

# “EYES HAVE THEY, BUT THEY SEE NOT”: ISRAELI ELECTION LAWS, FREEDOM OF EXPRESSION, AND THE NEED FOR TRANSPARENT SPEECH

**AMIT M. SCHEJTER\***  
**MORAN YEMINI\*\***

*A critical-historical description and analysis of the development of the laws regulating electioneering in broadcasting and their interpretation by policymakers and courts over a period of nearly fifty years in Israel demonstrates how the conceptual basis for the regulation scheme originally offered by the law as early as 1959 has been turned on its head. The result is a chaotic system in which the rules of, and the borderline between, the permissible and the forbidden are unclear. While the forbidden is perceived as dead letter, the permitted seems at times to be unrestricted, perhaps because the theory behind it makes it unenforceable. At the same time, there is growing skepticism about the efficacy of the electoral campaigning system as a whole, fostering extreme proposals for reform including proposals to abolish regulation. This study offers an alternative approach, based on a different theory of speech, a theory of “transparent speech.”*

Israelis have gone to the national polls nineteen times<sup>1</sup> in sixty years of existence and have seen the establishment of thirty-two cabinets headed by twelve prime ministers. This vigorous political activity has been governed by a dynamic legal structure that has been amended

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\*Associate professor and co-director of the Institute for Information Policy at the College of Communications, Pennsylvania State University. This study was supported by a Zevulun Hammer Memorial Scholarship awarded by the Second Authority for Radio and Television in Israel. The quote in the article's title is from Psalms 115:5.

\*\*Doctoral candidate in the Faculty of Law at the University of Haifa, Haifa, Israel.

<sup>1</sup>Eighteen elections were held to the Knesset, and one special election was held for prime minister only in 2001.

often over the years. In no field have these amendments had a more dramatic effect than in that of the rules regarding media usage during election campaigns. The Election (Means of Electioneering) Law,<sup>2</sup> was amended twenty-four times, fifteen of them since 1989, and, of these, eight dealt directly or indirectly with rules regarding the media. Since 2003 at least five additional bills proposed substantial amendments to the electioneering provisions of the law.<sup>3</sup> However, while the elections in Israel have garnered much scholarly attention,<sup>4</sup> the peculiar rules regarding media usage and in particular broadcasting have attracted little,<sup>5</sup> mostly factually descriptive,<sup>6</sup> attention.

This study attempts to fill that void, while illuminating the unique aspects of Israeli law. Indeed, uniqueness implies that the study is presented in a comparative context, but this not a comparative study, as legal arrangements in other countries are referred to only briefly. Its significance as a comparative resource lays in the fact that it details the Israeli case providing access to those not versed in Israeli law and seeking to learn from the Israeli case. While many countries employ laws similar to those in Israel, laws in which political parties are allotted free campaigning slots on radio and television that are proportionate to their representation in parliament, Israeli election law differs from

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<sup>2</sup>S.H. 138 (1959). The literal English translation of the law's title is the "Election (Means of *Ta'amula*) Law." In the absence of a specific word for "campaigning," the title of the law uses the Hebrew word "*ta'amula*," which is often defined as "propaganda." In an effort to avoid the negative connotation which accompanies "propaganda" in English, the word "electioneering" is used as the translation for the Hebrew in this article.

<sup>3</sup>Election (Means of Electioneering) (Amendment – Revocation of Limitations on Electioneering on Radio and Television) Bill, 5763-2003 (No. p/254, 16th Knesset, presented by MK Gideon Sa'ar); Election (Means of Electioneering) (Amendment – Revocation of Limitations on Electioneering on Radio and Television) Bill, 5763-2003 (No. P/762, 16th Knesset, presented by MK Yuli Edelstein); Election (Means of Electioneering) (Amendment – Revocation of Limitations on Electioneering on Radio and Television), Bill, 5766–2006 (No. P/17/232, 17th Knesset, presented by MK Yoel Hasson); Election (Means of Electioneering) (Amendment – Revocation of Limitations on Electioneering on Radio and Television) Bill, 5767–2007 (No. P/17/1927, 17th Knesset, presented by MK Gideon Sa'ar). Reference to an additional amendment can be found at <http://www.ynet.co.il/articles/0,7340,L-3593108,00.html>. "MK" is the abbreviation for "Member of Knesset."

<sup>4</sup>See, e.g., THE ELECTIONS IN ISRAEL – 1969 (Asher Arian ed, 1972); DAN CASPI, ABRAHAM DISKIN & EMANUEL GUTMANN, THE ROOTS OF BEGIN'S SUCCESS (1983); ABRAHAM DISKIN, ELECTIONS AND VOTERS IN ISRAEL (1991); DANIAL ELAZAR & SHMUEL SANDLER (eds.), ISRAEL AT THE POLLS 1996 (1998); JONATHAN MENDILOW, IDEOLOGY, PARTY CHANGE, AND ELECTORAL CAMPAIGNS IN ISRAEL, 1965–2001 (2003).

<sup>5</sup>See, e.g., Akiba Cohen & Gadi Wolfsfeld, *Overcoming Adversity and Diversity: The Utility of Television Political Advertising in Israel*, in LINDA KAIID & CHRISTINA HOLTZBACHA (eds.), POLITICAL ADVERTISING IN WESTERN DEMOCRACIES 113 (1995).

<sup>6</sup>See, e.g., Tamar Liebes & Yoram Peri, *Electronic Journalism in Segmented Societies: Lessons from the 1996 Israeli Elections*, 15 POL. COMM. 28 (1998).

other election laws in at least two main features.<sup>7</sup> The first, now defunct, was a prohibition on the broadcasting of portraits of candidates and the sounding of their voices during the period leading to the elections;<sup>8</sup> the second, still intact, is a comprehensive ban on electioneering during the regular programs over the broadcast media.<sup>9</sup>

We contend in this study that misinterpretations and miscomprehensions of the election law have led to a series of misguided rulings and amendments that, in turn, have created a chaotic system in which the rules of, and the borderline between, the permissible and the forbidden are unclear. While the forbidden is perceived as dead letter, the permitted seems at times to be unrestricted, perhaps because the theory behind it makes it unenforceable. At the same time, there is growing skepticism about the efficacy of the electoral campaigning system as a whole, fostering extreme proposals for reform, including proposals that would lead to an outcome we believe is undesirable: the full abolition of regulation of electioneering speech during election times. Such a possibility was evident in a number of legislative initiatives in the seventeenth Knesset<sup>10</sup> not reaching a required third reading only as a result of the decision to disperse the Knesset in October of 2008. We, therefore, offer an alternative approach, based on a different theory of speech, a theory of “transparent speech.”

The study begins with a description of the relevant aspects of Israel's parliamentary, judicial and media systems. It then describes in detail the policies governing political speech over broadcasting and how they emerged. From this general description of the regulation of political speech, it turns to a critical-historical description and analysis of the development of the laws regulating electioneering in broadcasting and their interpretation by policymakers and courts over a period of nearly fifty years. The article highlights and discusses the policy's shortcomings, then offers an alternative theory that can lead to better results promoting both freedom of expression and equality among contenders for the Knesset.

This critical analysis demonstrates how the conceptual basis for the regulation scheme originally offered by the law as early as 1959 has been turned on its head; instead of preserving a distinct

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<sup>7</sup>For a review of election laws world wide see, LOUIS MASSICOTTE, ANDRE BLAIS & ANTOINE YOSHINAKA, ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES (2004).

<sup>8</sup>Even though this provision, originally Section 5(a)(2) of the law, is now defunct, as the description and analysis in this article demonstrate, it has had an enduring effect on interpretation of election laws in Israel and, in fact, its elimination has contributed to much of the current crisis in the interpretation of the law.

<sup>9</sup>Election (Means of Electioneering) Law, 5719-1959 S.H. 138, § 5(a)(1).

<sup>10</sup>See *supra* note 3.

electioneering-speech sphere of discourse in order to (somewhat) equalize the playing field for all competing political parties (“If it’s ‘electioneering speech’ then it should be equal.”), the principle of equality has gradually become the definer of what constitutes “electioneering speech” in the first place (“If it’s equal then it stops being ‘electioneering speech.’”). This state of affairs makes it almost impossible to formulate a comprehensible and well-founded framework for regulating electioneering speech during election times in Israel, which both preserves freedom of expression and ensures fairness of the electoral process, adding the chaotic outcome of this mismanagement of electioneering speech, to the growing distrust of the political system.<sup>11</sup>

## BACKGROUND

Israel is a parliamentary democracy.<sup>12</sup> The single-chamber parliament, the Knesset, is elected in national elections, and the composition of its 120 members reflects the relative proportion of the vote gained by each party.<sup>13</sup> Consequently slightly more than twelve parties had been elected on average to each Knesset between 1949 and 2006, and at the time of each Knesset’s end of term there were on average fourteen and one-half parties and often – in eight instances – additional individual one-member parties, all as a result of party restructuring during the sitting Knesset’s term.<sup>14</sup> The largest party ever elected consisted of fifty-six members (the Labor Alignment in 1969).<sup>15</sup> Thus, in order to maintain a manageable majority that would enjoy the Knesset’s confidence votes, a coalition government needs to be formed, often consisting of several parties.<sup>16</sup> Indeed, Knesset members are elected as part of a

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<sup>11</sup>The growing distrust in the political system is demonstrated, among others, in ASHER ARIAN ET AL., *THE 2008 ISRAELI DEMOCRACY INDEX: AUDITING ISRAELI DEMOCRACY BETWEEN THE STATE AND CIVIL SOCIETY* (2008), available at <http://www.idi.org.il/sites/english/ResearchAndPrograms/The%20Israeli%20Democracy%20Index/Documents/2008DemocracyIndex.pdf>.

<sup>12</sup>See Myron Aronoff, *The “Americanization” of Israeli Politics: Political and Cultural Change*, 5 ISR. STUD. 92 (2000).

<sup>13</sup>See Michael Harris & Gideon Doron, *Assessing the Electoral Reform of 1992 and its Impact on the Elections of 1996 and 1999*, 4 ISR. STUD. 16 (1999).

<sup>14</sup>The statistical data is derived from the Knesset Web site, [http://www.Knesset.gov.il/description/eng/eng\\_mimshal\\_res.htm](http://www.Knesset.gov.il/description/eng/eng_mimshal_res.htm); the information regarding the number of elected lists is at [http://www.Knesset.gov.il/history/eng/eng\\_hist.all.htm](http://www.Knesset.gov.il/history/eng/eng_hist.all.htm); the information regarding the size of the parties at the end of the Knesset term appears only in the Hebrew version of the site, [http://www.Knesset.gov.il/history/heb/heb\\_hist.all.htm](http://www.Knesset.gov.il/history/heb/heb_hist.all.htm)

<sup>15</sup>See [http://www.Knesset.gov.il/history/heb/heb\\_hist.all.htm](http://www.Knesset.gov.il/history/heb/heb_hist.all.htm).

<sup>16</sup>See, e.g., Shlomo Aronson, *David Ben-Gurion and the British Constitutional Model*, 3 ISR. STUD. 193 (1998) (discussing the role of Mapai, the predecessor of the Labor party and its role as a coalition government member party).

list and are not subject individually to the scrutiny of the electorate – that burden is set on the political party as a whole.

Another feature of the Israeli system relevant to this study is the role of courts in the enforcement of administrative law. According to Basic Law: The Judiciary,<sup>17</sup> the Supreme Court may serve as a court of first instance in “matters in which it deems it necessary to grant relief for the sake of justice.”<sup>18</sup> As a result, the Supreme Court deals directly with petitions and grievances filed against the government, public authorities (such as the regulators of broadcasting), and the national election committee, and has assumed a unique position in Israeli public life.<sup>19</sup> When assuming that position, the court sits as a High Court of Justice.

The unique role of the Supreme Court expands its responsibilities during elections. Elections are governed and supervised by the Central Elections Committee.<sup>20</sup> The committee is comprised of representatives of the political parties proportionate to the party size in the sitting Knesset<sup>21</sup> and is chaired by a Supreme Court justice appointed by the fellow justices on the court.<sup>22</sup> Both the Knesset Election Law (Consolidated Version)<sup>23</sup> and the Election (Means of Electioneering) Law<sup>24</sup> fail to address the question of authority to overturn the Election Committee chairperson’s decisions with regard to issues of campaigning. As a result, the Supreme Court itself scrutinizes the decisions of the committee and of its chair on these matters and can thus overturn the decisions of one of its own members.

## ISRAELI MEDIA STRUCTURE

Israel’s media developed in a manner Dan Caspi and Yehiel Limor<sup>25</sup> identify as incorporating elements of the authoritarian, developmental and social responsibility models described by Fredrick S. Siebert,

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<sup>17</sup>S.H.1984, 78. In lack of a formal constitution, the structure of the Israeli polity is governed by a series of “Basic Laws,” a few of which have a constitutional-like standing. See David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238 (1992).

<sup>18</sup>*Id.* at § 15(c).

<sup>19</sup>See generally Gad Barzilai, *Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective*, in ISRAEL: THE DYNAMICS OF CHANGE AND CONTINUITY 15 (David Levi-Faur, Gabriel Sheffer & David Vogel eds., 1999).

<sup>20</sup>Knesset Elections (Consolidated Version) Law, 5729-1969, S.H. 103.

<sup>21</sup>*Id.* at § 16.

<sup>22</sup>*Id.* at § 17.

<sup>23</sup>S.H. 1969, 103.

<sup>24</sup>S.H. 1959, 138.

<sup>25</sup>DAN CASPI & YEHIEL LIMOR, *THE IN/OUTSIDERS: THE MASS MEDIA IN ISRAEL* (1999).

Theodore Peterson and Wilbur Schramm.<sup>26</sup> These models drew both criticism and praise over the years,<sup>27</sup> which raises the question of whether they can serve as descriptive models of existing press systems; however, they did establish one basic principle: The organization of the press reflects the system of control in a given society.<sup>28</sup> Later typologies added “advancing” or “developmental”<sup>29</sup> to the four theories to allow for a generalized description of media systems in the third world and the “democratic participant” theory in which control was ideally distributed equally to all members of society.<sup>30</sup> Yet another set of typologies identified other loci of control, such as commercial interests. These typologies included “private ownership,” “public service corporation,” “controlled commercialism,” “partnership in the public interest” (the Swedish model), and mixed systems.<sup>31</sup> A more generalized typology identified four theories by focusing on the motivation of the possessor of the control: The “authoritarian” is interested only in maintaining its own power and practices restrictive methods to achieve this; the “paternal” wishes to “guide and protect” the majority in adapting the ways of the minority by emphasizing what ought to be communicated; the “commercial” believes in the right of free choice but limits itself to producing content that will sell; and the “democratic” maintains open communication channels to alternative viewpoints.<sup>32</sup> Most recently, Daniel Hallin and Paolo Mancini developed a typology which takes into account four dimensions of media systems: the development of markets, the nature of the links between the media and the political establishment, the development of journalistic professionalism, and the degree and nature of state intervention in the media.<sup>33</sup> These dimensions lead to three models: the Mediterranean or Polarized Pluralist in which the press is elite-oriented, low in circulation and marginal economically, with high levels of government involvement and undeveloped journalistic traditions;<sup>34</sup>

<sup>26</sup>FREDRICK S. SIEBERT, THEODORE PETERSON & WILBUR SCHRAMM, *FOUR THEORIES OF THE PRESS* (1956).

<sup>27</sup>See WILLIAM E. BERRY ET AL., *LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS* 110 (John C. Nerone ed., 1995).

<sup>28</sup>See Amit Schejter, *Art Thou for Us, or for Our Adversaries? Communicative Action and the Regulation of Product Placement: A Comparative Study and a Tool for Analysis*, 15 *TUL. J. INT'L & COMP. L.* 89, 93 (2006).

<sup>29</sup>See J. HERBERT ALTSCHULL, *AGENTS OF POWER: THE ROLE OF THE NEWS MEDIA IN HUMAN AFFAIRS* 145 (1984).

<sup>30</sup>See DENIS MCQUAIL, *MASS COMMUNICATION THEORY: AN INTRODUCTION* 96–98 (1983).

<sup>31</sup>See SYDNEY W. HEAD, *WORLD BROADCASTING SYSTEMS: A COMPARATIVE ANALYSIS* 67–95 (1985).

<sup>32</sup>See RAYMOND WILLIAMS, *COMMUNICATIONS* 124–28 (2d ed., 1966).

<sup>33</sup>DANIEL HALLIN & PAOLO MANCINI, *COMPARING MEDIA SYSTEMS: THREE MODELS OF MEDIA AND POLITICS* 21 (2004).

<sup>34</sup>*Id.* at 73.

the North/Central European or Democratic/Corporatist, characterized by high circulation of newspapers, strong party affiliation replaced gradually by a commercial press and a high degree of professionalism,<sup>35</sup> and the North Atlantic or Liberal model dominated by commercial newspapers and an apolitical and professional journalist body. While the authors do not place Israel specifically within any of the models, the examples they provide would place it somewhere between the first two.<sup>36</sup> Electronic media, however, can be seen as constructed under a classic developmental model: Only in 1965, seventeen years after the state's founding, was radio broadcasting transferred from the Prime Minister's Bureau control to a public corporation – the Israel Broadcasting Authority (IBA)<sup>37</sup>—and only in 1968 was television introduced.<sup>38</sup> The government operated the television service until it was incorporated into the IBA in 1969.<sup>39</sup> Commercial broadcasting, albeit heavily regulated under the auspices of the Second Authority established in 1990,<sup>40</sup> was introduced in Israel in 1993<sup>41</sup> in the form of a second television channel and a subsequent network of privately owned regional radio stations.<sup>42</sup> A third broadcast television channel, commercial as well, was launched in 2001 under the same regulatory umbrella.<sup>43</sup>

The equilibrium between non-commercial and commercial broadcasting media is very sensitive, in particular with regard to the source of funding, and has been the subject of both legislation and of a number of Supreme Court cases.<sup>44</sup> The resulting model allows IBA to air advertising only on radio.<sup>45</sup> The practice that has developed over the years allows it to underwrite programs and to air public service announcements for

<sup>35</sup>*Id.* at 74.

<sup>36</sup>*Id.* at 40, 116.

<sup>37</sup>Broadcasting Authority Law, 5725-1965, S.H. 106.

<sup>38</sup>See SAM LEHMAN-WILZIG & AMIT SCHEJTER, *Israel, in* MASS MEDIA IN THE MIDDLE EAST 108, 115 (Hamid Mowlana & Yahia Kamalipour eds., 1994); Amit Schejter, *The Cultural Obligations of Broadcast Television in Israel*, 56 GAZETTE 183 (1996).

<sup>39</sup>For a history of the founding of Israeli television see TASHA G. OREN, *DEMON IN THE BOX: JEWS, ARABS, POLITICS, AND CULTURE IN THE MAKING OF ISRAELI TELEVISION* (2004).

<sup>40</sup>Second Authority for Radio and Television Law, 5750-1990, S.H. 59.

<sup>41</sup>See CASPI & LIMOR, *supra* note 25, at 33.

<sup>42</sup>See Amit Schejter, *The Fairness Doctrine is Dead and Living in Israel*, 51 FED. COMM. L. J. 281, 287 (1999).

<sup>43</sup>See Amit Schejter, "The Stranger That Dwelleth with You Shall Be unto You as One Born among You" — *Israeli Media Law and the Cultural Rights of the "Palestinian-Israeli" Minority*, 1 MIDDLE EAST J. CULTURE & COMM. 156, 168 (2008).

<sup>44</sup>See, e.g., HCJ 3424/90 *The Daily Newspaper Union in Israel v. The Minister of Educ. and Culture* [1990], IsrSC 45(2) 24; HCJ 757/84 *The Daily Newspaper Union in Israel v. The Minister of Educ. and Culture* [1987], IsrSc 41(4) 337.

<sup>45</sup>Broadcasting Authority Law (Amend. 8), 5753-1993, S.H., 89.

pay over television as well.<sup>46</sup> Commercial broadcasting, on the other hand, is funded through advertising, but both the quantity and content of advertising are subject to regulation.<sup>47</sup>

## THE BAN ON POLITICAL SPEECH IN BROADCASTING LAW

The laws governing broadcasting in Israel incorporate two provisions regarding political speech: (1) A general requirement that broadcasters ensure that a wide range of opinions is included within their broadcasts,<sup>48</sup> and (2) A prohibition on the broadcasting of paid-for political messages.<sup>49</sup>

The general requirement for impartiality found in both the Broadcasting Authority and the Second Authority laws has been inspired by the British doctrine,<sup>50</sup> although it has mistakenly been perceived as invoking a policy resembling the now-defunct American Fairness Doctrine.<sup>51</sup> The British concept is based on a system of public service broadcasting in which news is a central part of the broadcasters' remit, similar to the system that developed in Israel. British broadcasters are required to present political issues in a balanced manner and are prohibited from editorializing because they are public broadcasters.<sup>52</sup> The Fairness Doctrine, developed in a commercial market in which stations are privately owned and allowed to editorialize, imposed on broadcasters two concurrent obligations: to engage in controversial issues, and present them in a fair and balanced manner.<sup>53</sup> The Israeli Supreme Court has discussed the extent of the Israeli fairness rules a number of times, whether in regard for the need to accurately present historical accounts of events<sup>54</sup> or balanced political positions.<sup>55</sup> However, not less intensive has been the debate regarding the impact of the impartiality requirement over the content of advertising (or PSAs).

<sup>46</sup>H CJ 6032/94 Reshet Broad. and Production (1992) Ltd. v. Israel Broad. Auth. [1997], IsrSC 51(2) 790.

<sup>47</sup>Second Authority for Radio and Television Law, 5750-1990, S.H. 59, § 6, 46, 81.

<sup>48</sup>*Id.* at § 5; Broadcasting Authority Law, 5725-1965, S.H. 106, § 4.

<sup>49</sup>Second Authority Law at § 81. The prohibition on paid-for political advertising was not included in the Broadcasting Authority Law as such, since when that law was enacted it did not include any provisions regarding advertising.

<sup>50</sup>*See generally* Schejter, *supra* note 42, at 287.

<sup>51</sup>*See id.*

<sup>52</sup>*See id.* at 284.

<sup>53</sup>*See id.* at 283.

<sup>54</sup>*See* H CJ 1/81 Shiran v. Israel Broad. Auth. [1981], IsrSC 35(3) 365.

<sup>55</sup>*See* H CJ 1047/96 The Public's Right to Know Ass'n v. Israel Broad. Auth. [1996] (unpublished decision, on file with authors).

### *Political Advertising Over Public Broadcasting*

When the Knesset first enacted the law allowing advertising over IBA radio in 1993,<sup>56</sup> it approved a ban on advertising that is “partisan propaganda,” or discusses an issue that is “politically or ideologically controversial,”<sup>57</sup> extending the impartiality requirement to the domain of advertising.<sup>58</sup>

The rules regarding public service announcements over public television, on the other hand, were never enacted into law. In 1977, the IBA published internal guidelines regulating their content.<sup>59</sup> The guidelines stipulated that PSAs should not include any content that may “raise controversy.”<sup>60</sup> When asked to interpret this prohibition in 1983, the attorney general stated that while the IBA is required to mirror issues over which the public disagrees, it is required to do so in a manner that is balanced, and the balance cannot be achieved in the format of broadcasting a paid for message that might even create the false assumption that the position it supports is supported by the IBA as well.<sup>61</sup>

The scope of controversy over PSAs was first brought to the Supreme Court’s attention prior to the elections of 1992.<sup>62</sup> The Ministry of Construction and Housing under the hawkish Likud government paid IBA to broadcast PSAs promoting acquisition of homes in disputed settlements located in the Israeli-occupied West Bank and Gaza Strip.<sup>63</sup> Tzali Reshef, a leader of the dovish Peace Now movement, petitioned the Court to prohibit the broadcast on the grounds that it was controversial.<sup>64</sup> The Court denied the petition, stating that the PSA did not promote a position on the controversy regarding the scope of Israeli settlement in the occupied territories but was rather an announcement by the government that housing it has built is now available for the public to purchase, hence, the PSA was not a controversial broadcast.<sup>65</sup>

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<sup>56</sup>Until then it was managed through a contract with the Israeli government (until 1965) or the IBA (since 1965). See HCJ 389/80 Golden Pages Inc. (“*Dapey Zahav*”) v. Israel Broad. Auth. [1980], IsrSC 35(1) 421.

<sup>57</sup>Broadcasting Authority (Advertisements and Messages on the Radio) Rules 1993, KT 5531, 949, § 7(2).

<sup>58</sup>These rules, however, were not new, as they reiterated the internal IBA guidelines that existed until that time.

<sup>59</sup>Attorney General Directive No. 3.1201 (formerly Directive No. 21.567), Public Service Announcements on Issues of Public Controversy – Borderline Cases, available at <http://www.justice.gov.il/NR/rdonlyres/B6EF42E0-8EB3-4450-AAEE-2A0FBD97D0FA/0/31201.pdf>.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>See HCJ 1893/92 Reshef v. Israel Broad. Auth. [1992], IsrSC 46(4) 816.

<sup>63</sup>*Id.* at 817.

<sup>64</sup>*Id.* at 818.

<sup>65</sup>*Id.* at 820.

In a subsequent decision, *H.L. Education for Peace v. Israel Broadcasting Authority*<sup>66</sup> more than a decade later, the Court affirmed the *Reshef* rationale, stating that the test for classifying a broadcast as either “informative” or “controversial” laid in identifying its “dominant component,”<sup>67</sup> a term discussed later in this study.

### ***Political Advertising Over Commercial Broadcasting***

The Second Authority Law is more explicit than the Broadcasting Authority Law with regards to the impact of the impartiality requirement on advertising. Section 46 of the Second Authority Law forbids commercial broadcasters from airing programming that is “partisan propaganda,” and Section 81 extends the prohibition to the content of advertising. The Supreme Court examined this prohibition, but it generated a different response than the one made with regard to PSAs over public broadcasting. In the case of *Ya’akov Shamai v. the Second Authority*,<sup>68</sup> the Court found that a campaign the opposition party within the Labor Union’s general assembly wanted to air over commercial broadcasting by calling for a strong union was partisan because elections for the governing bodies of the union were looming, and the advertisements should thus be seen in the context of the elections, which made them partisan.<sup>69</sup> The ads, ruled the Court, were not “controversial” *per se*, as they were advocating a non-controversial position within the labor union, the position that it should be strong. This characterization of the ads was similar to the *Reshef* case, which “innocently” advertised government housing. However, while in *Reshef* the Court focused on the *content* of the PSA (making their “innocent nature” central), in the *Shamai* case it focused on its *context* – election times for the Labor Union’s government—and it deemed them “controversial” because of their timing and not because the message was deemed controversial.<sup>70</sup>

### **BROADCASTING DURING ELECTION TIMES: PARTY MESSAGES AND ELECTIONEERING**

The regulation of political advertising becomes more sensitive during election times. Even in the United States, where there is no ban on political advertising or any other fairness/impartiality requirement when no elections are taking place, there are special rules ensuring fairness in

<sup>66</sup>H CJ 10182/03 [2004], IsrSC 59(3) 409.

<sup>67</sup>*Id.* at 418–19.

<sup>68</sup>H CJ 7012/93 [1994], IsrSC 48(3) 25.

<sup>69</sup>*Id.* at § 12.

<sup>70</sup>*Id.* at § 13.

times of elections.<sup>71</sup> The issue of electioneering using electronic media during election times in Israel can be divided into two sub-issues:

1. The broadcasting of pre-prepared party electioneering messages in designated time-slots (the “party messages rule”);
2. Electioneering during regular programming (the “electioneering rules”). For decades, there was a *de facto* ban during the weeks leading to an election on broadcasting portraits of party candidates for Knesset seats and on sounding their voices on both radio, television and in movie theatres.

Both sub-issues were introduced in 1959 with the enactment of the election law.<sup>72</sup> Medium-sized parties (nine to thirteen Members of Knesset, or MKs) of both the coalition and opposition in the third Knesset proposed the law. They explained that the American and British systems of limitations on funding as a means of assuring fair elections were not sufficient within the Israeli system<sup>73</sup> because of the close ties between the ruling Workers of Israel Party (Mapai), the Labor Union (the Histadrut) and the Workers’ Corporation, a conglomerate of industries and the largest employer outside of the government.<sup>74</sup> The bill proposed a variety of limitations on parties running for the Knesset in order to assure the government does not take advantage of its economic power and that the electronic media of the time – radio and the movies – are not dominated by government messages.

### ***The Party Messages Rule: Proclaimed Equality, Structural Inequality***

The principles of the party messages rule have survived, in essence, for fifty years, the exceptions being the length and timing of the messages. The original party messages rule stated that a time would be set for each party to broadcast “election speeches” over radio, proportionate to the size of the party in the outgoing Knesset.<sup>75</sup> Under the rule, relaying party messages over electronic media (radio at first and television since 1969<sup>76</sup>) was limited to the pre-subscribed time slots offered to all parties free of charge.<sup>77</sup> The messages were cleared by the Supreme

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<sup>71</sup>See, e.g., 47 U.S.C. §§ 312, 315 (2000) (These sections are often referred to as the “Equal Opportunity Rule.”)

<sup>72</sup>Election (Means of Electioneering) Law, 5719-1959, S.H. 138.

<sup>73</sup>DK (1959) 2252.

<sup>74</sup>*Id.*

<sup>75</sup>S.H. 1959, 138, at § 15.

<sup>76</sup>Election Law (Means of Electioneering) (Amend. 3), 5729-1969, S.H. 567.

<sup>77</sup>*Id.*

Court justice chairing the Central Election Committee.<sup>78</sup> The roots of the party messages rule lie with the original Section 15 of the election law, which stipulated that each party would be allowed to broadcast a minimum of twenty-five minutes of “election speeches,” and four additional minutes would be awarded to each party proportionate to its size in the reigning Knesset.<sup>79</sup> Although intended to create equality and fairness in the election process, the disparity between the times allotted to the different parties introduced a structural inequality into the system as a result of the disparity of size among the parties. This problem did not go unnoticed by the members of the Knesset in the first reading of the bill,<sup>80</sup> but it was only with the eventual introduction of television in 1968 that the perceived importance of broadcast messages led to new rules of proportionate times for party messages,<sup>81</sup> rules that eventually required the intervention of the Supreme Court.

In July 1969, the Knesset passed the third amendment to the election law;<sup>82</sup> while the elections for the seventh Knesset were held in late October of that year. A revised Section 15 replaced the old wording “election speeches” with a term that more accurately describes these pre-prepared spots: “electioneering messages.”<sup>83</sup> Much more significant, however, was the addition of Section 15A, which awarded the chairperson of the Central Election Committee with the power to decide *when* election messages would be broadcast on television. The amendment stated that each party would be awarded a basic time slot of ten minutes, while each incumbent party would be awarded an extra four minutes for each of its members in the sitting Knesset. The messages were to be produced by the parties and at their own expense.<sup>84</sup> The parties were

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<sup>78</sup>*Id.*

<sup>79</sup>This system was reminiscent of the system adopted in the United Kingdom in the 1950s in which each party was awarded at first fifteen minutes of television for its televised party broadcasts. See Robin Hodess, John Tedesco & Lynda Lee Kaid, *British Party Election Broadcasts: A Comparison of 1992 and 1997*, 5 HARV. INT'L J. PRESS/POL. 55, 57 (2000).

<sup>80</sup>MK Yigal Alon, one of the original initiators of the law contested the rule and in his speech stated that for election purposes there should be full equality between the parties. DK (1959) 2257. MK Meir Vilner, a member representing the six-member Communist Party, mockingly, perhaps, welcomed the new rule. He stated that a rule that allowed all parties access to the national radio is in itself an achievement and progressive compared to the existing situation in which the left wing has had no access at all to the regular broadcasts. *Id.* at 2267.

<sup>81</sup>On radio, twenty-five minutes minimum allocation and an extra four minutes for each member of the sitting Knesset; on television, ten minutes minimum allocation and an additional slot of four minutes for each member of the sitting Knesset.

<sup>82</sup>Election (Means of Electioneering) (Amend. 3) Law, 5729–1969, S.H. 199.

<sup>83</sup>*Id.* at § 4.

<sup>84</sup>Although spending caps were not determined.

to be solely responsible for the messages, and a specific section clarified that the IBA was exempted *a priori* of any liability for its content.<sup>85</sup>

The proportional allocation instated for television broadcasting in 1969 followed in the footsteps of the imparities set for radio broadcasting by the initial legislation. This situation, however, was better than what was to come in 1981, when Section 15's time proportions were amended for the first time. Amendment 6<sup>86</sup> changed the proportions of the party messages in what seemed an insignificant manner. Instead of a twenty-five minutes minimum allocation on radio and an extra four minutes for each member of the sitting Knesset, the new law awarded twenty-three minutes as the basic allocation and six minutes for each additional member.<sup>87</sup> For television, the original ten minutes of basic time were reduced to eight, and each additional time slot was expanded from four to six minutes.<sup>88</sup> The outcome of this seemingly insignificant amendment was that the time allotted to one-member parties in the sitting Knesset was not affected. For parties with more than one member, however, this change offered a gradual and significant extension of their time slots. And perhaps most importantly, beyond changing the proportions between parties, one type of party was to lose time: newly established parties, as they would now enjoy only the diminished basic time allotment.

### ***The Derech Eretz Legacy – Equality (But Not Too Much)***

Two of the newly established parties, *Derech Eretz* (meaning “the way of the land”) and *Shorashim* (“roots”), petitioned the Supreme Court in its capacity as the High Court of Justice,<sup>89</sup> claiming that the equality they were assured by Section 4 of the Basic Law: The Knesset<sup>90</sup> was infringed upon, and thus the change of the rule should be annulled.<sup>91</sup> All five sitting justices in the expanded forum appointed to decide the

<sup>85</sup>Election (Means of Electioneering) (Amend. 3) Law, 5729-1969, S.H. 199, § 6.

<sup>86</sup>Election (Means of Electioneering) (Amend. 6) Law, 5741-1981, S.H. 198.

<sup>87</sup>*Id.* at § 1.

<sup>88</sup>*Id.* at § 2.

<sup>89</sup>HCJ 246, 260/81 *Derech Eretz Ass'n v. Israel Broad. Auth.* [1981], IsrSC 45(4) 1.

<sup>90</sup>S.H. 1958, 69.

<sup>91</sup>This petition was based on the precedent set in 1969 in the *Bergman* petition, HCJ 98/69 *Bergman v. Minister of the Treasury* [1969], IsrSC 23(1) 693, in which another law regarding financing of the elections was annulled because it violated Section 46 of the Basic Law: The Knesset. Basic Laws are laws passed by the Knesset with the future intention of becoming the building blocks of the constitution when it will be ratified, according to a 1951 Knesset resolution. Section 46 was added to the Basic Law in 1959, Basic Law: The Knesset (Amendment) S.H. 1959, 210, and states that any change in Section 4 can only be carried if a majority of the members of Knesset voted in favor of it in all three readings.

*Derech Eretz* petition<sup>92</sup> agreed that the change was significant enough to have violated equality between parties seeking a seat in the Knesset, and since it had not been passed by an absolute majority of the Knesset in all readings, as the Basic Law requires, the amendment was annulled.<sup>93</sup> As a result, the Knesset resorted to rewriting the law, and a new amendment introduced shortly thereafter left the new parties with the original respective twenty-five and ten minutes on radio and television, while the extra time allotted to each party was extended to six minutes from the original four minutes.<sup>94</sup> What did not change was the fact that new parties and small parties were allowed significantly less time to broadcast their messages during election time, relative to the big and established parties, and in the 1980s the difference in size between the large and small parties was significant: When the law was passed one party in the Knesset sat forty-three members, the second thirty-two, the third fifteen, the fourth twelve, and ten parties had between one and five seats. Justice Aharon Barak, axiomatically, declared that old and established parties require more time to explain their “positions, platforms, personae, deeds and misdeeds, failures and successes”<sup>95</sup> than newly established and narrowly focused parties. As long as the parties have enough time, Barak held, that amount of time is sufficient.<sup>96</sup> Thus the basic inequality created by the law remained intact.

### *The Introduction of Commercial Television*

The introduction of commercial television during the reign of the thirteenth Knesset in 1993 marked another need for adjusting the law to the new environment.<sup>97</sup> Section 130 of the Second Authority Law<sup>98</sup> amended the election law<sup>99</sup> and added the broadcasts under the Second Authority Law to the framework of broadcasts in which party messages should be carried. The amended law specifically stated that the same time frames allotted for broadcasting over the public channel would be allotted over the commercial channel. Still, jurisdiction was left with the chair of the Central Election Committee to determine when those broadcasts would be carried.

<sup>92</sup>Regularly a court of three deals with petitions to the High Court of Justice.

<sup>93</sup>HCJ 246, 260/81 [1981], IsrSC 45(4), at 4.

<sup>94</sup>Election (Means of Electioneering) (Amend. 7) Law, 5741-1981, S.H. 331.

<sup>95</sup>HCJ 246, 260/81 [1981], IsrSC 45(4), at 11.

<sup>96</sup>*Id.* at 12.

<sup>97</sup>See CASPI & LIMOR, *supra* note 25, at 33.

<sup>98</sup>S.H. 1990, 59,

<sup>99</sup>S.H. 1959, 138.

The question of the time of day in which the approved party messages would be carried once two competing television stations were broadcasting became an issue for the first time in the 1996 elections for the fourteenth Knesset.<sup>100</sup> All but one member of the Central Election Committee, which, as previously indicated, consists of representatives of the parties in the sitting Knesset,<sup>101</sup> wanted the segments to be broadcast simultaneously on both channels.<sup>102</sup> The heads of the Second Authority, the regulator of the commercial television channel, on the other hand, wanted to separate the broadcasts and to carry them on the commercial channel as late at night as possible so as not to hurt the income due to loss of advertising during prime time.<sup>103</sup> The chairman of the committee, Justice Theodore Orr, differed with both views, and decided accordingly. He explained in his decision that the rationale of the law allowing the parties to broadcast televised messages was to make the broadcast available to as many viewers as possible. Still, he stated, there was no need to force the populace to watch the party messages by not giving them a choice to watch another program over the alternative channel when one channel is carrying them. The justice rejected an expert opinion prepared by the chairman of Gallup Israel, according to which the way to achieve maximum exposure for the broadcasts would be by carrying them at the same time on both channels. Justice Orr decided to have the broadcasts at different times on both channels, within prime time, a decision reiterated in subsequent years by his successors.<sup>104</sup>

In 2003, elections for the Knesset were held for the first time after the launching of the second commercial (and third broadcast) channel. This led to a petition to the chairman of the Central Elections Committee at the time, Justice Mishael Cheshin, by the incumbent commercial channel and by its regulator, requesting to share the total time allotted

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<sup>100</sup>There was no question of when the programs would be carried on a satellite channel the IBA launched around that time (channel 33). See Regulations and Decisions of the Central Election Committee for the 14th Knesset and the Prime Minister, 29–49 (1996) (hereinafter Regulations and Decisions 1996), available at <http://www.knesset.gov.il/elections18/heb/law/Decisions1996-1..>

<sup>101</sup>Knesset Elections (Consolidated Version) Law, 5729-1969, S.H. 103, §§ 16–17.

<sup>102</sup>Regulations and Decisions 1996, *supra* note 100, at 35.

<sup>103</sup>*Id.* at 36.

<sup>104</sup>In 1996, the decision had the broadcasts in Hebrew carried on the public channel daily at 8:45 p.m. and on the commercial channel at 10:30 p.m. In Arabic, the public channel was to carry the broadcasts daily at 6:50 p.m., and the commercial channel was to carry them immediately following the Hebrew segment. In 1999, the times were shifted: The public channel was to carry the Hebrew broadcasts at 10:15 p.m. and the commercial channel at 8:30 p.m. In 2006, Justice Dorit Beinisch left the broadcast on IBA's channel 1 intact, set the Arabic broadcasts on an IBA satellite channel (channel 33) at 7:30 p.m. and on Fridays, the Muslim day of rest, at 1:30 p.m. Regarding commercial broadcasting, broadcasting on commercial channel 2 was set at 7 p.m. on weekdays and 11:15 p.m. on Saturday nights.

for the party messages between the two commercial channels.<sup>105</sup> Justice Cheshin denied the request but indicated he was doing so reluctantly.<sup>106</sup> A similar petition brought before Justice Dorit Beinish in 2006 was denied as well.<sup>107</sup> Cheshin's position, first expressed in a letter to the Speaker of the Knesset following the 2001 special elections held for the premiership, in which he chaired the committee as well, was that the law should be amended so that the parties would be required to pay for the broadcasting of their messages during the allotted time frame.<sup>108</sup>

### *Recent Developments*

During the election campaigns that took place in 1996, 1999 and 2001, the Israeli constitutional framework was altered (only to be eventually reinstated before the 2003 elections). Voters were required during this period to cast two votes, one for the party, the other to the candidate for prime minister.<sup>109</sup> While this change contributed to further fragmentation of the Knesset, its relevance for this study is that it raised a challenge regarding the time allotment for messages to be brought by candidates for the premiership. A new party formed on the eve of the 1999 elections, the Central Party, presented a candidate for the premiership and petitioned the chairman of the Central Elections Committee demanding that additional time be allotted for messages promoting premiership candidates.<sup>110</sup> The petition was denied. Even though the constitutional framework was changed, Justice Eliahu Matza, the committee chairman, was of the opinion that the additional electoral process did not create a need for additional time for party messages. A new party promoting a prime-ministerial candidate was thus put in additional inferiority in relation to the existing and larger sitting parties.

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<sup>105</sup>Decisions and Directives by Justice Mishael Cheshin During the Elections for the 16th Knesset, 226 (2003) (hereinafter Decisions and Directives 2003) available at <http://www.Knesset.gov.il/elections17/heb/law/Decisions2003.pdf>,

<sup>106</sup>*Id.* at 237.

<sup>107</sup>Decisions and Directives of Justice Dorit Beinish, Chairwoman of the Central Election Committee for the 17th Knesset, 127 (2006) (hereinafter Decisions and Directives 2006), available at <http://www.knesset.gov.il/elections17/heb/law/Decisions2006.pdf>, 127.

<sup>108</sup>Decisions and Directives from the Elections for Prime Minister, Feb. 2001, 166–67 (2001) (hereinafter Decisions and Directives 2001), available at <http://www.knesset.gov.il/elections18/heb/law/Decisions2001.pdf>.

<sup>109</sup>In 2001, under the same constitutional framework that was eliminated by 2003, elections were held only for the post of prime minister.

<sup>110</sup>Regulations and Decisions of the Central Election Committee for the 15th Knesset and the Prime Minister, 57–63 (1999) (hereinafter Decisions and Rulings 1999), available at <http://www.knesset.gov.il/elections18/heb/law/Decisions1999-1.pdf>.

The final chord (so far) regarding the party messages rule, was struck in the spring of 2008 with an overwhelming majority of Knesset members – sixty-five to sixteen<sup>111</sup> – approving the shortening of the time allocated to party messages by 30% to 40%: The basic time allocation per party on radio was set at fifteen (instead of twenty-five) minutes with four instead of six minutes per each additional member and on television at seven (instead of ten) minutes with two instead of three minutes allocated per each additional Knesset member.<sup>112</sup> In the explanatory memorandum appended to the bill, MK Yitzhak Levi of the National Religious Party explained that the effectiveness of the broadcast messages does not justify dedicating to them so much time and spending on them so many funds.<sup>113</sup>

### *Party Messages – Interim Summary*

The party messages rule has done more to perpetuate a basic structural inequality between parties of different size and between existing parties and new parties than it has done to ensure substantive equality, and even then, as the latest amendment indicates, it is not regarded as an effective means of campaigning. Still, if one looks beyond the actual implementation of the rule in the Israeli environment, then the importance of the rule's rationale, even on the declaratory level, cannot be overstated. The main concern leading toward the passing of the law – and the party messages rule in particular – was that of enabling all players in the electoral process to convey their messages to the voting audience on relatively equal terms. In order to reach that goal, the party messages rule (together with its completing counterparts, the electioneering rules) was to define, and closely regulate, the venue, or the sphere, in which electioneering through the electronic media was to take place. The assumption underlying this regulatory scheme was that electioneering speech can, and should be distinguished from other forms of speech, be treated separately during election-time, and allotted proportionately. This approach preferred the principle of equality over the principle of free speech; however, while it ensured that all parties have the freedom to speak, a few gained the freedom to speak a lot while many more were left with the “freedom” to speak very little, if at all.

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<sup>111</sup>Knesset Records, Mar. 10, 2008, <http://www.knesset.gov.il/plenum/data/02326508.doc>.

<sup>112</sup>Election (Means of Electioneering) (Amend. 24) Law, 5768-2008, S.H. 265.

<sup>113</sup>Election Bill (Means of Electioneering) (Amend. 24) (Shortening of Electioneering Broadcasts), 5767-2007, HH, 232.

### ***The Electioneering Rules***

More widely discussed than the party messages rule are the issues raised by Section 5 of the election law: the ban on “electioneering speech” and on the appearance of candidates in the electronic media. Since the election law was drafted years prior to the broadcasting laws, it did not cover the electronic media, beyond setting a categorical prohibition on the broadcasting of “electioneering speech” outside the time slots designated (proportionately) for that speech over the existing broadcast medium of the time – the radio.<sup>114</sup> Regulation of audiovisual expression was limited to the only existing audiovisual medium of the time – the movies.

### ***1959–1969: The Movies***

The electioneering rule originated in Section 5 of the 1959 law,<sup>115</sup> which determined that there would be no “electioneering speech” and no screening of “events in which candidates for the Knesset partake a role” in movie theatres. The ban eliminated from movie theatres both direct elections campaigning (delivered through screened advertising) and indirect election campaigning (delivered through manipulation of newsreels by government staged events). In the absence of television, newsreels in the movie theatres were, at the time, the only type of filmed news events. This double goal was well presented in the Knesset during the first reading of the law,<sup>116</sup> and unsurprisingly was opposed by the ruling party at the time, Mapai.<sup>117</sup> Mapai claimed that as there were 1,300 people in the eighteen parties competing for seats in the Knesset, it would be impossible for owners of movie theatres to look for those candidates and edit them off the news reels.<sup>118</sup> However, it was not the inadvertent appearance of an unknown candidate that the law’s initiators deemed problematic, but the organized staging of events by the ruling party, which gave the incumbent an unfair advantage over its competitors. The rationale of Section 5 of the law was to eliminate electioneering from the screen, which at the time was the sole audiovisual

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<sup>114</sup>The ban on electioneering speech is restricted, however, only to those media mentioned specifically in the Election Law. Thus, there is no restriction whatsoever on Internet electioneering. See SEF 16/2001 Shas v. Pinnes [2001], IsrSC 55(3) 159; GEF 3/17 Liran v. Rotter Net Ltd., available at [http://halemo.net/edoar/0080/liran\\_vs\\_rotter.htm](http://halemo.net/edoar/0080/liran_vs_rotter.htm). Similarly, since the elimination of the law’s application to movie theatres, it is no longer legally prohibited to screen electioneering speech messages in such theatres. See Decisions and Directives 2006, *supra* note 107, at 149.

<sup>115</sup>S.H. 1959, 138.

<sup>116</sup>DK (1959) 2260.

<sup>117</sup>*Id.* at 2259.

<sup>118</sup>*Id.* at 2268.

medium. The ban of electioneering speech in the movie theatres was to begin 150 days prior to an election, while the ban over the screening of the events was to commence thirty days prior to election day.

### ***1969–1996: The Introduction of Television***

When television was introduced in 1969, Section 5 was amended by adding the words “or on television” right after the words “in movie theatres” wherever they appeared,<sup>119</sup> meaning that electioneering speech on television was not allowed for 150 days prior to the election, and the ban on broadcasting events (indirect electioneering) was set for thirty days. Television, unlike the movies, is a natural place for the broadcasting of news, thus the amended election law presented a challenge to the IBA, at the time the sole broadcaster. How should the IBA treat legitimate news items?<sup>120</sup> As a result, the IBA, followed by the attorney general, the Central Election Committee and the Supreme Court itself, found the need to interpret the law and publish decisions pertaining to the way it should be implemented.

On July 23, 1969, the general counsel of the IBA approached the attorney general at the time, Meir Shamgar,<sup>121</sup> requesting the latter’s position on the law’s interpretation as it pertains to two issues:<sup>122</sup> First, does the word “screening” concerning televised events refer to the broadcasting of the voices of the candidates as well as to their physical appearance; second, are the “events” themselves, in which candidates take part, allowed in screening, without the participation of the candidates disclosed or broadcast?<sup>123</sup> Indeed, both questions imply an inherent assumption that at the center of the rules is the physical presence of the candidates.

The attorney general’s response to these queries is probably the most significant single contribution – one might say the “original

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<sup>119</sup>Election (Means of Electioneering) (Amend. 3) Law, S.H. 5729-1969, 199.

<sup>120</sup>An interesting question in this regard, albeit one that lies beyond the scope of this article, pertains to the lack of harmonization between the general broadcasting legislation, which prohibits the broadcasting of “partisan propaganda” at all times, and the election-related legislation that specifically prohibits the broadcasting of such messages at times of elections (save for designated time-slots). One might ask why the specific legislation is even necessary if partisan propaganda is banned at all times. Indeed, the historical circumstances, the fact that the ban during elections preceded the launching of independent broadcasting apparatuses, was the initial reason for this oversight. As the years have gone by, however, there has been no attempt to harmonize these two laws in a way that could have probably resolved some of the issues raised in this study.

<sup>121</sup>Future Chief Justice of the Israeli Supreme Court.

<sup>122</sup>Copies of the letter and response on file with authors.

<sup>123</sup>*Id.*

sin” – leading to the chaotic situation in which Israeli regulation of electioneering speech finds itself, and it incorporated the implied assumption that at the center of the ban are the candidate and his physical presence. Regarding the first question, the attorney general ruled that the voices of candidates should not be heard.<sup>124</sup> Regarding the second, he ruled that “events” could be broadcast.<sup>125</sup> The attorney general explained that the law was intended to avoid indirect electioneering through the incidental screening of a candidate and his deeds. Therefore, if the broadcast does not show the candidate and does not otherwise mention the candidate’s participation in an event, the attorney general reasoned, the event in itself can be broadcast.<sup>126</sup> This clause in the attorney general’s opinion consisted of five lines, twice stressing that the candidate and his words should not be mentioned or shown in any way in the broadcast.

While the IBA sought clarity, the result was further confusion, as the opinion undermined the idea behind the ban on the screening of events. As the Knesset debate in 1959 demonstrated,<sup>127</sup> the ban on the screening of the events was meant to overcome a possible manipulation of the news media through the use of staged events. The Israeli political system at the time was party-focused and not candidate-focused, and the ban was meant to ensure the ruling party did not use the events for the advancement of its own image.<sup>128</sup> As the wording of Section 5 demonstrates, the law specifically banned the screening of “events in which candidates to the Knesset partake a role.”<sup>129</sup> Thus, the physical presence of the candidate was the indicator that the event was an electioneering event. This interpretation also seems to be in line with the legislature’s intent as the public only had the choice of voting among parties, not among candidates. Attorney General Shamgar’s interpretation turned it from a substantive ban on indirect electioneering through the manipulation of news by staged events to a technical ban on the screening of faces and broadcasting of voices. After all, had the ban on the broadcasting of events been intended to prevent the screening of candidates’ faces and voices, wouldn’t it be much easier for the legislature to simply say so? The question whether an “event” is *bona fide* news in nature, rather than merely an event staged for election purposes, did not play any part in the attorney general’s reasoning. Instead of dealing with the nature of the event itself, his interpretation focused

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<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>DK (1959) 2252.

<sup>128</sup>*Id.*

<sup>129</sup>S.H. 1959, 138, at § 5.

on a purely technical criterion: whether a candidate's face or voice is shown or heard in the relevant item. An extreme example of the paradoxical consequences of the rule when implemented by the IBA, based on the opinion of the attorney general, took place during the 1981 elections. Then Prime Minister Menachem Begin met with then Egyptian President Anwar El-Sadat. The meeting, which took place three days prior to Israel's bombing of the Iraqi nuclear facility, was broadcast on television news showing Sadat in full, and Mr. Begin's knees! The Likud party, of which Prime Minister Begin was the leader, on the other hand, showed the whole event during its allotted party message time slot.<sup>130</sup> This event is only one of many instances in which the attorney general's position led to absurd outcomes<sup>131</sup> that clearly made no contributions to the fairness or equality of the electoral process.

### *The Central Election Committee's Position Until 1992*

Over the years, the Central Election Committee addressed the interpretation of Section 5 as well. In 1984, Justice Gabriel Bach, presiding as chairperson of the committee, published a briefing<sup>132</sup> on the issue of "the ban on screening electioneering speech according to section 5."<sup>133</sup> In the briefing Justice Bach set five rules:<sup>134</sup>

1. There shall be no interviews regarding the elections or any other political issue with an Israeli political figure broadcast on television unless the topic of the interview has a distinct "newsy" character.
2. In particular, representatives of parties should not be given the opportunity to explain their platforms, to predict the chances of their parties in the elections or to evaluate other party's candidates. In due time, when the party election messages will be broadcast, the parties will have an opportunity to carry such broadcasts in a manner that maintains equality.
3. The determination on whether an interview has "news value" should be based on common sense. Examples for news that should be

<sup>130</sup>See OREN TOKATLY, COMMUNICATION POLICY IN ISRAEL 253 (2000).

<sup>131</sup>For others, see, e.g., Cohen & Wolfsfeld, *supra* note 5, at 113.

<sup>132</sup>The "briefing" appears in the form of a letter by Justice Bach, following a meeting held in his chambers with IBA representatives (IBA being at the time the sole legal broadcaster). The letter, as published, is not addressed, but begins with the words "[F]ollowing our conversation on April 19th, 1984 in my chambers. . . ." It is compiled with formal directives and decisions the justice made during the campaign in formal procedures, in a booklet published after the elections by the Central Election Committee.

<sup>133</sup>Central Election Committee for the 11th Knesset: Decisions and Directives 15–19 (1984) (hereinafter Decisions and Directives 1984), available at <http://www.knesset.gov.il/elections18/heb/law/Decisions1984.pdf>.

<sup>134</sup>Decisions and Directives 1984, *id.* at 15–19.

permitted during the elections are reports regarding internal elections within the parties (without including speeches), information regarding alliances created or break ups within lists, and reports on the completion of party lists and of the names of the candidates on those lists.

4. Until the ban on events comes into effect (at that time thirty days prior to the election), candidates can be interviewed on issues regarding daily events that are not materially connected to the elections, and under the condition that the interviewee was chosen for his<sup>135</sup> connection to the event and not as a result of his being a political figure. However, if the information can be made public through a person who is neither a political figure nor a candidate, that is preferred. It is important to remember, stated Bach, that the mere appearance of a candidate may be perceived as electioneering, whatever the topic of the conversation may be.
5. Since the actual appearance of a candidate may have an electioneering effect, this should be taken into consideration when broadcasting PSAs in which candidates appear.

Justice Bach further iterated that the ban in Section 5 refers to television only, but the editors of radio broadcasts should also ensure that their programs do not become stages for unequal electioneering. Editors and reporters must hold the equality among the different parties as their guiding principle, along with impartiality, neutrality and an objective and matter-of-factly presentation of facts, he added.<sup>136</sup> He also prodded IBA's leadership to consult with him whenever in doubt.

In 1988, the only ruling of the committee's chair, Justice Eliezer Goldberg, regarding Section 5 was that events taking place during the Olympic Games in Seoul, South Korea, in which billboards of the competing political parties can be seen in the background, should not be broadcast.<sup>137</sup> In 1992, Justice Abraham Halima republished the rules contained in Justice Bach's briefing from 1984.<sup>138</sup> Justice Halima introduced this near-verbatim reiteration of Justice Bach's letter yet again as a "briefing" and not as a "decision,"<sup>139</sup> and stated that "electioneering" is any broadcast that fulfills one of two characteristics: It is either a broadcast that a viewer may perceive as focused on influencing the

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<sup>135</sup>The gender specific reference is made in the original document and is common in Hebrew.

<sup>136</sup>*Id.*

<sup>137</sup>Central Election Committee for the 12th Knesset, Decisions and Rulings 34 (1988), available at <http://www.knesset.gov.il/elections18/heb/law/Decisions1988.pdf>.

<sup>138</sup>Central Election Committee for the 13th Knesset, Decisions and Rulings 49–54 (1992), available at <http://www.knesset.gov.il/elections18/heb/law/Decisions1992-1.pdf>.

<sup>139</sup>*Id.* at 49.

outcome of the election, or it is a broadcast supporting or negating a candidate or a party taking part in the elections.<sup>140</sup> A broadcast that discusses a “political issue,” stated Halima, although it is not “electioneering” *per se*, should be broadcast in a manner that ensures there is an opportunity for the full range of political opinions to be heard and in a manner that will not harm the principles of equality in that it will be fair and will represent the different opinions that prevail in the general public as much as possible.<sup>141</sup> In addition, Halima extended the ban on broadcasting electioneering speech to cable television<sup>142</sup> and to the radio of the IDF,<sup>143</sup> although the law specifically banned neither.

### *The Supreme Court’s Position Until 1992*

Some of the decisions of the IBA and some of those made by the Central Election Committee called for a review by the Supreme Court, thus giving the highest court of the land the opportunity to have its say regarding the proper interpretation of the electioneering rules. The Court, however, only blurred the boundaries between the allowed and the prohibited, making the consistent and principled implementation of the electioneering rules an almost impossible task.

The first case in which the Court intervened was *The Association for the Wellbeing of Israel’s Soldiers v. The Director General of the IBA*,<sup>144</sup> a petition filed by the Association for the Wellbeing of Israel’s Soldiers, an established NGO. The chairman of the NGO was candidate for mayor of Ashkelon. The IBA refused to broadcast a public service announcement in which the chairman and mayoral hopeful called upon citizens to donate to the organization as part of its annual fund-raising campaign. The Court’s decision, delivered by Justice Shlomo Levin with the consent of Justice Eliezer Goldberg, allowed the airing of the PSA, stating that there was no direct electioneering intended and that the common Ashkelonite could differentiate between the candidate’s qualifications as mayor and his appearance on television in the name of a national cause. All justices, including the dissenting Justice Gabriel Bach, agreed that the PSA included indirect electioneering, but the majority concluded that this indirect electioneering was insignificant when balanced against the public good derived from the broadcast as planned. In his reasoning, Justice Levin stated that in his eyes, indirect electioneering resulting, for example, from an interview with a member

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<sup>140</sup>*Id.*

<sup>141</sup>*Id.* at 50.

<sup>142</sup>*Id.* at 24–25.

<sup>143</sup>*Id.* at 55–60.

<sup>144</sup>HCJ 524/83 [1983], IsrSC 37(4) 85.

of the cabinet on television's prime-time one-on-one interviewing program, was allowed even during the period prior to the election in which electioneering in the media was prohibited. "The strict ban, included in Section 5 of the Law, concerning the appearance of candidates to the Knesset," Justice Levin wrote, "has already caused trouble, and in my eyes there is no justification to add on it, in the form of judicial judgments, by creating stiff rules, that might cause more trouble."<sup>145</sup>

Three main aspects of *Soldiers' Association* deserve special emphasis: First, the Court reads a balancing test into the law's *prima facie* categorical prohibition on the broadcasting of electioneering speech, the result being that a speech act might be considered electioneering and still be allowed if the Court believes that an important enough public, or other interest, justifies its broadcasting; second, the Court departs from the electioneering rules' two-prong prohibition on direct and indirect electioneering in favor of a new differentiation between direct and indirect electioneering, whereby the first is prohibited, but the latter might very well be allowed (again, in light of worthy opposing interests); third, the Court changed the way of settling the relationship between the two prongs of the electioneering rules – direct and indirect – breaking the linkage and viewing the rules as independent from one another. The Court stated that "an 'event' according to the latter part [of Section 5 of the law] can or cannot be considered as 'electioneering' according to the first part [of Section 5 of the law], and 'electioneering' according to the first part can or cannot be considered as an 'event' within the boundaries of the latter part."<sup>146</sup> This outcome was obviously heavily influenced by the dominant understanding of the "events" ban, as interpreted by the soon to be chief justice of the Court, Meir Shamgar, back in his days as attorney general.

One difficulty with *Soldiers Association* is that it complicates things where complexity is not quite necessary. Another is that it is incompatible with the legislative history and original purpose of Section 5. Indeed, in the years following the Court's ruling in *Soldiers Association* the legal interpretation of the electioneering rules took a life of its own promoting a new set of values, different from those the rules were originally

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<sup>145</sup>*Id.* at 91. This note by Justice Levin with the consent of Justice Goldberg, and referring most probably to the Begin-Sadat incident of only two years before (*see* TOKATLI, *supra* note 130), went against the rules created by the Central Election Committee itself when it was headed by the dissenting Justice Bach one year later in 1984 – a decision under which, as described above, such interviews were not allowed in principle, unless they were on a specific newsworthy topic. Decisions and Directives 1984, *supra* note 133, at 15.

<sup>146</sup>HCJ 524/83 [1983], at 89.

designed to promote. The best example for this trend is in *Nissim Zvili v. Chairman of the Central Elections Committee*.<sup>147</sup>

During the 1992 electoral campaign, MK Nissim Zvili, then secretary general of the Labor Party, petitioned the Court regarding an interview with him on Israel Educational Television that was banned by the Central Election Committee. The Court upheld the ban.<sup>148</sup> In the same decision, the Court had to decide the fate of three other television programs which the IBA decided to broadcast on its news programs: one on religious education, a second on women in politics, and the third on new candidates and Knesset members on the verge of retirement. The Court upheld the IBA's decisions, this time allowing the news programs to be broadcast.<sup>149</sup>

Little does *Zvili* tell us about the content of the news segments allowed and of the interview that was banned; more important, however, is Justice Aharon Barak's long decision concurring with both Chief Justice Meir Shamgar and Justice Theodore Orr, in which he makes some significant insights. Basically, writes Barak, the language of the law itself is not very helpful in determining how to act upon it, as it doesn't offer any definition of the term "electioneering speech."<sup>150</sup> Stating that a candidate for the Knesset appears in a certain "event" does not make that event "electioneering speech."<sup>151</sup> Barak reiterated *Soldiers' Association's* differentiation between the two-prongs of the ban included in Section 5. He embraced a test he called the "dominant effect" test: A broadcast is considered to be an electioneering message if its "dominant effect," judged from the point of view of the viewer or listener, is an electioneering effect, as opposed, for example, to a newsy or artistic effect.<sup>152</sup> Barak, thus accepted that the ban is not total, but relative, continuing the logic of *Soldiers' Association*.

Barak seemed to be mostly concerned with the law's apparent infringement on the right to free speech. As a result, he stated that election laws need to choose between two values: freedom of speech on the one hand and equality on the other. While other systems promote freedom of speech at the expense of equality, Barak wrote, the Israeli system chose the latter as its dominant value.<sup>153</sup> Barak, therefore, identified the clear end of the law as being the promotion of equality among parties and candidates.

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<sup>147</sup>H CJ 869/92 [1992], IsrSC 46(2) 692.

<sup>148</sup>*Id.* at 697.

<sup>149</sup>*Id.*

<sup>150</sup>*Id.* at 704–05.

<sup>151</sup>*Id.*

<sup>152</sup>*Id.* at 709

<sup>153</sup>*Id.* at 708.

### *1996–2003: The Ban on “Events” is Lifted*

In 1992, Section 5 was further amended as part of Amendment No. 9 to the law.<sup>154</sup> The amendment added a ban on electioneering speech on radio, while reference to movie theatres was eliminated altogether. The period in which electioneering in the media was banned was set at sixty days, and the ban period on events remained thirty days. In 1996, the ban on events was shortened to twenty-one days and finally lifted altogether with the elimination of section 5(a)(2) of the law.<sup>155</sup> The elimination of the ban on events, however, was not to take effect in the first elections to take place following the amendment, but only in the subsequent elections.<sup>156</sup> This resulted in a new legal reality: The only ban remaining was the ban on “electioneering messages” during the sixty days prior to the election.

Justice Theodore Orr, the residing chair of the Election Committee in the 1996 elections, chose to reinterpret the ban one election cycle in advance of its total elimination, and in light of its upcoming elimination, which he understood sheds a new light on the old ban.<sup>157</sup> He instructed the broadcasting organizations that interviews with candidates prior to the election were allowed if the event at hand was a news event or catastrophe and not one of the kinds “the law referred to,” which in his interpretation meant “the inauguration of a factory, the laying of a foundation stone, the participation in a rally or an assembly, or even a planned event of a televised debate.”<sup>158</sup> Justice Orr’s position, which focuses on the nature of the events themselves, seems to be more in line with the original purpose of the ban on events; this position, however, did not leave a significant mark on the interpretation of the law, as the ban on events was to be eliminated in the next elections anyway.

Indeed, the lifting of the ban on events, instead of helping clarify things, as Justice Orr’s interpretation was attempting, created an interpretive nightmare: Since an “event” had been interpreted to mean the mere presentation of the image of the candidate and not the airing of an “event” that the candidate took part in, once the ban was removed, the media took it to mean that they were free to show the candidates regardless of context. Whether the nature of the event the candidates

<sup>154</sup> Election (Means of Electioneering) (Amend. 9) Law, 5752-1992, S.H. 160.

<sup>155</sup> Election (Means of Electioneering) (Amend. 13 and Provisional Order) Law, 5756-1996, S.H. 172.

<sup>156</sup> *Id.*

<sup>157</sup> Regulations and Decisions 1996, *supra* note 100, at 50–52.

<sup>158</sup> *Id.* at 51. Although Justice Orr did not make reference to American jurisprudence, this distinction seems to be very much in line with what the interpretation made to Section 315 of the American Communications Act referred to as *bona fide* news. What is still different in this respect from the American system is the approach towards political debates.

were taking part in was of electioneering did not matter any more and did not affect the airing of the event. The remaining ban on direct electioneering was perceived as such: limit the candidates not to engage in electioneering during the event.

### *The 1999 Debate Debacle: The Law Turned on Its Head*

The 1999 elections were the first following the removal of the ban on events. The residing chair of the committee, Justice Eliyahu Matza, was thus called for the first time to deal with a new legal situation and one central implication of the change was the fate of electoral debates.

Prior to the lifting of the ban on the events, debates were held jointly by the major parties at the expense of the time allotted to them under the party messages rule. Once showing the candidates was purportedly allowed, broadcasters started incorporating the debates into the regular programming in what seemed a logical conclusion from the accepted interpretation of the ban; as the ban was interpreted to have been on the *showing of the candidates* themselves and not on the *events in which they participated*. One could argue, of course, that a debate should intuitively be seen as a forum for electioneering and thus prohibited under the remaining ban, the ban on electioneering, and therefore that debates had to remain within the designated party messages and could not be aired during regular programming. This, however, was not how Justice Matza understood the legal situation; his position deserves careful analysis, as it accumulates all previous mistakes made in the interpretation of the electioneering rules and leads to a further absurd situation. In his decision on petitions filed by public advocacy groups and by one of the candidates to the premiership<sup>159</sup> to prevent a debate between two of five declared candidates to the premiership on one of Channel 2's (the only commercial channel at the time) most popular talk-shows, Matza made two determinations. First, he determined that "in conducting an interview with a candidate or candidates regarding current events that are of interest to the voting public there is no violation of the prohibition" on electioneering as long as the format of the broadcast did not allow any deviation from the questions presented to the candidate and the answers to those questions.<sup>160</sup>

He based this determination on a commitment made by the broadcaster and by the narrator of the program that both debaters will be instructed not to engage in forbidden electioneering speech during the broadcast, and that should they revert to it the narrator will invoke his

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<sup>159</sup>GEF 13,14/15 The Ass'n for the People's Right to Know v. the Admin. of the Second Auth. for Television and Radio, Decisions and Rulings 1999, *supra* note 110, at 93–97.

<sup>160</sup>*Id.* at 95.

“prerogatives as narrator of the program” to ensure that his instructions are followed.<sup>161</sup> This, however, Justice Matza saw as the minor question. The main issue the sides debated at the hearing was whether conducting such a debate among only two of the candidates constituted a breach of the equality among the candidates. On this issue Matza ruled to allow the program subject to a commitment made by the debating candidates that they will agree to debate any candidate who wished to debate them in the future.<sup>162</sup>

Following the elections, Justice Matza, aware of the controversy his decision to allow the debates stirred, published a letter addressed to the chairman of the Knesset and its members, in which he provided the “lessons learned during my tenure as chairman of the election committee.”<sup>163</sup> While Justice Matza criticized the law, and especially the inequality in the time frame allotted to the different parties for their messages, he dwelled at length on the issue of interviewing candidates and broadcasting debates on television.<sup>164</sup> Matza claimed that even though the interpretation of the Supreme Court in *Zvili* is that “electioneering speech” referred to a message, the main effect of which is a persuasive effect (unlike a “newsy” or “artistic” effect), it did not mean that interviews in which candidates discussed the issues of the election should be banned. The voters, Matza wrote, deserve to know what the candidates think of the issues, and this need is only stronger during election times.<sup>165</sup> The ideas of the candidates and even the back and forth between them regarding those ideas have a dominant “newsy” effect that overshadows their “persuasive” effect. In order to achieve the goal of “informing” the audience, broadcasters should thrive to reach two goals: first, to maintain some kind of “equality” between the different parties, and, second, to make sure that the interviewed candidates did not use their appearances on television or radio for political electioneering.<sup>166</sup> The idea behind the Supreme Court’s rulings, Matza wrote, was that there is only one justification for the restriction set on freedom of speech that the law imposes, and that is the maintenance of equality. With many media outlets, unlike in 1992 when the Supreme Court made the *Zvili* ruling, the judge proposed that equality could be achieved by

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<sup>161</sup>*Id.* at 96.

<sup>162</sup>*Id.* at 97. Eventually, one of the candidates, then Prime Minister Benjamin Netanyahu, refused to debate the other candidates claiming that the refusal of the Labor party candidate to take part in any debate (including the one that was televised) absolved him of his commitment. In a subsequent decision, Justice Matza ruled he could not take part in any more debates.

<sup>163</sup>Decisions and Rulings 1999, *supra* note 110, at 142–77.

<sup>164</sup>*Id.* at 161–70.

<sup>165</sup>*Id.* at 165.

<sup>166</sup>*Id.* at 166.

candidates' appearances on different channels. Thus he, as chairman of the committee, may be more liberal in allowing each of their individual appearances.<sup>167</sup> Clearly, Matza's conclusion follows the logic of his predecessors:

1. The assumption is that events as such are not a form of "electioneering."
2. The assumption is that the main purpose for regulating speech during elections in the Israeli system is to maintain equality.
3. Thus, if equality is maintained, the event does not take on the form of forbidden electioneering.

### ***Insights From the 2001 Special Elections***

Matza's successor as chairman of the committee, Justice Mishael Cheshin, published a letter of his own after the 2001 elections that took place between two candidates for the premiership.<sup>168</sup> While citing Matza and complaining profusely about the inadequacy of the law, Cheshin took a different approach. He stated that the ban on "electioneering messages" was problematic and should be lifted, because it could not be justified if the system abides by the fairness obligations it carries.<sup>169</sup> However, he maintained that should it be lifted, there should be a system that would ensure balance, fairness and the fair representation of all candidates.<sup>170</sup> Furthermore, it was possible, he added, that small parties in which the public shows little interest, will be awarded a "shield" ensuring their messages are presented in the media.<sup>171</sup> Thus, Justice Cheshin as well, reiterated the logic of the Court: equality achieves the fairest results for competing electoral messages.

### ***The Sharon Press Conference of 2003***

The events of 2003, however, raised questions about the Court's assumptions. The early elections that year were the first elections in which three broadcast television channels were operating, and as indicated previously, the commercial channels attempted to be relieved of some of the regulatory burden. The most dramatic event during these elections took place January 9, 2003.

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<sup>167</sup>*Id.* at 169.

<sup>168</sup>Decisions and Directives 2001, *supra* note 108, at 156–76.

<sup>169</sup>*Id.* at 159.

<sup>170</sup>*Id.* at 161.

<sup>171</sup>*Id.*

Following a leak to the daily *Haaretz*, the public was informed of an undercover police investigation regarding alleged improprieties in Prime Minister Ariel Sharon's funding practices during the 2001 campaign.<sup>172</sup> Sharon called a press conference to present his version of the events, and it was carried live on prime time by all three channels. Such a press conference couldn't have been broadcast, of course, prior to the lifting of the ban on events, since it would have been impossible to show Sharon or to sound his voice. Watching in his office, Justice Cheshin was of the impression the press conference was actually "pure election propaganda," and he ordered the television channels to terminate the broadcast immediately. After a hearing immediately following the terminated broadcast, he published his reasoning for both allowing the broadcast and terminating it *ad hoc*. Cheshin wrote that he did not approve the broadcast at the outset, since approval was not requested. The request made to him was to allow delaying the scheduled "party message" broadcast on IBA's channel 1 in order to air the press conference, and that since "not everyday does the Prime Minister himself request to address the public,"<sup>173</sup> he agreed that delaying the broadcast by a few minutes was a minor issue.<sup>174</sup> When he overheard the press conference while working in his chambers and was alarmed that instead of explaining his version for the allegations, the Prime Minister was deliberately conducting "net propaganda," he ordered the termination of the live broadcast.<sup>175</sup>

During the hearing following the cessation of the broadcast, the representative of Sharon's party, the Likud, demanded that Cheshin appoint monitors for all television and radio broadcasts to ensure there is full equal treatment for both the "left and the right."<sup>176</sup> Cheshin denied the request, stating that while equality is a fundamental value underlying the Israeli legal system, it is achieved through the "party messages" mechanism and cannot be achieved through the balancing of "electioneering speech" since the utterance of "electioneering speech" during the regular programming is illegal and he can't be required to balance illegalities.<sup>177</sup> On the other hand, in reply to a counter-petition by the opposing Labor party to deduct the time of the Sharon press conference

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<sup>172</sup>Baruch Kra, *Police Investigates: How and Why Have 1.5 Million Dollars Landed from South Africa into Gilad and Omri Sharon's Account*, HAARETZ, Jan. 7, 2003, at 1 (in Hebrew). See also Editorial, *Sharon Must Speak*, HAARETZ, Jan. 9, 2003, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=250125&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y>.

<sup>173</sup>Decisions and Directives 2003, *supra* note 105, at 111–19.

<sup>174</sup>*Id.*

<sup>175</sup>*Id.* at 112.

<sup>176</sup>*Id.* at 114.

<sup>177</sup>*Id.*

from the Likud's "party messages" allocation, Cheshin responded sarcastically that had he deducted time from both parties following their illegal insertion of "electioneering speech" to regular broadcast time, they would probably end with a deficit of minutes.<sup>178</sup>

Following the 2003 elections, Cheshin reiterated his recommendation that the election law should be changed in a way that "electioneering messages" would no longer be banned.<sup>179</sup>

### *Insights Following the 2006 Elections*

Cheshin's position was backed by the concluding remarks regarding the 2006 elections, by then chairwoman of the Central Elections Committee, Justice Dorit Beinish.<sup>180</sup> Justice Beinish also called the existing law outdated,<sup>181</sup> but she used this excuse as reasoning for the "light hand" she used when asked to enforce the law and for her repeated call upon the media (which she admits was not effective) to both demonstrate restraint and practice equality.<sup>182</sup> She also doubted whether the party messages had any effect and recommended overhauling the law rather than fixing it piecemeal yet again.<sup>183</sup>

Beinish's call did not go unheard. During the seventeenth Knesset, elected in 2006, at least two bills were proposed in which an elimination of the ban on electioneering was the centerpiece.<sup>184</sup> While one bill had been defeated,<sup>185</sup> other indirect attempts have been made to eliminate the ban<sup>186</sup> and have made their way to committee avoiding enactment into law only by the Knesset's decision to dissolve in October 2008 in anticipation of the early elections that took place in February 2009. In their quest to better the political process and to enhance fairness and equality in elections, Israeli lawmakers were about to revert to a total elimination of rules abandoning any notion of justice, as a result of frustration with the inability to enforce them, and they were bound to resume their efforts now that a new Knesset has been elected.

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<sup>178</sup>*Id.* at 116.

<sup>179</sup>*Id.* at 444.

<sup>180</sup>Decisions and Directives 2006, *supra* note 107, at 271–91.

<sup>181</sup>*Id.* at 284.

<sup>182</sup>*Id.* at 285.

<sup>183</sup>*Id.*

<sup>184</sup>*See supra* note 3.

<sup>185</sup>Knesset Records 45, Jan. 31, 2007, available at [http://www.knesset.gov.il/plenum/data/01281607.doc#\\_Toc174784631](http://www.knesset.gov.il/plenum/data/01281607.doc#_Toc174784631).

<sup>186</sup>*See* <http://www.ynet.co.il/articles/0,7340,L-3593108,00.html> (although no documentation of this has been verified in Knesset online records).

## **DISCUSSION AND ANALYSIS: WHAT WENT WRONG AND WHAT NOW?**

Two sets of complementary rules governed the regulation of broadcasting during election in Israel:

1. The “party messages” rule dictates a proportional allocation of time-slots for the broadcast of “electioneering messages” on behalf of political parties.
2. The “electioneering” rule consisted of two bans:
  - a. A ban on the broadcast of “electioneering speech” that is not a regulated “party message” (direct electioneering); and
  - b. A ban on the broadcasting of staged events in which candidates take part (indirect electioneering).

### ***Summary of the Changes***

The “party messages” rule has been maintained in its original form since 1959. Only the time allocation has changed, first expanded and then shortened to its current length. The constitutional issue it raised in the 1980s was whether the proportional allocation is in line with the purported principal of equality. The Supreme Court determined that as long as there is “enough” time provided for all parties, larger parties are justified to enjoy a bigger allocation and the principle is maintained.

The ban on direct electioneering also has withstood the test of time, and the only changes made to it over the years have been the determination of the length of the period of time before the election in which it should be applied. Only in 1992 was the Supreme Court required to define “electioneering speech” and it used the “dominant effect” test to differentiate between “electioneering” and other forms of speech such as news or entertainment.

The indirect electioneering rule has been historically misinterpreted and eventually eliminated. The misinterpretation developed as a result of applying the rule, which banned “events in which candidates to the Knesset take part” to focus on banning the portrayal of candidates instead of banning an event. As a result, the assumption in political, legal and media communities was that when the ban was in effect, “events” could be broadcast, however those taking part in them could not. Thus, when the ban was lifted, this interpretation led to the conclusion that all events as well as candidates can be shown. Since the first ban on direct electioneering was still in effect, broadcasters found themselves in a perplexing situation: On the one hand, they could broadcast every event and show any face; on the other, they had to ensure that the events and the candidates were not electioneering. And “electioneering,”

according to the “dominant effect” principle was determined in the eyes of the beholder. No regulation ensuring fairness in regular broadcasts was maintained (except for the ban itself), which led broadcasters to threaten candidates during live interviews that they should not resort to electioneering or they would be cut off. At the same time, the audience was informed that the broadcasters will ensure that no electioneering will take place in the program. Clearly, the broadcasters could not deliver on either: They could not effectively cut off the candidates and as a result, they could not uphold the promise they made to the viewers and listeners.

### ***What Went Wrong?***

The outcome from a legal and social standpoint is problematic: While there is a need to maintain fairness during electoral campaigns, and that need is expressed in the ban on electioneering speech, the ban has become unenforceable because there is no consideration to the electioneering aspect of the events themselves. Thus, the populist cry is to lift the ban on direct electioneering instead of creating a new mechanism that outdoes the interpretative mistakes of the past. Interpreting the lifting of the ban on events as if it meant lifting the ban on the portraits of the candidates without creating a mechanism that ensures fairness in this exposure has led to an undesirable outcome in which there is no control that ensures fairness in broadcasting during elections. Reinstating the failed legislation of the past is impractical.

As a result we advocate a new theoretical framework that will allow restoring balance to the system. In order to do so, we first review what has gone wrong with the old system, but we frame this review within the confines of our theoretical perspective. The original election law was structured to contain the broadcasting of electioneering speech within pre-defined boundaries. While according to the original rationale of the law the two prongs of the electioneering rules were closely related, the attorney general, Supreme Court and Election Committees split between the general ban on electioneering and the ban on events (prior to the latter’s elimination), because they missed the “electioneering” value of the event and attributed “electioneering” value to the mere appearance of the candidates. The original law incorporated a legal presumption that if a candidate took an active part in an event, the event was probably meant to promote the party’s electioneering message, and to avoid doubt, all events were banned from broadcasting. Of course, this was done with regard to newsreels in the movies, where it may have made some sense as news reels tended to contain more inaugurations of factories and other ribbon-cutting events, but in the

transition to television, in which news is more dynamic, the law was not updated to reflect the difference between the two media, in particular the live character of television and the central role news plays in its programming fare as compared to the recorded nature of the movies and the marginal role newsreels play in public life. Thus a new standard was needed to serve the emerging electronic media, and in order to differentiate between allowed speech and banned electioneering speech the Court (and the Central Elections Committee) created a new test, the “dominant effect” test, which examines, or actually speculates on, the presumed effect a certain speech act might have on the reasonable viewer or listener. Indeed, the effects frame is very popular among law and policymakers who assume the media have an effect whether that is the case.<sup>187</sup>

At the end of the day, the dominant effect test was not much more than an *ad hoc* balancing test heavily influenced by the perceptions of a particular judge (especially in light of the fact that a single judge chairs the Central Elections Committee). The potential for inconsistency and confusion in the use of the dominant effect test is almost self-evident; indeed, the application of the test caused the dividing line between the allowed and the prohibited to almost disappear. This created not only legal chaos, but also contributed to the law’s structural inequality, as the breakdown of regulation worked in favor of the larger, stronger and better financed parties and candidates. Moreover, a careful reading of the different rulings and decisions reveals an interesting transformation in the perception of the values underlying the law. While equality was the main incentive for passing the law, gradually the free speech narrative took over, which led to an increasingly liberal interpretation of the allowed and narrow interpretation of the prohibited. At the end of the day, the law had been turned on its head; equality had been used in order to pull “electioneering speech” out of the regulated zone, instead of being the reason for keeping it within that zone. Of course, the result of a virtually unregulated environment, in the name of “free speech,” might be a lot of speech for some – those who usually enjoy more access to the media anyway – but very little for others.

### **NEED FOR A NEW THEORY: TRANSPARENT SPEECH AS THE GUIDING PRINCIPLE FOR DEFINING BOUNDARIES**

How can it be repaired? Indeed, as our analysis suggests, what went wrong was a result of an erroneous interpretation of the law at the

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<sup>187</sup> See EVA ETZIONY-HALEVY, NATIONAL BROADCASTING UNDER SIEGE: A COMPARATIVE STUDY OF AUSTRALIA, BRITAIN, ISRAEL AND WEST GERMANY (1987).

first stage. Backtracking to the roots of the error is impractical and politically improbable. Having been practiced in a particular manner for decades, the assumption that the ban on “electioneering speech” was really a ban on showing the portraits of candidates rather than a ban on manipulation of the media during election times, has become the interpretation *de facto* even if *de jure* it was wrong. Political discourse during election times can be brought back to its egalitarian origins if we refocus on the fundamentals of free speech in a democratic society at the age of media abundance.

A close look at the crisis of broadcast regulation during elections in Israel leads to the conclusion that what is missing is a clear boundary between types of speech – a boundary which seems to have been the very rationale of the original election law and as time went by, with the utilization of new media technologies combined with a misguided legal treatment, became more and more blurred. Indeed, the original law of 1959 aimed at creating two arenas of broadcasting: “electioneering speech” and “non-electioneering speech.” Electioneering speech was to be contained in “party messages,” and the electioneering ban was to make sure it would stay there. Access by politicians to the media was denied because the control of party messages purportedly provided a leveled playing field. Staged government media events taking place in the non-regulated territory of broadcast news could distort it. The abolishing of the ban on events was based on the assumption that access (or exposure) can be granted to candidates, as long as it doesn’t relegate to electioneering speech that will unbalance the equality the first regulation had achieved in the form of party messages. This, however, is impossible to achieve, since the appearance of a political candidate on television during times of elections is more often than not made only for one reason – to garner more votes. A candidate doesn’t “inform” the public of views beyond what the candidate perceives is beneficial for the campaign.

Indeed, at the basis of both rules – designating party messages time and banning other direct and indirect electioneering speech – should stand another basic assumption: that the audience needs to be aware that it is about to be exposed to a campaign-motivated message. There is nothing inherently wrong with electioneering that justifies its ban; the opposite is true – electioneering is an important component of democratic discourse. The problem is when the audience is told the broadcast will be free of electioneering, when in fact it ends up being packed with little else. According to this approach, sneaking electioneering speech to an unsuspecting audience through staged media events (including televised debates) is wrong because it betrays the public trust when being presented as non-electioneering. It is the deceit that is wrong, not the electioneering itself. Part of the confusion leading to this state of

affairs is in the equal approach the courts have developed toward political speech in general and electioneering speech in particular, or more accurately, towards the ban on purchased time for political expression during non-election times and the ban on electioneering speech, which is created in the process of regular programming and cannot be flagged as such in advance. The fact that the Hebrew term for propaganda – *ta'amulah* – is used for both types of speech, contributed to this confusion. The two types of “propaganda” are simply not the same because the circumstances in which they are uttered are dissimilar, the preparation of the audience to absorb them and analyze them is different and as a result, the regulatory approach they call for is necessarily different. During times of election, the audience is aware that it is being exposed to a candidate, in particular if the issues of the day are discussed and those with opposing viewpoints are alerted to the introduction of conflicting positions that may affect the electoral process and can respond accordingly. This is true, in particular, if other mechanisms, such as campaign finance laws, are enforced in order to maintain fairness and if the debate is contained to a sphere in which it can be identified as electioneering speech. However, during normal times, the promotion of ideological positions backed by financial prowess raises the danger that the rules of the market according to which the wealthier acquires the loudest voice will be applied to political discourse as well, allowing the wealthy to control this discourse as well. Such a result is evidently undesirable.

Not all speech is cut of the same cloth and different types of speech raise different challenges and require different public responses. For example, commercial speech, aimed at encouraging financial transactions, requires regulation for consumer-oriented sensitivities, in particular truth in advertising. If political parties or other ideological entities are allowed to purchase time that is designated for consumer activities, should their messages be subject to similar scrutiny? Can they? Clearly, the answer is no. Can we hold a political party to truth in advertising? At the same time, the unfettered flow of political speech is the *sine-qua-non* of a functioning democracy. It is for that reason that one ideological group should not be allowed to control the airwaves over another only because it has an easier access to resources. At election times, however, the rules need to be changed yet again. Political parties should be allowed, even encouraged, to exhibit their ideological ware. The fact that election campaigns are bounded by time and that the political players are identifiable as a result of the requirements of the political campaign rules, however, allows creating arenas for political speech that can be overseen in a way that maintains an aura of fairness.

In order to be able to distinguish between different types of speech we must first discern what it is that makes some forms of speech different

from others. The legal differentiation between forms of speech can only serve here as an indicator. The American free speech doctrine distinguishes between protected speech, unprotected speech,<sup>188</sup> and speech that is deserving only of a limited amount of protection.<sup>189</sup> Historically, the distinction between protected and unprotected speech in American jurisprudence has been the distinction between speech that promotes public discourse and speech that promotes private interests, although that is no longer the case with the growing safeguards on commercial speech.<sup>190</sup> For our purposes as well, differentiation along these lines would be insufficient, especially since the aim of this exercise is not to censor any forms of political speech but rather to eliminate the potential for abuse of the political arena.

Applying this theoretical approach to today's media would create an environment based on a culture of transparent speech<sup>191</sup> which requires the disclosure of loyalties and separation of distinctive forms of speech, rather than on a culture of deceit, which relies on muddled up concealed and contradicting loyalties that seems to be evolving.<sup>192</sup> Thus, transparent speech becomes both a right of the receiver, the audience, as it is an obligation set on the sender, which emanates from her right for

<sup>188</sup>For example:

[T]he right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

<sup>189</sup>In commercial speech cases, for example, a four-part analysis has developed:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980).

<sup>190</sup>For an explication of this argument, see generally G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 302 (1996).

<sup>191</sup>We are aware that the term "transparency" is used in other parts of the legal world. We believe, however that it is useful here as well, in particular if maintained within the term "transparent speech," as it serves the same goal other types of transparency have been created for – the goal to ensure that the public viewing an activity (in this case a speech activity) has the tools to identify the roots of that activity.

<sup>192</sup>See generally Amit Schejter, *Jacob's Voice, Esau's Hands: Transparency as a First Amendment Right in an Age of Deceit and Impersonation*, 35 HOFSTRA L. REV. 1489 (2007).

free speech. Instead of allowing a candidate to say, "I am not engaging in electioneering speech," or a newscaster to promise the audience, "I will ensure no electioneering speech will take place during this program," the opposite should occur: Candidates should be identified as such, the parties and positions they represent should be laid forth, and the newscaster should inform the audience that it is about to be subjected to electioneering speech that should be evaluated as such. On the other hand, news programs should focus on *bona fide* news under the general legal obligation of providing accurate information, which in journalistic terms means that the staged cutting of ribbons does not constitute news and should not have made it to the news room to begin with unless the ribbon cutting is in honor of a project whose inauguration is newsworthy. Could have the Israeli media (or rather should have the Israeli media) avoided reporting on the 1981 bombing of Iraqi nuclear facilities because the event was on the eve of an election (and may have decided them)?<sup>193</sup> Clearly the answer is that the attack should have been reported even if it were motivated by electoral needs as its news value exceeds its electioneering motive.<sup>194</sup> Indeed, the effort to sort among stories and determine which constitute legitimate news can only be guaranteed if the broadcasting system maintains a non-commercial public broadcasting station that is independent enough to maintain a *bona fide* newsroom, what cannot be expected from a commercial broadcaster.

This was the basis for the original law: differentiate a newsreel from a staged event. And this should have been maintained as the basis for the law once the ban on "events" was lifted. The original law, designed to confront newsreels in movie theaters, cannot be transplanted in the culture of television, where the dynamic of the broadcast and the decision making process allows for differentiation between news and propaganda, at least to a reasonable extent. The rulings of the justices heading the Central Election Committee, however, led to the exact opposite, and unwelcome, conclusion.

When a justice of the Supreme Court allows two candidates to debate on a live television show, outside the designated time slots for party messages, or does not *a priori* ban a television station from carrying live a press conference in which a candidate is responding to allegations of impropriety close to an election, he should expect that the majority of the discourse that will transpire will focus on messages that are designed to sway voters and influence their votes, hence on "electioneering speech."

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<sup>193</sup> See AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD 385 (2001).

<sup>194</sup> Prime Minister Menachem Begin vehemently denied the attack was motivated by the elections. See Ranan D. Kuperman, *The Effect of Domestic and Foreign Pressure on Israeli Decisions To Use Limited Military Force*, 40 J. OF PEACE RES. 677, 685 (2003).

There should be nothing illegal in any of these cases, but it is misleading to announce to the viewers that a program will be held under certain rules that deny the inclusion of “election messages,” or “electioneering speech,” when it is clear that the speakers on the program have no other reason to be on the program but to convey election messages.

Viewers should be provided with the tools that allow them to identify that things that should stay separate are being mixed. Having established that there is a need to distinguish between these conflicting forms of speech, we contend that the means by which to distinguish among them is rooted in a very basic notion, the notion of loyalty. Audiences are led to, and wish to believe a broadcaster is loyal to them and will put their interests ahead of any other, when it comes to the truthfulness of the nature of the report. As a result they expect the broadcaster to provide them with political information on the eve of an election and not to make hollow promises such as that it will ensure the warring politicians will not revert to electioneering when debating on the broadcaster’s programs. Indeed, loyalty is one of the key considerations in ethical decision-making.

Ethical reasoning is often subject to controversy.<sup>195</sup> But identifying sources of disagreement regarding the desirable course of action in policymaking can facilitate the process.<sup>196</sup> At least four fundamental issues are subject to disagreement: the empirical reading of the facts; the non-empirical, definitional, framing of the facts; the traditional-systematic underlying value system with which moral dilemmas are accessed; and the divergent definition regarding the basic loyalties of the disagreeing sides.<sup>197</sup> This model for ethical decision-making, known as “The Potter Box,”<sup>198</sup> focuses on competing loyalties as its decisive factor. As such, it has become a central tool in the pedagogy of media ethics as well,<sup>199</sup> and as is evident in this case, it is a potentially useful instrument in helping sort out the differences between informative speech and “electioneering speech” and not in order to forbid either of them, but rather in order to guide the audience to identify them.

The assumption is that each form of speech that presents itself to audiences is aligned with one dominant loyalty and should not be tainted

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<sup>195</sup> See Ralph Potter, *The Logic of Moral Argument*, in TOWARD A DISCIPLINE OF SOCIAL ETHICS 93, 108 (Paul Deats ed., 1972).

<sup>196</sup> See *id.*

<sup>197</sup> See *id.* at 108–09.

<sup>198</sup> There are competing versions as to the source of this name. See Nick Backus & Claire Ferraris, *Theory Meets Practice: Using The Potter Box To Teach Business Communication Ethics. Proceedings of the 2004 Association for Business Communication Annual Convention* (2004), <http://www.businesscommunication.org/conventions/Proceedings/2004/PDFs/21ABC04.PDF>.

<sup>199</sup> See generally CLIFFORD G. CHRISTIANS ET AL., *MEDIA ETHICS: CASES AND MORAL REASONING* (5th ed., 1998).

by messages motivated by a competing loyalty. The discourse between broadcasters and audiences should aspire to meet a high ethical standard and ethics and ethical discourse should, therefore, become the criteria for assessing whether certain forms of speech are distorting the discourse taking place in the public sphere and whether they are strengthening the dominance of certain types of speech obtained through their being disguised as something different than what they really are, with the help of the broadcaster and to the detriment of the unsuspecting viewer or listener.

Instead of generating more regulation and absurd circumstances, applying this theory would uphold integrity in expression and would enhance the ability of audiences to make decisions based on autonomous choice. The definition of the speech situation inadvertently allows both the candidates and broadcasters on the one hand and viewers on the other to be fully informed about the characteristics of the conversation in which they are taking part. Since information contributes to the autonomous decision making power of the individual, it can be said that the clear identification of the speech formats contributes to a “morally and politically necessary adaptation to the complexities of modern life.”<sup>200</sup> By using ethical guidelines to draw boundaries of separation, the unethical aspects of this culture are exposed.

## PRACTICAL IMPLICATIONS AND CONCLUSIONS

What does this mean practically? One thing it doesn't mean is that the responsibility for making electioneering transparent lies with broadcasters. The contrary is true. The practice that emerged in the Israeli system in which candidates (and their advisors) are now free to roam the airwaves blasting electioneering speech, while news anchors and interviewers both assure the audience no electioneering will take place under their watchful eye and keep threatening their interviewees not to transition to electioneering speech, is unethical by definition. The ethical choice, thirty, sixty or ninety days prior to an election is that broadcasters should warn viewers that they are viewing a program in which a candidate is partaking and, thus, that they should be warned the speech they are to be exposed too has been designed to persuade them. A broadcaster who does not inform the viewers of that probability should be fined in a manner that is proportional. Regulations should determine the size and number of these disclaimers. This will lead to a practice that accepts that programming during election times in which

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<sup>200</sup>MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 352 (1983).

candidates take part is meant to be persuasive by nature, even if the candidate is performing a dance on stage or judging in a reality show. On the other hand, news programs should be edited so the audience is clear on the true nature of their messages. It is not the role of the broadcaster to tell an interviewee what not to say or cut him off making legal determinations; rather it is her role to frame politically staged events and politically charged statements as such, thus disarming their potential to deceive under the guise that they contain no electioneering.

Indeed, the practical steps that need to be taken do not end with the broadcast elements of the identification of electioneering speech. A deep responsibility lies with the educational system as well. The development of a media-literate public requires adding to the focus on protecting audiences from hypercommercialism, protecting audiences from disguised and disingenuous hyperelectioneering.

The regulation of broadcasting during election times can only be seen as a result of a perception by law- and policymakers that the mass media have indeed a powerful role in determining election results, a perception that is at minimum, questionable. This doubtful reasoning leads to what is unquestionable, and that is the effect of regulating and restricting the media during election times on freedom of expression during this most vulnerable point in time in the democratic life of a nation, on both civil rights and freedoms in general and on the integrity of the electoral process in particular. Indeed, while beyond the scope of this legal analysis, political commentators can probably point out the relationship between the unethical discourse during election times in Israel and between a growing distrust of government and a drop in turnout on election day. While the correlation between the two has not been substantiated, it is clear the two processes are concomitantly taking place: Unethical discourse is growing, as well as the basic distrust of all political institutions.<sup>201</sup>

While the reason for the chaotic situation described in this study extends from the misinterpretation of the law and the weak foundation on which this misinterpretation is based, understanding the unique characteristics of distinct forms of speech allows for the formulation of a comprehensible well-founded framework. The existing discussion aimed, indeed, at identifying what constitutes “electioneering” in order to disallow its inclusion in the broadcasting of news. This identification was based on the presumed effect the speech may have had on its listeners and viewers. The theoretical approach we recommend in this article, however, calls for an identification of these distinct forms of speech – in particular the distinction between news and electioneering speech and between electioneering speech and other forms of political

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<sup>201</sup>See ARIAN ET AL., *supra* note 11, at 11–12.

expression – by classifying the dominant motives that drive speakers. The motivation of speakers participating in public discourse should therefore be the guiding principle for distinguishing between disparate forms of speech. They should all be allowed, but clearly identified, and the role for identifying them lays much in the hands of the broadcasting organizations themselves, but also with the regulators of the electoral process that need to guide and monitor the broadcasters and with the educational system that needs to develop a citizenry able to distinguish between informative and persuasive messages, be them commercial or political in nature. A theory that informs of the criteria for such a distinction does not necessarily lead to a ban on either of them but may actually help preserve maximum protection for them as long as they remain distinct and distinguishable. This identification of the dominant motive, we dub a theory of “transparent speech,” and we offer this theory (rather than the currently employed “dominant effect” theory) as the basis for a systematic overhaul of election time broadcast regulation in Israel.