HCJ 212/03

Herut – The National Jewish Movement

v.

Justice Mishael Cheshin, Chairman of the Central Elections Committee for the Sixteenth Knesset

The Supreme Court Sitting as the High Court of Justice

[January 8, 2003]

Before President A. Barak, Justices E. Mazza and T. Strasberg-Cohen

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: Petitioner attacked the decision of the respondent to disqualify an election commercial it had prepared for broadcast over both radio and television. The jingle included praise for Yasir Arafat and a call for the expulsion of Jews from Jaffa and Ramle. In addition, the television version of the commercial depicted an Israeli flag, flying over the Knesset, as it changed into a Palestinian flag. The Chairman of the Elections Committee disqualified this commercial, reasoning that the jingle caused severe injury to the dignity of the flag and the national anthem. In the context of the petition, respondent also asserted that the Court did not have the jurisdiction to intervene in his decision.

Held: The Supreme Court held that it did have jurisdiction to consider the petition. It held that the authority of the High Court of Justice originates in the provisions of the Basic Law: The Judiciary, a constitutional law. As such, section 137 of the Elections Law cannot negate this authority. The Court further held that the authority of the Chairman of the Elections Committee to approve broadcasts should apply to both television and radio broadcasts. The fact that the statute did not expressly grant him that authority regarding radio broadcasts was a lacuna that should be filled by judicial interpretation. Finally, the Court held

that, in his decision, the Chairman of the Elections Committee was to balance the competing values of freedom of speech and of public order. The Court held that the decision of the Chairman did properly balance between these competing considerations. In a dissenting opinion, the President of the Court stated that the Chairman did not achieve a proper balance between the two competing values.

Legislation Cited:

Flag and Emblem Law-1949, § 5
Knesset Elections Law (Consolidated Version)-1969 § 137
Elections Law (Propaganda Methods)-1959**, §** 20b
Basic Law: The Judiciary § 15
Administrative Courts Law-2000
Foundations of Law Act-1980**, §** 1
Broadcasting Authority Law-1965, §§ 15(a), 15A(b), 15B, 16b & 16c
Penal Law-1977, § 1
Basic Law: The Knesset, § 7

Israeli Supreme Court Cases Cited:

[1] HCJ 344/81 *Negbi v. Central Elections Committee for the Tenth Knesset* IsrSC 35(4) 837
[2] HCJ 637/88 *Laor Movement v. Chairman of the Knesset Elections Committee* IsrSC 42(3) 495
[3] CA 6821/93 *Bank Hamizrahi v. Migdal Association Village* IsrSC 49(4) 22
[4] HCJ 1384/98 *Avni v. The Prime Minister* IsrSc 52(5) 206
[5] HCJ 3434/96 *Hofnung v. Chairman of the Knesset* IsrSc 50(3) 57
[6] HCJ 2208/02 *Slama v. Minister of Interior* (unreported decision)
[7] HCJ 8071/00 *Jacobowitz v. The Attorney-General* (unreported decision).
[8] HCJ 4562/92 *Zandberg v. Broadcasting Authority* IsrSc 50(2) 793
[9] CA 733/95 *Arpel Aluminum v. Kalil Industries* IsrSC 51(3) 577
[10] HCJ 89/92 *Zweely v. Chairman of the Central Elections Committee for the Thirteenth Knesset* IsrSC 5(2) 692
[11] CA 108/59 *Pritzker v. Niv.* IsrSC 14 1545
[12] CA 164/47 *Minkowitz v. Phishtzener* IsrSC 2 39

[13] BAA 663/90 *Doe v. Regional Committee of the Bar Association of Tel-Aviv/Jaffa* IsrSC 47(3) 397
[14] CA 4628/93 *State of Israel v. Apropim* IsrSC 49(2) 265
[15] CA 3622/96 *Haham v. Macabee Health Management Organization* IsrSC 52(2) 638
[16] CA 205/7 *Ross v. State of Israel* IsrSC 27(2) 365
[17] CA 10596/02 *Leah Ness v. Likud Party* (unreported decision)
[18] HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board* IsrSC 47(2) 22
[19] HCJ 5016/96 *Horev v. Minister of Transportation* IsrSC 51(4) 1
[20] HCJ 1514/01 *Gur Arieh v. The Second Television and Radio Authority* IsrSC 55(4) 267
[21] CA 697/98 *Sostzkin v. State of Israel* IsrSC 52(3) 289
[22] HCJ 4804/*94 Station Film v. Film Review Board* IsrSC 50(5) 661
[23] HCJ 73/53 *Kol Ha'am v. Minister of Interior* IsrSC 7 871).
[24] HCJ 1/81 *Shiran v. The Broadcasting Authority* IsrSC 35(3) 365
[25] HCJ 2888/97 *Novik v. The Second Television and Radio Authority* IsrSC 51(5) 193, 200
[26] HCJ 6126/94 *Senesh v. The Broadcasting Authority* IsrSC 53(3) 817
[27] CA 6024/97 *Shavit v. Rishon Letzion Burial Society* IsrSC 53(3) 600
[28] HCJ 8507/96 *Oreen v. State of Israel* IsrSC 51(2) 269
[29] HCJ 399/85 *Knesset Member Rabbi Meir Kahane v. The Administrative Council of the Broadcasting Authority* IsrSC 41(3) 255

Petition denied.

For the petitioners— Shai Zuckerman
For the respondent— Shai Nitzan; Dani Hurin

JUDGMENT

President A. Barak

1. The National Jewish Movement Herut [hereinafter Herut] is a list

of nominees participating in the elections for the Sixteenth Knesset. Herut approached the Chairman of the General Elections Committee for the sixteenth Knesset, Justice M. Cheshin [hereinafter the Chairman of the Elections Committee] on January 6, 2003, requesting that he approve the following jingle for broadcast on radio, during the time set aside for election propaganda broadcasting, in Arabic, and accompanied by the tune of "Hatikva:"

Original

Biladi Biladi
Phalastin
Arafat Salah-A-Din
Mabruk Yah Shahid
Al-Hamdu Li'llah
Fatah Ashaf Hizballah
Yaffo Aco Ramleh V'Lod
Ya Habibi Imshi al-Yehud
Allah Hu Akbar Allah Al-Karim
Phalastin Al-Quds Yerushalayim

Translation

My State My State
Palestine
Arafat, Salah-A-Din
Congratulations, O Martyr
Praise to God
Fatah, PLO, Hizballah
Jaffa, Aco, Ramleh, and Lod
My Friend, Jews Out
Allah is Great, Allah is Generous
Palestine Al-Quds Jerusalem

Herut also requested that a broadcast, during which this jingle is heard, be approved for the time set aside for election propaganda

broadcasting on television. During the first five seconds of the broadcast an Israeli flag is seen waving above the Knesset building, gradually changing into the Palestinian flag.

2. The Chairman of the Elections Committee disqualified the jingle and the radio broadcast. He considered them both "a show of contempt towards the national anthem and a desecration of it—contempt and desecration which lead to provocation and even incitement." The Chairman of the Elections Committee also drew attention to the provisions of section 5 of the Flag and Emblem Law-1949. The petition before us is directed against this decision. On January 8, 2003, we decided, by majority decision, to deny the petition. These are our reasons.

The Authority of the High Court of Justice

3. At the beginning of this proceeding, the State Attorney raised the argument that the decision of the Chairman of the Elections Committee is final, and that the High Court of Justice lacks the authority to review it. He based his argument on section 137 of the Knesset Elections Law (Consolidated Version)-1969 [hereinafter the Elections Law], which states:

> Any complaint as to an act or omission under this Law shall be within the exclusive jurisdiction of the Central Committee, and, save as otherwise provided by this Law, no court shall entertain an application for relief relating to any such act or omission or to any decision or direction of the Central Committee, the Chairman and Vice-Chairman of the Committee, the Chairman of the Committee, a District Committee or Voting Committee.

This provision also applies to the decisions of the Chairman of the Elections Committee regarding the broadcasting of election propaganda over radio and television. *See* Elections Law (Propaganda Methods)-1959, § 20b. It has been interpreted in various judgments as granting

"procedural immunity" against judicial review, including the review by the High Court of Justice." *See* HCJ 344/81 *Negbi v. Central Elections Committee for the Tenth Knesset* [1]; HCJ 637/88 *Laor Movement v. Chairman of the Knesset Elections Committee* [2]. Respondent claimed that, pursuant to this case law, the petition should be denied.

4. We cannot accept this argument. The authority of the High Court of Justice originates in the provisions of the Basic Law: The Judiciary, § 15. As such, it is enshrined in a constitutional, superior law. An ordinary legal provision does not have the power to change a provision of a Basic Law. I clarified this in *Bank Hamizrahi*:

> Basic Laws are chapters of the state's constitution. They are products of the Knesset's constitutional authority. A Basic Law exists at the highest normative level. Consequently, Basic Laws and their provisions should not be changed by anything but Basic Laws.

CA 6821/*93 Bank Hamizrahi Ltd. v. Migdal Association Village* [3]. *See also* HCJ 1384/98 *Avni v. The Prime Minister* [4]. Similarly, a regular law does not have the power to infringe upon the provisions of a Basic Law, unless such is allowed by the limitations clauses which are part of the Basic Laws themselves. *See Hofnung v. Chairman of the Knesset* [5]. Consequently, we ruled that the Administrative Courts Law-2000 does not have the authority to deny the authority of the High Court of Justice in administrative matters. We noted that "regular legislation, whether it was legislated before or after the institution of a Basic Law, cannot change the provisions of a Basic Law…. As such, legislation which grants authority to a different court in matters already granted to the High Court of Justice by the Basic Law, cannot alter the authority of the High Court of Justice. HCJ 2208/02 *Slama v. Minister of Interior* (unreported case) [6]; *see also* HCJ 8071/00 *Jacobowitz v. The Attorney-General* [7] (unreported case).

5. Therefore, section 137 of the Elections Law does not have the power to negate the authority of the High Court. The decisions cited by

the State Attorney in support of its arguments were handed down before our *Bank Hamizrahi* [3] judgment, and they are inconsistent with it. Thus, inasmuch as section 137 of the Elections Law—which states that "no court" shall grant the remedies there stated—can be interpreted as negating the authority of the High Court of Justice, it is unconstitutional, and thus void regarding its application to the High Court of Justice. Of course, the law continues to apply to all other courts. This same conclusion may be reached—and I think more properly—by reinterpreting the phrase "no court" as referring to all other courts besides the High Court of Justice. This interpretation reflects the view that "it is preferable to limit the scope of a law through interpretation, rather than achieve the same result by declaring a part of that law as being unconstitutional and void." HCJ 4562/92 *Zandberg v. Broadcasting Authority*, [8] at 814. This interpretation is consistent with the approach that "the right to the access to court is not a basic right in the ordinary sense of a basic right. Its existence is a necessary and essential condition for the existence of all other basic rights." CA 733/95 *Arpel Aluminum v. Kalil Industries* [9]. As such, find that we have the authority to consider the petition at hand. We now move on to consider the remaining arguments before us.

The Authority of the Chairman of the Elections Committee

6. Petitioner claims that the Chairman of the Elections Committee does not have the authority to prevent the broadcasting of election propaganda over the radio. Petitioner points to section 15A(d) of the Elections Law (Propaganda Methods)-1959 [hereinafter the Propaganda Methods Law], which establishes the authority of the Chairman of the Elections Committee regarding televised propaganda. The provision states:

> Only election propaganda, whether produced by a political party or by list of nominees at their own expense, which has been approved by the Chairman of the Central Elections Committee, shall be televised pursuant to this section.

No such provision exists regarding propaganda broadcasting over radio. Mr. Zuckerman argues that this arrangement—an explicit grant of authority over television propaganda broadcasting, and the absence of such an explicit grant for radio broadcasting—implies that the Chairman has no authority over the radio broadcasting. Petitioner argues that we should not interfere with this statutory scheme—we should not fill in the blanks, nor we should not exercise our inherent authority, nor should we interfere by any other means. As such, even if the Chairman of the Central Elections Committee lawfully instructed that the propaganda broadcast not be televised, he lacks all authority to give similar instructions regarding a radio propaganda broadcast.

7. Indeed, an inspection of the Propaganda Methods Law reveals that it contains no explicit provision similar to section 15A—a provision which only relates to television—that would provide that no election propaganda shall be broadcast over radio unless it has been approved by the Chairman of the Elections Committee. The legislative history regarding this matter is short. The regulation of propaganda methods was first set out in the Elections Law (Propaganda Methods)-1959. This law was legislated during the era of radio, before television was introduced into Israel. It forbade certain propaganda methods, and included a prohibition against election propaganda in film. Its central purpose was to empower the Chairman of the Elections Committee to set aside time slots that would be allotted to each party for radio broadcasting. He was not given the authority to intervene in the actual content of the broadcasts. When television was introduced into Israel, the legislature regulated televised election propaganda in the Elections Law (Propaganda Methods) (Amendment 3)-1969. This law provided that the absolute prohibition against broadcasting election propaganda in film would be extended to television as well, aside from the time explicitly allotted to televised election propaganda broadcasting. All election propaganda broadcasting over television was prohibited, except that which was approved by the Chairman of the Elections Committee.

Two questions arise concerning the broadcast of election propaganda over radio. First, is there a prohibition against broadcasting election

propaganda over radio? As we have seen, the law which originally regulated propaganda methods during elections did not include a provision regarding this issue. The amendment of the original law, after the introduction of television into Israel, applied only to the prohibition against broadcasting election propaganda over television. What is the law regarding broadcasting election propaganda over radio? This question arose in HCJ 89/92 *Zweely v. Chairman of the Central Elections Committee for the Thirteenth Knesset*, [10] at 713. There, the court ruled that the prohibition against broadcasting election propaganda over television did not apply to broadcasting election propaganda over radio. It noted: "not including radio in the original language of the provision reflects a conscious policy against extending the prohibition towards election propaganda over radio." *Id*. at 713. At the same time, *Zweely* [10] stated that the lack of authority of the Chairman of the Elections Committee is balanced by the authority of the Broadcasting Authority. The Broadcasting Authority, when broadcasting election propaganda over the radio, must take into consideration the prohibition against broadcasting election propaganda over television. *Zweely* [10] emphasized that "it is not proper that the legislature's policy of limiting televised broadcasting be completely defeated by allowing the breach of those limitations through radio." *Id*. at 713. While *Zweely* [10] was pending before this Court, the law was amended and extended the prohibition against broadcasting election propaganda on television or in film to include election propaganda on radio as well. We are left with the second question, which refers to the authority of the Chairman of the Elections Committee to approve election propaganda broadcasts. This authority originally concerned, as we have seen, the approval of election propaganda broadcasts for television. What is the law regarding the Chairman's authority to approve election propaganda broadcasts for radio? This is the question before us.

8. Petitioner argued that the authority of the Chairman of the Elections Committee to approve election propaganda broadcasts for television indicates that he lacks any such authority regarding election propaganda on radio. The State Attorney argued, in contrast, that the silence of the Election Law in this matter constitutes a lacuna. The Court

may complete this lacuna through inference, in comparison with the provisions regarding television broadcasts, by virtue of the authority granted to it in the Foundations of Law Act-1980.

9. We agree with the State Attorney. The authority of the Chairman of the Elections Committee to approve election propaganda over television should not be interpreted as negating his authority to approve the broadcast of election propaganda over radio. Such a negative inference may be drawn where the silence is "conscious." *See* CA 108/59 *Pritzker v. Niv*, [11] at 1549 (Sussman, J.). A negative inference may also exist where the silence "speaks." *See* CA 164/47 *Minkowitz v. Phishtzener*, [12] at 43 (Silberg, J.). Silence is "conscious," and silence "speaks" when making a negative inference is necessary for realizing the objective of the law. *See* BAA 663/90 *Doe v. Regional Committee of the Bar Association of Tel-Aviv/Jaffa*, [13] at 404. There is no reason to assume that realizing the goals of the Propaganda Methods Law demands that the Chairman of the Elections Committee be denied the authority to approve election propaganda over radio.

10. Even so, should we view the silence of the Election Propaganda Methods Law as a lacuna in the law? Should we not say, as we did in *Zweely*, that "the legislature was aware of radio and he even mentioned it in other provisions of the law." *Zweely* [10] at 713. This is not a simple question. In *Zweely* we did not see the silence of the Propaganda Methods Law concerning the radio broadcast of election propaganda as a lacuna, primarily because were of the opinion that the resolution of the problem could be found in a normative arrangement external to the Propaganda Methods Law. This arrangement was the Broadcasting Authority Law-1965. We were of the opinion that, regarding the radio broadcast of election propaganda, the discretion of the Broadcasting Authority—under the Broadcasting Authority Law-1965—was a substitute for the authority of the Chairman of the Elections Committee. We added that the Broadcasting Authority, in exercising its discretion with reference to broadcasting election propaganda, should presume "that the legislature prohibited the broadcasting of election propaganda on television, and it is not proper that the legislature's policy of limiting

televised broadcasting be completely defeated by allowing the breach of those limitations through radio." *Id*. at 713.

No such external arrangement is present here. The Broadcasting Authority and the Second Television and Radio Authority do not have the authority to interfere with the *content* of radio election propaganda broadcasts. *See* the Broadcasting Authority Law-1965, §§ 15(a), 15A(b), 15B, 16b & 16c. Thus, the silence of the Propaganda Methods Law should not be seen as "neglecting to take a stand on a legal issue, while leaving its regulation to other normative arrangements, external to the law being interpreted." BAA 663/90 [13], at 404. It is our opinion that the only possible way to interpret the silence of the Propaganda Methods Law regarding the authority of the Chairman of the Elections Committee to approve radio election propaganda broadcasting is that it is a legislative oversight. Indeed, a lacuna will exist whenever a legislative arrangement is incomplete, and this incompleteness acts to counteract the objective of the arrangement. *See* CA 4628/93 *State of Israel v. Apropim,* [14] at 323; CA 3622/96 *Haham v. Macabee Health Management Organization*, [15] 648. Such is the case before us. There is no reasonable justification to distinguish between granting the Chairman of the Elections Committee the authority to approve election propaganda broadcasting for television and denying him this authority regarding radio. There is no reasonable justification for a state of affairs where there is no supervision of election propaganda broadcasting over radio. In building a wall around election propaganda broadcasting the legislature forgot to lay a brick, thus creating a void which constitutes a lacuna, regarding the authority of the Chairman of the Elections Committee to approve election propaganda for radio.

11. When a statute contains a lacuna, the court must fill in the lacuna. Section 1 of the Foundations of Law Act-1980 considers this issue:

> Where the court, faced with a legal question, finds no answer in statute, case law, or by analogy, it shall decide the question

> in the light of principles of Israel's heritage—freedom, justice, equity, and peace.

This provision states that, as a first step towards filling in a lacuna, analogies should be drawn. If no suitable analogy may be drawn, we must turn to the principles of Israel's heritage: freedom, justice, equity, and peace. In this case, an analogy may be drawn from the provisions of section 15a of the Propaganda Methods Law. Thus, the provision that states that election propaganda shall not be broadcast unless it has been approved by the Chairman of the Elections Committee, also applies to election propaganda over radio. As such, the Chairman also has the authority to prohibit the broadcast of election propaganda over radio, as he has similar authority over televised election broadcasting.

We shall now turn to consider the scope of respondent's authority and discretion in this matter. Before leaving the issue of interpretation, however, we would like to make three comments. First, a criminal offence should not be created by filling in a lacuna in the law. *See* Penal Law-1977, § 1; CA 205/7 *Ross v. State of Israel*, [16] at 372. Therefore, though a failure to adhere to the decisions of the Chairman of the Elections Committee constitutes a criminal offence with regard to television broadcasting, it does not constitute a criminal offence in the case of radio broadcasting. Here, the lacuna and its interpretation produce constitutional and administrative law, and do not create criminal offences. Second, in filling in the lacuna, a new text is added to the law. This text has the same status as the law in which the lacuna was found. Therefore, the remainder of the law's provisions also apply to that text, as if it itself was an integral part of the law. Thus, for example, section 137 of the Elections Law, which we have discussed, *see supra* paras. 3-4, which also applies to decisions made according to sections 15 and 15A of the Propaganda Methods Law, *see* the Propaganda Methods Law § 20, will also apply to the decisions of the Chairman of the Elections Committee regarding election propaganda broadcast over radio. Third, the current legal situation, where a lacuna exists in the Propaganda Methods Law, is unsatisfactory. Our filling in the lacuna is not a substitute for a legislative act which will regulate the matter

comprehensively.

The Authority of the Chairman of the Elections Committee

12. What is the scope of the authority of the Chairman of the Elections Committee pursuant to section 15A(d) of the Propaganda Methods Law? This question arises regarding television broadcasts, which are explicitly regulated by section 15A, as well as radio broadcasts, which are regulated by the interpretation of the lacuna discussed above. The principles stated in section 15A of the Propaganda Methods Law apply to both these cases:

> Only election propaganda, whether produced by a political party or by list of nominees at their own expense, which has been approved by the Chairman of the Central Elections Committee, shall be televised pursuant to this section.

Petitioner asserts that the authority of the Chairman of the Central Elections Committee extends only to those two grounds explicitly mentioned in the Propaganda Methods Law for the disqualification of election propaganda broadcasting. These two grounds restrict election propaganda broadcasts involving the security forces or victims of terrorism, *see* Propaganda Methods Law, § 2B, and broadcasts that involve the participation of children, *see* Propaganda Methods Law, § 2C. The State Attorney, on the other hand, argues that the authority of the Chairman of the Elections Committee is more expansive—it includes the disqualification of election broadcasts that contain incitement, racism, and violations of privacy. The State Attorney claims that if this authority is not granted, the electoral system will descend into anarchy—a situation well described by the passage: "each man will swallow up his fellow man alive."

13. We agree with the State Attorney. The authority of the Chairman of the Elections Committee to approve election broadcasts is not limited to the two matters above. The proper interpretation of this authority demands that it extend to additional matters associated with election

propaganda. Not only have the Chairmen of the Election Committees acted in this manner over the years, this interpretation is also essential to ensure the public interest.

The Discretion of the Chairman of the Elections Committee

14. The Chairman of the Elections Committee was authorized to approve election propaganda broadcasts for both radio and television. This discretion is exercised in order to achieve the goals of the Propaganda Methods Law. These goals are both specific and general, and both subjective and objective. The application of these goals differs with regard to each specific matter. They naturally include those goals associated with the organization of elections, and which constitute the foundation of the Elections Law and the Propaganda Law. These include the preservation of equality in elections, the fairness of elections, the integrity of elections, preventing the deception of voters and preventing distortion in the electoral process and its results. *See, e.g.*, CA 10596/02 *Leah Ness v. Likud Party* [17] (unreported case). In this petition we must consider two opposing goals. We consider the realization of the freedom of speech as well as the attainment of public order. We must balance these two goals. The discretion of the Chairman of the Elections Committee is exercised within the context of this balance.

15. On one side of the scales lies the freedom of speech. We discussed the essence of this freedom, as embodied in the Propaganda Methods Law, in *Zweely:*

> Freedom of speech is a central and fundamental principal, which is important for forming the goals of a law. This freedom reaches every expression. It has special significance regarding political expressions in general, and specifically regarding political expressions articulated during election struggles. … One of the principle justifications of freedom of speech relates to the democratic regime. The spirit of democracy is lost without freedom of speech. Freedom of speech cannot exist without democracy. "True democracy and

> liberty of speech are one. This is true throughout the life of a democracy and especially true during elections." … Freedom of speech ensures the exchange of ideas between members of the public, and thus allows them to form opinions regarding issues which are on the national agenda. … "Only in this way will a person be able to form his own opinions with regard to critical issues—both social and national—whose resolution is ultimately in his hands by virtue of his right to choose the institutions of the state." … The result, which was expressed by President Shamgar in HCJ 372/84 *Klopfer-Neve v. Minister of Education and Culture*, at 239, is that "[i]t is not feasible to think that elections may be held in a democratic regime without allowing the exchange of ideas and mutual persuasion, and without allowing those debates in the context of which public opinion is formed, and which play an essential part in any free regime, whether during elections or during any other time of the year…" *Id.* at 706-07.

16. On the other hand, we have the public's interest in security, peace, and civil order. In the case at hand, these interests include protecting the feelings of members of the public regarding the anthem and the flag. Indeed, protecting the feelings of members of the public, whether they be religious, national or other feelings, is an integral part of the public interest. *See* HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board*, [18] at 34; HCJ 5016/96 *Horev v. Minister of Transportation*, [19] at 34; HCJ 1514/01 *Gur Arieh v. The Second Television and Radio Authority*, [20] at 275; CA 697/98 *Sostzkin v. State of Israel*, [21] at 307-08; HCJ 4804/94 *Station Film v. The Film Review Board*, [22] at 678.

17. In the petition before us these values and principles—freedom of speech on the one hand and the public interest on the other—are in conflict. Balancing is necessary to resolve this clash. This balance has been with us since *Kol Ha'am*. *See* HCJ 73/53 *Kol Ha'am Company v. Minister of Interior* [23]. In *Kol Ha'am* we held that freedom of speech should not be subject to prior restraint unless there is near certainty that,

if the expression were to be articulated, the public interest would suffer serious and substantial injury. *See* HCJ 1/81 *Shiran v. The Broadcasting Authority*, [24] at 378. My colleague, Justice Mazza has noted:

> Preventing the expected publication of expression constitutes a direct and serious injury to the freedom of speech. It is a well established law…that granting such relief may only be considered, where neglecting to do so creates a danger, whose probability reaches near certainty, of substantial injury to public peace or civil order, or of causing severe harm to any other protected value.

HCJ 2888/97 *Novik v. The Second Television and Radio Authority*, [25] at 200. When the protected value concerns the feelings of the public, one of the things which must be shown is that the injury to such feelings is so serious and severe that it exceeds tolerable levels. *See* HCJ 5016/96, [19] at 55; HCJ 6126/94 *Senesh v. The Broadcasting Authority*, [26] at 836; CA 6024/97 *Shavit v. Rishon Letzion Burial Society*, [27] at 657.

18. Does the decision of the Chairman of the Elections Committee properly balance between freedom of speech and the public interest? My answer to this question is negative. There is no certainty— neither near, nor reasonable, nor substantial—that publicizing the propaganda broadcast of the petitioner—a national movement that holds the sanctity of the anthem and flag especially dear—will cause painful and serious injury to feelings concerning the flag and the anthem, and which will exceed levels that are tolerable in a democratic society. I am willing to assume that there will be a number of people who will raise their brows and question the tastefulness of the broadcast. However, that is not our concern here. We are concerned with the censorship of freedom of speech; we are concerned with prior restraints on the freedom of political speech during the critical time of elections. Imposing such restrictions requires the utmost caution. Only when there is near certainty that the realization of freedom of speech will lead to painful and serious injury to the feelings of a considerable part of the public, will restrictions on political expressions be justified. Such circumstances do not exist in this

case. For these reasons, I am of the opinion that the petition should be granted.

19. The desecration of the sanctity of the flag, which the Chairman of the Elections Committee referred to, is severe. *See* HCJ 8507/96 *Oreen v. State of Israel* [28]. Nevertheless, I do not believe that in the case at hand there is a sufficient factual basis, regarding either the *actus reus* or the *mens rea*, to satisfy the elements of the offence established in section 5 of the Flag and Emblem Law-1949. Under these circumstances, this consideration—the desecration of the flag—cannot justify curbs on the freedom of speech. *See* HCJ 399/85 *Knesset Member Rabbi Meir Kahane v. The Administrative Council of the Broadcasting Authority* [29].

The Scope of Judicial Review

20. It is well established that authority and discretion are not the same. The High Court of Justice has the authority to review the decisions of the Chairman of the Elections Committee. Yet, does this case require us to exercise our authority? The decisions of the Chairman of the Elections Committee are subject to judicial review just as the decisions of any other public officer. Of course, our discretion is not a substitute for the discretion of the Chairman of the Elections Committee. We explained this in *Zweely*:

> We do not act as a superior Chairman of the Elections Committee. We will not interfere with his decisions unless a decision is made which is radically unreasonable.

Zweely, [10] at 703. We do not place ourselves in the position of the Chairman. However, if the Chairman's interpretation of a law differs from our own, and if the Chairman does not act within the boundaries of the proper balance, we have no choice but to intervene. *See Zweely* [10].

21. In exercising our discretion, we must be aware of the special circumstances under which the Chairman of the Elections Committee acts. He must make a large number of decisions in a short period of time.

We do not wish to act—nor can we act—as a court of review over each and every decision. Section 137 of the Elections Law is another example of this approach. Although that section itself does not apply here, its presence influences us. Of course, the Chairman has broad discretion in setting out the scope of freedom of speech on the one hand and the scope of the public interest on the other. The balance which we have discussed creates a "zone of reasonableness." Any given balance allows for a variety of results which may occasionally contradict each other. Balancing is not an exact science. It allows for discretion. We will usually not intervene in this discretion, and this is especially true when it is the Chairman of the Elections Committee who exercises this discretion. Thus, had I been of the opinion that the respondent's decision falls within the "zone of reasonableness," I would not have intervened, even in a case where, had I myself been the Chairman of the Elections Committee, I would not have made the same decision. This, however, is not the case in the petition before us.

Had my opinion been accepted, we would issue a final order and instruct the respondent to approve the petitioner's broadcast.

Justice E. Mazza

I agree with President Barak's reasoning with regard to our authority to deal with the petition, as well as with regard to the subjecting of radio election propaganda to the approval of the Chairman of the Central Elections Committee, and also with regard to the extent of the Chairman of the Elections Committee's authority to intervene in the content of radio and television propaganda broadcasts. I also agree that, in exercising his extensive authority, the Chairman of the Elections Committee must appropriately balance between the freedom of speech— to which every nominee list is entitled—and between other protected values. I cannot agree, however, with the President's conclusion that, in the case at hand, there is just cause for our intervening in the Chairman of the Elections Committee's decision to disqualify the petitioner's broadcasts.

In the broadcasts which were disqualified, petitioner made use of the flag and the anthem. In the propaganda jingle, which was intended to be broadcast over both radio and the television, words which attempt to imitate the Palestinian anthem "Biladi Biladi" were adapted to the tune of Hatikva. Examining the words of the song, cited in their original and accompanied by a Hebrew translation in the President's opinion, reveal that the song includes praise of Arafat, the "Shahid," the Fatah Movement, the Hizballa Organization, and the PLO. The song also calls for the expulsion of Jews from Jaffa, Aco, Ramla and Lod, and connects the greatness of Allah to that of Jerusalem and "Holy Palestine." At the beginning of the propaganda film, which was intended to be broadcast on television, the Israeli flag is shown waving above the Knesset building. Within a few seconds, during which the jingle plays in the background, the flag gradually turns into a Palestinian flag. In his explanation as to why he disqualified the broadcast, the Chairman of the Elections Committee stated that the two broadcasts contain "a show of contempt towards the national anthem and a desecration of it—contempt and desecration which lead to provocation and even incitement." Regarding the manner in which the state flag is shown in the propaganda television broadcast, the Chairman referred to section 5 of the Flag and Emblem Law-1949, which categorizes acts that desecrate the Israeli flag as criminal offences.

In his opinion, the President refers to the accepted tests regarding the prior restriction of expression: in general, freedom of speech should not be restricted unless there is near certainty that, if the expression were to be articulated, the public interest would seriously and substantially be injured. Furthermore, restricting freedom of speech, due to the suspicion that the public's feelings may be harmed, may only be justified if the expected injury from the expression exceeds the level of tolerance that can expected of the public. After laying down these tests, the President states that the decision of the Chairman of the Elections Committee to disqualify the broadcasts does not accord with this balancing equation. He is of the opinion that "There is no certainty—neither near, nor reasonable nor substantial—that publicizing the propaganda broadcast of the petitioner—a national movement that holds the sanctity of the anthem

and flag especially dear—will cause painful and serious injury to feelings concerning the flag and the anthem, and which exceed levels that are tolerable in a democratic society." The President, however, is willing to assume that, as a result of permitting the broadcasts, "there will be a number of people who will raise their brows and question the tastefulness of the broadcast."

I am not willing to concur with this position, and have thus supported the denial of this petition. As my honorable colleague has suggested, the petitioner's broadcasts do indeed suffer from a lack of "tastefulness." If this were their only shortcoming, my colleague and I would be of the same opinion, as the point of departure in this matter is that each nominee-list is entitled to express its propaganda messages in whatever manner it chooses. However, this case is not that simple. I have not found any basis for our intervening in the Chairman's determination that these broadcasts contain contempt and injury towards the anthem and the desecration of the sanctity of the flag, and that permitting the broadcasts may lead to provocation and incitement.

Furthermore, I accept that the intervention of the Chairman of the Elections Committee in the content of propaganda broadcasts, produced by the list of nominees and submitted for his approval, is only justified when there is a an actual suspicion that another protected value may be injured. Even so, the Chairman of the Elections Committee has broad discretion in deciding whether, under the specific circumstances, the suspicion of such injury exists. The normative framework for his decision of whether to approve a broadcast is similar to the way this Court itself balances between the freedom of speech and other values. However, his implementation of the balance must take additional considerations into account. These additional considerations are necessary since all propaganda broadcasts are subject to his approval. Thus, for example, the Chairman of the Elections Committee may disqualify a propaganda broadcast which includes expressions that incite racism, or expression opposition to the existence if the State of Israel as a Jewish and democratic state, even if there is no probability that the broadcast will harm the values which section 7 of the Basic Law: The

Knesset is intended to protect. This also applies to the Chairman's power to prevent the improper use of values, which the public is generally sensitive about, for propaganda purposes, even if the goal of the broadcast is not to harm these values, but rather to associate them with a specific nominee list. By virtue of this principle, Chairmen of Elections Committees have, in the past, disqualified broadcasts which made use of IDF soldiers, children, and members of bereaved families for the purposes of election propaganda. Such actions were taken even before the legislation of sections 2B(b) and 2C of the Propaganda Methods Law in 2001, which enshrined these prohibitions in legislation

An additional consideration, intrinsic to subjecting all election propaganda broadcasts to the approval of the Chairman of the Elections Committee, is in his duty to form identical, equivalent standards—which may occasionally be technical—for the examination of the broadcasts. The significance of this is that, in examining the broadcast, the Chairman should refrain from assuming that the broadcast is not intended to cause the injury which the broadcast, at face value, is likely to cause. In the appropriate circumstances, this consideration may lead him to disqualify propaganda broadcasts, which, according to an ordinary balancing approach, may have deserved approval. Take our case as an example: the President is of the opinion that as the petitioner is "a national movement that holds the sanctity of the anthem and flag especially dear." Thus, there is no reason to be concerned that its use of the anthem and flag in the propaganda broadcasts, in the specific manner in which they were used by the movement, will harm public feelings. I suspect that had the Chairman of the Elections Committee decided to approve the broadcasts, based on the consideration that the petitioner is not suspect of intending to desecrate the sanctity of the flag and anthem, he would have difficulties disqualifying other propaganda broadcasts which make similar use of the anthem and the flag, by a nominee list not known for holding the sanctity of the anthem and flag dear.

For these reasons, I am of the opinion that the disqualification of the propaganda jingle and television broadcast, which were produced by the petitioner, does not establish a cause for our intervention. The Chairman

of the Elections Committee was within his discretion in deciding as he did. With all due respect, I am of the opinion that his decision was correct. As such, I cannot agree that his decision deviates from the zone of reasonableness.

Justice T. Strasberg-Cohen

I too am of the opinion, as is my colleague Justice Mazza, that the petition should be denied.

I do not disagree with my colleague, the President, with reference to the rules, principles and norms which should guide us in our decision in the matter at hand. I too am of the opinion that "[o]n one side of the scales lies the freedom of speech … On the other hand lies the public's interest in security, peace, and civil order. In the case at hand, these interests include protecting the feelings of members of the public regarding the anthem and the flag. Indeed, protecting the feelings of members of the public, whether they be religious, national or other feelings, is an integral part of the public interest." We differ, however, with regard to the question of the application of those principles to this case, and the question of our intervening to invalidate the decision of the Chairman of the Elections Committee.

Regarding the application of the above-mentioned principles, I am of the opinion that that using the anthem and flag, as the petitioner has done, crosses the bounds of legitimacy, in such a way that subjects its right to express its opinions to the public's interest in security, peace and civil order.

In reviewing the decisions of the Chairman of the Elections Committee, "our discretion is not a substitute for the discretion of the Chairman of the Elections Committee." *See* para. 20 of the President's opinion. Similarly, "we do not act as a superior Chairman of the elections committee. We will not interfere with his decisions, unless the decision made is radically unreasonable." *Zweely,* at 703.

I am of the opinion that the decision of the Chairman of the Elections Committee properly balances between the freedom of speech and the public interest, and in any case, his decision falls within the zone of reasonableness and does not suffer from radical unreasonableness. Therefore, there is no room for intervention in the decision.

Petition Denied.
January 16, 2003

TRANSLATED BY: Leora Dahan
EDITED BY: Eli Greenbaum

Comments, questions and suggestions are all welcomed, and may be directed towards elig@supreme.court.gov.il

---