that case that freedom of speech is a constitutional right, *ibid,* p. 96; President Barak concurred with his view, *id.*).

25. Several Justices of this Court have expressed their position on the matter explicitly, holding that freedom of speech is part of the constitutional right to human dignity (see the survey in Katzir, *Commercial Advertising*, at pp. 4-6). This is the position of President Barak (in CA 4534/02 *Schocken Chain Ltd. v. Herzkowitz* [29], at p. 564; and see his comments in CA 105/92 *Re'em Engineers Contractors Ltd. v. Upper Nazareth Municipality* [30], at p. 201; HCJ 2481/93 *Dayan v. Wilk* [31], at p. 468{341} and recently in HCJ 2557/05 *Mateh Harov v. Israel Police* [32], para. 12). This is also the position of Justice Rivlin (LCA 10520/03 *Ben-Gvir v. Dankner* [33] para. 10), of Justice Procaccia (*ibid,* para. 13) and of Justice Arbel (*ibid*, para. 3). It is similarly the position of Justice Mazza (*Golan v. Prisons Service Authority* [25], at p. 156 and of Justice Meltz (LCA 2687/92 *Geva v. Walt Disney Company* [34], at p. 264), and finally, although only hinted at, of Justice Cheshin (HCJ 6126/94 *Szenes v. Broadcasting Authority* [35], at pp. 865-867, but see his comments in *Golan v. Prisons Service Authority* [25], at p. 187).

On the other hand, some Justices have held that freedom of speech is not necessarily part of the constitutional right to human dignity. This was the position of Justice Dorner (in *Golan v. Prisons Service Authority* [25], at p. 191 and of Justice Zamir (in HCJ 453/94 *Israel Women's Network v. Minister of Transport* [36]; and see Zamir, *Administrative Authority,* at p. 113).

The picture that emerges from the judgments I cited taken together is that freedom of political speech is included in the constitutional right to human dignity.

26. Recently, in *Movement for Quality Government in Israel v. Knesset* [14], it was held, regarding the right to equality, that human dignity includes only those rights which are materially and closely bound (whether at the core or on the periphery) to human dignity:

> 'The median model does not limit human dignity exclusively to humiliation and desecration, but neither does it extend it to the entirety of human rights. In the category of human dignity it includes all those aspects thereof that figure in different

> constitutions as specific human rights, but which are characterized by *what we regard* as *close and material connection to human dignity (whether to the core or at the periphery)…. I believe that the appropriate model for structuring the relationship between human dignity as a constitutional right, and equality is the median model….* The appropriate conception of human dignity which accords a central role to the autonomy of individual will, freedom of choice, a person's physical and spiritual integrity and the entirety of his humanity – justifies the inclusion within the parameters of human dignity of those aspects of equality that ensure this fitting conception of human dignity' (*per* President Barak, paras. 38 and 40).

This criterion, in my opinion, is also in keeping with the relationship between human dignity as a constitutional right, and freedom of political expression. My view is that the right under discussion – *freedom of political expression* – is, according to our juridical conception, closely and materially bound to human dignity, for –

> 'What is human dignity according to the approach of the Supreme Court? … Human dignity is based on the autonomy of individual will, freedom of choice and a person's freedom of action as a free agent. Human dignity rests on the recognition of the individual's physical and spiritual integrity, on his humanity and on his value as a human being, regardless of the extent of his utility to others (*ibid.* at para. 35).

This conception of human dignity invites the conclusion that freedom of political expression is part of the constitutional right to human dignity (see also Barak, "The Tradition of Freedom of Speech and its Problems", p. 231; Barak, *Interpretation in Law,* p. 427). Indeed, freedom of political expression is an essential component of human dignity. And as mentioned, it has already been held that freedom of political expression is "the "core" of the right to freedom of speech (*per* Justice Rivlin in *Shinui - the Center Party v. Chairman of the Central Elections Committee* [16], para.3). As for freedom of commercial expression – in my view this issue does not arise in the matter before us, and I will therefore leave it pending.

27. The conclusion is that a violation of freedom of speech by the Rules entails a violation of human dignity. The Rules violate those rights and values that are the foundation of human dignity as expressing recognition of the autonomy of individual will, freedom of choice and a person's freedom of action as a free agent (cf. Dan Birnhack, "Constitutional Genetics: The Methodology of the Supreme Court in Value-based Decisions", *Bar Ilan Law Studies*19 (2002), 591, 626). Thus a positive answer is also given to the second question that I posed.

We will now proceed to the *second stage* of the constitutional examination, at which we examine whether the violation of rights protected by Basic Law: Human Dignity and Liberty is lawful. The "geometric location" of this question is in the limitation clause of Basic Law: Human Dignity and Liberty.

The second stage of the constitutional examination: Is the violation of the constitutional right lawful?

28. At the second stage of the constitutional examination, the lawfulness of the violation of the constitutional right is considered. Indeed, a distinction exists between the scope of the right and its lawful realization; this distinction is the basis of a recurring statement in the case law and in the legal literature to the effect that human rights are not absolute, but rather, of a relative nature (see recently in the context of freedom of speech, *per* President Barak, *Shinui - the Center Party v. Chairman of the Central Elections Committee* [16], paras. 8 and 9).

29. The "balancing formula" which is the basis of the parties' claims is that which is found in the limitation clause of s. 8 of Basic Law: Human Dignity and Liberty:

> 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or according to a law as stated by virtue of explicit authorization therein.'

The limitation clause is the accepted criterion today for achieving a balance between conflicting values. This point was made by President Barak:

> 'In the petition before us, the values of state security and the maintenance of public order are in conflict with the rights of a

> person to freedom of movement, freedom of occupation, property and dignity as a human being. The military commander must achieve a balance between these conflicting interests. How should he strike this balance? What is the accepted criterion for achieving the balance? The accepted criterion today, in the wake of the enactment of the Basic Law on human rights, is found in the limitation clause (s. 8 of Basic Law: Human Dignity and Liberty)' (HCJ 6893/05 *Levy v. Government of Israel* [36a], at p. 887; and see *Horev v. Minister of Transport* [26], at p. 41 {192}).

President Beinisch also dwelt on this point in relation to a violation of freedom of speech:

> 'Freedom of speech and demonstration are derived from human dignity, and for that reason the application of s. 8 [of Basic Law: Human Dignity and Liberty] to the exercise of administrative authority is direct (HCJ 8988/06 *Meshi Zahav v. Jerusalem District Commander* [37], at para.10).

The limitation clause aspires to minimize the violation of a human right (*Shin – Israeli Movement for Equal Representation for Women v. Council for Cable and Satellite Broadcast* [23], at p. 87). It reflects on "the proper balance between conflicting values and rights which form the background to the actions of the public administration … and it constitutes the background of the appropriate conception of the process of weighing up conflicting values" (*per* Justice Procaccia, *Ben-Gvir v. Dankner* [33], para.13). The limitation clause gives expression "to the notion that human rights do not enjoy full protection. This emphasizes the conception that the individual exists as part of a society, and the needs of society and its national objectives may permit the violation of human rights …. There are, however, limits to the restriction of human rights. These are set in the limitation clause" (*Gaza Coast Regional Council v. Knesset* [13], at pp. 545-546). The limitation clause is the constitutional balancing formula applicable to the current case and evidently, the parties were not in dispute on this (regarding the limitation clause as a constitutional balancing formula, see: HCJ 953/01 *Solodkin v. Beth Shemesh Municipality* [38], at p. 612f; Birnhack, "Constitutional Engineering", pp. 623, 627-629; Gideon Sapir, "Old versus New – Vertical Balancing and Proportionality", *Legal Studies* 22 at pp. 471, 476).

The limitation clause contains four conditions, all of which must be met. We will examine the conditions in relation to our case, one by one.

Limitation clause - first condition: by a law or according to a law by virtue of explicit authorization therein

30. The first condition for the constitutionality of a rule that violates a human right protected by Basic Law: Human Dignity and Liberty is that the violation be "… *by a law ... or according to a law by virtue of explicit authorization therein."* For the readers' convenience, we again quote the authorizing provisions as prescribed in the primary legislation.

The authorizing provision for the Broadcasting Authority is s. 25A(b)(2) of the Broadcasting Authority Law:

> '25A Advertisements and Announcements on Radio
>
> ….
>
> (b) The Management Committee shall determine, in consultation with the Director General, rules concerning -
>
> (2) *Prohibitions and restrictions* on advertisements and announcements.'

The authorizing provision for the Second Authority is s. 88(2) of the Second Authority Law:

> '88 Rules for Advertisements
>
> The Council shall make rules concerning the broadcast of advertisements, *inter alia*, on the following matters:
>
> (2) *Prohibited* advertising subject-matter for broadcast as advertisements, in general, under specific circumstances, or by reason of being offensive to good taste or public sensitivities;'

Are the aforementioned rules made "by virtue of explicit authorization" in primary legislation? My answer is affirmative. Although the legislative provisions pertaining to the Second Authority differ from those relating to the Broadcasting Authority, in both cases authorization appears in primary legislation.

31. Regarding the Second Authority Law: this Law authorizes the Second Authority Council to determine prohibited "advertising subject-matter" for broadcast as advertisements. This phrase was construed as

authorizing the Second Authority Council to impose prohibitions on the contents of advertisements: "It is clear that the authority to disqualify 'advertising subject-matter' encompasses both the style and the contents of the advertisements" (HCJ 5118/95 *Maio Simon Advertising Marketing and Public Relations Ltd. v. Second Authority for Television and Radio* [39], at p. 755). Indeed –

> '[T]he Council's authority to impose prohibitions applies not only to the advertising subject-matter, but also to *the contents of the advertisements*, their format and the manner of their presentation. Furthermore, the choice facing the Council, in exercising its authority, is not necessarily between absolutely permitting and absolutely prohibiting advertisements on particular subjects, but also between permitting them in general and prohibiting them in particular circumstances. This emerges explicitly from the language of s. 88(2) of the Law …. The interpretative presumption regarding … the authorizing law … is that it intended to realize and uphold the basic rights' (HCJ 4520/95 *Tempo Beer Industries Ltd. v. Second Authority* [40]; see also *per* President Barak in *Neto M.A Food Trade Ltd. v. Second Authority for Television and Radio* [4], at p. 526A).

Here it should be mentioned that the Rules of the Second Authority, as per their previous formulation relating to both television and radio together (Second Authority for Television and Radio (Ethics in Television and Radio Advertising) Rules, 5754-1994, K.T. 640) (hereinafter: "previous Second Authority Rules") have been approved, on the level of statutory authorization, by this Court (see *Thermokir Horshim v. Second Authority for Television and Radio* [7], at p. 403). However the previous Second Authority Rules did not include provisions regarding "advertisements on controversial subjects"). These provisions appear in the current Rules.

32. Regarding the Broadcasting Authority Law: this Law authorizes the Broadcasting Authority to set "prohibitions and restrictions" on advertisements. The phrase "advertising subject-matter" does not appear

in the Broadcasting Authority Law, but in my view, the above-said authorization, too, empowers the Broadcasting Authority to set prohibitions on the contents of advertisements (see HCJ 7144/01 *Gush Shalom Society v. Broadcasting Authority* [41], at p. 891g). This authority is subject to interpretation; interpretation provides a more complete picture of the authority. This point was taken up by Prof. Zamir:

> 'A law without interpretation resembles a sketch of a picture. Interpretation adds colour, depth and soul to the law. *A statutory provision that confers authority upon an administrative body without being accompanied by an interpretation of the provision does not provide a full picture of the authority*.... The law and interpretation are not the same thing. They are two sources of law, a principal source and a complementary source, but they are linked by a close bond of partnership, as though they were spouses who constitute a family. *When complementing a law that confers authority, interpretation changes that authority. It may broaden or narrow the scope of the authority that emerges from a plain reading of the law.* It may add tools of implementation to the authority, or restrict it to certain conditions, or channel it for certain purposes. In short, the authority after interpretation is different from the authority before interpretation' (Zamir, *Administrative Authority*, at pp. 142-143).

On the interpretative level, my opinion is that the language of the authorization in the Broadcasting Authority Law is very similar to the wording of the authorization for the Second Authority, and requires that the interpretation of both be uniform. Admittedly, the arrangement specified in the Second Authority Law is more detailed than that of the Broadcasting Authority Law, but I accept the State's position that the difference in wording does not, *per se*, constitute cause for establishing separate arrangements for the Second Authority and the Broadcasting Authority. The fine linguistic difference between the respective wordings relating to "advertising subject-matter" is not of sufficient

interpretative importance to preclude a uniform interpretation, in view of the purpose of the authorization, which we will discuss presently. The purpose of the arrangements is identical, and as such the legal arrangements require similar interpretation. It is not very logical to permit the broadcast of a political advertisement on one radio channel and to prohibit the same broadcast on a second channel (cf. HCJ 213/03 *Herut National Movement v. Chairman of Central Elections Committee for the Twelfth Knesset* [42], at pp. 763-764, which compared oversight of propaganda broadcasts on radio and on television, despite the differences in the legal arrangements).

In any case, the authority to totally prohibit a particular activity plainly includes the authority to partially prohibit it: "Even had this not been explicitly stated, it would have emerged from the nature of the authority. Is it conceivable to decide that an authority that is authorized to prohibit a particular action is precluded from prohibiting part of it?" (*Tempo Beer Industries Ltd. v. Second Authority* [40]). For our purposes, the authority to prohibit the broadcast of an advertisement - in its entirety - includes the authority to prohibit the broadcast of a particular component thereof. This applies to the Second Authority Law as well as to the Broadcasting Authority Law.

33. The authorizing sections relating to both the Broadcasting Authority and the Second Authority explicitly authorize the secondary legislator to restrict the contents of advertisements. They confer authority to establish content-based "restrictions" and "prohibitions" on the broadcast of advertisements. This is an *explicit* authorization to deal with the said matter by way of restriction or prohibition, and not simply a general authorization to make regulations and rules (cf. HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Internal Security* [43]); this constitutes explicit authority to prohibit and to restrict (see Oren Gazal, "Violation of Basic Rights 'By a Law' or 'According to a Law'", *Law and Administration* 4, 381, at pp. 396 – 412); and cf. Barak, *The Judge in a Democracy*, 345; Barak, *Interpretation in Law,* 504).

34. Our interim conclusion is that both laws explicitly authorize the secondary legislator to make rules that prohibit or restrict

advertisements. According to the petitioner, however, the Rules regulate matters for which they have no mandate. They establish primary arrangements that properly belong in primary, not secondary legislation. On this issue, the petitioner invokes the principles laid down in settled case law:

> 'Violation of human rights, even when it promotes the values of the State, even if for a worthy purpose, and even when not exceeding the required degree, must be established in a law that prescribes primary arrangements, and the formal vesting of legislative competence in the executive branch is insufficient.' (HCJ 5936/97 *Lam v. Director General of the Ministry of Education, Culture and Sport* [44], at p. 684b).

The petitioner also refers to HCJ 3267/97 *Rubinstein v. Minister of Defence* [45], in which the Court stated:

> 'The basic rule of public law in Israel provides that where *governmental action is anchored in a regulation or an administrative directive*, then the general policies and basic criteria pursuant to which the regulation was enacted should be grounded in primary legislation by virtue of which the regulation was enacted or the administrative directive issued. In more "technical" language, under this basic rule, "primary arrangements" that determine general policy and the guiding principles must be fixed in Knesset legislation, whereas regulations or administrative directives should only determine "secondary arrangements" (p. 502) {164}.'

35. I cannot accept the petitioner's argument that the Rules should be abrogated (to the extent that they apply to the case before us) because they prescribe a primary arrangement that should be established by way of primary legislation.

The argument is appealing, but in my opinion, a reading of the statutory provisions taken together provides its refutation. Indeed, a perusal strictly of those sections of the two Laws concerning advertisements gives no indication of the intention of the primary legislator regarding that which is permitted and that which is forbidden. However, one cannot read the provisions concerning

advertisements in isolation from the other provisions of the Law, as if these broadcasts were a limb severed from the body of the Broadcasting Authority or of the Second Authority. We mentioned the provisions of s. 4 of the Broadcasting Authority Law which concerns "ensuring reliable programs" and which directs the Authority to ensure suitable expression of different approaches and points of view current among the public, and the broadcast of reliable information. Similarly, regarding the Second Authority, we mentioned s. 47 of the Second Authority Law, dealing with the principle of providing the opportunity to respond and which states that in relation to current events which are of public significance, the franchisee must ensure that proper expression is given to the variety of views prevailing amongst the public; s. 5(b)(7) of the Law under which the Authority must ensure the broadcast of "reliable, fair and balanced information"; s. 5(b)(6), under which the functions of the Authority include ensuring that suitable expression be given to the different views current amongst the public, and s. 46(c) that prohibits the franchisee or the managers from expressing their personal views. (Similar legislative sections also relate to other communications entities in the Israel media world: see s. 34F(7)(5) of the Communications (Bezeq and Broadcasts) Law, 5742-1982 and ss. 10-11 of the Communications (Bezeq and Broadcasts) (Broadcasting Licensee) Rules 5748-1987)). We will elaborate on these matters below, when we explain our position whereby the Rules were enacted for a proper purpose.

In my opinion, these principles, which deal with *programs* – the "hard kernel" of the functions of the Broadcasting Authority and the Second Authority – are the primary arrangement in the light of which the Rules should be made. The Rules for advertisements must be consistent with the primary arrangement in the primary legislation, and in my opinion – and to the extent that they relate to the matter before us - they are indeed consistent. We are not in a "legislative vacuum" and in my view, the claim regarding the absence of primary legislation in the authorizing law is not relevant here. The subject of advertisements is a subsidiary matter that follows the main matter.

36. Over and above what is required, I would point out that there can be no sharp and absolute distinction between primary and secondary arrangements. As noted by Vice-President (ret.) M. Cheshin:

> 'An absolute separation of this kind between the legislature, which enacts primary legislation, and the executive, which executes and implements, exists only in Utopia, since "the complexity of life in modern society leaves the legislature with no choice other than to transfer some of its powers to the executive branch, mostly by delegating to the government and those who act on its behalf the power to make regulations that contain primary arrangements (*praeter legem* regulations)" (HCJ 6971/98 *Paritzky v. Government of Israel* [46], at p. 790) … How do we distinguish between a primary arrangement and a secondary arrangement? *The answer to this question is not at all simple, and the line between primary arrangements and secondary arrangements can sometimes be somewhat vague*…. Of this it has been said that the substance of the arrangement, its social ramifications and the degree to which it violates individual liberty will all affect the determination as to whether we are dealing with a primary arrangement or a secondary arrangement' (HCJ 111/63 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israe* [47], paras. 30 and 39).

Let us reiterate: advertising is not the principal function of the respondents. Their main function relates to the *programs* themselves, and the advertisements are simply a means of funding the respondents' activities.

Furthermore, the media market is a dynamic one (cf. in another context of the communications market, and in relation to cable and satellite broadcasts, HCJ 10338/03 *Wesh Telecanal Ltd. v. Minister of Communications* [48]). To require explicit and detailed regulation on the subject of advertisements in primary legislation may well yield cumbersome primary legislation and may occasionally even lead to the regulatory process becoming paralyzed and frozen at a particular point in time, and cause harm to the interests of those active in the area and to the public interest at large due to the inability to regulate all of the activities of the regulator in primary legislation:

> 'Indeed, on the one hand, substantial detail in the criteria should not be required, for this would freeze the legal position, and make it impossible to take into consideration the dynamic reality of everyday life. On the other hand,

> criteria that are so general and abstract that they add nothing will not suffice. According to this line of argument a golden mean must be found which charges the legislature with prescribing criteria that provide sufficient guidance on the one hand, but which are not overly specific to the extent of precluding consideration of the changing realities of life' (Barak, *Constitutional Interpretation*, at p. 504).

In summary, the first condition of the limitation clause is satisfied. We now proceed to the second condition.

Limitation clause – second condition: befitting the values of the State of Israel.

37. The second requirement of the limitation clause is that the rule "befits the values of the State of Israel". It was not argued here that this condition was not satisfied.

38. The third condition ("proper purpose") and the fourth condition ("to an extent no greater than is required") are connected. The first establishes the proper purpose, and the second the appropriate means of achieving it. As long as the purpose is not known and as long as it has not been determined that the purpose is proper, we cannot know what the appropriate means for achieving that purpose are (see HCJ 7052/03 *Adalah Legal Center for Rights of Arab Minority* [49], para. 59 of President Barak's judgment). We will now address each of these two conditions, beginning with "proper purpose".

Limitation clause – third condition: proper purpose

39. The third condition in the limitation clause is that a rule that violates a human right anchored in a Basic Law be for a "proper purpose". It will be recalled that the "proper purpose does not neutralize the possible violation of the right but at the very most, and subject to the fulfilment of the required conditions, renders the violation legal and constitutional" (*per* Justice Rivlin in *Association for Civil Rights in Israel v. Minister for Internal Security* [43], para. 3; see also *per* President Barak in *Movement for Quality of Government* [14], para. 52; HCJ 4769/95 *Menahem v. Minister of Transport* [50]).

The Rules in the case before us represent a balance between freedom of speech and other values that the Broadcasting Authority and the Second Authority must protect (see *Gush Shalom Society v. Broadcasting Authority*

[41], at p. 892). What are the conflicting values in the case before us? What values are the Rules designed to realize? I referred above to the statutory provisions intended to ensure balanced and fair programs. The case law, too, speaks of the importance of fair and balanced programs in keeping with the "doctrine of fairness". Indeed, the Rules of the Broadcasting Authority and of the Second Authority are "a system of rules that reflects the 'doctrine of fairness'… which is appropriate for any communication medium worthy of its name" (HCJ 2888/97 *Novik v. Second Authority for Television* [51], at p. 204d).

The fairness doctrine in Israeli law

40. The fairness doctrine is the underlying justification for the Rules. The doctrine as understood in Israeli law was succinctly described by its "father", President Shamgar:

> 'The fairness doctrine applies to situations in which a number of opinions prevail regarding a public matter that is controversial. If the media, which is subject to this doctrine, provides a platform for those holding a particular view, it is not permitted to discriminate and prevent the expression of other mainstream views. In fact, the fairness doctrine is actually part of the laws of discrimination' (HCJ 6218/93 *Cohen v. Israel Bar Association* [52], at p. 541).

The fairness doctrine has its source in the status of the Broadcasting Authority as a public authority, which is also a platform that is subject to the principle of equality:

> 'The regulation of programming on the basis of equality is dictated by the principle of equality (see HCJ 1/81 *Shiran v. Broadcasting Authority* [53], at p. 386). To be precise: if the broadcast constitutes election propaganda, then at all events it is prohibited. *But even if the broadcast does not constitute election propaganda, care must be taken in its transmission to ensure compliance with the principle of equality*…. This interpretation-based conclusion is dictated, as stated, by the Elections (Modes of Propaganda) Law itself. It dovetails with the general obligation of the Broadcasting Authority to maintain equality in its programs. It finds expression in the 'fairness doctrine' to which

> this Court has related on a number of occasions…. As such the authority must ensure that its programs – even if they do not contain prohibited election propaganda – must adhere to the principle of equality' (*Zwilli v. Chairman of the Central Elections Committee* [6], at pp. 705-706).

The fairness doctrine was extended to include broadcasts of the Second Authority:

> 'Our case law contains much discussion of the importance of an independent Broadcasting Authority, which "is not merely a 'mouthpiece' but also a 'platform' that must guarantee the expression of viewpoints and opinions… [reference has been made to] the Authority's obligation to guarantee the public's freedom of speech …. These comments related to the Broadcasting Authority, but whatever holds for the application of freedom of speech to the activity of the Broadcasting Authority *also applies by definition to the activity of the operators of the Second Channel and to the Administration of the Second Authority* (*Novik v. Second Authority for Television* [51], at p. 203); and see also Karniel, *Laws of Commercial Communication*, at p. 70; Barak, "The Tradition of Freedom of Speech and its Problems", at pp. 239-240).

The purpose of the fairness doctrine is to ensure a free "marketplace of ideas" which properly reflects the range of views on the matter under discussion (HCJ 10182/03 *Education for Peace*, at p. 416c). Indeed, "the rationale of the fairness doctrine is obvious: presentation of the different aspects of a particular issue or event to the community and maintenance of equality or at least a minimal equality, between the different positions, are intended to improve the flow of information and to prevent distortions and entry barriers" (Reichman, at p. 223; and see also Daphne Barak-Erez, "The Individual's Access to the Media: Balance of Interests and the Freedom of Speech," 12 *Tel-Aviv U. Law Rev.* (1987) 183, 196-200 (hereinafter: Barak-Erez)). The fairness doctrine is intrinsically linked to the principle of equality (*Shiran v. Broadcasting Authority* [53], at p. 373d); *Zwilli v. Chairman of the Central Elections Committee* [6], at p. 708; HCJ 399/85 *Kahane v. Management Committee of Broadcasting Authority* [54], at p. 303).

Abandonment of the Fairness Doctrine in the U.S.A.

41. Admittedly, in 1987 the fairness doctrine was abandoned in the U.S.A (Karniel, *Laws of Commercial Media*, at pp. 67-69; Pesach, "The Theoretical Foundation", at p. 961; Amnon Reichman, '"The Voice of America in Hebrew? The Israeli Court's Reliance on the American Law of Freedom of Speech" in *Be Quiet! Someone Is Speaking: The Legal Culture of Freedom of Speech in Israel* (ed. Michael D. Birnhack) 185, at p. 223 (2006 (hereinafter: Reichman)). This development does not, however, alter my view. President Shamgar already ruled on this very matter:

> 'I am of course aware that in its native country, the standing of the fairness doctrine has diminished somewhat. I do not think that we are bound to endorse the negative view that has been accepted in the U.S.A. *The fairness of the doctrine exists in its own right, and no change of wind in the U.S.A. need disturb the bounty of its trees.* The reality in the U.S.A., with its hundreds of newspapers and thousands of broadcasting stations, and the broad range of choice offered thereby to every individual, differs from the local reality. The question of whether the fairness doctrine is necessary and reasonable must be determined in accordance with prevailing domestic conditions' (*Cohen v. Israel Bar Association* [52], at p. 542; see also *per* Justice Strasbourg-Cohen, *ibid,* at p. 570).

The fairness doctrine in Israel is therefore anchored in a statutory arrangement in primary legislation, both in the Broadcasting Authority Law and in the Second Authority Law (see also the *Structure of the Public Broadcast Report,* at pp. 40 – 41). It has taken root in Israeli case law, and it has in fact become Israeli-style common law.

42. It will be mentioned that the principle of equality in programming, whether or not we refer to it as the "fairness doctrine", operates with even greater force in the statutory arrangements of the European states. For example, Italy recognizes the doctrine of *par condicio* (equal conditions) whereby in order to conduct the democratic discourse, the media must be equally accessible to all political bodies and must treat them all equally and fairly in terms of the place and time of broadcasting. This Italian legislative arrangement prohibits the broadcast of a political advertisement, other than in specific and exceptional conditions. The *par condicio* doctrine was anchored

in Italian legislation in the year 2000 (in relation to all forms of regular programs that were not within the framework of pre-election propaganda; on political advertising, see s. 3 of *Legge* 22 *Fabbraio* 2000). France too has an explicit and total prohibition on the broadcast of political advertisements (see s. 14 of Law no. 86-07 of 30 September 1986, which relates to freedom of the press, and s. 29 of Regulation no. 88-66, of 20 January 1988, which supplements the law and establishes a prohibition on the broadcast of an advertisement that contains elements liable to offend to political, religious and philosophical opinions or beliefs). Below I will relate to the law in Europe, and particularly in England, which is closer to Israel in terms of the media market and its regulation.

The Fairness Doctrine and the Justification for Regulation of Broadcasts

43. The point of departure of the fairness doctrine is that in all that pertains to freedom of speech in the electronic media such as radio and television, the "marketplace of ideas" is not a free and efficient marketplace.

> 'The free marketplace may fail. A "constitutional marketplace failure" may eventuate in which a small circle of powerful people dictate and fashion the "marketplace of ideas"' (*Cohen v. Israel Bar Association* [52], at p. 540; HCJ 4915/00 *Reshet Communications and Production Company v. Government of Israel* [55], at p. 471).

This gives rise to the need to "impose limitations on a process that threatens to transform freedom of speech into the special privilege of a minority group, instead of it being a universal right" (Barak-Erez, at p. 186). Limitations are imposed by way of oversight and regulation of programs:

> 'In view of the great social importance attaching to the electronic communications media, and against the background of their unique features, the general view is that there is a need for regulation in this area. The aim of governmental oversight is to ensure that the maximum number of opinions and views find expression in the framework of the media and hence protect the "marketplace of ideas"' (*Satellite Services (1998) Ltd. v. Committee for Cable and Satellite Broadcasts* [9], paras. 12 -13).

An additional point of departure that justifies regulation in the communication marketplace derives from the conception that "the airwaves are public property and do not belong to any particular individual" (*Shiran v. Broadcasting Authority* [53], at p. 378), the conception that the electronic media constitute a "public platform" (*Cohen v. Israel Bar Association* [52], and see *Zwilli v. Chairman of the Central Elections Committee* [6], at p. 707; HCJ 5933/98 *Documentary Creators Forum v. President of the State* [56], at p. 515) as well as a "limited resource" (*Media Most Company Ltd v. Council for Cable and Satellite Broadcasts* [18], at p. 24), and from the conception that the public media – television and radio – "constitute a governmental authority from the perspective of Israeli law" (Barak, "The Tradition of Freedom of Speech and its Problems", p. 237).

It follows that whoever controls the public platform is also subject to obligations. President Barak discussed this point in relation to the affirmative aspect of the freedom of speech:

> 'The media is not just a mouthpiece. It is also a platform. It is likely to be perceived as governmental in nature, and as discharging a public function. This is the affirmative aspect of freedom of speech' (Barak, "The Tradition of Freedom of Speech and its Problems", at pp. 237-240, 247).

Regarding the Broadcasting Authority, Barak stated explicitly:

> 'Recognition of the governmental nature of the Broadcasting Authority made it possible … to recognize the obligations of the Broadcasting Authority as a governmental authority. These are the obligation of objectivity in programming, prevention of politicization of the authority, fairness in advertising, equality, reasonability, the absence of conflict of interest, and good faith in its decisions. *It is its obligation not to discriminate'* ("The Tradition of Freedom of Speech and its Problems", at p. 238).

For a comprehensive discussion of the possibility - which does not arise in our case - of imposing legal obligations in relation to private newspapers due to their social function, see: Pesach, "Analytical Basis", at pp. 933-962, 975-984, and Aharon Barak, "Private Printed Media", *Alei Mishpat*, at p. 293 (2002).

44. In this context I accept the State's position that the role of regulating freedom of speech for our purposes is to ensure equality in public discourse and to prevent unfair and unequal influence on the listening and viewing public.

Whereas equality is often realized by removing obstacles to expression in fori that are particularly accessible to the public and in which expression is effective (cf: AAA 3307/04 *Kol Acher BaGalil v. Misgav Local Council* [57]), sometimes - seemingly paradoxically - a specifically restrictive act is required to ensure substantive equality between political expressions. On the theoretical level, this approach is based on the democratic theory of the freedom of speech (Dayan-Urbach, at pp. 388-391, 395-404), on the importance of the principle of equality (Guy Pesach, "Resources of Expression – Characterization and Guidelines for their Allocation" in *Be Quiet! Someone is Speaking: The Legal Culture of Freedom of Speech in Israel,* 299 at pp. 333, 353-354 (ed. Michael Birnhack, 2006)) and on the role of the media as operating in the "public domain" (Pesach, "Analytical Basis", pp. 970-974):

> 'The paradigm of discourse … takes a positive view of a certain degree of governmental regulation in the area of communications and expression …. This kind of involvement is regarded as essential in order to ensure proper discourse and a fitting environment for expression in terms of the degree of decentralization, the variety and the multiplicity of opinions and information' (Pesach, "Resources of Expression").

In this context, where a concern arises that the possibility of purchasing advertising time for the purpose of disseminating political messages may lead to discrimination against those expressions that lack the financial support to enable them to appear in the framework of advertisements, the threat to the preservation of a balance between the different views in society is clear. In such a situation, the restriction of political expression in the framework of advertisements as prescribed by the Rules, insofar as it is proportionate under the circumstances, is a factor that actually strengthens rather than weakens public discourse. It limits the influence of wealth on processes of choice in society and allays the concern expressed by the State – a concern to which this Court has related in the past:

> 'Freedom of election means not only the physical freedom to cast a ballot in the booth, but also, and principally, *the complete freedom to experience the voting process as a free person, both psychologically and intellectually*. Therefore, any act that could reduce or eliminate, either directly or indirectly, the voter's freedom of thought and his ability express his preferred course of action and his philosophy genuinely, in accordance with his independent judgment – whether due to a benefit that interferes with this freedom or because the opinions of others have been forcibly imposed upon him - violates the basic principle of freedom and independence of choice. Hence, acts such as these are fundamentally improper. A different or more lenient approach to this subject, or acceptance of and succumbing to such acts, would necessarily undermine the democratic process and distort its character, because *the inevitable result would be that he who pays the piper would call the tune, in addition to holding the reins of power with all that it implies*; there can be no greater perversion of the principle of the democratic system in an enlightened society' (CrA 71/93 *Flatto-Sharon v. State of Israel* [58], at p. 766; see also the *Report on the Structure of Public Broadcasting*, at p. 57).

President Barak also commented on the importance of equality between participants in political discourse and on the persuasive power of capital:

> 'Placing a "price tag" on the realization of a right means violating the rights of those who are unable to pay the price' (*Mateh Harov v. Israel Police* [32], para. 16; this judgment was partially the subject of a Further Hearing, see HCJFH 552/07 *Magen David Adom BeYisrael v. Mateh Harov* [58a]).

On the importance of the principle of equality amongst the participants in political discourse and the concern about the undue influence of wealth see below, in para. 53, quotations from the judgment of the House of Lords in 2008, in R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport, [2008] 3 All ER 193.

The fairness doctrine in programs and its effect on the framework of advertisements

45. In the present case, the respondents' responses to the petition focused largely on their concern that abrogation of the Rules in such a way as to open the framework of political advertisements to political entities and messages, would lead to domination of the framework of advertisements by those powerful elements who are better able than others to express their positions in political advertisements, thus negating all substance of the fairness doctrine in *programs*.

In the similar, though not identical, context of election propaganda, President Barak noted in the past:

> 'The desire to ensure equality between the parties leads to extending the prohibition on election propaganda, due to fear of the governing parties "gaining control", one way or another, over the media during the election period. The same applies to the desire to prevent "undue influence" on the elector. Ensuring attainment of this desire - which the mandatory legislator had in mind - also led to the extension of the prohibition on election propaganda' (*Zwilli v. Chairman of the Central Elections Committee* [6], at p. 703; and cf. *Shammai v. Second Authority for Television and Radio* [5], para.17).

This concern also exists in relation to advertisements:

> 'Public bodies with large advertising budgets *may try to acquire immunity against oversight through the use or threat of use of their advertising budgets*…. Even where nothing explicit is said, a particularly large and inflated advertising budget confers upon the giant companies a certain degree of immunity, or at least protection against damaging publications…. The natural tendency of some of the advertisers and some of the commercial media [is that] *they have no interest in falling out with the advertisers who are the source of their livelihood*. This is a serious restriction of the flow of information and of the public's right to know…. It reveals the influence of the advertisers over the contents of the media…. It is the very heart of the discussion regarding commercial media, its character, and its regulation' (Karniel, *Laws of Commercial Media*, at pp. 133-136).

This concern is amplified in view of the fact that radio and television broadcasts are very powerful communication media:

> 'When the target audience of the expression is the general public, the most effective means of realizing freedom of speech is the communications media, particularly radio and television broadcasts, which reach almost every house in Israel' (*Gush Shalom Society v. Broadcasting Authority* [41], at p. 891c. And see, regarding commercial advertising, HCJ 7833/96 *Melnik v. Second Authority for Television and Radio* [59], at p. 595b; *Neto M.A Food Trade Ltd. v. Second Authority for Television and Radio* [4], at p. 526).

46. The respondents' aforementioned concern provides the background for these comments. As noted, the fairness doctrine aims to "neutralize" this concern in relation to *regular* programs. It was not intended to neutralize the concern in the framework of advertisements. As we held in HCJ 10182/03 *Education for Peace,* the fairness doctrine is inapplicable within the framework of advertisements:

> 'Commercial advertising that realizes the freedom of commercial expression is also subject to rules intended to ensure fairness in advertising from consumer and other perspectives…. However, as noted, *the "fairness doctrine"* underlying the restrictions and conditions specified in s. 4 of the Broadcasting Law and in s. 47(a) of the Second Authority Law *cannot be applied in relation to advertising*. As a result, *tremendous difficulties arise where advertisements are used for non-commercial purposes* (HCJ 10182/03 *Education for Peace,* at para. 7; cf. in the context of service broadcasts of the Broadcasting Authority, *Israeli Association for Prevention of Smoking*, at p. 166).

This invites the question of the relationship between the *programs*, which are subject to the fairness doctrine, and the framework of advertisements, in which the fairness doctrine cannot be applied. In my opinion it is inappropriate to thwart the legislative intention to apply the fairness doctrine in programming by "shattering the boundaries" by means of the framework of advertisements (cf. *Zwilli v. Chairman of the Central Elections Committee* [6], at p. 707).

47.By its very substance, the framework of advertisements was not intended to provide a platform for the airing of controversial ideological-political views, as decided in *Gush Shalom Society v. Broadcasting Authority* [41]:

> 'The Broadcasting Authority serves *inter alia* as a forum for the expression of varying positions and views, in the framework of the programs broadcast and the time allotted to them. The Authority is charged with ensuring reliable programming "which provides suitable expression of different approaches and points of view current among the public" (s. 4 of the Law). At the same time, *it is clear that by its very essence, the framework of advertisements is not intended as a platform for broadcasting controversial ideological-political views*. The broadcast of such opinions in the framework of paid commercials frustrates the preservation of a balance between different views in the framework of the Authority's programs' (*Gush Shalom Society v. Broadcasting Authority* [41], at p. 894).

Indeed, the broadcast of a political advertisement in the framework of advertisements is liable to upset the balance between the different views in the framework of the public programs of the Broadcasting Authority, and undermine the doctrine of fairness in programming. The Rules under discussion are intended to prevent this, and here too, that which is ancillary (the framework of advertisements) is determined by the principal (the programs).

The comparison between the public platform in the town square in which a person stands on a soapbox and voices his opinions, and between the political advertisement in the media is incomplete. A person who wishes to express his opinion in the town square needs only a megaphone, and perhaps a soapbox, both of which can be used repeatedly, at minimal cost. The town square is large, and there is usually enough room for all those wishing to have their say. Not so with the broadcast of political matters in the framework of advertisements via the channels of the electronic media. Here funding is required; in other words, this is not really an avenue which is open to all.

48. In summary: The main purpose of the Rules in our case is to ensure balanced and fair *programs.* The Rules were intended to prevent erosion of the

application of the fairness doctrine in programs and "the shattering of the framework" by the broadcast of political messages within the framework of advertisements, to which, as stated in *Gush Shalom Society v. Broadcasting Authority* [41], the fairness doctrine is not applicable. In my view this reason suffices to determine that the Rules satisfy the requirements of the third subtest of the limitation clause, i.e. the condition of a proper purpose.

The means adopted by the Rules to realize this goal is the total prohibition on the broadcast of political messages in the framework of advertisements. We will now proceed to examine the proportionality of the means adopted.

Limitation clause - fourth condition: proportionality

49. The fourth and final condition for the constitutionality of the violation of a human right protected by the Basic Laws is that the violation be "to a degree no greater than necessary." This condition comprises three subtests, which will be examined below.

In my view, the State's argument that the right to freedom of speech does not impose an obligation on the Broadcasting Authority "to broadcast the political messages of the petitioner at the time, place and manner desired by the petitioner" has merit. It has already been held that "freedom of speech is not an absolute value. The mere recognition of an expression as being protected by the freedom of speech does not require that it be granted a platform in *every framework* …. Not every individual is entitled to realize his freedom of speech through the Authority, with respect to every expression, in every framework, and at any time he wishes" (*Gush Shalom Society v. Broadcasting Authority* [41], at p. 891). Even the petitioner acknowledges that "certain rules must be set that will permit the publication of political or controversial matters, subject to certain restrictions … including the contents of the message, the manner of its presentation, the frequency of its broadcast, the hours of broadcast etc." The petitioner thus recognizes the importance of restricting rules in this area. Hence, the real dispute is only whether the existing, restricting rules are proportionate, or whether different, more lenient rules should be formulated.

A.Limitation clause – proportionality: the rational connection test

50. The first subtest for the proportionality of the violation is that of the rational connection. The means chosen must lead rationally to the realization

of the objective. The rational connection is examined by means of the "results test" (*per* President Barak, *Movement for Quality Government in Israel v. Knesset* [14], at para. 58), despite the fact that "[i]n most cases it is possible to base the rational connection on experience and common sense. On this basis, it is possible to show that the legislation is not arbitrary, but based on rational considerations" (*per* President Barak, *Adalah v. Minister of the Interior* [49], at para. 67).

In our case, a complete prohibition on political advertisements is an effective means for realizing the objective that we discussed above. The conclusion is therefore, that the Rules satisfy the first subtest.

B. Limitation clause - proportionality: the test of the least harmful measure

51. The second subtest of proportionality of the violation is the test of the least harmful measure. From among the measures available to the legislature, the one chosen must be that which is the least damaging to human rights. The chosen measure need not be the least harmful in an absolute sense, but it must be within the bounds of proportionality:

> 'The obligation to choose the least harmful measure does not amount to an obligation to choose the measure that is absolutely the least harmful …. The rational options must therefore be compared, and the option selected must be that which, in the concrete circumstances, is capable of achieving the proper purposes with a minimal violation of human rights' (*per* President Barak, *Adalah v. Minister of Interior* [49], para. 68).

In the case before us, the Rules that were laid down represent the selection of the least harmful measure. We were not shown any other, less harmful measure, capable of effectively achieving the same goal. Under the circumstances there is no appropriate alternative to a total prohibition. The petitioner proposed an alternative based on "individual examination" of each advertisement in accordance with specific restricting criteria to be laid down in primary or secondary legislation, instead of the total prohibition. For example, it was proposed to set criteria relating to the date of the advertisement and its duration, the number of times it would be broadcast per day, the position of the political advertisement in the cluster of advertisements etc. I have two reasons for rejecting the petitioner's proposal. *First,* this kind of "individual examination" already exists by virtue of the binding

interpretation of the Rules as determined in HCJ 10182/03 *Education for Peace*. *Secondly,* the question is not whether the rules proposed by the petitioner constitute less of a violation of freedom of speech than the blanket prohibition. Rather, the question is whether the same goal, and especially the fairness doctrine, can be achieved using a less harmful measure. After all, "[i]f the less harmful measure is less effective in achieving the proper purpose, it is not a measure that the legislature is obliged to adopt" (*per* President Barak, *Adalah v. Minister of the Interior* [49], para. 88). In our case – will the measures proposed by the petitioner realize the goal that we discussed above to the same extent as the full prohibition? In my opinion the answer is negative, and there is therefore no obligation to choose that measure (cf. *ibid,* para 89). In my opinion the Authority was entitled to choose the complete prohibition for which it in fact opted.

The conclusion is that the Rules also pass the second subtest.

52. Here it should be mentioned that recourse may also be had to comparative law on the subject of the proportionality of a total prohibition on the broadcast of political advertisements. In England a complete prohibition was established in ss. 319 and 321 of the Communications Act, which prohibits the broadcast of political advertisements outside the framework of propaganda broadcasts (see: Ian Walden and John Angel, *Telecommunication Law and Regulation* 444-447 (2nd Edition, 2005). Following the ruling of the European Court of Human Rights regarding similar prohibitions in other states (in Switzerland, *VgT Verein Gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR, 2001-VI; and in Ireland, *Murphy v. Ireland*, no. 44179/98, ECHR 2003-IX), the issue recently arose in the context of R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport, [2006] EWHC 3069 (Admin). Another question that arose was whether English law conformed to the European Convention on Human Rights and Fundamental Freedoms (hereinafter: "the European Convention"). In that case the British Communications Authority disqualified the broadcast of an advertisement of the Organization for the Protection of Animals that protested against the use of monkeys for entertainment purposes in zoos and circuses. The Organization for the Protection of Animals petitioned against this decision in the High Court of Justice - Administrative Court, asking the Court to declare that the total ban "does not comply" with the requirements of the European Convention as

incorporated in the Human Rights Act of 1998 in Britain. The Court examined whether the total ban satisfies the requirements of the limitation clause in art. 10(2) of the European Convention, which permits a violation of freedom of speech subject to the fulfilment of three cumulative conditions: the prohibition is established by statute; the prohibition is essential in a democratic society; the prohibition is for purposes of national security or public safety (there are also alternatives relating to additional interests that are not relevant to the present case). The dispute in the Court related to the question of whether the total ban was "essential in a democratic society". The Court ruled that this condition was satisfied and held that it would not declare that a total ban was in conflict with the European Convention. Some of the rationales that I discussed above are mentioned at length as the basis of the Court's decision.

Lord Justice Auld ruled that in this context a total ban is justified because a lower-level ban would thwart the general aim of protecting the democratic process:

> '79. […] To have attempted to limit the prohibition by a more restricted and more precise definition of such bodies or ends would have defeated the overriding objective of preventing the distortion of political debate, which takes many forms and embraces a vast range of matters of public importance and interest. Moreover, it would have engendered much uncertainty and scope for litigation, and would have invited evasion by political parties thus disadvantaged to "contract" out their political advertising to other bodies or individuals'.

Mr. Justice Ousely ruled that the purpose of the total ban was to support the democratic process in a wide sense:

> '108.The justification for the view embodied in the legislation is clearly made out. Does it however demonstrate a pressing social need, to a high level, for this legislation?
>
> 109. I take the view that it does. As I have said, at root the prohibition in s. 321 is aimed at supporting the democratic process in a wide sense, supporting a fair framework for political and public debate and avoiding an undesirable advantage being obtained by those able and willing to pay for advertisements in

> the most potent and pervasive media. The prohibition thus achieves a very important aim for a democracy'.

Mr. Justice Ouseley added that a ban at a lower level, limiting political advertisements according to specific criteria, would not achieve its purpose in view of the difficulty of accurately distinguishing between parties, and between types and categories of advertisements:

> "103. […] It is also difficult to see what principle underlies an outcome permitting access only to those who have enough to advertise, but not so much as to be over wealthy. I cannot see why under Article 10 those who have money should be denied access to the media accessed by their opponents - poorer but not so poor as to be unable to afford access.
>
> …
>
> 104. It is clear that part of the justification for the complete ban is the real difficulty of drawing any rational, practicable distinctions between parties, groups and types of advertisements.
>
> …
>
> 110. No lesser degree of restriction adequately achieves that aim, by time or group. The democratic process is not confined to election time but extends to all those decisions which Government or the legislature may have to make between times. The existence of parties and groups which would have sought to influence debate through their economic power and willingness to spend money on broadcast advertising is quite clear. The potentially malign effect of over-mighty groups spending in a way which alters the terms of public debate, or of policies, or which alters the votes of legislators and influences electoral outcomes to the disadvantage of those less well-endowed or well-organised is obvious, and at work not only at election times. The power of the broadcast media, pervasive and potent, in that respect is not readily deniable.
>
> 111. For the reasons which I have already given, no sound or practicable distinction can be drawn between political parties or

> groups and social advocacy groups, or between groups by reference to their individual wealth or worth'.

He further emphasized that the importance of unbiased broadcasting was undisputed, and summed up:

> '125. In summary, the necessity for restrictions on political/social advocacy broadcast advertising outside elections periods has been convincingly shown. It is necessary to protect the rights of others through preventing undue access to the broadcast media based on willingness and ability to pay. At root it supports the soundness of the framework for democratic public debate. The broadcast media remain pervasive and potent throughout the period between elections. The suggested distinction between political parties or groupings and social advocacy groups does not reflect the true political impact of all such advertising. The completeness of the prohibition avoids arbitrary and anomalous distinctions in practice".

On 12 March 2008, the House of Lords, sitting as a panel of five justices, unanimously rejected the appeal filed against the judgment (R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport [2008] 3 All ER 193). The leading judgment was written by Lord Bingham of Cornhill, who adopted the basic reasons of Justices Auld and Ouseley. I have chosen to quote a number of comments appearing in the opinion of Baroness Hale of Richmond, which I think are also germane to the case at hand.

Baroness Hale dwelt upon the fact that the background to the decision was the concern for the tremendous power wielded by television and radio in the molding of public opinion.

> 'My Lords, there was an elephant in the committee room, always there but never mentioned, when we heard this case. It was the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States of America. Enormous sums are spent, and therefore have to be raised, at election times.'

According to Baroness Hale, democracy is based on equality in voting power. Opinions backed by a greater budget must not be allowed to trample on other opinions purely by virtue of financial differences. The total ban thus expresses the proper balance between the right to freedom of speech and the principle of equality in elections.

> '[48] In the United Kingdom, and elsewhere in Europe, we do not want our government or its policies to be decided by the highest spenders. Our democracy is based upon more than one person one vote. It is based on the view that each person has equal value. 'Within the sphere of democratic politics, we confront each other as moral equals' (see Ackerman and Ayres, *Voting with Dollars* (2003) p. 12). We want everyone to be able to make up their own minds on the important issues of the day. For this we need the free exchange of information and ideas. We have to accept that some people have greater resources than others with which to put their views across. But we want to avoid the grosser distortions which unrestricted access to the broadcast media will bring.
>
> [49] So this case is not just about permissible restrictions on freedom of expression. It is about striking the right balance between the two most important components of a democracy: freedom of expression and voter equality….
>
> [51] For all the reasons which my noble and learned friend, Lord Bingham of Cornhill, has so eloquently and comprehensively given, I agree that the ban as it operates in this case is not incompatible with the appellants' convention rights.'

In conclusion she clarified that a person seeking to disseminate a political advertisement was entitled to express himself via other means of communication, in which the danger of tilting public opinion was lower. There is no justification for establishing exceptions to a total ban that have no practical application.

> 'It is a balanced and proportionate response to the problem: they can seek to put their case across in any other way, but not the one which so greatly risks distorting the public debate in favour of the rich. There has to be the same rule for the same kind of advertising, whatever the cause for which it campaigns and

> whatever the resources of the campaigners. We must not distinguish between causes of which we approve and causes of which we disapprove. Nor in practice can we distinguish between small organisations which have to fight for every penny and rich ones with access to massive sums. Capping or rationing will not work, for the reasons Lord Bingham gives.'

Similar dilemmas arise with respect to political advertisements in the framework of public broadcasting in England. The rationales for justifying the total ban that I referred to above are similar, and as I showed, the discussion of the subject in England, too, is accompanied by an examination of the proportionality of the total ban, as well as an elucidation of the concern about abuse of public broadcasting.

53. It would seem that in the case law of the European Court of Human Rights, too, there have been developments.

The case of *VgT Verein Gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR, 2001-VI involved the request of a Swiss association for the protection of animals to publish a response to an advertisement of meat marketers on Swiss television, which would include their opposition to the manner in which pigs were raised. Swiss law prohibits the publication of religious and political advertisements. Based on this law, a private television company banned the advertisement. The matter finally came before the European Court of Human Rights. The Court ruled that this constituted a violation of the association's freedom of speech, and it examined whether the conditions of the limitation clause in the European Convention were fulfilled. The Court ruled that the violation was lawful and that it was for a proper purpose – the provision of equal opportunity for the development of a public platform that was not influenced by wealthy sectors (s. 73 of the judgment). According to the Court, however, the ban was not proportional, and where a 'political expression' - as the particular advertisement was perceived – was concerned, the state had less room for maneuver.

Two years later, however, the same court handed down a decision in *Murphy v. Ireland*, no. 44179/98, ECHR 2003-IX that concerned a refusal on the part of Irish television to broadcast an advertisement with religious content that was liable to offend public sensibilities. Here too it held that there had been a violation of freedom of speech protected by the European Convention,

but this time the Court confirmed the refusal to broadcast the advertisement as complying with the conditions of the limitation clause of the European Convention, distinguishing between the "political" advertisement that was considered in the VgT case and a "religious" advertisement. It held that there was greater latitude when it came to religious advertisements. In its judgment the Court stated that the advertisement was not subject to the rules of equality (in the category of the fairness doctrine that applies to broadcasts) and the fact that the broadcasting time was purchased for consideration *operates in an unbalanced manner in favour of religious groups with financial resources*. Regarding this, the Court's ruling, similar to the ruling issued in Israel in HCJ 10182/03 *Education for Peace,* was that there are practical difficulties in the fair and equal implementation of various criteria and distinctions that are made in each and every case, and it is preferable to ban such an advertisement completely:

> '77. In the first place, the Court would accept that a provision allowing one religion, and not another, to advertise would be difficult to justify and that a provision which allowed the filtering by the State or any organ designated by it, on a case by case basis, of unacceptable or excessive religious advertising would be difficult to apply fairly, objectively and coherently (the above-cited case of United Christian Broadcasters Ltd v. the United Kingdom). There is, in this context, some force in the Government's argument that the exclusion of all religious groupings from broadcasting advertisements generates less discomfort than any filtering of the amount and content of such expression by such groupings.
>
> ...
>
> 78. Secondly, the Court considers it reasonable for the State to consider it likely that even a limited freedom to advertise would benefit a dominant religion more than those religions with significantly less adherents and resources. Such a result would jar with the objective of promoting neutrality in broadcasting and, in particular, of ensuring a “level playing field” for all religions in the medium considered to have the most powerful impact.'

54. My view is that the arrangement for political advertising in Israel is not exceptional in comparison with other arrangements in Europe. There too it was difficult to find an alternative to a total ban. The rationales specified there to justify a total ban as the least harmful measure, are similar to those I discussed above. As stated, I believe that the balance achieved in the framework of the Israeli legislative arrangement satisfies the second subtest, and it is the least harmful measure. We will now proceed to the third and last subtest.

C. Limitation clause - proportionality: the proportionality test "in the narrow sense"

55. The third subtest is the proportionality test "in the narrow sense". "Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper purpose, and are derived from the need to realize it, the test of proportionality (in the narrow sense) examines whether the realization of this proper purpose is commensurate with the violation of the human right" (*per* President Barak, *Adalah v. Minister of Interior* [49], para. 75; see also *United Bank Mizrahi Ltd. v. Migdal Cooperative Village* [15], para. 23).

The third subtest is a "values-based test" (*per* President Barak, *Adalah v. Minister of Interior* [49], para.75, and see *per* Deputy President M. Cheshin, *ibid.* para. 107). It is a "test of balancing" between conflicting values and interests according to their weight" (*per* President Barak, *ibid.* para. 74). It is an expression of the principle of reasonableness (*Levy v. Government of Israel* [36a], at p. 890d; see also *Horev v. Minister of Transport* [26], at p. 43 {195}). Ultimately, the third subtest requires a reasonable balance between the needs of the public and the harm to the individual:

> 'According to [the third subtest] a decision of the governmental authority must maintain a *reasonable balance* between the needs of the general public and the harm to the individual. The objective of the test is to determine whether the severity of the harm to the individual and the reasons justifying it are duly proportionate (HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [59a]).'

What is required, therefore, is a values-based balance of a "reasonable relation between the damage … and the social benefit engendered by the

violation" (HCJ 4769/95 *Menahem v. Minister of Transport* [50], at p. 279; see also *per* President Barak in *Movement for Quality of Government v. Knesset* [14], para. 60; and *Gaza Coast Regional Council v. Knesset* [13], at p. 550). "This values-based balancing … is not new in Israel. It is common in the case law of the Supreme Court since the founding of the State" (*per* President Barak, *Adalah v. Minister of Interior* [49], para. 47; see also Barak, *The Judge in a Democracy*, at pp. 270-274; Sapir, 'Old versus New,' pp. 478 – 480, 487; Birnhack, 'Constitutional Engineering,' at pp. 620, 639). The values-based balance is therefore the thread running through the rulings of this Court in relation to freedom of speech as well (Barak, 'Tradition of Freedom of Speech and its Problems,' at p. 226; Salzberger, 'Tradition of Freedom of Speech in Israel,'; and see *inter alia* the methods of balancing of values in HCJ 73/53I *Kol Ha'Am Ltd. v. Minister of the Interior* [60], at p. 892; *Miller v. Minister of Defense* [11] at p. 138 {232}; *Horev v. Minister of Transport* [26], at p. 43 {195}; HCJ 316/03 *Bakri v. Film Censorship Board* [61], at p. 263e; *Solodkin v. Beth Shemesh Municipality* [38], at p. 612; *Levy v. Government of Israel* [36a], at p. 889; *per* President D. Beinisch in *Meshi Zahav v. Jerusalem District Commander* [37], para.10; *per* President D. Beinisch in HCJ 5277/07 *Marzel v. Commander of Jerusalem Regional Police* [62], para. 2).

56. In the present case, the requirements of the third subtest are similarly satisfied, for there is a reasonable balance between the damage to the individual and the benefit to society stemming from the violation. The violation of the petitioner's freedom of political expression is not serious, and it is reasonable in relation to the benefit to society from upholding the fairness doctrine. The *benefit* from upholding the fairness doctrine is considerable. Above we discussed the importance attaching to the values and interests that the Rules are designed to realize. As opposed to this, the *damage* occasioned by the violation of the petitioner's freedom of political expression is not great. Indeed, in the framework of the balance of values, the magnitude of the violation of the right must be taken into consideration as well (*per* President Barak in *Adalah v. Minister of Interior* [49], para. 65). Many alternatives are available to the petitioner for the publication of the political expression in frameworks suited for political expression, both in the programs themselves, such as news programs, or in political broadcasts which are aired by the Broadcasting Authority and the Second Authority by virtue of their functions and subject to the fairness doctrine (see *Zakin v. Mayor of Beer Sheva* [27], at

p. 303b), and in other advertising frameworks, such as the print and the electronic press. Under these circumstances, the violation of the constitutional right does not carry great weight (cf. *Thermokir Horshim v. Second Authority for Television and Radio* [7], at p. 414). The violation affects equally all those with an opinion that they wish to express in the framework of the advertisements, and this fact, too, has implications for the proportionality of the Rules (cf. HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits* [63]). In terms of the "effect" that the Rules have on the constitutional human right, it cannot be said that the recourse to a legislative measure causes a grave violation of a human right while the anticipated benefit for the public is negligible (cf. HCJ 1715/97 *Israeli Office of Investments Managers v. Minister of Finance* [64], at p. 385). At the very least there is a reasonable balance between the benefit conferred by the Rules and the damage they entail.

57. I do not accept the petitioner's approach whereby abrogation of the Rules will enable a person whose political opinion did not receive sufficient exposure in the regular programs, to express his opinion in the framework of advertisements. The petitioner claims that otherwise, such a person will have no access to the public, and will be condemned to silence. I have two reasons for rejecting this approach. *First*, the holder of the opinion has numerous means at his disposal for expressing his views, outside the framework of the programs of the Broadcasting Authority and those of the Second Authority, and consequently, he is not condemned to silence. In this context we must not underestimate the growing importance and influence of the Internet, which serves as a kind of modern "town square", the size of which is that of the entire country (see Pesach, "Sources of Expression", 307, at pp. 312-315; and see also Laura Stein, *Speech Rights in America: The First Amendment, Democracy and the Media* (2006)81-112).

Secondly, even within the framework of the broadcasts of the Broadcasting Authority and the Second Authority, the holder of a political opinion is not condemned to silence, because the regular programs are governed by the fairness doctrine. If he so wishes, the holder of a political opinion should apply to the Authority with data that supports his claim (*Kahane v. Management Committee of the Broadcasting Authority* [54]*; Gush Shalom v. Broadcasting Authority* [41]*,* at p. 894).

58. The conclusion is that the Rules also satisfy the third subtest, and they embody a reasonable and proper balance between freedom of speech and other values that the Broadcasting Authority and the Second Authority are required to protect in their capacity as public broadcast channels (see *Gush Shalom v. Broadcasting Authority* [41], at p. 892).

59. Having concluded the examination of proportionality, it will be mentioned that the proportionality of the Rules is reinforced by the interpretation of the Rules in HCJ 10182/03 *Education for Peace*, which permitted the broadcast of political advertisements provided that the focus be exclusively on the factual message (see also in HCJ 1893/92 *Reshef v. Broadcasting Authority* [65], at p. 820). Admittedly, in that case the Court dealt with the application of the Rules, and it was not required to rule on their constitutionality, since the point of departure was that they were constitutional (see *ibid,* para. 8). Nevertheless, the binding interpretation of the Rules in that case may buttress their constitutionality: as we know, "it is preferable to interpret and not to cancel" (*Zakin v. Mayor of Beer Sheva* [27], at p. 299c).

In my comments above I mentioned that in HCJ 10182/03 *Education for Peace*, the petitioner and the Broadcasting Authority came to an agreement regarding the wording of the advertisements that would satisfy the case law requirements. The result was that the petitioner was permitted to broadcast an advertisement in accordance with the existing Rules, in a manner that complied with the case law. This is an additional indication of the proportionality of the existing arrangement as explained in HCJ 10182/03 *Education for Peace*. This practical solution is equally availableto those holding unorthodox opinions (cf. *Kahane v. Management Committee of Broadcasting Authority* [54]).

60. I am of the opinion, therefore, that the Rules satisfy the requirements of the limitation clause. They do not raise a "constitutional problem"; consequently, in the case before us there is no need for relief or for a constitutional remedy.

Epilogue

61. Summing up: I accept that the Rules of the Broadcasting Authority and of the Second Authority violate the petitioner's freedom of political expression. This is a violation of a constitutional right. However, this violation does not render the Rules unconstitutional. This is because they satisfy the

conditions of the limitation clause. The arrangement prescribed in the primary legislation and in the Rules is for a proper purpose – ensuring fair and balanced programs in accordance with the fairness doctrine. The violation of freedom of speech is of a degree that does not exceed that which is necessary. As such the petitioner's constitutional argument is rejected. The Rules of the Broadcasting Authority and of the Second Authority have "passed" the constitutional examination and there are no grounds for us to interfere with them.

If my opinion is accepted, we should deny the petition without an order for costs.

Justice E.E. Levy

1. I concur with the result reached by my colleague, Justice M. Naor, but my view is based on an additional consideration, which I will discuss briefly. Personally, I am not convinced that the fairness principle is the only core issue. Indeed, the importance of substantive equality between concerned parties should not be underestimated; it was referred to by Justice I. Zamir as the "equality of chances" [of the concerned parties] to convey their message to the public for the purpose of influencing its position (HCJ 3434/96 *Hofnung v. Knesset Speaker* [66], at p. 67). This principle has found expression in a string of legislative acts: the Second Television and Radio Authority Law, 5725-1965; Political Parties Funding Law, 5723-1973, and the Elections (Modes of Propaganda) Law, 5719-1959, as well as the rulings of this Court.

Indeed, even though we know that the great mass of water that has flowed in the stream of political dealings in Israel since its very beginning has occasionally cast doubt on the actual existence of such equality – so that it sometimes seems that despite legal restrictions, the wealthy have found ways to use their wealth to obtain an advantage in the struggle over public opinion - nevertheless, the importance of ensuring equal allocation of *public resources* as far as possible cannot be overstated.

2. In my view, however, the principle of equality can be realized in a way that involves less of a violation of freedom of speech. Apart from an absolute ban on advertisements with political contents, one can think of several options

for the allocation of communications resources in a manner that would promote equality among all those seeking to use the media. If this does not happen, it is only because the reason for the prohibition must be sought elsewhere. My view is that the fundamental consideration underlying the opposition to political advertisements involves the maintenance, or at least the prevention of further degeneration, of the character of public discourse in Israel.

3. Opening the field of advertising to political content would radically change the nature of public discourse as we know it. I am particularly perturbed by the element of indoctrination that is liable to accompany the advertising media. Marketing ideological views like sausages on the supermarket shelf, in which the frequency of repetition of the jingle singing their praises influences the willingness of people to endorse them, poses a substantive danger to the quality of political discourse in Israel, which even now is not ideal. It may be that in the particular case at hand, the effect would not be extreme, but one can easily imagine how slippery the slope is and how quickly we might find ourselves at the bottom. If we must resign ourselves to a similar phenomenon on the eve of election campaigns, it is only by virtue of express legislative provision, which in like vein attempts to clearly delineate the times at which it is permitted; it does so on the basis of a purpose that does not exist on a daily basis, namely the need to influence the voting public before it goes to the polls.

It may be argued that regulation restricting the contents or the spirit of broadcast advertisements would help reduce the dimensions of the difficulty. I do not think so. Not only would the application of this kind of restriction not satisfy the advocates of freedom of expression and freedom of political association, but primarily, it would be the commercial interests - which usually predominate - that would dictate the regulatory result in the final analysis. My colleague Justice Naor rightly ruled that the broadcast of these advertisements stems from the need to find funding sources for the activities of the broadcasting bodies. From my perspective it is immaterial if the advertiser is charged, or if it is allowed to transmit for free, at the expense of time allotted to paid commercial advertising. A concrete example of this is the ubiquitous complaint of commercial broadcasting franchisees, whenever an election period is just around the corner. It is then that they are required to

comply with the requirements of the Elections (Modes of Propaganda) Law, and to broadcast election propaganda at the expense of their programs.

4. I propose that the relevant rules of the relevant broadcasting authorities be interpreted first and foremost with the aim of distinguishing between political expression and its commercial aspect. This form of analysis makes it possible to reconcile the purpose and the means adopted to achieve it on the one hand, with the conditions of the "limitation clause" of Basic Law: Human Dignity and Liberty, which is the appropriate means of examining any government action that violates a basic right or protected interest of the individual, irrespective of whether the examination is based on the provisions of constitutional law, or whether it is based on the rules of administrative law (HCJ 8035/07 *Eliyahu v. Government of Israel* [67], at para. 6, and references).

5. It is clear that in the absence of proof of such a violation there is no point, nor any advantage, in invoking these tests. Nevertheless, I am unable to concur with the conclusion of my colleague, Justice Procaccia, for I believe that in the case before us, the restriction of the petitioner's access to such a central avenue of expression, that offers exposure to a broad public and draws significant public attention, and even the very act of conditioning such access upon payment, violates the petitioner's freedom of expression. I think that the petitioner has successfully cleared the hurdle of proving a violation, but disposing of the remaining hurdles may prove difficult. Unlike my colleague, the President, my view is that the authorizing language of the Law is sufficiently clear and explicit to enable the secondary legislator to anchor the violation in regulations. It is abundantly clear that the legislation under discussion, which concerns advertising in the media, impacts directly on freedom of expression. As such, the authorization it grants to impose restrictions on those advertisements would seem to be an explicit authorization to impose restrictions on freedom of expression, even though the Laws do not establish criteria for the regulation of those restrictions. I believe that the legislative intention is sufficiently clear. The specific question of its appropriateness is a matter for the other components of the judicial examination, i.e. the question of the propriety of the purpose, and the proportionality of the means adopted for its attainment. As I explained above, and bearing in mind that the use of the mode of expression under discussion

has yet to strike roots and that television broadcasts anyway provide an extensive platform for political expression, my view is that the foundations of the proper purpose and proportionality are satisfied by the ban on political advertising.

6. For these reasons I agree that the petition should be denied.

President D. Beinisch

I have read the opinion of my colleague Justice M. Naor and I concur with significant parts thereof, but I am unable to remain in step with her along the path to the final result.

Like my colleague, I too think that the prohibition on the broadcast of advertisements on political subjects, prescribed in s. 7(2) of the Broadcasting Authority Rules 5753-1993 (hereinafter: "Broadcasting Authority Rules"), in s. 5 of the Second Authority for Radio and Television (Advertising Ethics in Radio Broadcasts) Rules, 5759-1999, and in s. 11 of the Second Authority for Television and Radio (Ethics in Television Advertising) Rules, 5754-1994 (hereinafter: "Second Authority Rules"), violates the freedom of political expression that is part of the constitutional right to human dignity. I also agree that this violation must be examined from the perspective of the limitations clause. The first condition of the limitations clause is that the violation must be "by law … or according to … law by virtue of explicit authorization therein." According to Justice Naor, this condition was satisfied in the current case, for the reasons set out in her judgment. On this matter, my view is different. In my view, like all the other substantive conditions of the limitations clause, the requirement of "explicit authorization" should be construed in accordance with the entirety of the circumstances, including the nature of the right being violated, its underlying reasons, and the magnitude of the violation. Bearing in mind that the prohibition on political advertisements is an absolute one, which constitutes a substantial, and grave, violation of the freedom of political expression that is accorded central status in our legal system, my opinion is that the authorization sections in the existing legislation do not constitute "explicit authorization" by law to establish a prohibition in secondary legislation. This considered, my view is that the Rules with which this petition is concerned were enacted without the appropriate legal authorization, and for that reason, the petition should be granted. In this context it will be

stressed that granting the petition by reason of that defect should not be understood as the expression of a position on the question of whether a total ban on political advertising is appropriate and proportional. My approach is that the issues of the proper purpose and proportionality do not arise in the current circumstances because of the failure to satisfy the condition of "explicit authorization" by law to violate the aforementioned right.

In my comments below I will elaborate on the reasons for my conclusion that the petition should be granted. At the outset, and before addressing the issue at hand, I will discuss the statutory authority of the Broadcasting Authority and the Second Authority to broadcast advertisements on television and radio. As clarified, the authority to advertise for consideration is not limited to essentially commercial advertisements and in principle is also granted for advertisements intended to take a position on publically disputed political and ideological matters.

Statutory authorization for the broadcast of advertisements for consideration

1. The Broadcasting Authority and the Second Authority are statutory corporations, established by law, by virtue of which they are authorized to broadcast. Section 25A(a)(1) of the Broadcasting Authority Law (hereinafter: "Broadcasting Authority Law") authorizes the Broadcasting Authority to broadcast advertisements, as follows:

> '25A – Radio Advertisements and Announcements
>
> (a)(1) The Authority may broadcast *on radio* advertisements and announcements for consideration (hereinafter: advertisements and announcements), and commission them, prepare them or produce them by itself or by way of one or more other people, as determined by tender.'

It will be pointed out that the Broadcasting Law contains no provision authorizing the Broadcasting Authority to broadcast advertisements on television, and the authority to broadcast advertisements therefore relates exclusively to radio advertisements (see *Osem Investments Ltd. v. Broadcasting Authority* [2], para. 6 of the judgment of Justice Strasberg-Cohen).

As for the Second Authority - s. 81 of the Second Authority for Television Law, 5750-1990 (hereinafter: "Second Authority Law") states that the franchisee may include advertisements in the framework of his broadcasts. This authorization applies to both television and radio broadcasts (see definition of "broadcasts" in s. 1 of the Law). Following is the text of the aforementioned s. 81 of the Law:

> '81. Broadcast Advertisements
>
> (a) The franchisee is permitted to include within the framework of its broadcasts, advertisements for consideration at the rate that it determines.'

What does the term "advertisement" mean in s. 25A(a)(1) of the Broadcasting Law and s. 81(a) of the Second Authority Law? What kinds of advertisements are included in the authorization in principle to broadcast "advertisements" on radio and television?

The Broadcasting Authority Law does not provide a statutory definition of the term "advertisements". Nevertheless, s.1 of the Broadcasting Authority Rules states that for purpose of the Rules, "advertisement" means "an advertising broadcast, sponsor broadcast, or an announcement, broadcast on the radio for payment to the Authority". In the same section, "Announcement" is defined as "giving information to the public". Regarding the Second Authority Law, s. 1 of the Law, entitled "Definitions", states that a broadcast advertisement is "the *broadcast of a commercial advertisement* as defined in Chapter F (italics not in original). It is noteworthy that Chapter F of the Second Authority Law is entitled "Advertising", and it begins with the abovementioned s. 81, which authorizes the franchisee to include "advertisements" in the framework of its broadcasts.

As a rule, the term "advertisement" admits of various meanings in accordance with its context. The meaning of the term "advertisement" in the authorizing sections of the Broadcasting Authority Law and the Second Authority Law is not necessarily identical to its meaning in a different context (cf. *per* Justice I. Zamir in *Zakin v. Mayor of Be'er Sheva* [27], at p. 300 ff). On the face of it, the terms "advertisements" and "commercial advertising" in ss. 25A(a)(1) of the Broadcasting Authority Law and 81(a) of the Second Authority Law may bear more than one literal meaning in accordance with the context. One meaning of "advertisement" is the broadcast of an advertisement

for consideration. The person ordering the advertisement pays for the publicity, and acquires the possibility of influencing the wording of the advertisement, its contents and the frequency of its public transmission subject to legal restrictions. According to this meaning, the statutory authorization for advertising on radio and television means sanctioning in principle the commercial vehicle of paid advertising, without limiting, in advance, the contents, the message or the purpose of the advertisement. Thus, according to this meaning, the "advertisement" that the Broadcasting Authority and the Second Authority are permitted to broadcast is not confined to an advertisement with a commercial purpose and nature; an advertisement may also be intended to convey other messages, including political or ideological messages, provided that the means of imparting the message is commercial/funding-related. Accordingly, to impose restrictions on the message, the contents or the character of advertisements, would require separate statutory provisions.

Alternatively, "advertising" means publicizing a certain product or service, for the commercial purpose of marketing and promoting its sale in public. According to this meaning, the broadcast of advertisements is authorized not only because the means of advertising are commercial, but also because the contents, the character and the purpose of the advertisements are commercial. In other words, according to this meaning, the Broadcasting Authority and the Second Authority are authorized to broadcast advertisements of a commercial character, intended to promote sales of a product or a particular manufacturer (cf. *per* Justice M. Elon in *Israeli Daily Newspapers Association v. Minister of Education and Culture* [68], at p. 389).

It seems that the second meaning of “advertisement” is the common and normal one (see *per* Justice E. Hayut in HCJ 10182/03 *Education for Peace,* para.7). Nevertheless, the question confronting us is that of the normative meaning of the word “advertisement” in the authorizing provisions prescribed in s. 25A(a)(1) of the Broadcasting Authority Law, and s. 81(a) of the Second Authority Law. In their arguments, both the petitioner and the respondents assumed that the term “advertisements” in the aforementioned authorizing provisions bore the first of the two meanings mentioned above. Both parties *refrained from* arguing that advertisements dealing with political or ideological matters do not fall within the framework of “advertisements”. The

preliminary assumption in court was, therefore, that the term "advertisements" in the abovementioned ss. 25A(a)(1) and 81(a) includes advertisements that are designed to adopt a position on a political matter. This interpretative position is correct.

First, as noted above, the definition of "advertisement" in s. 1 of the Broadcasting Authority Rules also includes an "announcement" which is defined in that section as "giving information to the public." Linguistically, the definition is a broad one that makes no exceptions with respect to the substance and contents of the information being conveyed. Section 1 of the Second Authority Law defines advertising as "the broadcast of a commercial advertisement within the meaning of Chapter F". This definition, too, is linguistically broad and does not necessarily relate to the contents and purpose of the advertisement. Moreover, s. 25A of the Broadcasting Authority Law and s. 81 of the Second Authority Law stress that the authorization that they grant is for the broadcast of advertisements "for consideration." This phrase reinforces the conclusion that the authorization was intended specifically to sanction the commercial/funding-related medium, and it is not concerned with imposing limitations on the contents and purpose of the advertisements. *Secondly,* regarding their purpose, the authorizing sections are intended to allow the Broadcasting Authority and the Second Authority to recruit additional sources of funding for their broadcasts by means of advertisements. The aim of the authorization was, therefore, to permit the use of the funding medium of paid advertising, even though the authorizing sections as such did not establish an advance limitation on the contents and the aim of the advertisements. *Finally,* it will be noted that s. 25A(b) of the Broadcasting Authority Law authorizes the management committee, in consultation with the Director General, to make rules regarding "*prohibitions and restrictions* on advertisements and announcements." Section 88(2) of the Second Authority Law states that the Council will make rules on matters concerning the broadcast of advertisements, *inter alia* relating to *"Prohibited* advertising subject-matter for broadcast as advertisements …." These statutory provisions, which will be discussed at length below, support the conclusion that the authorization for the broadcast of "advertisements", as such, does not impose any limitations on the contents and substance of the advertisement, and that in order to impose such restrictions it would be necessary to establish explicit constraints. In fact, it is one of the restrictions prescribed in the Rules of the

Broadcasting Authority and of the Second Authority that is the focus of this hearing, i.e. the restriction whereby advertisements may not be broadcast to impart political or ideological messages that are the subject of public controversy. It will be noted that if the meaning of the said authorizing sections was that the Broadcasting Authority and the Second Authority are authorized to broadcast, *ab initio*, only advertisements with a commercial purpose and content, it is doubtful whether a prohibition would have been established on advertisements on political subjects that arouse public controversy.

Thus, the statutory authorization of the Broadcasting Authority and the Second Authority to broadcast advertisements on television and radio is not restricted to advertisements intended to promote the commercial sale of a particular product. In principle, the Broadcasting Authority and the Second Authority are also authorized to broadcast advertisements intended to convey other messages, including political and ideological messages. Note that this interpretation is compatible with the general principles of our legal system, whereby the application of prohibitions and restrictions on freedom of expression should be limited to the minimum necessary extent (see e.g. *per* Justice (ret.) M. Shamgar in CA 723/74 *Ha'aretz Daily Newspaper Ltd. v. Israel Electric Corporation Ltd* [68], at p. 295). The obvious conclusion is that no restriction on the character, purpose and contents of advertising broadcasts can be derived from the basic authorization provisions in s. 25A(a)(1) of the Broadcasting Authority Law and s. 81(a) of the Second Authority Law. These restrictions were established in the Rules of the Broadcasting Authority and the Second Authority. One such restriction is the focus of this proceeding.

The prohibition on the broadcast of political advertisements

2. The dispute between the parties concerns the constitutionality of the prohibition established by the Rules of the Broadcasting Authority and the Second Authority on the broadcast of an advertisement regarding a matter "which is the subject of a public political or ideological controversy" (as per s. 7 of the Broadcasting Authority Rules) or an advertisement intended for the "imparting of a message on a political, social, public, or economic matter that is the subject of public controversy" (as per ss. 5 and 11 of the Second Authority Rules). For the reader's convenience I will cite the full text of these

rules as they were also cited in the judgment of my colleague. Section 7 of the Broadcasting Authority Rules, concerning advertising broadcasts and radio announcements states as follows:

> '7. Prohibited Advertising
>
> It is forbidden to broadcast an advertisement if, in the opinion of the Director General, it contains one of the following:
>
> …..
>
> (2) Party propaganda or a *broadcast on a matter that is the subject of public political or ideological controversy,* including a call for a change in the legislation concerning these matters' (emphasis not in source – D.B.).

Similarly, s. 5 of the Second Authority for Television and Radio (Ethics in Radio Advertising) Rules 5759-1999 states the following regarding advertising broadcasts on radio:

> '5. Advertising on Controversial Subjects
>
> A franchisee shall not broadcast an advertisement that imparts a message on a political, social, public, or economic matter that is the subject of public controversy.'

The wording of s. 11 of the Second Authority Rules for Television and Radio (Ethics in Television Advertising) 5754-1994 is identical to that of the aforementioned s. 5, and concerns the prohibition on television advertising regarding controversial topics:

> '11. Advertising on Controversial Subjects
>
> A franchisee shall not broadcast an advertisement that imparts a message regarding a political, social, public, or economic matter that is the subject of public controversy.'

The parameters of the prohibition on the broadcast of advertisements on controversial subjects were recently considered in the aforementioned HCJ 10182/03 *Education for Peace*. In that case Justice E. Hayut held that in accordance with the most restrictive construction of prohibitions and restrictions upon freedom of expression –

'… the test for classifying a broadcast as being controversial should be that of the "dominant component", which examines whether the broadcast is intended primarily to convey information, with no emphasis nor any adoption of a stand on the substantive issue; or whether the broadcast also features a dominant component of persuasion concerning the advantages of the subject that is the focus of the broadcast…. An advertising broadcast may relate to a subject that is essentially a matter of public dispute, but without being controversial in terms of its text, its contents or form, and hence permitted for broadcast' (*ibid,* at para. 8; see also: HCJ 1893/92 *Reshef v. Broadcasting Authority* [69], at p. 820).

In that case the parties agreed to changes in the texts of the advertisements so that their focus would be the imparting of information to the public concerning a controversial matter, with no element of persuasion or adoption of a stand. It was held that this kind of broadcast *is not* included in the prohibition under discussion.

The ruling in HCJ 10182/03 *Education for Peace* invites the conclusion that the prohibition on advertisements regarding publically controversial issues does not apply to advertisements consisting primarily of the imparting of factual information to the public. In terms of both essence and purpose, advertisements included in the prohibition under discussion take a position on a publically controversial political or ideological issue. Such advertisements are at the center of this hearing. For the sake of brevity I will refer to advertisements of this kind as "political advertisements".

3. It will be emphasized that in the course of these proceedings, the petitioner agreed that the broadcasts constituting the subject of the original petition are political advertisements within the meaning explained above. The dispute between the parties does not, therefore, concern the classification of the broadcasts as political advertisements; the principal focus of the discussion is the question of the legality of prohibiting political advertisements. It is further emphasized that in view of the reasons on which the Broadcasting Authority and the Second Authority based their original decision to disqualify the petitioner's advertisements, and in accordance with the wording of the order *nisi* granted on 29 July 2004, the present petition does not concern a prohibition on an advertisement that contains "party propaganda" as stated in s. 43(a)(3) of the Second Authority Law and in the opening clause of s. 7(2) of

the Broadcasting Authority Rules (see para. 9 of Justice Naor's judgment). The present case focuses, therefore, on the constitutionality of the Rules that prohibit the transmission of political advertisements within the meaning elucidated above, i.e. – advertisements whose dominant component is influence, persuasion or the adoption of a position regarding an issue which is a subject of public, political or ideological controversy.

Political advertising as political expression

4. Political advertising features mixed aspects. *On the one hand* the messages of political advertisements are imparted to the public via a commercial avenue in return for payment. The external framework is therefore commercial. *On the other hand*, the entity requesting publication is not necessarily a commercial or business entity. The purpose and message of the advertisement are not commercial but rather political-ideological. Political advertising does not seek to promote a commercial transaction of the sale of a particular item, but rather to promote a political or ideological position among the public. (see Andrew Scott, "'A Monstrous and Unjustifiable Infringement'? Political Expression and the Broadcasting Ban on Advocacy Advertising", 66 *Modern L.R*. 224, 225 (2003)). These hybrid features raise the question addressed by Justice Naor in her judgment regarding the classification of political advertising as political or commercial expression.

In principle, the distinction between kinds of expressions is not always clear-cut, given that a particular speech may comprise hybrid features. The decision on whether the expression in this case is political or commercial should be based on the test of the "dominant aspect" of the expression from the perspective of the reasonable viewer, listener, or user (cf. *Melnik v. Second Authority for Television and Radio* [57], at p. 595, *per* Justice Y. Zamir). In this regard I agree with my colleague Justice Naor that the contents and the purpose of the expression, the motivation for its publication, its target audience, and the character and identity of the entity expressing itself are components of greater significance than the type of medium or the external framework through which the expression is brought to the public's knowledge. Bearing this in mind, I too believe that where an advertisement aims to communicate a political-ideological message to the public, and the publicizing entity functions on a public level as opposed to a commercial-business level,

it should be classified as political expression even if the medium of publication is of a commercial character.

5. The classification of a political advertisement as political expression is significant in terms of the degree of protection accorded to such expression. Indeed, commercial expression, too, is accorded protection in the framework of freedom of speech. Commercial expression realizes the right of the public to receive information, and guarantees business competition between advertisers in the framework of the market of products and services. Commercial expression also enables the personal fulfillment of the individual issuing the publicity and of the public at whom the advertisement is directed, and it is a part of the freedom of occupation. At the same time, it seems that commercial expression does not constitute a strong realization of the range of possible rationales for freedom of expression. Commercial expression, whose essence and purpose are to promote a commercial transaction for the sale of products, does not make a direct contribution to public dialogue on the subjects on the national agenda. Considering all these, it was held that the scope and degree of protection granted to freedom of commercial expression are more limited than the protection of freedom of political, literary or artistic expression (on the kinds of legal restrictions on freedom of commercial expression see: *per* Justice E. Mazza in *Maio Simon Advertising Marketing and Public Relations Ltd. v. Second Authority for Television and Radio* [39], at p. 755; *per* Justice I. Zamir in *Thermokir Horshim v. Second Authority for Television and Radio* [7], at p. 414; and see *Kiddum Yazamot v. Broadcasting Authority* [22]).

Political expression, on the other hand, lies at the very core of the right to freedom of speech and it constitutes the highest degree of realization of the reasons underlying that right. Freedom of political expression is an essential condition for the existence and development of the democratic regime, which in turn secures other basic rights. It makes possible the exchange of views between the members of society and thus enables them to consolidate their positions regarding matters on the public agenda. Freedom of political expression is also a tool for the individual's self-realization and the crystallization of his world view. Through freedom of speech in general, and freedom of political expression in particular, the individual is able to formulate independent views, to give expression to his own personal credo, to persuade

and be persuaded, and to be involved and influential in matters of concern to the society of which he is a part (see *Kahane v. Broadcasting Authority* [52], at p. 270 ff.). All of these affect the constitutional standing of the said right. On this matter I agree with those who maintain that that there is a close substantive connection between freedom of political expression and human dignity, which is based on the autonomy of will and the freedom of choice of the individual. Accordingly, I too believe that freedom of political expression falls within the bounds of the constitutional right to human dignity (see my comments in *Meshi Zahav v. Jerusalem District Commander* [37], at para. 10, regarding freedom of expression and demonstration).

The great importance of freedom of political expression for the individual and for society, and its contribution to the democratic process, affect not only its constitutional status but also the scope and degree of the protection accorded to such expression. Our case law has already held that among the different categories of expression, the protection afforded to political expression "… is particularly broad" and that political expression deserves "maximum protection", albeit not absolute (*per* Justice D. Dorner in *Indoor v. Jerusalem Mayor* [28], at p. 164; and see also *Kahane v. Management Committee* [54], at p. 293). The classification of political advertising as political expression therefore affects the scope and degree of protection given to this form of expression, and we will elaborate below.

Violation of freedom of political expression

6. As mentioned, the Rules of the Broadcasting Authority and of the Second Authority prohibit the broadcast of political advertisements on radio and television. This is an absolute ban on the broadcast of advertisements whose dominant component is the adoption of a position on a subject that is the subject of public controversy. This ban violates freedom of political expression, and to my mind the magnitude of the violation is significant. As explained above, the authorization on principle for the broadcast of advertisements on radio also applies to advertisements of an essentially political or ideological nature (see para. 1 above). The unqualified prohibition on political advertisements totally excludes the possibility of utilizing the media's advertising framework for purposes of persuasion and relaying political messages, thereby giving absolute preference to commercial expressions over political expression in the financial framework of paid

advertisements (see Eric Barendt, *Freedom of Speech* 445 (2005). Considering all this, my view is that the prohibition under discussion involves a significant, and serious, violation of freedom of political epression.

Here it should be mentioned that the respondents did not dispute that the Rules of the Broadcasting Authority and of the Second Authority violate freedom of speech. Their argument, however, was that freedom of political speech can be realized by way of the regular broadcasting framework as distinct from the framework of advertisements on radio and television. Bearing that in mind, it was argued that the said right was not violated to a significant degree. I cannot accept this argument. Indeed, the existence of another effective avenue for relaying speech may be a relevant consideration when examining the magnitude of the violation of freedom of speech (see: *Cohen v. Israel Bar Association* [52], *per* President Shamgar, which was the minority view with respect to the outcome in that case). At the same time, in the present context it cannot be said that the format of news broadcasts or political programs constitutes an effective, equivalent alternative to the relaying of a political message by way of an advertisement, in which the person commissioning the advertisement can significantly influence its content, its manner of presentation and the scope of its public exposure. Neither can it be claimed that other media in which political advertising is permitted, such as the print media or the Internet, have the same value in terms of publicity as the broadcasting media which has such extensive power of communication. The inevitable conclusion is that preclusion of all possibilities for persuasion and the conveying of political messages by way of advertisements on television and radio constitutes a significant, and serious, violation of freedom of political expression. As will be explained below, this conclusion is significant for purposes of examining whether the conditions of the limitations clause, which include the requirement that the violation be "by a law … or according to a law … by virtue of explicit authorization therein", have been fulfilled.

It will be mentioned that the Broadcasting Authority emphasized that the broadcast of advertisements is not part of its duties, being no more than an ancillary power intended to enable it to enlist an additional source of funding for its broadcasts by law. The argument is that the Broadcasting Authority is authorized to broadcast advertisements on radio, but it is under no obligation

to do so. In view of the fact that advertisements are broadcast by the Broadcasting Authority by virtue of an ancillary power the purpose of which is financial, and considering the respondents' position whereby the advertising framework is "inappropriate" for political speech – it is argued that the prohibition on the broadcast of political advertisements does not constitute a serious violation of freedom of speech. I am unable to accept these arguments either. The various communications media are not just a platform for the realization of freedom of speech of those speaking and of the target audience; the media itself enjoys autonomy with respect to its broadcasts as a substantive component of freedom of speech. It has already been held in our case law that "the right of access [to the media] is not a key to all channels of communication …. The holder of the right does not have freedom of speech at all times, in all forms and in all places" (*per* President M. Shamgar in *Cohen v. Israel Bar Association* [52], at p. 552; see also *per* Justice (previous title) A. Barak in *Kahane v. Management Committee* [54], at p. 268 and in *Senesh v. Broadcasting Authorit* [35], at p. 846). Nevertheless, since the Broadcasting Authority and the Second Authority chose to exercise their authority to establish a framework for advertisements on television and radio, the preclusion of any possibility of political advertising constitutes a serious violation of freedom of political expression, considering all the above-mentioned reasons. It is stressed that the question of whether advertisements are a suitable means for conveying political messages is not relevant when examining the scope and degree of violation of the protected right; rather, it arises in the framework of the examination of the constitutionality of the violation according to the criteria of the limitations clause (cf: *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2006 BCCA 529, par. 131. That case concerned the invalidation of a decision of the public bus company to refrain from placing political advertisements on the sides of buses. An appeal on the judgment is currently pending in the Canadian Supreme Court).

Examination of the constitutionality of the violation – the Limitations clause

7. Like all human rights, the right to freedom of speech is not absolute, and at times it must give way to other rights or values or competing interests. As explained in the judgment of my colleague Justice Naor, the relevant

balancing formula is that which appears in the limitations clause in s. 8 of Basic Law: Human Dignity and Liberty. This is indeed "the criterion accepted at present for balancing conflicting values" (para. 29). On this matter, I would like to add several comments.

First, the Rules of the Broadcasting Authority and of the Second Authority under discussion have the normative status of secondary legislation. The Broadcasting Authority Rules were made by the management committee, in consultation with the Director General by virtue of the authority under ss. 25A (b)(2) and 33 of the Broadcasting Authority Law. The Second Authority Rules were made by the Second Authority Council by virtue of their authority under ss. 24 and 88 of the Second Authority Law. These Rules were enacted with the knowledge of the Knesset Education and Culture Committee. As such they acquire the normative status of secondary legislation (cf: *per* Deputy President T. Or in HCJ 9596/2 *Pitzui Nimratz, Experts for the Realization of Medical Rights and Insurances v. Minister of Justice* [70], at p. 797 and the sources cited there regarding the normative status of the Bar Association Rules. While the principal aim of the limitations clause was to limit the powers of the primary legislator, it is clear that anything forbidden to the primary legislator would certainly be forbidden to the secondary legislator (see I. Zamir, *Administrative Authority,* vol. 1, pp. 135, 138, 154). Bearing this in mind, I too am of the opinion that the Rules under consideration should be examined through the spectrum of the limitations clause.

Second, the limitations clause in the Basic Laws on human rights is the tool for assessing the constitutionality of a violation of rights enjoying meta-legal status, in that they are included in the inner core of rights specified in the Basic Laws. Nevertheless, the tests of the limitations clause may also be applicable by virtue of general principles governing human rights, which are part of the "Israeli common law", and which do not have a status that is entrenched directly in the Basic Laws (see *per* President Barak in *Horev v. Minister of Transport* [26], at p. 43 {195}). Accordingly, even on the view that freedom of political expression is not included in the constitutional right to human dignity, the constitutionality of secondary legislation that violates the aforementioned right must still be examined in accordance with the conditions stipulated in the limitations clause. These conditions are essentially similar to the tests applied in the case law relating to protection of human

rights prior to the enactment of the Basic Laws (see my comments in *Meshi Zahav v. Jerusalem District Commander* [37], at para. 10); see also *per* Justice D. Dorner in *Bakri v. Film Censorship Board* [61], at para. 10).

Finally, it is noteworthy that counsel for the state argued that in the circumstances of the case, the criteria of the limitations clause should not be applied. The argument is that in order to examine the constitutionality of the prohibition on political advertising, the freedom of speech of the person wishing to advertise much be weighed up against the freedom of speech of the entire state citizenry, who are entitled to receive reliable and balanced information from the media. According to counsel for the state, this is a horizontal balance between two rights of equal status, which should be based on compromise and mutual waiver of both rights. In light of this, it is argued that the balancing formula prescribed by the limitations clause should not be invoked, because this formula is suited only to a vertical balance between a right and a conflicting interest, and not to a horizontal balance between two rights of equal status. Counsel for the state based his arguments on the comments of Justice D. Dorner in *Shin v. Council for Cable Broadcast* [23], (at para. 19).

I do not accept these arguments. The petitioners' freedom of political expression to publish political advertisements is not competing with the right of an individual or a defined group of individuals amongst the public, but rather, with the general public interest of the members of society to receive reliable, balanced information from the media. As such, the absolute ban on the broadcast of political advertisements requires, in essence, a vertical balance between the individual right and the general public interest, and not a horizontal balance between two rights of equal status, as claimed by counsel for the state. In any case, we are not faced with the question of whether the fundamental balancing formula prescribed by the limitations clause applies only to vertical balances between competing rights and interests or whether it can also be applied to horizontal balances between two conflicting human rights. I will just mention that according to my understanding, the requirements of the limitations clause – and especially the requirements of a proper purpose and proportionality – may under suitable circumstances also be invoked in cases involving horizontal balancing of competing human rights. I tend to the view that the tests of limitations clause may also serve for striking

horizontal balances between rights of equal status, even if the manner of applying these tests may change in accordance with the category of the conflicting values, their relative weight, the nature of the balance, and the overall circumstances. Under the current circumstances this issue does not require further discussion and it may therefore be left for future consideration (cf: *per* Deputy President M. Elon in *Shefer v. State of Israel* [71], at p. 105; regarding the view that the proportionality tests allow for waiver and mutual compromise between conflicting values, see Gideon Sapir, "Old versus New: Vertical Balance and Proportionality," 22 *Bar-Ilan L. Stud.* 471 (2006)).

The Requirement that the violation be "by a law ... or according to a law by virtue of explicit authorization therein"

8. The limitations clause in s. 8 of Basic Law: Human Dignity and Liberty, the wording of which is essentially identical to that of s. 4 of Basic Law: Freedom of Occupation, provides as follows:

> 'There shall be no violation of rights under this Basic Law except *by a law* befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or *according to a law as stated by virtue of explicit authorization therein*' (italics not in original – D.B.).

The limitations clause specifies four cumulative conditions that must be satisfied for the violation of a protected right to be lawful and to pass the constitutional examination: the violation must be by a law, or according to a law or by virtue of explicit authorization therein; the violating law must befit the values of the State of Israel; the violation of the protected right must be for a proper purpose; and the violation must be "to an extent no greater than is required." The last three conditions express the principle of the rule of law in the broad substantive sense. Their concern is with the contents of the normative arrangement that violates a human right. Their purpose is to ensure that the violation of the right of the individual is necessary and justified from a substantive point of view, and that it strikes a proper balance between individual rights and the needs of the public. On the other hand, the provision requiring that the violation be "by a law …or according to a law as stated by virtue of explicit authorization therein" is not concerned with the contents of the legal norm but rather, with the need for its existence. This provision

expresses the principle of the rule of law in the narrow, formal-substantive sense, as we will now explain.

In the circumstances of this case, my position is that the Rules of the Broadcasting Authority and the Second Authority, which establish a total ban on the broadcast of political advertisements, do not comply with the first condition of the limitations clause. In order to explain my position, I will first consider the meaning of the requirement that the violation of the protected right be "by a law… or according to a law as stated by virtue of explicit authorization therein." To that end, we must first consider the interpretation of the term "by a law" or "according to a law". I will then discuss the interpretation of the requirement for "explicit authorization" in the law. It will be stressed that the following discussion will focus on the interpretation of the components of the said provision in the present context, i.e. secondary legislation that violates a protected human right.

"By a law" or "according to a law ..."

9. The first requirement of the limitations clause according to which the violation of the protected right must be "by a law" means that as a rule, the violation of the right must derive its force from primary legislation. Where the violation is dictated by secondary legislation, the administrative authority must show authorization that originates in a legislative act of the Knesset ("according to a law"). This is an expression of the principle of administrative constitutionality, which is a constituent of the principle of the rule of law in the formal sense, whereby the executive authority may only act in accordance with the powers vested in it by law (see Baruch Bracha, *Administrative Law,* vol.1, 35, 38-40 (hereinafter: Bracha); Zamir, at p. 60). This principle is particularly applicable to powers that involve a violation of basic human rights. For such a violation of rights, the secondary legislator must receive "explicit" authorization from the primary legislator. Below we will discuss the meaning of the requirement of "explicit authorization".

It will be noted that the phrase "according to a law …" in reference to the violation of a protected right was not included in the original version of the limitations clause at the time of passage of the two Basic Laws concerning human rights in 1992. It was added to the limitations clause in 1994, in the framework of an amendment to the two said Basic Laws (see: Basic Law: Freedom of Occupation (Amendment) Bill, H.H. 5754 129, that prescribed an

indirect amendment to the limitations clause in Basic Law: Human Dignity and Liberty (hereinafter: "the Amendment"). The explanatory note to the Amendment states that "… the existing requirement whereby any limitation of the freedom of occupation must find expression exclusively in primary legislation and not in secondary legislation – is unnecessarily extreme." This clearly indicates that the phrase relating to a violation "according to a law" was intended to enable the secondary legislator to violate human rights subject to the restrictions that we will now discuss. In that sense, the requirement that the violation be "by a law" or "according to a law" resembles the requirement of "prescribed by law" appearing in the European Convention of Human Rights and in s. 1 of the Canadian Charter. The European Court of Human Rights and the Canadian Supreme Court interpreted the word "law" in this requirement as permitting a violation of basic rights not only in primary legislation but also in secondary legislation that complies with the other conditions of the limitations clause (see: Peter W. Hogg, *Constitutional Law Of Canada* (5th ed., 2007) 123 (hereinafter: Hogg)).

Further to the above it will be mentioned that the requirement that the violation be "by a law" or "according to a law" is an expression of the rule of law not only in the formal sense, but also in the narrow-substantive sense. Accordingly, in order to pass the test of constitutionality, legislation that violates human rights must comply with all of the elements that are essential for the validity of legislation as binding legal norm, including publicity, accessibility, generality, absence of ambiguity, and absence of arbitrariness (see A. Barak, *Interpretation in Law,* vol. 3, *Constitutional Interpretation*, at pp. 480-490 (1995) (hereinafter: Barak, *Constitutional Interpretation*). Indeed, this interpretation is also consistent with the interpretation of the requirement "prescribed by law" in the rulings of the European Court of Human Rights and the Canadian Supreme Court. In keeping with this interpretation, a norm that violates human rights must be public, accessible and sufficiently clear so that the aggrieved individual, as well as the authority causing the violation, can plan their course of action and conduct their affairs in accordance therewith (see: The Sunday Times v. United Kingdom, 2 EHRR 245 (1979); Hogg, at pp. 122-123, 125-126). Concluding this section, it is noteworthy that in our legal system, the aforementioned requirements, including the requirement that the offending norm be clear and unequivocal, may also be

dictated by the substantive components of the limitations clause, including the requirement of a proper purpose and proportionality.

Violation "according to a law" by virtue of "explicit authorization" therein

10. The provision under which the violation of human rights must be "by a law… or according to a law as stated by virtue of explicit authorization therein" includes an important additional component. A violation that is "according to a law" must be by virtue of "explicit authorization" in the primary legislation. This requirement *is not* included in the limitations clauses of the European Convention of Human Rights or the Canadian Charter. What is the reason for adding the requirement of "explicit authorization" by a law in the limitations clause of the Basic Laws? The explanatory note to the Amendment of 1994 reveals that the aim was to restrict the possibility of violating human rights by means of secondary legislation. To that end, three cumulative conditions were set that had to be satisfied in order to affirm the constitutionality of the violation of a human right by way of secondary legislation. *First,* authorization for such a violation must be in primary legislation ("by a law"); *secondly*, the authorization in the primary legislation must be "explicit"; and *thirdly*, the authorizing law, like the secondary legislation itself, must satisfy the substantive conditions of the limitations clause.

It must be said immediately that the requirement for "explicit authorization" by law for the violation of a protected right by way of secondary legislation is not new to us. Even prior to the enactment of the Basic Laws concerning human rights, the case law of this court established that any violation of human rights by way of secondary legislation requires explicit authorization in primary legislation. It further determined that such authorization would be narrowly and meticulously construed in view of the interpretative presumption whereby the primary legislator did not intend to authorize the secondary legislator to violate central basic rights or values. In order to refute that presumption, it was ruled that there must be explicit and unequivocal authorization in a law. In the words of President M. Shamgar in the context of violation of freedom of occupation:

> 'A basic right can be neither revoked nor restricted other than by way of explicit statutory provision of the primary legislator, and also, as long as the Basic Law does not determine otherwise, by

> the secondary legislator who was authorized to do so by the primary legislator ….
>
> In my view, such authorization means "explicit authorization", by which I mean exclusively a case in which the primary legislator states *clearly and explicitly,* that he authorizes the secondary legislator to make regulations that establish prohibitions or restrictions on engaging in a particular profession ….
>
> To summarise this point, ... secondary legislation draws its force exclusively from the authorizing act of the primary legislator, and in relation to matters concerning the restriction of fundamental rights, in my view the secondary legislator is not authorized to act in that regard unless the primary legislator granted him *clear, overt and explicit* authority to deal with the said matter by way of restriction or prohibition, as the case may be'(HCJ 337/81 *Miterani v. Minister of Transpor* [71], at p. 360; italics not in original – D.B).

As mentioned, this ruling had already struck roots in our legal system in the period that preceded the Basic Laws concerning human rights (see e.g. *per* Justice (previous title) Barak in CA 524/88, *Pri HaEmek Agricultural Cooperative Society Ltd. v. Sde Yaakov Workers Settlement Ltd*. [73]). However, it is noteworthy that in the case law that preceded the Basic Laws, less rigorous approaches may be discerned, whereby basic rights may be violated by way of secondary legislation even in the absence of explicit statutory authorization, provided that the authorization for the violation of human rights was clearly implied by the purpose of the authorizing law. In the words of Justice Berinson:

> '[a basic right – D.B.] … can neither be revoked nor restricted other than by way of a *clear and unequivocal* legislative provision. This is the case *a fortiori* when executed by the secondary legislator, who can do only that which the sovereign legislator has authorized him to do, and this authorization must be *clearly and expressly stated, or at least it must be implied by the general purpose and intention of the law* by virtue of which the secondary legislator presumes to act'

(HCJ 144/72 *Lipevski-Halipi v. Minister of Justice* [73], at p. 723. On the different approaches taken by this Court during the period preceding the enactment of the Basic Laws concerning human rights, see Oren Gazal-Ayal, "Restrictions of Basic Rights "By Law" or "According to Law" *Mishpat Umimshal - Law and Government in Israel* 4, pp. 381, at pp. 385-389 (1998) (hereinafter: Gazal).

11. The enactment of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation created an opportunity for a fresh interpretative perspective of the requirement of "explicit authorization" currently anchored in the limitations clause. Our case law has already established that in keeping with the status accorded to human rights in the Basic Laws, and in view of their spirit, greater weight is assigned today to the obligation to take into account protected human rights (see CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* [75], at para. 46 of my judgment). Indeed, as mentioned, the requirement of "explicit authorization" by law seeks to reduce the damage to basic rights by way of secondary legislation, while giving expression to the principle of the rule of law in its formal and narrow-substantive sense. However, the interpretative question arising in this context is this: when is an authorization in a law considered to be "explicit" as stated in the limitations clause? A variety of interpretative questions may arise in this context: is it sufficient for the primary legislator to authorize the secondary legislator to fix an arrangement in a particular area that by its very nature is liable to involve a violation of human rights, or is clearly-stated authorization to violate the relevant protected human right necessary? Is it sufficient that the law contain a general authorization to violate a human right, without determining the substance and scope of the violation, or must the statutory authorization also determine the fundamental criteria for the offending arrangement, in order to direct and define the secondary legislator's discretion when fixing an arrangement that restricts human rights?

These questions necessitate a balance between different and even conflicting considerations. Two main approaches present themselves in this context. *On the one hand*, our case law has established that the principles of the separation of powers, the rule of law, and democracy in both its formal-representative sense and its substantive sense, all require that the principal norms and the fundamental criteria for implementing them be fixed in

primary legislation ("primary arrangements") (see *per* Justice (previous title) T. Or in HCJ 244/00 *New Dialogue Society for Democratic Dialogue v. Minister of National Infrastructures* [76], at p. 56 and references cited).

The considerations underlying this basic rule of public law in Israel were discussed at length by President Barak in *Rubinstein v. Minister of Defence* [45] and by Deputy President Cheshin in HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel et al. v. Prime Minister of Israel* [77]. Briefly, this doctrine is based on a conception of representative democracy in which the parliament elected by the people is the principal carrier of the legislative role, enjoying social legitimacy in that capacity. A sweeping conferral of legislative authority on an administrative agency without the fundamental arrangements for exercising such authority being set out in legislation is tantamount to transferring the legislative power granted to the Knesset to the executive branch or one of its offshoots, and may directly contradict the fundamental basis upon which the system of the regime is premised. According to this conception, it is the Knesset, as opposed to administrative authorities, that must prescribe the fundamental criteria for the violation of basic rights. This is the way to ensure that the Knesset fulfils its constitutional role and that it guides the administrative authorities in their activities that involve violations of human rights. In this way, there will also be a public parliamentary discussion of the relevant constitutional and normative considerations, in a manner that provides a "certain institutional guarantee that basic rights will not be violated except where necessary" (*per* Justice D. Dorner, *Lam v. Director General of the Ministry of Education, Culture and Sport* [44], at p. 684; and see further *per* Justice E. Hayut, *Association for Civil Rights in Israel v. Minister of Internal Security* [43], at p. 762; *per* Deputy President E. Rivlin, *ibid.,* at p. 765; Amnon Rubinstein and Barak Medina, *The Constitutional Law of the State of Israel,* vol. 1, pp. 127-128, 159ff (2005) (hereinafter: Rubinstein and Medina)).

It will be noted that this conception also underlies the *interpretative* presumption operative in our legal system, the status of which was reinforced by the enactment of the Basic Laws concerning human rights, whereby it is not the intention of the primary legislator to authorize the secondary legislator to prescribe primary arrangements in secondary legislation (on this interpretative presumption, see: *New Dialogue Society v. Minister of*

National Infrastructures [76], at pp. 56-57, *per* Justice (previous title) T. Or; *Rubinstein v Minister of Defence* [45], at p. 523 {193}, *per* President Barak; A. Barak, *Interpretation in Law,* vol. 2, *Legislative Interpretation*, at pp. 527-530 (1993); Rubinstein and Medina, at p. 166). In accordance with this presumption it was held that as a rule, the secondary legislator should refrain from establishing primary arrangements itself and should focus on determining the means for implementation and enforcement of the substantive arrangements outlined by the primary legislator. This ensures that the "democratic-parliamentary regime" is not replaced by a "formal democratic regime" (*per* President M. Shamgar in HCJ 256/88 *Medinvest Herzliya Medical Center v. Director General, Ministry of Health* [78], at p. 45).

In this context it is noteworthy that in parliamentary democracies in which the constitutional system protects human rights, the requirement to specify the manner of limitation of rights in primary legislation is anchored within the system. Thus, in the German legal system, this concept finds specific constitutional anchorage in s. 80(1) of the Basic Law (*Grundgesetz*). This section stipulates that the federal and state governments may be authorized by law to establish secondary legislation, but the contents, purpose, and scope of the authorization must [also] be determined by law. A similar conception is evident in the case law of the Supreme Court of the United States. Basing itself on the principle of separation of powers, this court ruled that legislative powers are given to Congress, and that delegation of these powers to administrative authorities is conditional upon Congress setting standards to guide the secondary legislator in exercising his authority. In actual practice, it must be said, the Supreme Court of the United States deems sufficient the establishment of broad and general standards in a law, thus weakening the status and the application of the doctrine in the American legal system (see: Mistretta v. United States, 488 U.S. 361 (1989); and Calvin Massey, *American Constitutional Law: Powers and Liberties* 394-395 (2nd ed., 2005)).

The constitutional considerations discussed so far are likely to support a strict and precise interpretation of the requirement of "explicit authorization" in the limitations clause. Accordingly, in order for secondary legislation that violates protected human rights to be constitutional, a general, comprehensive blanket statutory authorization concerning enactment of harmful secondary legislation does not suffice. It is necessary to point to a clearly articulated

authorization in the law, specifying the nature of the violation of the protected right and its fundamental criteria in the framework of the authorizing statute.

As opposed to this interpretative approach, it could be argued that in the modern reality, the multitude of matters requiring statutory regulation prevents the primary legislator from dealing personally with all the matters that require legislation. According to this argument, the requirement of a clear, detailed authorization in the law for purposes of violating basic rights by way of secondary legislation is liable to lead to cumbersome and slow primary legislation that does not allow for adaptation to the changing circumstances of life and to the needs of time and place. This situation is liable to paralyze the regulatory enterprise, harming the broad public interest and even the protection of human rights. Moreover, a rigid construction of the requirement of "explicit authorization" may overly limit the power of the administrative authorities to exercise broad discretion in the regulation of matters within their area of expertise. Furthermore, it is difficult to determine a clear guideline for distinguishing between primary and secondary arrangements, and it is thus doubtful whether it is practically possible to single out the primary legislator as being charged with establishing primary arrangements (see para. 36 of the judgment of Justice Naor and her judgment in *Association for Civil Rights v. Minister of Internal Security* [43], at pp. 759-760; also see and compare Bracha, at p. 82; Zamir, at p. 68). Indeed, this Court has already said that "the complexity of life has forced us to reconcile ourselves to the existence of primary arrangements in secondary legislation…" even though this is not a desirable situation (*per* Deputy President Cheshin in HCJ 2740/96 *Chancy v. Inspector of Diamonds* [79], at p. 505).

These considerations may justify a more moderate approach to the requirement of "explicit authorization", whereby it would suffice for the authorization for violating a basic right to be dictated by the purpose of the authorizing law, without requiring explicit wording or a specific arrangement in primary legislation regarding the substance and scope of violation of the protected right (cf: Gazal, at p. 416). A similar approach prevails in the English legal system, where it was ruled that not only an explicit provision, but also an intention that is necessarily implied by a parliamentary statute, may rebut the interpretative presumption whereby the secondary legislator is not authorized to make arrangements that violate the basic principles of the

system (see: A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law* 687-688 (14th ed., 2007); P. Craig, *Administrative Law* 389-390 (5th ed., 2003)).

12. How should we balance all of the above considerations? What construction should be given to the requirement of "explicit authorization" in the limitations clause, in view of the variety of considerations as stated? It would seem that our response to these questions must be from a broad perspective that takes in the other components of the limitations clause of the Basic Laws. As explained above, the limitations clause expresses a complex conception of the rule of law, in both the formal and the substantive senses. The conditions of the limitations clause are grounded in a delicate balancing of human rights among themselves, and human rights as against the general good. The balancing task does not admit of precise, fixed advance definition, being the product of evaluation and estimation. The task of balancing eludes precise advance definition, for it is the product of relative calculation and evaluation. It must be sensitive to the context in which it takes place (see: Barak, *Constitutional Interpretation*, at p. 548).

Considering all the above, we have ruled previously that the interpretation and manner of application of the *substantive* conditions of the limitations clause - especially the requirements of a proper purpose and proportionality - should be determined in light of all the parameters, including: the area with which the offending legislation deals; the reasons underlying the protected right and its relative social importance; the nature of the violation and its magnitude in the concrete case; the circumstances and the context of the violation; and finally, the nature of the competing rights or interests (see my comments in *Menahem v. Minister of Transport* [48], at pp. 258-259). Further to this it was ruled that the nature of the violation of the protected right and its magnitude are likely to impact on the examination of the violation from the perspective of the limitations clause. In the words of Justice I. Zamir: "In principle, the level of protection accorded to a basic right must be directly proportional to the importance of the right and the magnitude of the violation" (HCJ 7083/95 *Sagi T*‹;'/.. v. Minister of Defense [80], at p. 262 {657}; see also Menahem v. Minister of Transport [48], at p. 260; Horev v. Minister of Transport [26], at p. 49 {202}).

In accordance with the above, this court has ruled that the greater the social value of the violated right, and the more comprehensive and severe the violation, the more important and substantive the purposes must be in order to satisfy the requirement of "proper purpose" in the framework of the limitations clause (see e.g. M*ovement for Quality of Government in Israel v. Knesset* [14] at p. 890, *per* President A. Barak; HCJ 8276/05 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Defense* [81], para. 28, *per* President Barak).

Similarly, regarding the requirement of proportionality it was ruled that "the magnitude of the violated right or the magnitude of the violation of that right will determine the extent of our strictness with the authority regarding the grounds of proportionality" (HCJ 3648/97 *Stemkeh v. Minister of the Interior* [82], at p. 777, *per* Justice (previous title) M. Cheshin; see also HCJ 5503/94 *Segel v. Speaker of the Knesset* [83], at p. 544, *per* Justice A. Goldberg; *Tzemach v. Minister of Defence* [80], at p. 282, *per* Justice I. Zamir; *Menahem v. Minister of Transport* [48], at p. 280 of my judgment; *Israeli Office of Investments v. Minister of Finance* [64], at pp. 420-423, *per* Justice Dorner). It will be mentioned that insofar as the requirement of proportionality is concerned, the examination of the nature and extent of the violation are an integral part of the tests of this requirement, especially of the third subtest, in the framework of which the relationship between the nature and the extent of the violation and the benefit stemming from it is examined (see e.g. LAA 696/06 *Alkanov v. Supervisory Court for Custody of Illegal Residents* [84], *per* Justice Procaccia, at para. 21).

Thus, according to the settled case law of this court, the substance of the violated right, the reasons underlying the right and its relative social importance, the magnitude of the violation, and the context in which it occurred, all have implications for the interpretation and the mode of application of the requirements of proper purpose and proportionality that constitute an expression of the principle of the rule of law in the broad, substantive sense. In my opinion, the requirement of "explicit authorization" by law, which likewise is a manifestation of the principle of the rule of law, should be interpreted in similar fashion (para. 9 above). Indeed, the requirement of "explicit authorization" by law does not have a single, essential meaning. Its application calls for sensitivity to the context and all the

circumstances of the case. Accordingly, the nature of the violated right and its underlying rationales, the relative social importance of the right, the magnitude of its violation, its social ramifications, the nature of the offending authority and the context – should all affect the mode of interpretation and application of the requirement for "explicit authorization" in the limitations clause.

Bearing this in mind, the closer the substantive connection between the violated right and the dignity and liberty of the person, the greater the social importance of the right, and the more serious and comprehensive the violation, the stricter will be our interpretation of the requirement of "explicit authorization" in the concrete case. Accordingly, in cases involving a serious violation of a major basic right, clear statutory authorization in the authorizing law establishing general criteria for the essential features of the violation that is permitted by way of secondary legislation will be required. The level of detail required in the authorization will be a function of the magnitude of the violation of the protected right, the nature of the matter, and the overall context. President Barak dwelt on this issue in his discussion of the basic principle whereby primary arrangements must be fixed by the primary legislator:

> 'The level of abstraction of the primary arrangement changes from case to case. *The greater the violation of individual liberty, the less acceptable is too high a level of abstraction, and an arrangement in primary legislation establishing – even if only in general terms - the nature or the extent of the violation of liberty is required*. When the object of the arrangement is a complex matter, necessitating great expertise, it is sometimes possible to accept a high level of abstraction ....
>
> Indeed, the nature of the arrangement, its social ramifications, and the degree of violation of individual liberty all affect the scope of the primary arrangement and the degree of detail required thereof' (*Rubinstein v. Minister of Defence* [45], at pp. 515-516 {182-184}; see also *Supreme Monitoring Committee v. Prime Minister of Israel* [47], *per* Deputy President Cheshin at para. 37-39).

On the other hand, the lower that the underlying rationales of the protected right lie in the scale of social importance, and more minimal the violation of the right in the context and under all the circumstances of the case, the more it becomes possible to interpret the requirement of "explicit authorization" in a flexible and lenient manner. Under these circumstances the secondary legislation can draw its validity from explicit authorization dictated by the clear purpose of the authorizing law. In other words, where the nature, scope and magnitude of the violation of the protected right are not significant, it is sufficient that the authorization to violate the basic right is an inevitable outcome of the particular purpose of the authorizing law, even in the absence of clear language and of regulation of the main features of the violation in primary legislation (cf: Gazal, at pp. 403-408).

13. This interpretation of the requirement of "explicit authorization", which is based on the connection to the nature and magnitude of the violation of the protected right, is a suitable one. It creates interpretative coherency and harmony between the various components of the limitations clause, which constitute one integral unit, the purpose of which is to allow a violation of human rights for the purpose of maintaining human rights (see Barak, *Constitutional Interpretation*, at pp. 486-487). It allows flexibility in accordance with the context and the circumstances, while striking a proper balance between the reasons supporting the establishment of basic criteria in primary legislation for the violation of human rights, and the need for administrative efficiency and for leeway for the secondary legislator as part of the public good and the protection of individual rights (see para. 11 above).

The proposed interpretation also reconciles the varying approaches expressed in the decisions of this court regarding the requirement of "explicit authorization" in the Basic Laws (see para. 10 above). According to the interpretation discussed above, the requirement of *"overt, clear and explicit authorization",* as stated by President M. Shamgar in *Miterani v. Minister of Transport* [72], at p. 360, applies to secondary legislation that significantly and severely violates fundamental basic rights (cf: Justice Dorner in *Lam v. Minister of Sport* [44], at para 10, and *Association for Civil Rights v. Ministry of the Interior* [12], at para. 8). On the other hand, where the violation is insignificant in terms of magnitude and in relation to the relevant right, the requirement of "explicit authorization" is satisfied even if the authorization for

violation is "*implied by the general purpose and intention of the law,*" as stated in *Lipevski-Halipi v. Minister of Justice* [74], at p. 723.

Finally, it will be mentioned that the proposed interpretation is compatible with the interpretative presumption that we discussed above, according to which the legislature did not intend to authorize the executive branch to establish primary arrangements in secondary legislation. As we have said, this presumption was reinforced following the enactment of the Basic Laws on human rights (see para. 11 above). And indeed, under the interpretation that we are proposing, secondary legislation that involves a serious violation of major basic rights must draw its validity from a clear authorization in primary legislation that prescribes normative criteria for the regulation of that violation, at least in general terms. This ensures that arrangements involving a significant and severe violation of basic human rights will not be anchored in secondary legislation in the absence of suitable regulation of the matter in a statutory act of the Knesset.

We would also mention that our case law has yet to consider the question of whether after the enactment of the Basic Laws on human rights, the aforementioned interpretative presumption has become a binding constitutional norm that affects the ability of the Knesset to explicitly authorize an administrative authority to determine its own primary arrangements that violate human rights. This question does not arise in the current case, and what I have written in my opinion here does not resolve it (see and compare to other cases in which this question was left pending further examination: *Supreme Monitoring Council v. Prime Minister* [77], at para. 34, *per* Deputy President M. Cheshin; *New Dialogue Society v. Minister of National Infrastructures* [76] at p. 58, *per* Justice (former title) T. Or; *Rubinstein v. Minister of Defence* [45], at p. 522-523 {192-194}, *per* President A. Barak; also see: Rubinstein and Medina, at p. 170).

From the general to the specific

14. This petition concerns the constitutionality of the prohibition on the broadcast of political advertisements on radio and television. The prohibition appears in the Rules of the Broadcasting Authority and of the Second Authority, which constitute secondary legislation. The statutory authorization for the Broadcasting Authority to make these Rules appears in s. 25A(b)(2) of the Broadcasting Authority Law, which reads as follows:

> '25A. Advertisements and Announcements on Radio
>
> ….
>
> (b) The management committee shall determine, in consultation with the Director General, rules concerning -
>
> …
>
> (2) *prohibitions and restrictions* on the broadcast of advertisements and announcements' (italics not in original – D.B.)

Regarding the Second Authority, the relevant authorization provision appears in s. 88 of the Second Authority Law, which states as follows:

> 88. Rules for Advertising Broadcasts
>
> The Council shall make rules concerning the broadcast of advertising broadcasts, *inter alia*, concerning the following matters:
>
> (1) …
>
> (2) *Subjects that are prohibited for broadcast as advertisements* in general, or in specific circumstances, or by reason of being offensive to good taste or to public sensitivities' (italics not in original – D.B.).

In her judgment, my colleague Justice Naor made the point that the linguistic difference between the two authorizing provisions is not significant and that the Broadcasting Authority and the Second Authority are both authorized to impose restrictions on the *contents* of advertisements (see pars. 31-32 of her judgment and all the references there). I agree. However, the question here is whether the aforementioned statutory authorization constitutes "explicit authorization" by law for purposes of establishing an *absolute* prohibition on the broadcast of political advertisements. My colleague answered this question in the affirmative. My position on this matter is different.

In both the Broadcasting Authority Law and the Second Authority Law, the authorization to impose restrictions on the contents of advertisements is general. The discretion of the Management Committee of the Broadcasting Authority and the Council of the Second Authority in this context is extremely broad. These authorizing provisions do not specify the particular considerations that the Broadcasting Authority and the Second Authority are

permitted to take into account for purposes of setting such restrictions, nor does it specify the nature, the substance and the scope of these restrictions. Indeed, s. 88(2) of the Second Authority Law provides that the Second Authority is authorized to impose restrictions on the subjects of advertisements "by reason of being offensive to good taste or to public sensitivities," but apart from this the legislature added nothing.

I am prepared to say that the purposes of s. 25A(b)(2) of the Broadcasting Authority Law and s. 88(2) of the Second Authority Law clearly and even necessarily imply an intention to authorize the Management Committee of the Broadcasting Authority and the Council of the Second Authority to restrict the applicants' freedom to advertise on radio or television. In appropriate circumstances, this authorization may even constitute "explicit authorization" by law to violate freedom of speech, even though its language is general and it does not prescribe normative criteria for imposing restrictions on the contents of advertisements. This is the case, for example, in relation to freedom of commercial expression, for which the level of protection is lower than for political expression, or in relation to a violation of freedom of speech - including freedom of political expression - under circumstances in which the magnitude of the violation is not great. As explained above, in such circumstances the requirement of "explicit authorization" by law could be construed in a "more lenient and flexible manner" (see and compare: *Zakin v. Mayor of Beer Sheva* [27], *per* Justice I. Zamir, at para. 9).

This is not the case in the present context. The prohibition on political advertising prevents absolutely and in advance the broadcast of political advertisements on radio and television, owing to the fact that their goal is to influence the public on a publicly controversial political matter. For the reasons elucidated above, my position is that a total ban on the broadcast of political advertisements severely violates freedom of political expression. The fundamental rationales of freedom of political speech, its immense importance to the individual and society, its crucial contribution to the democratic process, and the magnitude of its violation under the circumstances, should all affect the interpretation of the requirement of "explicit authorization" by law in the current context.

Bearing all the above in mind, my view is that for purposes of a total ban that prevents in advance any possibility of political advertising in the

broadcast media, the general authorization in s. 25A(b)(2) of the Broadcasting Authority Law and s. 88(2) of the Second Authority Law is insufficient. Imposing this kind of broad prohibition requires clear authorization by law that determines the basic criteria relating to this prohibition, even in general terms. It will be pointed out where necessary, the *arrangements for implementation* of the prohibition on political advertising on radio and television are likely to be made in the framework of secondary legislation, to enable the implementation and enforcement of the prohibition. Similar arrangements operate both in England and in Germany. In Germany, all sixteen states resorted to *parliamentary legislation* to incorporate the German Interstate Broadcasting Treaty, which established a total ban on the broadcast of political advertisements other than during election periods (s. 7 para. 8 *Rundfunkstaatsvertrag* - Interstate Broadcasting Treaty). At the same time, authorization to make rules for the purpose of implementing that prohibition was prescribed by law. In England, the total ban on political advertising in the broadcasting media other than during an election period was anchored in parliamentary legislation – section 321 of the Communications Act, 2003. S. 319(2) of the said Act contains authorization to make rules for the implementation of that particular prohibition.

15. In their pleadings, the respondents referred to other provisions in the Broadcasting Authority Law and the Second Authority Law that relate to the Authority's duty to act fairly and to ensure reliable broadcasts that *give expression to the variety of views prevailing in the public* (for the specific statutory provisions, see para. 35 of Justice Naor's judgment). My view is that given the nature and magnitude of the violation of freedom of political expression, these statutory provisions do not constitute "explicit authorization" by a law to establish the prohibition under consideration. The statutory obligation to maintain fairness in broadcasts may well necessitate a strict regulatory regime for political advertising on radio and television, but it is not, *per se*, sufficient to constitute "explicit authorization" by law to make a rule that categorically denies the possibility of political advertising. Establishing such a prohibition requires clear authorization by law that determines the fundamental criteria for the existence of such a prohibition.

16. I wish to emphasize here that contrary to the respondents' claims, our conclusion in this case is not inconsistent with previous rulings of the Supreme

Court. In HCJ 10182/03 *Education for Peace* and in *Gush Shalom Society v. Broadcasting Authority* [41], the constitutionality of the rule prohibiting the broadcast of political advertisements was not at issue; in any case, the rulings in that case have no bearing on the question of whether there is "explicit authorization" by a law for the establishment of the aforementioned prohibition. The other judgments cited by the respondents in their pleadings dealt with the issue of the constitutionality of the rules that prohibited freedom of commercial speech (see e.g. *Tempo Beer Industries Ltd v. Second Authority* [40], para. 4, which discussed the constitutionality of the rule prohibiting a "broadcast proposing a competition or campaigns with prizes for drinking" alcoholic beverages). These judgments, which concern restrictions on freedom of *commercial* speech, do not contradict our conclusion regarding the absence of "explicit authorization" in a law for establishing the rules under discussion in the present petition, which significantly restrict the freedom of *political* expression.

Further to the above, it is noteworthy that our conclusion in this case is consistent with the approach of this court in *Association for Civil Rights in Israel v. Minister of Internal Security* [43]. In that case, the majority (Justice Hayut and Deputy President Rivlin, Justice Naor dissenting) held that the general authorization established in s. 132(17) of the Prisons Ordinance [New Version] 5732-1972 does not constitute "explicit authorization" by a law to enact a regulation that restricts the meeting between a prisoner and his lawyer. In that case, Justice Hayut ruled that "the magnitude of the right that is liable to be violated by the limitations specified in s. 29(b) [the right of consultation with a lawyer – D.B.] and the nature of the violation, necessitate explicit and detailed authorization in primary legislation, and the general authority in s. 132(17) of the Prisons Ordinance is insufficient" (*ibid*., at p. 768). Deputy President Rivlin added: " In s. 132(17) of the Prisons Ordinance I found no hint of authorization of the secondary legislator to violate the right to counsel. General statements regarding authority to make regulations "in other matters that must be arranged to ensure the effective implementation of this Ordinance" or in matters related to "the proper administration and the discipline of the prisons" are insufficient." (*ibid.,* at p. 768). We may therefore conclude that in view of the social importance of the right of consultation with a lawyer, and considering the nature of the violation of the said right and its magnitude in the particular circumstances, the majority view of this court is

that a general authorization in the Prisons Ordinance does not constitute "explicit authorization" by law for the purpose of a serious violation of the aforementioned right in the framework of secondary legislation. This position is consistent with our conclusion in the circumstances of the case before us, which is that considering the elevated status of freedom of political speech and taking into account the magnitude of its violation, the general authorizing provisions of s. 25A(b)(2) of the Broadcasting Authority Law, and s. 88(2) of the Second Authority Law do not constitute "explicit authorization" by a law for the purpose of establishing a rule that prohibits absolutely the broadcast of political advertisements.

17. The conclusion dictated by the above reasons taken together is that the absolute ban on the broadcast of political advertisements in s. 7(2) of the Broadcasting Authority Rules and ss. 5 and 11 of the Second Authority Rules was established without proper authorization by law. However, under the circumstances I believe that an immediate voiding of the Rules would have undesirable consequences, due to the need for legislative regulation of the subject following a comprehensive examination of all aspects involved. I further note that even according to the petitioner, the broadcast of political advertisements on radio and television requires regulation by legislation of the Knesset. In these circumstances my proposal to my colleagues is to suspend the effect of the invalidition of the said rules for a period of one year to enable the Knesset to address the issue. (On recourse to suspension as a manifestation of the doctrine of relative invalidity, see *Association for Civil Rights v. Minister of Public Security* [43], at p. 763 and citations there.)

Comments prior to closing

18. In view of my conclusion that under the circumstances, the requirement that the violation be by virtue of "explicit authorization" in a law has not been fulfilled, I am not required to decide on the question of whether the *substantive* components of the limitations clause were present. Even so, I wish to make a few brief comments on the matter.

From the respondents' pleadings before this Court it emerged that the ban on political advertising on the broadcasting media was designed to ensure the fairness and balance of television and radio broadcasts. The purpose of the prohibition is to prevent undue and unequal influence on the public-political discourse on the part of financially powerful bodies by means of relaying

political messages in the framework of advertisements at a high financial price. The concern is that the ability to purchase advertising time in order to broadcast political messages may be detrimental to substantive equality in relation to those messages lacking the financial backing that would enable their presentation on that platform. Such a result may undermine the aspiration for a balanced presentation of the different opinions in society and even lead to a perversion of the democratic process. The parties agreed that this purpose was a fitting one, and Justice Naor elaborated on the reasons justifying this purpose in her judgment.

In the circumstances of this case, the main dispute concerning the substantive components of the limitations clause is over the requirement of proportionality. Evidently, all are agreed that the broadcast of political advertisements over the electronic media is a subject that requires intervention and regulation. The dispute pertains to the extent of intervention and the proper means of achieving the purpose we discussed. In this regard there are a number of conflicting considerations. *On the one hand*, the electronic channels constitute a limited public resource. Broadcasts over these channels are a source of tremendous public influence and power. It could be argued that a framework for the broadcast of advertisements that depends on the funding power of those seeking to advertise precludes proper implementation and enforcement of the fairness doctrine; therefore, the means necessary for maintaining a fair balance between the differing views amongst the public is the total preclusion of any possibility of political advertising on radio and television. This is the way to prevent a situation in which "money talks". Indeed, as mentioned, the legislation in England and in Germany established an absolute prohibition on political advertising on the broadcasting media. It will be mentioned that in Germany, the constitutionality of that prohibition has never been adjudicated by the Federal Supreme Court. In England, the House of Lords recently handed down a decision that unanimously denied an appeal filed against a judgment of the High Court of Justice, which held that the absolute statutory prohibition on political advertisements *does not* contradict art. 10 of the European Convention on Human Rights (see Animal Defenders International v. Secretary of State for Culture, Media and Sport, [2008] 3 All ER 193).

On the other hand, some would argue that establishing a total ban on the broadcast of political advertisements in the electronic communications media constitutes an excessively harmful means, considering the potential contribution of such advertisements to the political-public discourse in Israel. According to this approach, in order encourage pluralism in society, political advertisements ought not to be banned entirely; rather, they should be permitted, subject to certain qualifications. In this context it should be mentioned that today, political advertisements are published for payment in the print media, on internet sites and on public billboards. Furthermore, it must be recalled that advertisements with political content are in fact broadcast today, if the rule governing the imparting of information to the public can be applied to them. Thus, for example, in the framework of announcements about conferences, assemblies and demonstrations, there is nothing to prevent the broadcast of paid advertisements featuring political contents. Against the background of this reality, a doubt may arise, *prima facie*, as to whether the fear of a distortion of the public discourse due to the broadcast of political advertisements on television and radio is indeed serious and substantiated. Support for this approach can be found in the ruling of the European Court of Human Rights in the case of *VgT Verein Gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR, 2001-VI.[ ]. In that case, the Court ruled that a Swiss law that established a blanket prohibition on political advertising on radio and television disproportionately violates the freedom of expression protected by art. 10 of the Convention. I should mention that in view of this judgment of the European Court of Human Rights, the British Government at the time *refrained from* making a declaration in the House of Commons regarding the compatibility of the statutory prohibition on the broadcast of political advertisements with the European Convention on Human Rights (a declaration of this kind is required under s. 19(1)(b) of the Human Rights Act for purposes of a government draft law). See: Joint Committee on Human Rights, Scrutiny of Bills: Further Progress Report – Fourth Report of Session 2002-2003, p. 6-10, Ev 14).

A comparative examination of the position in the United States and Canada reveals that these jurisdictions permit the broadcast of political advertisements, subject to limitations. For example, a number of states in the United States, such as Kansas and Florida, require that these broadcasts be accompanied by an announcement explaining to the listener and the viewer that this is an

advertisement, intended to encourage "an informed choice" in the political message that is conveyed to the public by commercial means. The Canadian legislator refrained from establishing a prohibition or restriction on the broadcast of political advertisements when it was not an election period. At the same time, the broadcasting entities themselves established partial limitations for the purpose of regulating the matter. For example, s. 1(f) of the Canadian Code of Advertising Standards states that "[t]he entity that is the advertiser in an advocacy advertisement must be clearly identified as the advertiser" in the framework of the advertisement so that the listener or viewer can know who is behind the advertisement.

Further to the above, it will be pointed out that an approach that supports the broadcast of political advertisements on radio and television – even if only in a qualified and restricted manner - must address all the aspects requiring attention. For example, according to such an approach, the question of whether there are alternative means of preventing the excessive domination of certain messages over others (for example, by placing restrictions on the amount of time allocated for political advertisements and the times of their broadcast, the duration of the broadcasts, their frequency and their price, and the position of the political advertisement within the cluster of advertisements) should be examined. Moreover, the approach supporting the broadcast of political advertisements subject to limitations and qualifications requires that recourse to measures to ensure that listeners and viewers are aware that this is political advertising be considered (this is the purpose of the duty of notice in the U.S.A and in Canada). Another matter that should be considered is the relationship between the regulatory arrangement for the broadcast of political advertisements and the prohibition on the broadcast of "party propaganda", and also the question of the relationship between that arrangement and the broadcast of propaganda by the parties during an election period. These are sensitive and complex issues that must be examined in depth, and as such they justify primary legislation.

19. Thus, the question of the proportionality of an absolute prohibition on political advertising has no simple answer. According to the case law of this court, the question of proportionality is the sort of question that does not have a precise, standard answer, because it requires acts of balancing and evaluation. Taking this into account, this court has acknowledged "room for

constitutional maneuver", also known as the "range of proportionality". The room for constitutional maneuver is determined in accordance with the specific circumstances of each particular case, taking into account the nature of the right and the magnitude of its violation, as opposed to the nature and substance of the competing rights or interests (see my comments in *Menahem v Minister of Transport* [50], at pp. 281-282 and citations). Presumably, when regulating the broadcast of political advertisements on Israeli radio and television, the primary legislator will consider the various factors taken into account and the regulatory arrangements that were adopted by other countries. This being so, at this stage I will not adopt a position on the question of the proportionality of the Rules that are the subject of the current petition.

I therefore propose to my colleagues to rule that the order *nisi* be made absolute. Accordingly, there should be a declaration of the invalidity – suspended, at this stage – of the prohibition on the broadcast of political advertisements on television and radio as prescribed in s. 7(2) of the Broadcasting Authority (Radio Advertisements and Announcements) Rules, 5753-1993, s. 5 of the Second Authority for Television and Radio (Ethics in Radio Advertising) Rules 5759-1999 and s. 11 of the Second Authority for Television and Radio (Ethics in Television Advertising) Rules 5754-1994 – all this, in the absence of "explicit authorization" by a law for the establishment of that prohibition. Should my opinion be accepted, the effect of the declaration of invalidity will be suspended for one year in order to enable the Knesset to address the matter.

Concluding Note

20. After writing the above, the opinion of my colleague Justice A. Procaccia arrived on my desk. For the reasons elaborated in her judgment, she believes that the Rules prohibiting paid advertisements of ideological – political expressions should not be viewed as a violation of freedom of speech. I will just mention that this approach was not mentioned in the parties' pleadings before us, and the point of departure in this hearing was that the Rules do indeed violate freedom of speech, and therefore they must be examined in accordance with the limitations clause. For the reasons elucidated in my opinion above, I too believe that the Rules violate the freedom of political expression, and I see no reason to add to those reasons. Nevertheless,

I would like to comment briefly on the doctrinal-fundamental aspects emerging from my colleague's judgment.

In her judgment, my colleague Justice Procaccia discussed the importance of the two-stage doctrine in the examination of a constitutional argument. According to this doctrine, an argument regarding the violation of a constitutional right must be examined in two stages: at the first stage, the internal scope of the constitutional right must be defined. In view of that definition, the question of whether the right under discussion was indeed violated under the circumstances must be examined. Only if the answer is affirmative do we proceed to the second stage, which is concerned with the degree of protection afforded to the right that was violated. At this stage of the constitutional analysis, the question that must be examined is whether the violation of the right is lawful in accordance with the criteria of the limitations clause. The two-stage doctrine is clearly dictated by the wording and provisions of the Basic Laws concerning human rights, and constitutes a central tool of analysis in the constitutional rulings of this court. Indeed, an examination of my own opinion and the judgments of my other colleagues on this bench reveals that we have no argument regarding the two-stage doctrine. However, on reading the judgment of Justice Procaccia, it would appear that there is in fact a dispute concerning the relationship between the two stages upon which the doctrine is based.

The two-stage doctrine is grounded in the conception that the two stages of the constitutional examination affect each other. Thus, for example, some are of the opinion that the more the court extends the scope of the constitutional rights, so it is liable to narrow the scope of protection afforded to them (see para. 45 of Justice Procaccia's judgment and citations there). Moreover, the nature of the violation of the protected right and its magnitude will affect the examination of the right in terms of the limitations clause (see para. 12 of my comments above). The two stages of constitutional examination are therefore closely linked. This does not, however, alter the fact that analytically and practically, there are two distinct stages of examination. The definition of the internal scope of a constitutional right (or a basic case-law right) is based on factors that influence the substance and dispersion of the relevant right. Usually, the definition of the internal parameters of a right reflects a value-based, normative balance between the right under discussion and other human

rights (see: Barak, *Constitutional Interpretation,* at p. 381). On the other hand, the question of whether the violation of a constitutional right is justified according to the conditions of the limitations clause is based on "external" balances between the protected right and opposing public interests. In the framework of the external balancing, conflicts arise between values and principles of a public nature which, by virtue of their cumulative weight, justify the violation of a protected human right.

21. I am afraid that my colleague Justice Procaccia has applied the two-stage doctrine in a way that may obscure the distinction between the two stages. In general, the accepted approach in the case law of this court is that a restriction on the manner in which a human right is realized constitutes a violation of the inner scope of the right, and the examination must therefore also relate to the violation of the manner in which a right is realized, as part of the violation of the right. According to this conception the very existence of other means of realizing a relevant human right may reduce the magnitude of the violation of the right, but it does not negate the actual fact of the violation (see and compare e.g. in the context of freedom of occupation: *Menahem v. Minister of Transport* [50], para. 11 of my judgment). In the circumstances of the present case, my colleague Justice Procaccia agrees that the broadcast of political advertisements for payment may constitute a "special means of realization" of the political expression. At the same time, she argues that this means of realization is not part of the inner scope of the constitutional right of freedom of speech. Here, Justice Procaccia attached significant weight to the public interests and values forming the basis of the fairness doctrine, which aims to ensure "a free marketplace of ideas" in the media. The background for this is the nature of commercial advertising, which is purchased for payment and is dependent upon the financial abilities of the person commissioning it.

There would appear to be no disagreement amongst the justices hearing this case regarding the status and importance of the fairness doctrine in the communications media. However, the question of principle that arises here is that of the stage at which the said doctrine should be considered in the framework of the constitutional examination. Should the fairness doctrine influence the definition of the internal scope of the right to freedom of speech as suggested by Justice Procaccia's approach? Or perhaps the appropriate context for consideration of the fairness doctrine is in the framework of the

limitations clause, as indicated in Justice Naor's judgment. My position on this matter is in line with Justice Naor's position, as stated in para.s 18 of my comments above.

As a rule, when considering a limitation on the manner in which a protected constitutional right is realized, the balance that must be struck is between the relevant protected right and other public interests and values. This indeed is the case before us, in which the primary justification for the restriction - or more precisely, the prohibition - on the realization of freedom of political speech by way of paid advertising lies in the fairness doctrine. The balance here is an "external one" between a constitutional human right and opposing public interests, and in principle, the appropriate context for effecting this balance is within the framework of the limitations clause. Any other approach is liable to lead to an excessive narrowing of the internal scope of human rights, because the ways of realizing these rights would be in danger of not receiving protected status. Such an approach might also lead to an analytical and practical blurring between the stage of defining the internal scope of human rights and the degree of protection afforded them, since the public interests weighed up in the framework of the requirements of proper purpose and proportionality in the limitations clause might seep into the definition of the internal scope of the rights. *Inter alia*, this is liable to lead to a heavier burden of proof borne by petitioners claiming a violation of a right, because the consideration given to public factors would be diverted to the first stage of examining whether or not the right was actually violated.

These comments are of a general nature, but they are especially true in relation to the freedom of political expression. In my understanding, the elevated status of freedom of political expression in the democratic system and its important underlying rationales justify viewing the various means of realizing the aforementioned right as being of constitutional status within the framework of the internal scope of the right, and the justification for any violation of them should therefore be examined in the framework of the degree of protection afforded to freedom of speech in accordance with the conditions of the limitations clause.

Justice E. Hayut

1. Like my colleagues President D. Beinisch and Justice M. Naor, I too believe that the protected value in the present case is the freedom of political expression, any violation of which must comply with the criteria of the limitation clause in s. 8 of Basic Law: Human Dignity and Liberty. I also accept my colleagues' position that the petitioner's freedom of political expression was substantively violated when respondents 2 and 3 decided to prohibit the broadcast of the advertisement at issue in this petition, and that according to one of the conditions of the limitation clause, which my colleagues discussed at length, respondents 2 and 3 are required to show that this violation was "by a law" or "according to a law… by virtue of explicit authorization therein." At this point President Beinisch and Justice Naor part ways. Justice Naor is of the opinion that the Broadcasting Authority Rules and the Second Authority Rules (Rule 7(2) of the Broadcasting Authority (Radio Advertisements and Announcements) Rules, 5753-1993; Rule 5 of Second Authority for Television and Radio (Advertising Ethics in Radio Broadcasts) Rules 5759-1999, and Rule 11 of the Second Authority for Television and Radio (Ethics in Television Advertising) Rules, 5754-1994) which prohibit, *inter alia,* the broadcast of an advertisement that relays a publicly controversial political or ideological message (hereinafter jointly: "the prohibiting rules") were made by virtue of "explicit authorization" as required. In her view, this authorization can be read into the general authorizing provisions of s. 25A(b)(2) of the Broadcasting Authority Law, 1965-5725 (hereinafter: "Broadcasting Authority Law"), and ss. 24(a)(6) and 88(2) of the Second Authority for Television and Radio Law, 5750-1990 (hereinafter: "the Second Authority Law") respectively. According to Justice Naor's approach, this interpretation of the authorizing provisions in the aforementioned Laws is supported by various provisions in the Broadcasting Authority Law and the Second Authority Law that give rise to a general duty to broadcast balanced programs that fairly reflect the variety of opinions prevailing amongst the public. In her own words:

> 'Indeed, a reading strictly of those sections of the two Laws concerning advertisements provides no indication of the intention of the primary legislator regarding what is permitted and what is forbidden. In my view, however, one cannot read the provisions

> concerning advertisements in isolation from the other provisions of the Law, as if these broadcasts were a limb severed from the body of the Broadcasting Authority or of the Second Authority.
>
> ….
>
> In my opinion, these principles, which deal with *programs* – the "hard kernel" of the functions of the Broadcasting Authority and the Second Authority – are the primary arrangement in the light of which the rules should be determined. The rules for advertisements must be consistent with the primary legislation, and in my opinion – and to the extent that they relate to the matter before us – they are indeed consistent. We are not in a "legislative vacuum" and in my view, the argument regarding the absence of primary legislation in the authorizing law does not apply here. The subject of advertisements is a subsidiary matter that is attached to the main matter (para. 35 of Justice Naor's judgment).'

Satisfied that the condition of "explicit authorization" prescribed by the limitation clause has been fulfilled, Justice Naor proceeds to examine whether the prohibiting rules comply with the other conditions of the limitation clause relevant to our case, i.e. whether the Rules were intended for a proper purpose and whether the violation was proportionate and not in excess of that which is necessary. Here too Justice Naor gives an affirmative answer. Regarding the proper purpose, Justice Naor holds that the Rules were intended to prevent erosion in the application of the fairness doctrine in programs, and the rupture of this doctrine by the relaying of political messages in the framework of advertisements to which it is not applicable. Regarding proportionality, Justice Naor holds that this condition too is satisfied, along with all of its subtests; there is a rational connection between the means chosen and the purpose that the Rules seek to realize; a total prohibition is necessary to realize the purpose for which the Rules were established, and there is a reasonable balance between the magnitude of the violation of the petitioner's freedom of political speech and the benefit to society from upholding the fairness doctrine.

2. The President, on the other hand, opined that the authorizing provisions in s. 25A(b)(2) of the Broadcasting Authority Law and ss. 24 (a)(6) and 88(2) of the Second Authority Law do not constitute "explicit authorization" as

required under the limitation clause for the establishment of prohibiting rules, and stresses in this context that -

> '... in cases involving a serious violation of a major basic right, clear statutory authorization in the authorizing law establishing general criteria for the essential features of the violation that is permitted by way of secondary legislation will be required. The level of detail required in the authorization will be a function of the magnitude of the violation of the protected right, the nature of the matter, and the overall context.'

On this matter I concur with President Beinisch, and as mentioned in her judgment, I expressed this view in a previous case in which a similar question arose (*Association for Civil Rights in Israel v. Minister of Internal Security* [43]). This being the case, I too take the view that the order *nisi* should be made absolute as far as it relates to the constitutionality of the prohibiting rules. Nevertheless, I do not concur with the President regarding the outcome of the petition before us, insofar as it relates to the decision of the Second Authority for Television and Radio (hereinafter: "the Second Authority") to prohibit the broadcasts that are the subject of this petition. The reason is that s. 86(a) of the Second Authority Law, which refers to s. 46(a) of that Law, prescribes a primary arrangement concerning "party propaganda" (which has no parallel in the Broadcasting Authority Law), establishing an explicit prohibition that is relevant for our purposes. In my view, this prohibition legitimates the decision adopted by the Second Authority in the present case. My colleague Justice Naor maintained that the reliance of the Second Authority's decision on the statutory arrangement in s. 86(a) of the Second Authority Law was "over and above what was required," and as such did not require further attention. She further held that in view of the wording of the order *nisi* of 29 July 2004, the question of the constitutionality or the interpretation of the provisions regarding "party propaganda" does not arise in our case. The President too was of the opinion that the wording of the order *nisi* and the reasons relied upon by the Second Authority in its initial decision to disqualify the petitioner's advertisements obviated the need to hear the Second Authority's alternative pleadings, according to which even if the prohibiting rules were to be invalidated, the decision in the present case should not be overturned, even if only because it

was also lawfully based on the provisions of s. 86(a) of the Second Authority Law.

My view of the matter is different. In his letter of 19 October 2003 to the petitioner's lawyer, the Second Authority's legal advisor did indeed stress that the advertisements were disqualified for broadcast in view of Rule 5 of the Second Authority Rules for Radio, whereas the prohibition on "party propaganda" within the meaning of s. 46(a)(3) of the Second Authority Law (to which s. 86 (a) refers concerning advertisements) was mentioned in that letter "above and beyond that which was necessary." Nevertheless, in rejecting the appeal filed by the petitioner on this matter, the Appeals Committee of the Second Authority Council clearly relied on the aforementioned statutory provision as well, stating as follows:

'Section 5 of the Rules (Ethics in Radio Advertising) prohibits the broadcast of an advertisement "on a political, social, public or economic matter that is the subject of public controversy." In addition, s. 46(a)(3) of the Second Authority Law, 5750-1990 prohibits the broadcast of party propaganda (*Shammai v. Second Authority for Television and Radio* [5]). as stated it is not disputed that the programs that are the subject of this appeal promote an initiative which is essentially of a political-ideological nature, with the intention of persuading the public to support the initiative. As such their broadcast cannot be allowed.'

This decision of the Appeals Committee with its reasons was attached as appendix H to the petition, and *inter alia* was challenged by the petitioner, insofar as it relates to the Second Authority. As to the wording of the order *nisi*: as opposed to my colleagues, my view is that s. 1 of the Order relates in a general sense to the legal and constitutional validity of the decisions made by respondents 2 and 3, including all that they were based upon, and in any case it does not limit the scope of this hearing to the validity of the "prohibiting rules". This question was specifically addressed in ss. 2 and 3 of the order. Examination of the briefs and summations submitted by the Second Authority similarly indicates that they relate extensively to the issue of anchoring the prohibiting decision in the provisions of ss. 46(a)(3) and 86(a). For all these reasons I think that this question must be addressed, and were my opinion to be accepted, we would accept the claims of the Second Authority on this matter.

3. Section 86(a) of the Second Authority Law provides as follows:

'A franchisee shall not broadcast *an advertisement* –

(1) On subjects the broadcast of which are prohibited under s. 46(a);

(2)….

Section 46 (a) of the Second Authority Law, referred to in s. 86(1), determines inter alia that -

'A franchisee shall not broadcast programs that contain -

(1) …

(2) …

(3) party propaganda, except for election propaganda that is permitted by law;

In *Shammai v. Second Authority for Television and Radio* [5], President Barak addressed the interpretation of "party propaganda" in s. 46(a) of the Second Authority Law, and in preferring an interpretation that attributed maximal weight to the substance and content of the propaganda over a literal, formal interpretation, President Barak held that -

'"Propaganda" refers to an expression, the dominant effect of which – at a level of substantial or near-certain probability – lies in its influence on the viewer and which has no other dominant effect such as artistic, or news-related (see HCJ *Zwilli v. Chairman of the Central Elections Committee* [6]). *It is "party" propaganda if the content directly relates to subjects that are disputed by political parties in Israel*. For that purpose, the phrase "party propaganda" (in s. 46(a)(3)) cannot be restricted to (party) propaganda concerning the Knesset elections. "Parties" exist in Israel in relation to matters that are not only at the highest national level (Knesset)' (*ibid,* at p. 33).

This ruling has its logic. The underlying rationale for the prohibition of advertisements on publically disputed political matters was elucidated at length in Justice Naor's judgment, and her comments need not be repeated. I will briefly add that the "fairness doctrine" is well grounded in the legislation regulating the media market in Israel (see s. 4 of the Broadcasting Authority

Law and ss. 5(b)(6), 5(b)(7), 46(c) and 47 of the Second Authority Law) and while it has been argued that the time has come to cancel it and to adapt the legal position in Israel to the developments in this context in the U.S.A (on the significant differences between the Israeli media market and the American media market and the difficulties involved in the cancellation of the "fairness doctrine" in Israel, see Amnon Reichman, "The Voice of America in Hebrew?" *Be Quiet, Someone is Speaking – The Legal Culture of Freedom of Speech in Israel* 185, 228-229 (ed. Michael Birnhack, 2006)). At all events, as long as the current statutory arrangement remains in force, and the fairness doctrine lives and breathes within its framework, the primary and secondary legislation in this area must be interpreted as legislation that is designed for its realization. There is no dispute that by their very essence, advertisements are not the appropriate platform for the application of the fairness doctrine; this being the case, it must be ensured that in relation to political and ideological subjects that are publicly controversial in Israel, these advertisements will not be used in order to circumvent this doctrine. In other words, the incursion of publicly controversial matters into advertisements, the air-time of which was paid for and which from the outset are not intended for that kind of content, should be prevented. In HCJ 10182/03 *Education for Peace* we pointed out the risks involved in this situation:

> 'The concern arises that wealthy political bodies will be able to purchase broadcasting time in order to "market" their positions in advertisement form, and in that way purchase an advantage over political rivals with less financial capability' (*ibid,* at p. 417).

Aware of that danger, in the case of *Shammai v. Second Authority* [5] this court interpreted s. 46 of the Broadcasting Authority Law and the term "party propaganda" in a manner that accorded primacy to the substance of the broadcast and not to the identity of the entity seeking its publication (on the separate statutory arrangement applicable to propaganda during an election period see Elections (Modes of Propaganda) Law, 5719-1959; *Zwilli v. Central Elections Committee* [6], at p. 709). I accept this interpretative approach. It may further be pointed out in this context that on a practical level, franchisees of television and radio programs or of the Second Authority are naturally quite limited in their ability to the identity of the entity seeking to broadcast an advertisement or the identity of the entities directly or indirectly

involved in its activities, and this too supports the substantive approach applied by President Barak in *Zwilli v. Central Elections Committee* [6], which examines the actual content of the matter. It will be recalled that the advertisements relevant to this petition concern the Israeli-Palestinian conflict and the principles which in the petitioners' view could lead to its resolution. This being so, it would appear that these advertisements conform to the definition of the term "party propaganda" as interpreted in *Shammai v. Second Authority* [5], given that they are broadcasts the contents of which "directly relate to subjects that are disputed by [political] parties in Israel" and the dominant effect of which is to influence the viewer or the listener on these topics. As such, according to my approach, s. 86(a) of the Second Authority Law (which refers to s. 46(a) of the same Law) definitely provides a legal basis for the Second Authority's decision, by stipulating that these advertisements are prohibited for broadcast. It should be emphasized that this is a statutory arrangement that was enacted in 1990, and it is therefore governed by s. 10 of Basic Law: Human Dignity and Liberty regarding the validity of laws; at all events it seems that the statutory arrangement in s. 86 (a) of the Second Authority Law aims for a proper purpose and satisfies the proportionality tests; therefore, it does not violate the spirit of the Basic Law and the conditions of the limitation clause in that Law (cf. *Stein v. Commissioner of Israel Police* [10], at para. 16).

4. In conclusion, regarding the "prohibiting rules" I concur with the position of the President, that in the absence of explicit authorization on this matter in the primary legislation, the rules that violate the freedom of political expression cannot stand, and the order *nisi* should therefore be made absolute with respect to the invalidity of the "prohibiting rules". At the same time, and contrary to my colleagues who were of the opinion that the matter need not be decided, my view is that s. 86(a) of the Second Authority Law is a primary arrangement that provides a legal basis for the Authority's decision to prohibit advertisements in this case, and I would therefore deny the petition and cancel the order *nisi* insofar as it relates to the legality of the prohibiting decision of the Second Authority. This result, whereby the prohibition is valid only with respect to the radio and television broadcasts of the Second Authority, creates an undesirable lack of uniformity between the Second Authority and the Broadcasting Authority regarding those advertisements that constitute "party propaganda". It is for this reason, combined with all the other reasons given by

the President in this context, that it would be appropriate to formulate with all possible speed a uniform statutory arrangement that would apply to the whole communications market, and would address all of the matters addressed by the "prohibiting rules". Like the President, I too believe that the effect of the invalidity of the "prohibiting rules" should be suspended for one year to enable the legislature to formulate an appropriate arrangement.

Justice A. Procaccia

1. I have read the judgments of my fellow justices carefully. I concur with the conclusion of my colleague Justice Naor, according to which this petition should be denied. However, my path to that conclusion is different, and I would like to present it.

2. In her judgment Justice Naor assumes that the Rules of the Broadcasting Authority and of the Second Authority (hereinafter: "the Rules") prohibiting political-ideological expression in paid advertisements violate the petitioner's freedom of political speech, and in doing so violate a constitutional right. Nevertheless, in her view, this violation does not render the Rules unconstitutional, since the violation satisfies the conditions of the limitation clause of Basic Law: Human Dignity and Liberty (hereinafter: "the Basic Law"). According to her approach the Rules also satisfy the test in the limitation clause that the violation be *"by a law… or according to a law by virtue of explicit authorization therein."*

3. My colleague President Beinisch, too, assumes that the Rules prohibiting paid political-ideological advertisements violate a person's freedom of political expression, which is part of the constitutional right to human dignity, and that this violation should be examined from the perspective of the limitation clause of the Basic Law. In her view, however, the case at hand does not satisfy the first condition of the limitation clause which requires, as a condition for the constitutionality of the violation, that such violation be by a law or according to a law by virtue of explicit authorization therein. According to the President, the concept of "explicit authorization" in primary legislation as stated in the limitation clause is circumstance-dependent, its actual implementation deriving from the conditions and circumstances of the case. *Inter alia*, weight must be attached to the nature of the violated right, its underlying reasons and the magnitude of

the violation. In President Beinisch's view, the absolute prohibition on political advertisements dictated by the Rules is a significant violation of freedom of political expression, which has constitutional standing in the Israeli legal system. Under these circumstances, the general authorizing provisions to enact regulations in the Broadcasting Law and in the Second Authority Law cannot be viewed as satisfying the condition of "explicit authorization" for the competent authority to violate a person's freedom of political expression in the avenue of paid advertising. Therefore, according to this approach, the Rules do not fulfill the first condition of the limitation clause, and the petition should therefore be granted, the Rules should be declared invalid and the Knesset should be in a position to address the fundamental issue raised in this proceeding in the framework of the process of primary legislation.

4. The approaches taken by the President and Justice Naor proceed from the basic assumption that not providing a platform for political expression in paid advertisements on the Broadcasting Authority and the Second Authority (hereinafter: "the media authorities") is a violation of freedom of speech; hence the need to examine the significance of the violation from a constitutional perspective and to clarify whether the violation satisfies the constitutional test in accordance with the balancing formula of the limitation clause.

5. I disagree with my colleagues regarding the basic assumption that in the circumstances of this case, the Rules banning paid advertising of political-ideological expression violate the basic right to freedom of speech.

The essential difference in our approaches is reflected in the legal classification of the claim of a right to political-ideological expression by way of paid advertisements. In the framework of a person's broad right to freedom of political expression, is he entitled to realize that freedom by way of an advertisement on the public media? Is political expression in a paid advertisement necessarily included within the broad scope of the constitutional right to freedom of speech, such that its violation is a violation of a constitutional right, necessitating a constitutional analysis of the nature of the violation and the degree of its justification in accordance with the limitation clause? Or, on the other hand, should we say that the constitutional right to freedom of political expression does not establish the right to realize that freedom by way of the broadcast of paid advertisements, and it does not,

therefore, give rise to a duty on the part of the media authorities to provide a platform for political expression in that particular broadcasting format. If this is the case, then the regulation of paid advertising tracks to exclude political-ideological expression should not be regarded as a violation of the constitutional right to freedom of political expression. Where there is no violation of the constitutional right to freedom of speech, there is no need to examine the administrative arrangement governing the advertising tracks in light of the conditions of the limitation clause.

6. My assumption is that the second possibility reflects the correct classification of the petitioner's claims. As such, I see no need for a constitutional analysis of the Rules prohibiting political expression in paid advertisements from the perspective of the limitation clause in the Basic Law. The matter in dispute lies outside the constitutional arena, and therefore it does not involve an analysis of the limitation clause, which is required only for a matter within the purview of the basic right, when the basic right has been violated. In the case before us, the constitutional right to freedom of political expression, the scope of which is particularly broad, does not extend to the right to realize that freedom via the medium of paid advertisements. The broad scope of that constitutional right and the duty of the public media authorities to provide a platform for that expression do not engender the right to claim that the political speech must be expressed within the paid advertising track offered by these authorities. This being the case, the matter lies outside the purview of the constitutional right. Another consequence of this reality is that rules made by the competent authority limiting paid advertisements to matters that are essentially commercial and neutral do not "violate" the constitutional right to freedom of political expression, and do not draw the matter into the constitutional arena. There are no grounds, therefore, for examining the alleged "violation" from the perspective of the balances in the limitation clause. I will elaborate, and will begin with the main foundations of my approach:

(1) The argument that there has been a constitutional violation of a constitutional right requires a two-stage analysis. The first stage addresses the question of whether the violation of the right pertains to a matter situated within the parameters of the constitutional right. If the answer is negative, the constitutional examination stops at the first stage, continuing no further. If the

answer is affirmative, one proceeds to the second stage, at which the nature of the violation of the constitutional right is examined in accordance with the conditions of the limitation clause in the Basic Law. While there may be a certain overlap between the factors to be considered at each stage, this does not obviate the need to differentiate them and to draw a clear distinction between the discussion of the *scope of the constitutional right*, and between the questions relating to the existence of a *violation* of the right and the degree of constitutional justification for the violation. The discontinuation of the legal-constitutional examination at the first stage may give rise to additional grounds for judicial review, for example, from the field of administrative law.

(2) In our case, in the framework of the first stage of the constitutional examination we must consider whether, within a person's constitutional right to freedom of political expression, he is entitled to demand that a public communications entity provide him with a platform for expression via the medium of paid advertisements. This question aims to classify the claim to a right of expression in that medium, and to determine whether it is included within the parameters of the constitutional right to freedom of political expression, or whether it goes beyond them. This classification involves a determination of the scope of the constitutional right and its limits. Examining the scope of a constitutional right means charting its contours, which define what falls within it and what does not. The definition of the scope of the constitutional right is extrinsic, rather than intrinsic, to the limitation clause.

(3) The definition of the contours of the constitutional right and the resolution of the question of whether or not they include the matter under consideration, directly affect the question of whether there was a "violation" of the constitutional right to freedom of speech. Only where there is a violation of a constitutional right can one progress to the second stage of constitutional examination to consider the significance of the violation in accordance with the balancing formula of the limitation clause. When the alleged violation is external to the constitutional right in terms of its defined scope, we are not required to conduct a constitutional examination of the limitation clause.

(4) At the first stage of the constitutional examination, the scope of the constitutional right is examined by way of purposive interpretation, to which the question of the appropriate content of the constitutional right is central. Purposive interpretation is influenced by the fundamental values of the

constitutional system, the foundations of the democratic system, and the social, value-related and moral goals of Israeli society. Essentially, it is a question of legal policy that guides purposive interpretation in constitutional matters. The purposive interpretation of a constitutional right answers the question of whether a particular matter falls within the area of a constitutional right or outside it.

(5) Drawing the contours of the constitutional right impacts on the question of whether the alleged violation is of a right that is defined as a constitutional right. If the answer is in the negative, the constitutional discussion is then complete. If the answer is in the affirmative, the question then is whether there was an unconstitutional *violation* of the right. This too is a question of legal-constitutional interpretation. If there was a *violation* of a constitutional right, then the examination proceeds in accordance with the balancing formula of the limitation clause.

(6) Defining the contours of the constitutional right is of particular importance in assigning the appropriate specific weight to the constitutional right. An overly-broad conception of the scope of a constitutional right, exceeding that of the purpose it serves, may lead to a dilution of constitutional rights and to their devaluation. The constitutional discussion must focus on the core of the constitutional rights and on the questions relating to the constitutionality of their violation. A constitutional discussion of matters that lie outside the purview of the constitutional rights, or at their periphery, is liable to harm the status of the constitutional rights and the scope and the nature of protection accorded to them.

(7) The right to freedom of speech, including freedom of political expression, is a constitutional right of particular importance in the hierarchy of human rights. A violation of this right is a violation of a constitutional right. Nevertheless, realization of freedom of political expression as a constitutional right, even if it requires a positive act on the part of the public authority, does not necessarily include every possible existing means of realization. Within the framework of realizing freedom of political expression, a person does not have the right to demand that the public communications authorities provide a platform for political expression in paid advertisements for anyone who wants it. Even though the public communications authorities are obligated, by their very existence, to provide a political platform for the range of opinions and

views prevailing in the public within their schedule of programs, they are not obligated, *ab initio,* to allocate a platform for such expression in their paid advertising track, nor are they competent to operate a track of that nature without special legislative authorization. For reasons that will be elucidated below, the issue of political expression in paid advertisements is external to the broad scope of the right to political expression. As such, the administrative regulation of paid advertisements by the communications authorities, which prevents political expression within those broadcasts, does not involve a constitutional violation of the freedom of speech, and there is therefore no need to proceed to the second stage of constitutional examination, involving constitutional adjudication of the balances formula in the limitation clause.

(8) Beyond the issue of the constitutional violation of the freedom of speech, several other questions that were not raised or considered in the present case may well arise in the context of regulating paid advertisements. For example, on the constitutional level, the question could arise as to whether the petitioner's right to equality in the advertising track was violated in comparison with other commercial bodies who were allowed to advertise, whereas the petitioner was not. Moreover the prohibition in the Rules of paid advertising of political-ideological messages raises questions from the field of administrative law, such as whether such a prohibition gives rise to administrative grounds of disqualification, e.g. discrimination, unreasonableness, or irrelevant or unfair considerations. These issues did not arise directly in this proceeding and as such no basis was laid for judicial intervention in the Rules of the communications authorities.

We will now elaborate on the above.

The constitutional right – its essence and scope

7. The constitutional right is not an absolute right, but a "relative" one, from two aspects. First, in terms of its scope, the borders of the constitutional right are defined and not all-encompassing. Secondly, even within its defined borders, the constitutional right is not necessarily protected in its entirety. There are circumstances in which the violation of a constitutional right may be considered permitted and justified, due to its conflict with opposing human rights, or due to conflicting values in the sphere of the public interest; this results in the limitation of the protection of the full scope of the constitutional right. This point was made by A. Barak in *Interpretation in Law,*

Constitutional Interpretation, (1994), at pp. 370-371 (hereinafter: *Constitutional Interpretation*):

> 'The first aspect of the "relativity" [of the constitutional right – A.P.] reflects the scope of the human right (the problem of scope)… . The second aspect of "relativity" reflects the protection accorded to a human right ("the problem of protection"). It is the product of the constitutional relationship between a constitutional human right and its violation… . The main difference between these two aspects – and hence also between the two kinds of balance – is that the first aspect establishes the scope of the constitutional right. The second aspect does not affect the scope of the right but rather the degree of protection accorded to it.'

In constitutional discourse, the examination of the relativity of the constitutional right in two stages – the scope of the right and the degree to which it is protected – has been dubbed "the two-stage doctrine." This doctrine has been developed in the case law in various contexts.

An example of the application of the two-stage doctrine appears in CrimA 4424/98 *Silgado v. State of Israel* [85], at pp. 551-2, *per* Justice Strasberg-Cohen:

> 'According to the principles that we follow, the constitutionality of a statutory provision is examined in two main stages: in the first of them, the interpreter of the law examines whether the human right anchored in the Basic Law was indeed violated by the statutory provision under constitutional examination. Only if he concludes that this is the case will he proceed to the second stage, at which the question of whether the offending legislation satisfies the requirements of the limitation clause in the Basic Law is examined' (see Barak, *Constitutional Interpretation*, at pp. 473-4).

The two-stage doctrine has been developed and analyzed in several other case-law rulings: *Adalah Legal Center for Rights of Arab Minority v. Minister of the Interior* [49], *per* President Barak, at paras. 41, 52 and 53, and *per* Deputy President Cheshin, at paras. 34 and 37; *Shinui – the Center Party v. Chairman of the Central Elections Committee* [16], *per* President Barak, at

paras. 8 and 9; CrimA 2831/95 *Alba v. State of Israel* [86], at pp 288-289, *per* President Barak; *Movement for Quality Government in Israel v. Knesset* [14]. On the distinction between the scope of the constitutional right and the degree of its protection, see also HCJ 1435/03 *A v. Haifa Civil Servants Disciplinary Tribunal* [87], at p. 538). The scope of the right is determined in accordance with the interpretation of the wording of the right and its purpose: see e.g. *Mateh Harov v. Israel Police* [32], at para. 13 (*per* President Barak) in which it was held that not all aspects of freedom of speech are included in the ambit of the constitutional right to human dignity, and one cannot read into the right more than it can carry. The scope of the right to freedom of speech as a constitutional right that is derived from human dignity must be determined in keeping with the particular meaning that must be attributed to human dignity (see also HCJ 326/00 *Municipality of Holon v. N.M.C. Music Ltd*. [88], at pp. 664-5; *Shin – Israeli Movement for Equal Representation for Women v. Council for Cable and Satellite Broadcast* [23], in which the justices expressed doubt as to whether pornographic expression is included in the freedom of speech).

Regarding the two-stage doctrine in Canada, see Irwin Toy Ltd. v. Quebec (1989) 1 S.C.R. 927; R. v. Keegstra (1990) 3 S.C.R. 697; R.M Elliott, "The Supreme Court of Canada and Section 1: The Erosion of the Common Front", 12 *Queen's L.J.* 340 (1987). Regarding the doctrine in South Africa, see: Woolman & Botha, *Constitutional Law of South Africa*, 2nd ed. Ch. 34 (hereinafter: Woolman & Botha).

8. There is a reciprocal relationship between the two aspects of the "relativity" of a human right. The first aspect establishes the contours of the right, and defines the borders of its natural reach. The second aspect is based on these borders and it examines the circumstances in which a violation of the constitutional right exists, and those in which the violation is permitted in order to allow for the realization of conflicting rights and values. This examination establishes the scope of protection accorded to the constitutional right, which does not always follow its contours. A matter situated beyond the borders of the constitutional right anyway cannot be the subject of a "violation" of the right in the constitutional sense, and it is extrinsic to the constitutional protection.

At its first stage, the two-stage doctrine of constitutional examination requires analysis of whether the claim of a violation involves a matter falling within the parameters of the constitutional right. Only if the answer is affirmative is it necessary to conduct a constitutional examination at the second stage, and to clarify whether there was a "violation" of a constitutional right; if there was, the balancing formula in the limitation clause, which answers the question of whether the violation of the constitutional right was justified and permitted, must be invoked. This examination of the limitation clause establishes the *protected scope* of the constitutional right in circumstances of conflicting values. There may be a certain overlap of the considerations relevant to the first and second stages of the constitutional examination.

9. In my view, our concern is with the first stage of the examination of the "relativity" of the basic right of freedom of political expression, and does not reach the second stage of the constitutional examination, which relates to the nature of the violation of the basic right. The reason for this, according to my approach, is that the petitioner failed to substantiate its claim that its right to freedom of political expression in the public media includes the right to realize that freedom in paid advertisements. The scope of the right to freedom of political expression in the public media does not extend to this particular claim of right, for the reasons that will be elucidated below. This being the case, I believe that the petition should be denied outside the gates of the limitation clause, without entering them. Hence, a discussion of the constitutionality of the Rules against the background of the limitation clause is altogether irrelevant here.

Determination of the scope of the constitutional right

10. The scope of a constitutional right is established by means of purposive constitutional interpretation, according to which the extent of the right is determined. This determination is an interpretative act based on the underlying purpose of the right and the nature of the goals that it is intended to realize (*United Bank Mizrahi Ltd v. Prime Minister* [21], at para. 10, *per* President Barak). Purposive interpretation answers the question of what matters are included within the parameters of the constitutional right, and what matters are external to it. This is an examination of the intrinsic nature of the constitutional right and of the matters it includes. Any conduct falling within

the bounds of the constitutional right enjoys constitutional status. Conduct external to those parameters does not (Barak, *Constitutional Interpretation,* at pp. 371-2, 373; *Kahane v. Managing Committee* [54], at p. 270; *Universal City Studios Inc. v. Films and Plays Censorship Board* [19], at p. 33 {242}). The scope of the right is determined in its interpretation. The interpretation is constitutional, effected in accordance with the constitutional purpose, and with a broad view of the values of the system.

11. The constitutional purpose is inferred from the language, the history and the fundamental principles of the system (President Barak, *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [15], at para. 86 ff.). Every right must be assigned the scope that realizes its purpose. It is not the linguistic borders that determine the scope of the right but its purpose (Barak, *Constitutional Interpretation*, at p. 376).

In their text, Woolman and Botha address the need to define the scope of the constitutional right utilizing interpretive tools that rely on the value-related purpose of the right, as opposed to a literal interpretation of the scope of the right. They reject the determination of the scope of a right in accordance with the literal interpretative approach, which relies on a literal definition of the right, and endorse the approach of value-based interpretation, for a number of reasons: *first,* the constitution should be interpreted according to its logic and the values underlying it. Its ambit should not extend to activities that were not designated for protection within the constitutional right, and the aforementioned value-related approach is intended to filter out those kinds of activities and exclude them from the constitutional framework. *Secondly,* a more rigid purposive approach to the interpretation of the scope of the constitutional right at the first stage of the constitutional analysis commits the state to a higher degree of persuasion in justifying the violation of the constitutional rights at the second stage of the examination; and *thirdly,* the value-related interpretation would have a welcome effect in reducing the burden of litigation and in decreasing the number of applications to court for the exercise of judicial review.

The scope of the constitutional right – content and manner of realization

12. In determining the scope of the constitutional right, a distinction must be drawn between the borders of the *content* of the right and the *means of realizing* the right. One aspect examines the question of the contents of the

constitutional right. The second aspect is concerned with the modes of constitutionally realizing the constitutional right. The aspect dealing with the modes of realizing the right is also relevant in determining its borders, for it poses the question of whether every possible means of realizing the right is part of the constitutional right, or whether there are means of realizing rights that are not naturally built into the scope of the constitutional right.

In defining the scope of the constitutional right, therefore, both the *contents* of the right and *the means of realizing* the right, which are interwoven, are examined.

The constitutional right to freedom of speech

13. Freedom of speech is one of the most important basic freedoms of a person in Israel. It is a central value without which a free society cannot exist. Freedom of speech comprises a complex of aspects that relate to both society and the individual. One aspect, directed at society, is that freedom of speech is the bedrock of the workings of a democratic regime, based upon the free flow of opinions, ideas and beliefs. Freedom of speech is, indeed, the life-blood of democracy. Without it, a regime of free government based on free choice cannot be established. Another aspect of freedom of speech in this context is designed to bring about the full and complete dissemination of knowledge and information, which is critical for the formulation of an opinion and a position in a democratic regime, and to thereby enable engagement with truth and falsehood. In its other aspect, directed at the individual, freedom of speech is intended to enable a person to express himself and to develop his personality and individuality in an open and free society that accepts, examines, criticizes, and contends with a wealth of human expressions, opinions, ideas, beliefs, styles, tastes and lifestyles. Freedom of expression embraces all walks of life – philosophy, culture, art, policy and the economy, religion and ways of life. It is reflected in all the experiences to which a man is exposed in the course of his life.

Freedom of political expression

The contents

14. Freedom of speech is a broad concept that spans a large array of subjects and areas. In the aspect relating to the democratic process, special normative significance attaches to freedom of political speech among the

broad variety of categories of expression in the many realms of life. A democracy without freedom of political expression loses its life force and vitality, paving the way for a regime of secrecy, operating far from the eyes of the individual and far from the public eye as well. Without freedom of political expression, freedom of speech in other areas of life also disappears; culture and human creativity are suppressed, philosophy and thought frozen, and human progress arrested. Along with these, the individual's ability to develop his talents and to realize his individuality disappears. The flow of knowledge and information concerning the actions of the government, which is a critical tool for public criticism of the regime, is interrupted. Hence the exceptional, widespread and broad protection accorded to the freedom of political expression, among the whole range of types and forms of free speech in a democratic regime.

Means of realization

15. Freedom of speech in general in Israel is reflected in diverse avenues of expression – in the printed media, on radio and television, in print, in words, in photographed expression, in a range of media of expression. In a free regime, the channels of expression, including political expression, are broad and varied. Written, broadcast and photographic communication play a central role in the realization of freedom of speech in a democratic society. Indeed – "Freedom of access to the media is, in fact, a condition for realizing freedom of speech, which without access to the media is liable to be stripped of any content and real importance" (Daphne Barak-Erez, "The Individual's Access to the Media – Balance of Interests in the Area of Freedom of Speech", 12 *Tel Aviv Law Review* 183 (1987), at p. 184). Israeli law recognizes the right of access to the media (s. 47 of the Second Authority Law; s. 4 of the Broadcasting Authority Law; *Cohen v. Israel Bar Association* [52], at pp. 537-538, and *D.B.C. v. Committee for Cable Broadcasts* [9]; HCJ 10182/03 *Education for Peace v. Broadcasting Authority*, at para. 7 of Justice Hayut's judgment). The right of access to the media means ensuring a broad scope for the full and varied expression of the opinions and ideas prevailing in society. The aforementioned right of access also incorporates the doctrine of fairness, by virtue of which the media bodies in Israel are obliged to fairly and faithfully present the full spectrum of prevalent public opinions, while

achieving the proper balance between them (*Novik v. Second Authority for Television* [51]).

16. These two aspects of freedom of speech in the media – the right of access to the communication media and the doctrine of fairness – merge into one principle, which is that of the effectiveness of expression (*Cohen v. Israel Bar Association* [52], at pp. 547-548). Derived from the state's obligation to protect the rights specified in Basic Law: Human Dignity and Liberty is its duty to protect the effectiveness of freedom of speech by achieving a proper balance in the presentation of the expression in all its forms. Indeed, "[i]t is incumbent upon the democratic regime to monitor the use of the media rigorously, to prevent upsetting the vital balance in the marketplace of ideas and public expression. This applies to the freedom of access and the right of access to the media and to the contents of the broadcasts" (*Documentary Creators Forum v. President of the State* [56], at pp. 515). (On the approach whereby the protection of constitutional freedom of speech may also necessitate active state interference, see: Jerome Baron, "Access to the Press – A New First Amendment Right" 80 *Harv. L. Rev*. 1641, 1642-3 (1967)).

17. Political expression is particularly important in the public-state media channels, the role of which is to reflect the diversity of political-social expression in all its forms and quality, in the broadest, most open and most balanced manner, as required in a society based on the unfettered flow of views and information. The question before us is whether the constitutional right to freedom of political expression extends to the right to political expression in paid advertisements. Does this special form of political expression form part of the constitutional right to freedom of speech in the public media, and is it included among the constitutional means for its realization? Does restriction of this form of expression constitute a constitutional "violation", the justifiability of which must be examined in accordance with the limitation clause?

Political expression in paid advertisements – part of the constitutional right to freedom of expression?

18. The constitutional right to freedom of expression is, in its essence, the freedom to express opinions and ideas unhindered. This means that it is essentially a negative right, at the core of which lies the power and the legal

capacity to prevent a violation and constriction of the right to expression, in the broad sense of the concept. The constitutional right to freedom of speech, in its pure sense, does not impose a correlative constitutional duty upon the state to make various forms of expression available to the citizen. Its obligation is to refrain from interfering with the forms of expression that the citizen chooses to employ. In a modern state, however, the borders between positive and negative constitutional rights are often blurred, and in the area of freedom of speech situations may arise in which the state is also required to take positive action in order to enable the exercise of this freedom by the citizens. The area of the modern communication media may be a good example of this.

19. The existence of a constitutional right does not necessarily mean that every possible means of realizing it must be included within the parameters of the right. When the realization of an individual's right is not dependent upon the authority's cooperation, the question arises whether every possible means of individual realization of the right is included within the bounds of the constitutional right. This question is examined by means of purposive interpretation, which looks for the purposes and goals underlying the right and the means of realizing it. When the means of realization of a right depends upon the active cooperation of the public authority, the question becomes more complex: the examination then required is whether the particular means imposes a constitutional duty on the authority to enable the individual to realize the right, or even, under certain circumstances, obligates the authority to take action in that respect. In certain circumstances, purposive interpretation may yield the conclusion that the means of realizing the freedom of speech chosen by the individual, requiring cooperation on the authority's part, is not included within the scope of the constitutional right, and is extrinsic to it. Here, a claim of a violation of right occasioned by the authority's refusal to enable the realization of the right in that particular manner does not mandate constitutional consideration of the nature of the violation, because the normative conduct of the authority is extrinsic rather than intrinsic to the constitutional right. This applies to the case before us, for the following reasons:

20. *First,* in examining the scope of the right to freedom of expression in the communications media and the means of its realization, a broad view of

the freedom of political expression in the media authorities is required, above and beyond the narrow perspective that focuses on paid advertising. Under the existing legal system, freedom of speech in all its variations, including freedom of political expression, is broadly and fully protected in the context of the functions and obligations imposed on the authorities in the relevant legislation. They must ensure this freedom of expression, and secure a proper internal balance between the diverse aspects of social expression. This obligation of the authorities, which also applies to the provision of full and balanced political expression in the general lineup of programs, is integral to the doctrine of "fairness", which by virtue of statute and case-law is anchored at the basis of the actions of these bodies. The duty of balance and fairness binding the media authorities is designed to provide a full response to the right of expression of the state populace in the framework of the general schedule of programs they broadcast. If they fail to discharge this duty, they can be obligated to do so by way of judicial review of administrative actions.

21. *Secondly,* paid advertising in the media authorities, which is the object of the disputed Rules, is not part of the general lineup of programs, which is intended to provide a full response to freedom of speech, including freedom of political expression, in the different fields. The advertising track is an ancillary tool, created and designed purely to serve the fiscal objectives of the media authorities as a means to trim budgetary deficits, in order to enable the media authorities to fulfill their duties and provide a proper and balanced service to the population within the general lineup of programs. In terms of its purpose and objective this track is not intended to promote freedom of expression in any particular area, the framework for realization of which exists in the general lineup of programs. Moreover, according to the principles of customary law, in the absence of explicit authorization in the relevant statutes the media authorities have no authority to introduce and permit paid advertising, in that the track of advertisements is "alien" to the primary roles for which the authorities were established by law.

22. The essence of the constitutional right of freedom of speech is that no statutory source is necessary to grant it or to provide a basis for it. It exists inherently by virtue of its normative, constitutional status. A law is required in order to *limit* the constitutional right, and not in order to grant it (Zamir, *Administrative Authority,* vol. 1 at pp. 50-51 (hereinafter: *Administrative*

Authority); *Dovrin v. Prisons Authority* [20], at para. 16). In the absence of special legislation, the media authorities would not have been competent to establish paid advertising tracks. This is an indication that the broadcast of paid advertisements is not an avenue for the realization of freedom of speech, which has a constitutional, normative status, and the prevention of which is a violation of a constitutional right.

23. Furthermore, even after the regulation of the paid advertisements track by statute, its introduction by the authority is optional. Should it wish – it may introduce it. Otherwise it may cancel it. It cannot be assumed that the right of freedom of speech includes a vested right to demand of the authority, as a constitutional claim of right, that it operate a paid advertising track and that it allocate a platform for any particular expression by way of this particular means. It may be presumed that were the authority to decide to cancel its operation of the advertising track, we would be hard put to find a legal source obligating it to change its decision. According to its purpose, therefore, the advertising track does not constitute an avenue of expression. Regulating this track for the purpose of achieving a financial objective does not engender a right to use it as a means of political expression, and it is difficult to regard the prevention of such expression as a violation of the constitutional right to freedom of speech.

24. *Thirdly,* and deriving from the two other reasons, within the framework of the constitutional right to freedom of speech a person is not entitled to realize freedom of political expression vis-à-vis a media authority specifically by means of a paid advertisement, which requires a positive action on the authority's part, assuming that the system guarantees freedom of political expression in the general lineup of programs designed for that purpose. In the context of the programs, the media authorities are permitted to regulate the range of contents of expression, including political expression, in the various tracks designed to reflect that range in a balanced and fair manner. There is no vested right to demand of the authority, as part of the constitutional right to freedom of speech, that it provide a platform for political expression through a track designated for a different purpose. Thus, for example, just as a person has no right to demand that a political expression be broadcast on a music channel of the Broadcasting Authority, neither can he demand this on the sports or culture channel. This is the case *a fortiori* with respect to the track of

paid advertisements, which from the outset is not part of the general lineup of programs, and the entire purpose of which is to raise funding rather than to serve as a platform for any particular form of expression, and which also requires statutory authorization to allow it to operate.

25. *Fourthly,* from a value-based perspective, the Rules preventing political expression in paid advertisements also bar the purchase of air time for the expression of socially controversial ideological messages. In doing so they prevent a distortion of the requirement of balance and fairness in the general lineup of programs, the purpose of which is to grant a platform for expression in the free marketplace of ideas and opinions in a manner that is not dependent on the financial standing of the opinion-holder.

In view of all the above, regulation of the broadcast of paid advertisements in the Rules that prevents political expression in that framework does not amount to a constitutional violation of a constitutional right.

I will now elaborate on these lines of reasoning.

Freedom of speech in the broadcasts of the media authorities and the doctrine of "fairness"

26. The laws that apply to the media authorities for our purposes guarantee, as a fundamental principle, freedom of speech in broadcasts, and proper balance in this medium of expression.

The *Broadcasting Authority Law* states that the Authority will maintain the broadcasts as a state service (s. 2), and that one of its functions is to *"broadcast educational, entertainment, and informational programs in the fields of policy, society, economy and industry, culture, science, and the arts*," with a view, *inter alia*, to *"reflect the life, struggle, creativity, and achievements of the state"* (s. 3(1)(a) of the Law).

The *Second Authority Law* defines the functions and powers of the Authority including, *inter alia*, "the broadcast and supervision of programs in the fields of learning, education, entertainment and information, on subjects of politics, society, economics, culture, science, art and sports" (s. 5(a) of the Law). In the framework of its functions, the Authority must act to *"foster good citizenship, and strengthen the values of democracy and humanism…"* (s. 5(b)(2)), and *"to give expression to the cultural diversity of Israeli society and to the different points of view prevalent among the public"* (s. 5(b)(6)), and

also *"to broadcast reliable, fair, and balanced information"* (s. 5(b)(7) of the Law)).

27. The requirement of balance and fairness in giving expression to the diversity of viewpoints among the public applies to the media authorities, and it was established as a statutory duty incumbent upon them.

Section 4 of the Broadcasting Authority Law states as follows:

> 'Ensuring reliable broadcasts
>
> The Authority will ensure that the programs provide suitable expression of different approaches and opinions current among the public, and that reliable information shall be broadcast.'

S. 47 of the Second Authority Law establishes the duty of balancing as follows:

Providing the opportunity to respond

(a) The franchisee shall ensure that in programs on current affairs, the contents of which are of public significance, suitable expression shall be given to the various views prevailing amongst the public.

(b) The Council will make rules with respect to providing those who are, or who are liable to be, directly harmed by the broadcasts with an opportunity to respond in a manner fitting the circumstances.'

Section 46(c) of the Law prohibits the franchisee from expressing his own personal views in the broadcasts, or those of his managers or interested parties.

28. These statutory provisions bind the media authorities in the framework of their duty to provide a platform for the variety of opinions and viewpoints prevalent among the Israeli public, while ensuring a balanced and fair approach. The media authorities are also obliged to broadcast reliable information. They must guarantee the free flow of ideas and opinions of all shades and types, without requiring a special fee, except for general fees intended to finance the broadcasting enterprise as a whole. The media authorities must ensure equality in their implementation of freedom of speech. Within their obligations of balance and fairness in broadcasts, the media authorities are entitled to regulate the programming schedule, and to that end they may establish different channels, each designated for particular areas of expression in accordance with the different subjects that the media authority

presents in its broadcasts. This brings about the formation of a general lineup of programs comprising tracks devoted to matters of policy and politics, economics and the economy; another track for culture and music, a sports channel etc. Assuming that an internal balance in the range of different subjects broadcast is maintained and that the media enables broad and fair expression, it is difficult to find a basis for the assumption that there is a right to demand the broadcast of political messages in the paid service advertisements track as part of the realization of the constitutional right to freedom of political expression in the media. This is true *a fortiori* for a demand that relates to a secondary track, of a commercial nature, which is not part of the general lineup of programs, which is basically intended to serve as an auxiliary funding tool to cover the Authority's budget, and which was not meant to serve as a platform for free speech.

29. The statutory framework, which guarantees fair and balanced programming, assumes that freedom of speech, including freedom of political expression, is regulated in the context of the lineup of programs of the media authorities by virtue of their statutory obligations. The statutory obligations of fairness and balance in the media are joined by the "doctrine of fairness" – accepted in the media of many of the Western states – that has become part of settled case law in Israel. This doctrine, which bases the duty of the media entities to preserve balance and fairness on the presentation of a variety of ideas and opinions in a free society, has struck deep roots in the Israeli normative system, and is now firmly anchored in both statutory law and settled case law (for an extensive analysis on this subject, see para. 40 of Justice Naor's judgment).

A claim that the obligations of fairness and balance have been violated may constitute grounds for judicial review, on the administrative level, of the manner in which the media authorities exercise their powers within the parameters of public law. Since our assumption is that complete freedom of speech is guaranteed within the context of the general lineup of programs, which regulates the different forms of expression in the different tracks, no foundation was laid for recognition of a right to political expression in a paid advertisement in a commercial track that from the outset was not intended for that purpose, and the prevention of expression in that track should not be regarded as a constitutional violation.

30. From the above it emerges that our assumption must be that freedom of political speech finds its full expression within the context of the general broadcasts alignment of the media authorities, which are required to provide it with a platform, and are obligated to ensure a fair balance of all its varieties, representing the entire spectrum of Israeli society. The violation of these duties by the media authorities may provide grounds for an administrative claim for the exercise of judicial review over the operations of the Media Authority in that particular area.

The assumption that there exists full freedom of political expression in the broadcasts of the media authorities, and that there exists a duty of fairness to which they are subject in regulating that expression, lies at the heart of the approach according to which paid political advertising is not one of the constitutional means available to a person in order to realize his recognized right of freedom of political expression.

The nature of the paid advertisements track

31. The status and the position of the paid advertisements track of the media authorities must be analyzed from the broad perspective of the general lineup of programs of these authorities, and not as an organ detached from the entire system. The particular character of the paid advertisements track, its establishment, its legal foundation, and its overall goals, reinforce the conclusion that its existence does not grant any person the right to demand realization of political expression by way of paid advertisements as part of the constitutional realization of his right to freedom of speech. It follows that the Rules prohibiting political expression in paid advertisements establish a behavioral norm that is outside the "constitutional arena" involving freedom of speech, and not inside it. As such, the claim of violation of freedom of speech in view of the said prohibition is not on a constitutional level, but rather, if at all, on an administrative level, in the realm of one of the recognized grounds for judicial review.

32. Paid advertising, which is the subject of the Rules in dispute, is not an integral part of the programming setup of the media authorities, within which they are required to provide a platform for political expression. The paid advertisements track of the two media authorities is an extra-professional, auxiliary tool, which is not part of their statutory functions and obligations. It is an optional matter, subject to the discretion of the media authority, which

may or may not use it, as it wishes. Its entire purpose is to serve as a financial tool for increasing the budgetary income of the media bodies and enabling them to function efficiently in discharging the tasks and duties and imposed upon them. It is not intended to serve as a platform for any particular category of expression, including political expression. Incidental to achieving the monetary goal, and in order to realize it, various bodies – generally commercial – are permitted to relay their messages, without such expression, *per se*, constituting a purpose of the advertising track. My colleague, Justice Naor, discussed this particular feature of advertisements at length (para. 18 of her judgment).

33. Being extrinsic to the programs framework, the paid advertisements track is not bound by the obligation of balance and fairness that binds the authority as part of its professional duties. In that it is external to the obligations of the authority, and because, in terms of its purpose, it is not intended to reflect the messages of any particular kind of expression, the operation of this track is not subject to the general duty binding the authorities in the context of general broadcasts, to give expression to the range of opinions and trends in Israeli society. Since the advertising track was not, from the outset, intended to provide a platform for the expression of ideological messages, the authorities are entitled to regulate the contents of advertisements in a manner that realizes the funding objectives of advertising in optimal fashion, without violating any duty of balancing and fairness that binds them in relation to programs, which relates to the level of their contents and ideas. The authorities' position in this regard is that paid advertisements, as a funding tool, may legitimately be restricted to matters that are purely commercial and neutral in terms of their social-ideological contents.

34. Not only does the prohibition on extending paid advertising to matters that are publically controversial not violate the freedom of political-ideological expression, but it actually prevents the wealthy from gaining control over opinions and public information in the state. Limiting the advertising track to matters of a commercial-neutral nature actually promotes freedom of expression, rather than conflicting with it. It dovetails in with the functions of the media authorities and the duty of fairness and balance that binds them. This is the background to understanding the underlying rationale of the arrangements governing paid advertising tracks, and their designation

for matters which are essentially commercial and neutral (s. 25A of the Broadcasting Authority Law and s. 7(2) of the Broadcasting Authority Rules; s. 81 of the Second Authority Law, and s. 5 of the Second Authority Rules).

35. Furthermore, from a legal perspective, the operation of a paid advertisements track by the media authorities requires special statutory authorization, without which they have neither the power nor the authority to operate this track, in that it is extra-professional vis-à-vis the classic functions of these authorities. Indeed, authorization for the broadcast of advertisements was a later addition to the Broadcasting Authority Law, by way of s. 25A, in 1993. Prior to this amendment, it was legally problematic for the media authorities to operate a track for paid advertisements in the absence of specific statutory authorization. The legal position adopted by the Attorney General and the court was that without special statutory authorization, the media authorities had neither the power nor the authority to broadcast a paid advertisement (Explanatory Notes to the Broadcasting Authority (Amendment No. 8) Bill, 5752-1992, HH. 2114, at p. 220). This was the background to the enactment of the provision in s. 25A of the Law, which authorized the Broadcasting Authority to operate this track. (Regarding the limitations that apply to paid advertisements without special statutory authorization, see also *Osem v. Broadcasting Authority* [2], at para. 6; *Reshet Communications v. Broadcasting Authority* [3], at pp. 808-890; *Daily Newspaper Association v. Minister of Education* [68], and HCJ 3424/90 *Daily Newspaper Journalists Association v. Minister of Education* [89]). These decisions clearly indicate that specific authorizing legislation is required in order to enable the media authority to operate a track for paid advertising.

Can it be said that as part of the constitutional right to freedom of political expression, a person has the right to demand a platform for expression specifically within paid advertisements, when this activity is not an integral part of the classic functions of the media authority, and when the media authority requires specific statutory authorization to carry it out, and has discretion to decide whether to do so, depending upon the circumstances in accordance with its funding requirements?

36. In this context it should be remembered that a constitutional right does not require statutory expression. It exists by virtue of the values of the constitutional system and by virtue of the Basic Law; even without being

reflected in a regular law, it exists by virtue of the constitutional norm it embodies. Indeed –

> 'When a person has a right, and certainly when he has a constitutional right, a public authority does not need statutory authorization in order to uphold and respect that right. The opposite is true: it requires statutory authorization to restrict or violate the right, and where the violation restricts or denies the realization of a human right, it must satisfy the tests of the limitation clause as a condition for its validity and operation' (*Dovrin v. Prisons Authority* [20], at para. 16 of my judgment).

(See also in HCJ 1/49 *Bejerno v. Minister of Police* [90], at pp. 80, 82). It is the violation of a human right that requires an authorizing law that seeks to legitimate the violation (Zamir, *Administrative Law,* at p. 50). In the absence of statutory authorization to violate the right, the administrative authority oversteps its competence and its authority.

37. In the present case, the administrative authority requires special statutory authorization to enable it to operate a track for paid advertising, for the legal starting point is that without special authorization it cannot operate such a track. This assumption involves a further assumption – that there is no constitutional right to realize the freedom of political expression in paid advertising. Since a person does not have a primary constitutional right to express his messages, irrespective of their contents, in paid advertisements, special statutory authorization is required to vest competence and power in the authorities to operate such a track. Absent that explicit authorization, as stated, the authority would not be able to perform that activity. It follows that the right to freedom of political expression in the media does not encompass expression in paid advertising, and were it not for the special authorization, the authority would not have been permitted or competent to operate that track. This structure of rights and authority also explains why freedom of political expression for paid advertising is not part of the freedom of political expression that is constitutionally protected.

38. Moreover, even assuming the existence of statutory authority for paid advertisements, the authority is an optional one, which the media authority has the discretion to exercise, to ignore, or even to revoke. Since this track is designed for funding purposes, its use is circumstance-dependent, and it is

entirely a function of the financial position of the authority. Had the authority not found itself in financial straits, and had it not been granted statutory authorization to operate a paid advertising track, it may reasonably be assumed that it could not have been compelled to operate that kind of track to allow for paid political expression as part of the basic right to freedom of speech. It may further be assumed that in the absence of statutory authorization for paid advertising, a petition seeking to compel the authority to broadcast a paid political advertisement would have been denied. Furthermore, once there is no longer a financial need, the media authority would be entitled to discontinue the use of the advertising track, or even to bring about the repeal of the statutory authorization for paid advertising. It is doubtful whether such repeal would constitute grounds for a claim of violation of the constitutional right to freedom of speech. This is because realization of the right to expression in the media in various areas, including the political-ideological area, is not dependent upon the advertising broadcasts. As such, the regulation of this track and its designation for matters that are commercial and neutral in nature does not constitute a violation of a constitutional means of realizing freedom of political expression. Realization of the freedom of political expression in a paid advertisements track is not part of the right to freedom of expression in the media, and it is not part of the constitutional right that warrants constitutional protection. Consequently, regulation of the paid advertisements track and its designation for particular kinds of messages that are commercial or neutral in nature, and which do not include matters that are politically or ideologically controversial, do not constitute a constitutional violation of the freedom of political expression.

39. Furthermore, from a comprehensive perspective it can be said that limiting advertisements to commercial broadcasts and announcements of a neutral character promotes, rather than violates, freedom of political expression in the broad sense. Precisely by reason of its cardinal, vital importance to the democratic process, political expression should not be a commercial commodity, and to the extent that it is, by its very nature it distorts free public discourse. It may also distort the duty of balance and fairness that binds the media authorities in relation to broadcasts in general. When the wealthy person purchases a public information platform in the media by way of a paid advertisement, while the person of lesser means is unable to purchase broadcasting time in order to relay his views, the inevitable result is a

disruption of the required balance in the presentation of ideas and opinions in the ideological arena. This inequality in power of political expression, which derives from the funding capacity of the wealthy party, is a serious violation of the principle of equality and fairness in the media, and it may severely distort the appropriate point of balance in social-political expression that is guaranteed in the general lineup of programs. It was not by chance that the Broadcasting Authorities imposed prohibitions on paid advertising of political and ideological programs. They were motivated by the desire to *promote* the idea of substantive freedom of political expression, and by their concern for equality in the means of its realization, and not the opposite. The concern for substantive realization of political-ideological expression and balance in the means of its regulation provides a substantive, value-based reinforcement for restrictions established by the Rules regarding paid advertisements of publicly controversial messages. This point was made by Baroness Hale of Richmond in the matter of Regina (Animal Defenders International) v. Secretary of State for Culture, Media and Sport (2008) 2 WLR 781 UKHL 15, handed down in March of this year in the English House of Lords, and cited in the judgment of my colleague, Justice Naor, in her comments on the harm involved in paid political advertisements, where she writes, *inter alia*:

> 'So this case is not just about permissible restrictions on freedom of expression. It is about striking the right balance between the two most important components of a democracy: freedom of expression and voter equality.'

And elsewhere she clarifies:

'…we do not want our Government or its policies to be decided by the highest spenders. Our democracy is based upon more than one person one vote. It is based on the view that each person has equal value. "Within the sphere of democratic politics, we confront each other as moral equals"… . We want everyone to be able to make up their own minds on the important issues of the day. For this we need the free exchange of information and ideas. We have to accept that some people have greater resources than others with which to put their views across. But we want to avoid the grosser distortions which unrestricted access to the broadcast media will bring.'

40. In her article, Prof. Aditi Bagchi points out the dangers to freedom of speech that are likely to issue from private parties who acquire control over

the means of expression and public information. The dangers looming from this direction are no less than those which the government itself may place in the way of freedom of speech. Therefore, according to this view, in certain cases the state is justified, and possibly even duty-bound, to intervene and take measures to increase freedom of speech, while limiting the dangers of the distortion of freedom of speech that can be caused by private bodies:

> '[W]e should not blindly emphasize the dangers posed by state action at the expense of those posed by certain types of private action. Random insults by individual private actors are not likely to affect the political identity of those insulted. But restrictive choices by mass media that influence large numbers of people and claim to respond to the views of the public do pose a substantial threat to those excluded from their forums. This is not to say that these media must affirm all viewpoints, but the rules governing access – rules affirmatively enacted by the government – should ensure that each citizen can consider herself a participant in public discussion.'

And therefore –

> '[W]hen private actors wield disproportionate power over public discourse, the state should ensure that all citizens retain the access necessary for their voices or views to count' (Aditi Bagchi, "Deliberative Autonomy and Legitimate State Purpose Under the First Amendment", 68 *Albany L. Rev*. 815 (2005) 819, 861-962).

41. Restricting the broadcast of paid advertisements to commercial and neutral matters does not jeopardize the balance required for the realization of freedom of political-ideological expression in society. Expanding the broadcasts to include this kind of expression is liable to destroy and fundamentally distort the fairness required of the media, which necessitates providing a platform of expression for the different opinions prevailing in a society, with no dependence on or connection to money and the financial capacity of the opinion holders.

In Summary

42. Our concern here is with determining the contours of the constitutional right to freedom of political expression and with the question of whether these

yakovm 1/17/2011 1:57 PM
Deleted:

contours include the right to express a political message in paid advertisements facilitated by the public media authorities. This places us at the *first* of the two stages of constitutional analysis. Delineating the scope of the constitutional right should answer the question of whether the Rules preventing paid advertisements of political matters violate the constitutional right to freedom of political expression in that medium. This question is answered according to purposive interpretation of the right to political expression and the constitutional means of realizing that right. Purposive interpretation is based on an examination of the *values* underpinning the right, and not on the basis of the *literal* scope of the right.

43. From the above analysis my conclusion is that the scope of the right to freedom of political expression, however broad, does not, in terms of its purpose, extend to the right to realize that expression by way of a paid advertisement in the public media. Freedom of political expression in Israel is guaranteed in the framework of the duty of balance and fairness in the general lineup of programs operated by the authorities. It does not extend to the entire advertising track, which from its inception was not intended as a platform for expression, but rather, was introduced for a budgetary-financial purpose. The existence of this track is, from the outset, dependent upon the existence of special statutory authorization granted to the authority for the purpose of its operation, which is dependent entirely upon the will and the financial requirements of the authority. Restricting advertisements to matters that do not arouse public controversy promotes, rather than contradicts, the function served by the media authorities in the protection of freedom of political expression, and their mission to preserve the balance and fairness of socio-political messages in the broadcasts, independent of the finances and the economic ability of the opinion holder. As such, regulation of the advertising track in this manner does not violate a constitutional right, and it does not, therefore, give rise to the need for a constitutional examination of the alleged violation. Consequently, there are no grounds for examining the applicability of the limitation clause, with its various conditions, in our case. We therefore stop at the first stage of the constitutional examination, without crossing the threshold of the second stage. The relativity of the right to freedom of political expression in the public media leaves political expression in paid advertisements outside its borders.

General Comment

44. To complete the picture, I wish make a number of observations.

The normative constitutional system in Israel is young, and it is undergoing a process of gradual development towards its complete formation. At this stage of its development it is especially important to attribute adequate weight to the examination of the relativity of the constitutional right in accordance with the two-stage doctrine, and in so doing, to relate to the natural scope of the right, prior to considering its relativity in terms of the second aspect, which concerns the constitutionality of the violation according to the conditions of the limitation clause. The comprehensive approach whereby almost every matter that is connected *literally* to the constitutional right falls within the parameters of the right itself rapidly leads the constitutional discussion into the second stage, at which the constitutionality of the violation is analyzed in accordance with the limitation clause. This approach is liable to entail both a theoretical and a practical difficulty. On the theoretical level, it obscures the two-stage doctrine required in the constitutional discourse. On the practical level, it may dilute constitutional rights, and weaken their protection against violation. It is only natural that the more that essentially marginal matters, situated on or outside the borders of the constitutional right, are treated as constitutional matters, the weaker becomes the need to provide effective protection against the violation of the constitutional right, and the more blurred becomes the distinction between the important and the unimportant. Such a process is liable to impoverish the constitutional discourse, diluting its intensity and vitality. It seems to me that the constitutional discourse should focus on the core of basic rights and on the core of the protection they require against violation. As the constitutional rights are developed, care must be taken to define their appropriate borders, to prevent them from being interpreted as all-inclusive and from absorbing matters that do not properly belong within their borders, all within the framework of the constitutional purpose.

45. Delineating appropriate borders for the scope of the basic human rights is likely to reinforce the rights rather than weaken them. It can enrich constitutional discourse and focus it on the substantive protection required for the core of human rights. Delineating the limits of constitutional rights by borders defined according to the constitutional purpose enhances their

constitutional protection, and is not detrimental to them. In the words of Deputy President Cheshin in *Adalah Legal Center v. Minister of the Interior* [49] (para. 41):

'Stretching basic rights in every direction – up, down and to the sides – while referring the interests that are capable of affecting their boundaries to the limitation clause, is liable to have a detrimental effect on constitutional debate, and this is liable to lead eventually to a reduction in the constitutional protection of human rights.'

See also in *Bank Mizrahi v. Migdal* [15], at pp. 470-471{286}, the opinion of Justice Zamir, who warns against rigid determinations as to what constitutes "property" and what constitutes a "violation of property", based on the concern that *"the more the scope of property as a constitutional right is widened, the more it is to be feared that the force of the protection of this right will be weakened."* Comments in a similar vein were made by Hogg in his article, "Interpreting the Charter Rights: Generosity and Justification", 28 *Osgood Hall L.J.* (1990) 817, 819. See also Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Vol. 2 (2005), at para. 3.83:

> 'There is a close relationship between the standard of justification required under s. 1 and the scope of the guaranteed rights. If the courts give to the guaranteed rights a broad interpretation that extends beyond their purpose, it is inevitable that the court will relax the standard of justification under s. 1 in order to uphold legislation limiting the extended right. For example, if the guarantee of freedom of expression in s. 2(b) were held to protect perjury, fraud, deception and conspiracy – all forms of expression in an extended sense – it would be foolish to require a legislative body to satisfy a high standard of justification in order to regulate or prohibit such obviously harmful behavior.
>
> … Each right should be so interpreted as not to reach behavior that is outside the purpose of the right – behavior that is not worthy of constitutional protection… .'

It could be argued that in terms of the result, there is no difference between the approaches:

'It may well be that it makes little difference in result whether the courts opt for a stringent standard of justification coupled with a purposive interpretation of rights, or for a relaxed standard of justification coupled with a broad interpretation of rights.'

However, as Hogg explains, tremendous importance attaches to this question in terms of the scope of judicial review.

> '[I]t certainly makes a great deal of difference to the scope of judicial review. If the rights are broad, and the standard of justification is low, then many more charter challenges will come before the courts, and will fall to be determined under s. 1. Since the standard of justification under s. 1 would be low, it would be difficult to devise meaningful constraints on the process of judicial review. The result would be that judicial review would become even more pervasive, even more policy-laden, and even more unpredictable than it is now. In my view, therefore, the courts should adhere to the strict standard of justification prescribed by Oakes, and should give a purposive (rather than a generous) interpretation to the guaranteed rights. That approach will help to stem the wasteful floods of litigation, to limit the occasions when courts have to review the policy choices of legislative bodies and to introduce meaningful rules to the process of Charter review.'

For additional opinions in the legal literature that support defining the scope of constitutional rights as a means of fortifying them and of preventing their dilution, see: Yves De Montigny, "The Difficult Relationship between Freedom of Expression and its Reasonable Limits", 55(1) *Law & Contemp. Prob.* 35 ; V. Blasi, "The Pathlogical Perspective and the First Amendment", 85 *Colum. L. Rev*. 449, 479 (1985); Sidney R. Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms", 25 *Osgoode Hall L.J.* 1 1987. See also Bradley W. Miller, "Justifications and Rights Limitations" http://ssrn.com/abstract=1084468, who supports interpreting the scope of constitutional rights strictly at the first stage of the constitutional examination*, inter alia* to prevent a devaluation of the rights and a weakening of the constitutional examination at the second stage,

which focuses on reviewing the degree of justification for the violation of the right according to the constitutional balancing formula.

A different approach is taken by President Barak, according to whom the main restrictions on constitutional rights should be imposed at the second stage of the constitutional examination, rather than the first stage, which is concerned with defining the scope of the right. According to his approach –

> 'The starting point should assume a generous definition. The restriction – which might take into account the situation of the case on the periphery of the right or at its core – should be considered within the framework of applying the limitation clause. The balance between the rights of the individual and the public interest or between rights *inter se* should be made within the framework of the limitation clause' (*per* President Barak in *Adalah Legal Center v. Minister of the Interior* [49], at para. 102).

For a critique of the aforementioned approach of Prof. Hogg, see *per* President Barak in *Bank Mizrahi v. Migdal* [15], at pp. 462-3{246-247 }.

46. On the basis of all the above, it cannot be said that the petitioner's constitutional right was violated as a result of the refusal of the authorities, within the framework of the Rules, to broadcast a paid advertisement involving an expression whose content was political-ideological.

Other possible grounds for challenging the Rules

47. Quite another question is whether the manner of regulation of paid advertisements in rules that permit commercial advertisements and bar advertisements of a political-ideological character provides the petitioner with constitutional cause based on the violation of equality between commercial bodies and political bodies, or with cause under administrative law, such as unreasonableness, irrelevant considerations, discrimination, etc. The petitioner did not make any claims to that effect and none were considered in the course of the hearing. As such we need not consider them. I would nevertheless like to relate to the aspect of equality as a possible constitutional claim in the circumstances of this case, which is also connected to the claim of discrimination on the administrative level.

Violation of equality

48. The petitioner focused on the argument that its right to freedom of political expression was violated by the prohibition that the Rules imposed on the publication of such expression in paid advertisements. I attempted to show why the constitutional right was not violated in a manner that justified constitutional adjudication in accordance with the limitation clause.

For the sake of completion I would add that a claim of violation of equality might possibly have been raised on the constitutional level, its thrust being that the Rules in our case discriminate unlawfully between those expressing themselves commercially, who are permitted to advertise in service broadcasts, and those expressing themselves politically, to whom this channel of expression is blocked. Could it be said that under these circumstances there has been a violation of the constitutional right to equality between the purveyors of different messages, who seek to advertise their messages for payment?

49. Equality is an established foundation of the Israeli legal system. It is a value that lies at the foundation of a society's existence, and a guarantee for a person's development and self-realization. It is essential for the establishment of a democratic regime: *Adalah Legal Center v. Minister of the Interior* [49]; HCJ 4112/99 *Adalah Legal Center v. Tel-Aviv Municipality* [91], at p. 415; HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [92], at p. 332; HCJ 7111/95 *Center for Local Government v. Knesset* [93], at p. 503.

50. Nevertheless, the value of equality was not included as a basic right in the Basic Law, and the question has therefore arisen in the past as to whether the right to equality can be classified as a constitutional right that derives from the right to human dignity, and in that capacity granted constitutional protection by virtue of Basic Law: Human Dignity and Liberty.

Israeli case law is divided over whether the right to equality can be derived from the right to dignity. According to some, the right to equality is included in Basic Law: Human Dignity and Liberty as an "unnamed right" (Justice Or in HCJ 5394/92 *Huppert v. Yad VaShem Holocaust Martyrs and Heroes Memorial Authority* [94], at pp. 360-363; Justice Mazza in *Israel Women's Network v. Minister of Transport* [36], at pp. 521-523, and see all the citations in s. 39 of *Adalah Legal Center v. Minister of the Interior* [49]). There were some who adopted a restrictive approach in applying the basic right to dignity to the right to equality (Justice Zamir in HCJ 4806/94 *D.S.A. Environmental*

Quality Ltd v. Minister of Finance [95], at pp. 205-206 and his comments in *Center of Local Government v. Knesset* [93], at pp. 510-511). Others sought to restrict constitutional recognition of the right to equality to cases in which the violation of equality amounted to humiliation of another person, in which case, according to this approach, there was an overlap between the right to equality and the core of the right to human dignity (*Miller v. Minister of Defense* [11], at pp. 146-147 see also HCJ 4513/97 *Abu Arar v. Knesset Speaker Dan Tichon* [96], at pp. 47-48).

51. Ultimately, the case law adopted an "intermediate approach", according to which "human dignity" is not limited to damage to the core of human dignity, but neither does it encompass every human right that can be derived from human dignity. It includes all those rights that are linked to human dignity (whether at its core or at its periphery) by close, significant ties (as *per* President Barak in *Movement for Quality of Government v. Knesset* [14], at para. 33). The right to human dignity thus includes those aspects of equality that guarantee protection of human dignity from violation, and that are closely related to it. Human dignity thus extends to those situations in which a violation of equality is inextricably linked to human dignity and to a violation thereof. In determining the scope of the constitutional right to dignity, consideration must be given to the violation of equality as a factor in delineating the contours of the right. This approach was also adopted in later case-law (see HCJ 2223/04 *Levy v. State of Israel* [97]; 9722/04 *Polgat Jeans Ltd. v. Government of Israel* [98]; HCJ 8487/03 *IDF Invalids Organization v. Minister of Defence* [99]; HCJ 11956/05 *Suhad Bishara v. Ministry of Construction and Housing* [100]).

52. Do the Rules in the present case, which permit paid advertisements in commercial matters but bar advertisements of a political-ideological character, violate equality as a constitutional right? The obvious answer to this question is in the negative, for in the circumstances of this case, even if there is a violation of equality, it is not a violation that is closely linked to human dignity, and as such we find ourselves outside the constitutional purview of Basic Law: Human Dignity and Liberty.

Our assumption for this purpose is that political expression and its messages are regulated by the general lineup of programs as part of the authorities' obligation to ensure balance and fairness in their operation. This

stems both from the Broadcasting Authority Law and the Second Authority Law, and from the basic principles of the system. The paid advertisements track was not originally intended to serve as a platform for expression, and it was introduced to serve a financial-economic purpose of the media authorities. Given our assumption that freedom of political expression is maintained and protected, and that the paid advertising track was not intended for the realization of freedom of speech, it follows that the violation of equality is not closely linked to human dignity, and there is therefore no violation of the constitutional right to dignity, in the context of the right to equality.

53. Even if the issue is not the violation of a constitutional right, one ought nonetheless to examine whether there could be a claim of discrimination on the administrative level, as opposed to the constitutional level, that justifies consideration.

Substantive equality is defined as like treatment of equals, and different treatment of those who are different (HCJ 10076/02 *Rozenbaum v. Prison Authority Commissioner* [101], *per* President Barak, at para. 11). In order for there to be a violation of equality, it must be proved that there are groups between which there is identity or equivalence in relevant features, and which, despite their similarity, are treated differently (HCJFH 4191/97 *Rekanat v. National Labor Court* [102], at p. 330, *per* President Barak).

54. In the case at hand, as far as paid advertising is concerned, there is a substantive difference between the two relevant groups involved – a difference that explains and justifies the contents of the Rules, which permit commercial advertisements of a neutral nature, and prohibit advertisements of a political or ideological nature. The conception underlying the distinction between the two groups is value-based, deriving from the understanding that political-ideological-social expression in the public-national communications media should not be affected by the financial capacity of the opinion-holder, and that allowing political expression to be bought for money not only fails to promote the marketplace of opinions and ideas in a free society, but actually disrupts it, by letting money talk. Permitting paid political advertising means allowing the power to disseminate information on social, political and ideological matters to be purchased. This conflicts with the basic conception whereby free discourse and expression should be available equally to all people, irrespective

of their financial abilities – a conception which furthers the democratic process and does not thwart it.

55. Commercial advertisements and other neutral broadcasts for which payment is made do not influence the marketplace of ideas and opinions in the social sphere, and do not distort the free flow of political-ideological expression in the general lineup of programs of the public media, which is not dependent upon financial resources. Opening the track of paid advertising to political expression may well disrupt the existing balance in the open marketplace of opinions and ideas and distort public discourse in view of the concern that financial magnates could assume control of this broadcasting track in the media. This explains the substantive difference between the two groups that are relevant in our case, and justifies the distinction made by the Rules in relating to each group. This distinction between the two groups is particularly valid in view of the fact that the matter involves public media authorities, which operate as statutory corporations by virtue of laws regulating their public activity. This is especially significant in relation to the Broadcasting Authority, which operates its schedule of programs as a statutory state service (s. 2 of the Law).

Political expression is given an extensive platform in the context of the programs themselves, without special payment. Commercial and neutral expression was allocated a paid advertisements track, which does not affect or distort public discourse through the monetary purchase of the power to disseminate information. It is difficult to argue that this approach, with its particular distinctions, provides grounds for a claim of inequality and unlawful discrimination, in either the constitutional or the administrative realm, that warrants judicial intervention.

Conclusion

56. In view of all the above, my view is that it was not proved that any of the petitioner's constitutional rights was violated, be it a violation of freedom of speech or a constitutional violation of the right to equality. Nor would there appear to be any administrative cause of action based on discrimination, which, had it existed, may have warranted judicial intervention in the actions of the authorities on the administrative level.

Therefore, and based on the aforementioned reasons, I concur with the conclusion proposed in the judgment of Justice Naor, whereby the petition should be denied on all counts.

.

Justice A. Grunis

I agree that the Rules should not be declared invalid]as stated in the opinion of my colleague Justice M. Naor. In doing so, there is no need to to take a stand on the relation between freedom of political expression and human dignity.

I have studied the opinion of my colleague Justice Procaccia. I accept her fundamental approach regarding the determination of the boundaries of a constitutional right. I concur with her statements (in para. 6(6) of her opinion) that "[a]n overly-broad conception of the scope of a constitutional right, exceeding that of the purpose it serves, may lead to a dilution of the constitutional rights and to their devaluation" (see also para. 2 of my opinion in *Adalah Legal Center v. Minister of the Interior* [49]). Nevertheless, there is no dispute that there was a violation of freedom of speech in the case before us. I will therefore refrain from expressing a position regarding the approach of Justice Procaccia as far as freedom of speech is concerned. Nor do I think it necessary to adopt a position regarding the relationship between the actual existence of the right and the means of expressing it in the circumstances of this case.

Justice S. Joubran

I concur with the opinion of my colleague Justice M. Naor, and with the additional comments of my colleague Justice E.E. Levy

1. First, I will point out that in view of our conclusion, I accept as a starting point – purely for purposes of this hearing – the assumption that the Rules under discussion contain a violation of freedom of expression as a protected basic right. This assumption was accepted by the litigants in this hearing; as such I will not relate to the analysis of my colleague, Justice Procaccia, and prefer to leave that subject for future consideration.

2. As explained in the opinion of my colleague Justice M. Naor, to enable political expressions on controversial matters to be broadcast in the framework of paid advertisements will, in practice, spell the demise of the fairness doctrine in Israel. Concededly, this doctrine applies only to the "regular" framework of broadcasts, and if political advertising is not possible in the framework of broadcast advertisements, the doctrine will not apply to them. On the other hand, opening the advertising track to broadcasts of political expression will, inevitably, empty the fairness doctrine of any content. It is clear that despite the fact that the air time allotted for advertisements is quite brief in relation to the regular programs, the other features of advertisements - including the possibility of frequent repetition of a particular message, freedom in formulating the contents of the message, and the very fact of this being a dedicated track for the relaying of messages intended to influence - increases the weight attaching to them (in this regard the scholar Marshall McLuhan already pointed out that "the medium is the message"). In the public, media-oriented environment of our times, as pointed out by Justice E. E. Levy, there is a serious concern that granting the access requested in the petition will flood the advertising track with political broadcasts of all types, and in doing so divert the central focus of political discourse from "regular" programs to advertising programs. It is clear that all this would directly affect the application of the fairness doctrine, and in fact lead to its revocation.

3. It is for these reasons that I concur with Justice Naor's ruling that there is nothing wrong with the fact that the arrangement preventing the broadcast of political expressions in the framework of advertisements is not explicitly anchored in primary legislation. I accept her ruling that this arrangement actually relies upon the general fairness doctrine, and is a direct product of it. In my view, it is sufficient that the fairness doctrine is well anchored in primary legislation to satisfy the requirement of "explicit authorization".

4. To be precise: the only way of preventing the revocation of the general fairness doctrine, should the petition be granted on its merits, would be to make it directly applicable to advertisements through the creation of a supervisory regime over these broadcasts as well. However, even assuming that creating such supervision is possible, it is unclear why the petitioner and similar entities would benefit from such an arrangement, and why it would

ameliorate the violation of freedom of expression. It should be remembered that the possibility of being heard, subject to the laws of the fairness, is already available to the petitioner in the framework of the regular programs, without payment. The petitioner contends that in the current situation, entities with unique political views are not given sufficient exposure in the framework of regular programs. However, as mentioned by Justice Naor, the solution to this problem must be found in the existing framework, through recourse to the fairness doctrine itself, and if necessary, by use of administrative processes, as mentioned by Justice Procaccia.

5. Moreover, opening the advertising track to the broadcast of political expressions would not necessarily solve the problem that the petitioner describes. On the one hand, the creation of a rigid regulatory regime for oversight of the broadcast of "advertising" political material would deprive this track of its uniqueness, because the main difference between this track and the regular programs would be the component of payment for broadcasting content. However, as stated, the component of payment is itself problematic; the drawbacks of this course of action would therefore appear to outnumber its advantages – in view of the fact that the very regime that allegedly harms the petitioner in the framework of regular programs would harm him again in the framework of advertising broadcasts.

On the other hand, the creation of a more lenient supervisory regime would create a situation in which "money talks", given that broadcasting time is limited by its very nature. In that situation, one form of exclusion would be replaced by another, and here too, opinion holders supported by more limited means would be in an inferior position to their more established competitors.

6. I wish to clarify that these comments do not imply that the fairness doctrine is a sacred principle from which there can be no diversion. Like any other socio-legal conception it has its drawbacks, and it may even involve a violation of protected basic rights. However, even were it to be claimed that the drawbacks of this conception exceed its advantages, this would not, in my view, lead to its invalidation on the grounds of contradicting Basic Law: Human Dignity and Liberty. On this matter I share the view of my colleague President D. Beinisch, that due to its complexity and tremendous sensitivity, the subject requires thorough study and consideration, and should be dealt with by legislation, even though I disagree with her conclusion on the matter.

Under the circumstances, as stated, I do not find that the current arrangement lacks explicit statutory authorization. At the same time, I do not find that we have the ability or the possibility of deciding whether the fairness doctrine itself is good or bad, or at least, whether to allow it to be emptied of content.

Petition denied, by majority opinion, as *per* the judgment of Justice M. Naor.

18 Av 5768.

20 August 2008.