

The Fairness Doctrine Is Dead and Living in Israel

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I. INTRODUCTION

Although the fairness doctrine has been eliminated in the United States as of 1987,¹ the idea of regulating speech concerning issues of public disagreement continues to stir a lively academic and legal debate.

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1. Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, *Memorandum Opinion and Order*, 2 F.C.C.R. 5043, 63 Rad. Reg. 2d (P & F)

However, in Israel, the reason for this debate emanates from the fact that not only has the doctrine not been eliminated, it has in fact taken on a life of its own. Still, it does not always take into account where the doctrine has come from, what it really meant, and how it is suited to the Israeli legal logic. Following a series of legal decisions and administrative acts, the doctrine has been redesigned in a manner that does not resemble its North American origins, although it still carries its name.

This regulatory regime, imported from one legal system and implanted in another, continues to develop a new nature in Israel and is in itself an interesting cross-cultural phenomenon. It is even more intriguing because its original adoption was formed from case law, and only later has it taken an administrative form. Still, case law determines the doctrine's nature, redefining it, and questioning the ability to stretch it beyond its existing boundaries.

Interestingly enough, had the development of the doctrine been tested in a court of law in its country of origin, it could have been found unconstitutional, as the constitutional safeguards in both societies are different. In that sense, the fairness doctrine as implanted in the Israeli system is like a sandwich from McDonald's—it bears the same name, looks, and tastes like the original, but the meat is local and so is the cook. Thus, the sandwich claims to be of similar standards to its foreign counterpart, but its ingredients are local. Its popularity stems much from its American origin, even though other types of imports from systems of less glamour may better fit the local culture.

This Article describes the fairness doctrine and how it is different from impartiality, another form of speech regulation. Further, this Article briefly paints the structure of Israeli media law, the new environment in which the doctrine has been implanted. Finally, the unique character of the Israeli fairness doctrine and its American roots, planted in its continental ground, is analyzed, and its current situation is critiqued.

II. DEFINING FAIRNESS

In order to be able to deduce whether a particular legal term has been adopted by a foreign legal system, the original setting of the term must be analyzed. The fairness doctrine, developed and applied in the United States between 1934 and 1987, is a well-defined legal and policy term. It is based on a particular logic: The U.S. Constitution safeguards freedom of expres-

541 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989).

sion and of the press.² Still, due to the fact that broadcasting is a medium of expression that only a small number of license holders may use due to technical scarcity, it may be regulated. At the same time, a unique feature of the U.S. system has always been that once a license to broadcast is awarded, the license holder may use the airwaves to promote his or her own opinion. The doctrine, thus, was created in order to make sure that the highest bidders were not the only parties able to communicate their views on public issues.³ The doctrine originally consisted of two types of regulations imposed upon broadcast licensees: first, the regulation on broadcasters to focus on issues concerning political speech, that is the type of speech that deals with the day-to-day issues in public disagreement;⁴ second, the regulation of personal attacks and the means by which one can remedy an unflattering portrayal by the broadcast media.

A. *Speech in Instances of Disagreement*

1. The American Fairness Doctrine

Different doctrines of regulating the issue of speech in instances of disagreement have developed for a number of reasons in different legal systems. The fairness doctrine was the unique approach adopted to regulate political speech within the American system, characterized by a large number of commercial broadcasters. The doctrine's rationale was based on the idea of spectrum scarcity under which a limited number of outlets are available to the public. This spectrum scarcity justified regulation of the station owners' freedom of speech due to the existence of a competing right, namely the "public convenience, interest or necessity."⁵ A balancing of the rights led to a two-pronged doctrine: First, the license holders were obliged to raise controversial issues. Second, when doing so, they were to present opposing viewpoints on the matter.

By 1985, the Federal Communications Commission (FCC) found that the doctrine's rationale had become obsolete, a decision upheld by the U.S.

2. U.S. CONST. amend I.

3. *Red Lion Brdcast. v. FCC*, 395 U.S. 367, 392 (1969).

4. *Id.* at 377.

5. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102 (codified as amended in scattered sections of 47 U.S.C. (1994 & Supp. II 1996)).

Court of Appeals.⁶ All attempts since to make the doctrine into law have failed.

2. The European Rule of Impartiality

In Europe, the rule during the same time period was that in most countries the dominant broadcaster (and sometimes the only one) was a national public broadcaster. As such, the broadcasters were obliged to maintain what can be dubbed the doctrine of impartiality.⁷ As providers of a public service, the national broadcasters were not deemed suspects for evading controversial issues based on commercial considerations or as promoters of personal agendas. Rather, as public organizations close to the authorities, they were to be guarded from presenting political reality lopsidedly. Thus, impartiality was described as the duty to present issues in an objective, fair, neutral, pluralist, and comprehensive manner. Such requirements exist in most Western European countries including the United Kingdom, France, Germany, and Italy.⁸

European impartiality is different than the American fairness doctrine mainly because it prevents the broadcasters from editorializing. In addition, unlike the case in the United States where the fairness doctrine had been eliminated, impartiality as such still exists in European systems. Thus, for example, the British Broadcasting Corporation (BBC) Producers' Guidelines state in their current version that "[d]ue impartiality lies at the heart of the BBC. It is a core value and no area of programming is exempt from it. It requires programme makers to show open-mindedness, fairness and a respect for truth."⁹

At the same time, the regulator for commercial television, the Independent Television Commission, states in its Programme Code that:

Licensees may make programmes about any issues they choose. This freedom is limited only by the obligations of fairness and a respect for truth, two qualities which are essential to all factually-based programmes, whether on "controversial" topics or not.

Impartiality does not mean that broadcasters have to be absolutely neutral on every controversial issue, but they should deal even-

6. *See* *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

7. ERIC BARENDT, *BROADCASTING LAW: A COMPARATIVE STUDY* 101-04 (1993).

8. *Id.*

9. *Producers' Guidelines 1996: Impartiality & Accuracy* (visited Feb. 15, 1999) <<http://www.bbc.co.uk/info/editorial/prodgl/02.htm#1>>.

handedly with opposing points of view in the arena of democratic debate. Opinion should be clearly distinguished from fact.¹⁰

B. *Personal Attacks*

Unlike the political fairness doctrine, rules that pertain to unfair reporting concerning individuals and that also exist across legal systems are still being enforced in the United States as well. In the United States, this type of regulation is known as the personal attack rule and is an extension of the fairness doctrine. In Europe, this can generally be found under the heading of right of reply. In the European sense, the right of reply is seen as a form of fairness. Unlike the American rule, it is not limited to fairness during the broadcasting of a controversial issue of public importance.

Formulated in the 1960s on the heels of the *Red Lion* ruling, the American personal attack rule combines political fairness with fairness to people acting within the political arena. It thus states that:

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the persons or group attacked:

- (1) Notification of the date, time and identification of the broadcast;
- (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
- (3) An offer of a reasonable opportunity to respond over the licensee's facilities.¹¹

Even though the fairness doctrine has been eliminated, the personal attack rule still exists and has been an issue of contention among FCC officials as recently as 1998.¹²

In the United Kingdom, the attack rules are not limited to political programming. The authority on the matter is the Broadcasting Standards Commission established by the Broadcasting Act of 1996.¹³ The Commission may deal with two types of complaints: Standards complaints have to do with portrayal of violence and sexual conduct and with matters of taste and

10. *The ITC Programme Code: 3. Impartiality* (visited Feb. 15, 1999) <http://www.itc.org.uk/regulating/prog_reg/prog_code/section_3.asp?section=regulating>.

11. 47 C.F.R. § 73.1920(a)(1)-(3) (1997).

12. See Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, *Public Notice*, 13 F.C.C.R. 21,901, 12 Comm. Reg. (P & F) 497 (1998).

13. Broadcasting Act, 1996, ch. 55, § 106 (Eng.).

decency generally, while fairness complaints relate to unjust or unfair treatment or infringement of privacy.¹⁴ In addition, the Independent Television Commission (ITC), which regulates content on all television broadcasts and cablecasts in the United Kingdom, and the BBC, each has its own code of conduct. The BBC Producers' Guidelines state that:

Where a programme reveals evidence of iniquity or incompetence, or where a strong, damaging critique of an individual or institution is laid out, there is a presumption that those criticised be given a fair opportunity to respond. There may be occasions when this is inappropriate (usually for legal or overriding ethical reasons) in which case the Head of Department should be consulted. It may then be appropriate to consider whether an alternative opportunity should be offered for reply at a subsequent date.¹⁵

Surprisingly, the ITC Programme Code, published in 1998, does not contain a similar rule.¹⁶ In other European nations, the right of reply has taken different forms: The narrow Italian right to respond is limited to factual objective inaccuracies. The French right arises when the broadcast is only allegedly untrue, but the broadcast must affect the aggrieved party's honour or dignity. The German right of reply is limited to facts, but their untruthfulness again need only be alleged, and no evidence of damage to the plaintiff needs to be demonstrated.¹⁷

III. THE STRUCTURE OF ISRAELI MEDIA LAW

Like all aspects of Israeli law, media law combines Knesset¹⁸ legislation, administrative regulation, and court decisions. Print media in Israel require licenses in order to be published, a remnant of colonial regulations. In 1953, the Israeli Supreme Court determined that freedom of speech was a freedom awarded by the Israeli system,¹⁹ even though the law has, and continues to, refrain from granting it. As a result, the power of government to limit freedom of speech, and specifically to close down newspapers, was limited to instances of clear and present danger to the public safety. In the formative years of the state, the government solely ran the electronic media.

14. *Id.*

15. *Producers' Guidelines 1996: Impartiality and Accuracy*, § 2.7 *Right of Reply* (visited Feb. 15, 1999) <<http://www.bbc.co.uk/info/editorial/prodgl/02.htm>>.

16. *The ITC Programme Code* (visited Feb. 15, 1999) <http://www.itc.org.uk/regulating/prog_reg/prog_code/index.asp>.

17. ERIC BARENDT, *supra* note 7, at 162-63.

18. Knesset refers to the Israeli Legislative Assembly.

19. H.C. 73/53, *Kol Ha'am v. Minister of Interior Affairs*, 7 P.D. 871.

In 1965, radio, still the sole electronic medium, was transferred from government auspices to those of the Israel Broadcasting Authority (IBA), a public nongovernmental authority. The IBA acts under the Broadcasting Authority Law,²⁰ and was the sole broadcaster of both radio and television (formed in 1968) until the second half of the 1980s, when cable television franchises were created by the Telecommunications Law of 1986.²¹ The Cable Television Council regulates these activities within Israel.²² In 1990, the Second Authority for Television and Radio Law was enacted, forming a regulatory regime charged with a commercial television channel and a network of commercial regional radio.²³ Each of these three media acts, therefore, under a separate law and separate regulatory bodies, are charged with regulation. As a result, this structure produces different rules and regulations for different media.

IV. HOW THE FAIRNESS DOCTRINE BECAME ISRAELI LAW

A. *The Written Law and Regulations: Political Speech*

The fairness doctrine is not present in the Israeli law books as such. However, sections of the Broadcasting Authority Law of 1965 and the Second Authority for Radio and Television Law of 1990 adopt general principles of political fairness, as do regulations created by the Second Authority and the Cable Television Council. Still, these are principles of impartiality in the European sense rather than principles of fairness in the American one. They call for a fair representation of ideas; they do not permit editorializing (or rather presenting opinions of owners); and they do not enforce the raising of controversial issues. As for personal attacks, those have been dealt with separately and in different ways across Israeli electronic media. Thus, article 4 of the IBA Law states that “[t]he Authority will ensure that a place for adequate expression of different views and opinions prevalent in the public will be awarded in the broadcasts, and that credible information will be broadcast.”²⁴

20. Broadcasting Authority Law, 1965, S.H. 106.

21. Telecommunications Law (amend. no. 4), 1986, S.H. 224.

22. As of January 1998, it is the Cable and Satellite Council. *See* Law for the Amplification of Growth and Employment and the Achievement of Budgetary Goals, 1998, S.H. 48.

23. Second Authority for Television and Radio Law, 1990, S.H. 59.

24. Broadcasting Authority Law, 1965, S.H. 106.

This directive, together with article 2 of the law in which the Authority's service was defined as a national, thus nonpartisan service,²⁵ differs immensely from the American idea of fairness. First, there is no requirement for the raising of controversial issues. The contrary is true, only prevalent opinions in the public need be represented. Second, the requirement of balance refers to the totality of the broadcasts and is not limited to issues that are controversial. Third, there is no reference whatsoever to personal attacks and the rules pertaining to them. The IBA's code of conduct, *Guidelines for Broadcasting News and Current Affairs*,²⁶ interprets this rule as one of impartiality by stating that "[b]eyond the word of the law the Authority has no voice, policy or point of view of its own. The Authority does not broadcast 'editorials.' The role of the Authority and its employees is to let different voices speak for themselves."²⁷

Although these internal guidelines resemble and are drawn from European codes of conduct, they contain reference to political fairness under the heading of fairness doctrine. They state that the fairness doctrine provides the right of reply to parties in dispute, but its main purpose is to ensure the public's right to receive full and reliable information alongside balanced and varied opinions.²⁸ The means of achieving this fairness are by "[s]oliciting the opposing opinion, [f]airly notifying the public if comment was refused, [u]sing 'newsworthiness' as the measure for professional decisions, [and] [a]voiding becoming 'tools of response' for professional 'reaction teams.'"²⁹

When the Second Authority Law was legislated in 1990, Israeli legislators chose a somewhat different wording for the Authority's requirement of balanced broadcasts. Article 5, which lists the Authority's supervisory obligations, includes two specific obligations. Article 5(b)(6) and (7) require that in fulfilling its duty the Authority will aim to: "(6) [p]rovide an adequate expression to the cultural diversity of Israeli society and to different views prevalent in society[, and] (7) broadcast balanced, fair and credible

25. The phrase used in the law, *Mamlakhti*, is untranslatable to English. It reflects the Ben Gurionist ideology of nonpartisanship.

26. Also known as the "Nakdi Document" after their originator, Nakdimon Rogel, the guidelines have been published by the Broadcasting Authority in the 1990s in the format of a book to which the legal appendix was written by the undersigned. NAKDIMON ROGEL & AMIT M. SCHEJTER, *THE NAKDI DOCUMENT: GUIDELINES FOR BROADCASTING NEWS AND CURRENT AFFAIRS* (1995).

27. *Id.* at 22.

28. *Id.* at 30.

29. *Id.* at 31.

information.”³⁰ In addition, article 47 states that in a broadcast on issues of the day whose content has public significance an adequate expression to different opinions prevalent among the public will be given.³¹

The Second Authority’s ethical regulations stipulate that on issues of public significance, a broadcaster will allow an adequate and balanced expression of different opinions prevalent in the public and will not favor one opinion over others, thus merely repeating the dictate of the law.³² In addition, under the heading non-favoritism, the regulators maintain that license holders will ensure their broadcasts will not, directly or indirectly, advance their personal, economic, or public interest.³³

These provisions are even less reminiscent of the American concept. According to Broadcasting Authority law, fairness and balance have been set for information only, while as far as opinion is concerned, the views that are prevalent and different should be given adequate expression. In addition, it should be noticed that the balance of opinions required by the law pertains only to news and to issues deemed significant. By not allowing a license holder to advance his or her own public interest, editorializing becomes impossible.

As is the case in many regulatory issues in Israel, cable television regulations, which are the toughest to enforce, are the most detailed. It is particularly interesting that such detail and so much thought was put into issues of public concern and political speech, considering the law forbids cable companies from broadcasting national news and that, according to their mandate, their news programs are to deal mainly with local issues. The Telecommunications Law under which cable television operates is silent on the issue. Thus, the cable council chose to create the following rules: (1) a franchise holder will refrain from expressing, through his own productions, his private opinion;³⁴ (2) a franchise holder will ensure adequate balance so that prevailing opinions will be given in broadcasts that

30. Second Authority for Television and Radio Law, 1990, S.H. 59, art. 5(b)(6), (7).

31. *Id.* art. 47.

32. Second Authority Regulations (Ethics in Television and Radio Broadcasts), 1994, K.T. 5580, 636, art. 7.

33. *Id.* art. 5.

34. Telecommunications Regulations (Broadcasts by a Franchise Operator) (amend.), 1991, K.T. 5397, 429, art. 6(12)(a).

have a public significance;³⁵ (3) at least two opinions on an issue should be presented;³⁶ (4) the presentation of the two opinions should be equal in time and in form of presentation;³⁷ and (5) in the absence of the opportunity to bring competing viewpoints, the public should be notified that such a request was made and denied by the other party.³⁸ These rules pertain to disagreements among public authorities within the region or between local and national authorities.³⁹ Thus, within the cable television arena, the arena least regulated for content by the law (and rightly if scarcity is the justification for content regulation), the strictest limitations are set on license holders.

B. *Court Interpretations of Fairness in Political Speech*

An analysis of the freedom of access to media in Israel completed in the middle of the 1980s reached the conclusion that the fairness doctrine may have already become part of the Israeli legal system in its original American form.⁴⁰ At least a half dozen more cases mentioning the fairness doctrine have reached the Supreme Court since and have changed the picture somewhat. It is no longer doubtful, but in fact certain, that there is a fairness doctrine in Israeli law, and that Israeli courts perceive it to be similar to or at least based on the American concept. However, it is doubtful whether it really is the same doctrine that existed in the American system.

The political speech aspect of the doctrine was first introduced in 1981 in *Shiran v. Israel Broadcasting Authority*.⁴¹ The case dealt with the upcoming broadcast of a historical television series about Zionism, the liberation movement of the Jewish people that spearheaded the effort leading to the creation of the State of Israel, called *The Pillar of Fire*. A group of intellectuals of Middle Eastern Jewish descent claimed the series misrepresented the contribution of their ancestors to the history of Jewish yearning for Zion and asked the High Court of Justice to prevent the broadcast. The court rejected this request citing previous decisions in which freedom of speech had been safeguarded. In reference to the fairness doctrine cited by the petitioners, Justice Shamgar claimed that the doctrine was irrelevant to the petition.

35. *Id.* art. 10(a).

36. *Id.* art. 10(b)(1).

37. *Id.*

38. *Id.* art. 10(b)(2).

39. *Id.* art. 10(b)(3).

40. Dafna Barak, *Freedom of Access to the Media—Balancing Interests Within the Right for Freedom of Speech*, 12 IYUNEY MISHPAT 183 (1987) (in Hebrew).

41. H.C. 1/81, *Shiran v. Israeli Broadcasting Authority*, 35(1) P.D. 365.

The fairness doctrine does not award the court the power of censorship; rather it requires that another aspect of the issue should be presented. It cannot therefore serve as justification for a move to censor the broadcast.⁴² The actual issue of the acceptance of the doctrine into Israeli law was thus left unanswered.

The following year, in *Zichroni v. Israel Broadcasting Authority*, a decision made by the Broadcasting Authority to ban all interviews with supporters of the Palestinian Liberation Organization in the territories occupied by the Israeli Defense Forces was questioned.⁴³ The court annulled the Authority's decision, but in the process, Justice Bach⁴⁴ and probably Justice D. Levin were under the impression that the American fairness doctrine is part of Israeli law.⁴⁵

In a groundbreaking decision of the High Court of Justice concerning freedom of expression, the court in *Kahane v. Israel Broadcasting Authority* acknowledged racist speech as a protected form of speech, as long as the racist speech does not present imminent danger to public safety.⁴⁶ In *Kahane*, the court was asked to void a decision of the Broadcasting Authority not to broadcast the views and opinions of the racist *Kach* party, elected to the Knesset in 1984. The Authority, carefully working around the court decision in the *Zichroni* case, decided only factual information about the party would be broadcast, and the party's right of reply would be limited to instances in which views that are not its own are attributed to it.⁴⁷ The Authority forbade any broadcast of the party's racist platform, including its response to criticism of its views by other parties.

Justice Barak avoided questioning the existence or the scope of the fairness doctrine in Israeli law.⁴⁸ Following that detour, Justice Barak said it is enough to state that, as a public authority, the IBA must abide by the principles of administrative law, which include practicing equality and fairness toward opinions and views.⁴⁹ This conclusion cannot be derived from the Broadcasting Authority Law itself, which specifically refrains from requiring equality when claiming adequate expression of opinions is needed.

42. *Id.* at 378.

43. H.C. 243/82, *Zichroni v. Israel Broadcasting Authority*, 37(1) P.D. 757.

44. *Id.* at 784.

45. *Id.* at 777.

46. H.C. 399/85, *Kahane v. Israel Broadcasting Authority*, 41(3) P.D. 255, 281, 285.

47. *Id.* at 262-63.

48. *Id.* at 302.

49. *Id.*

Thus, Justice Barak bypassed the Broadcasting Authority Law, choosing instead to apply principles he imported from administrative law of which fairness is an integral part. In addition, Justice Barak was troubled by the elimination of the *Kach* party's right of reply, which he deemed unfair, when other parties were allowed to criticize its views.⁵⁰ His conclusion, thus, was to deem the Authority's action void.

In 1990, the Israeli Association for the Prevention of Smoking petitioned the High Court of Justice,⁵¹ requesting that the Broadcasting Authority provide it with free airtime to counter the episodic appearance of advertisements for cigarettes in sporting events.⁵² The court's opinion, authored by Justice Barak, rejected the petition, stating that, without questioning the doctrine itself, the IBA's efforts to prevent such broadcasts should be enough, and these incidental appearances of the advertisements did not create a right for the petitioners that may emanate from the doctrine had it existed.

Even though the court was reluctant in the 1980s to declare the admission of the doctrine in Israeli law, in a major decision on the eve of the 1992 elections, the court all but announced that the doctrine was part of Israeli law.⁵³ By then, the political speech aspect had long been eliminated by the FCC in the United States. In *Zvili v. Chairman of the Central Election Committee*, Justice Barak accepted the stand of the Chairman of the Central Election Committee, Supreme Court Justice Halima.⁵⁴ Justice Halima wrote that, in a broadcast concerning a political issue, an opportunity should be granted during the broadcast or soon thereafter to present the full range of political opinions.⁵⁵ In support, Justice Barak deduced the principles of equality and fairness from the Election Propaganda Law, from the general

50. Following the *Kahane* decision, Israeli law was changed and racist parties were banned from participating in the elections, thus eliminating the problem of having their ideas being regarded as prevalent.

51. H.C. 2868/90, *Israeli Society for the Prevention of Smoking v. Israeli Broadcasting Authority*, 46(1) P.D. 163.

52. Advertising is forbidden in the Broadcasting Authority's broadcasts, and advertising for tobacco products is illegal on radio and television. Thus, the petition referred to incidents where the camera may have "caught" an advertisement in a foreign stadium.

53. H.C. 869/92, *Zvili v. Chairman of the Central Election Committee*, 46(2) P.D. 692.

54. *Id.* at 711.

55. *Id.* at 698.

duty of the Broadcasting Authority to provide equality in its broadcasts based on administrative law, and from the fairness doctrine.⁵⁶

It is not surprising, therefore, that when the Israeli Bar Association was taken to court in 1993 for refusing to publish an opinion piece written by a member of an opposition party in the Bar Association Newsletter, the court no longer questioned the actual existence of the doctrine.⁵⁷ In fact, the court only questioned whether the Bar Association Newsletter was a public forum to which the fairness doctrine should be applied. Chief Justice Shamgar rewrote the fairness doctrine, applying it to public rather than private media and disregarded the broadcast-print dichotomy more closely associated with the doctrine.⁵⁸ Chief Justice Shamgar's opinion remained the minority opinion,⁵⁹ but his belief that the doctrine lives in the Israeli legal system despite its elimination in the United States was accepted by both Justices Strassberg-Cohen and Bach.⁶⁰ Justice Strassberg-Cohen went so far as to state that the concentration of the Israeli print media may justify imposing the doctrine on it as well, based upon the balancing as opposed to the issue-raising factor.⁶¹ This conclusion is itself dramatic, as lower courts⁶² and scholars⁶³ have concluded that the doctrine is nonexistent for the print media. It sits well, though, with Chief Justice Barak's notion that a mass circulation newspaper is not only a private asset but a public stage or forum, and therefore, the person owning it must act as the public's trustee.⁶⁴ As a result, Chief Justice Barak suggests as an idea for discussion that fairness may be legislated and required of the printed press as well.⁶⁵ Negbi adds that a legal obligation on all media to offer access to a wide spectrum of views is

56. *Id.* at 711.

57. H.C. 6218/93, Cohen v. Israel Bar Ass'n, 49(2) P.D. 538.

58. *Id.* at 547.

59. *Id.* at 556. Chief Justice Shamgar thought the fairness doctrine should be applied to the specific case at hand.

60. *Id.* at 557, 571.

61. *Id.* at 572.

62. Jerusalem Peace Court Civil Case 5808/88, Dr. Mubarak Awad v. Ilan Bachar (unpublished decision).

63. ZEEV SEGAL, FREEDOM OF THE PRESS—BETWEEN MYTH AND REALITY 24-26 (1996) (in Hebrew).

64. Aharon Barak, *The Tradition of Freedom of Expression in Israel and Its Problems*, 9 JUST. 3, 8-10. (1996).

65. Moshe Negbi, *The Enemy Within: The Effect of "Private Censorship" on Press Freedom and How to Confront It—An Israeli Perspective* 15, Paper Published by the Joan Shorenstein Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University, Discussion Paper D-35 (Nov. 1998).

the appropriate way to counter publisher control over content in Israel's small newspaper market.⁶⁶

The doctrine's idea of providing a fair forum for the expression of opposing ideas appears in Israeli Supreme Court decisions even where the doctrine as such is not mentioned. Such was the decision in *Society for the Public's Right to Know v. Israeli Broadcasting Authority*.⁶⁷ The plaintiffs opposed the appearance of personal-view programs on public television. Eventually, the Authority explained that the personal views would not be limited to a particular journalist's views.⁶⁸ This explanation satisfied the plaintiffs, and they withdrew their case.⁶⁹

The latest instance in which the doctrine was declared alive was in *Novik v. Second Authority for Radio and Television*.⁷⁰ The appellants tried to prevent a commercial television franchisee, acting under the auspices of the Second Authority, from broadcasting a documentary that accused the Israeli right wing of conspiring to assassinate Prime Minister Yizhak Rabin.⁷¹ The court's decision, delivered by Justice Matza, stated that the commercial channel's franchise holders are bound by the duties imposed on them by forbidden broadcasts law and by ethical rules.⁷² Justice Matza stated, "[t]his is a system of rules reflecting the 'fairness doctrine' (as named by Justice Shamgar in the *Shiran* case) and that is worthy of any respected medium."⁷³ Thus, Justice Matza interprets the Second Authority rules as if they have been designed to reflect the logic of the fairness doctrine.

C. *Written Law and Regulations: Personal Attacks*

In the absence of a central regulatory body, as explained above, the personal attack rule in Israel has taken different forms in the different media institutions. The personal attack rule appears in three levels: in law, in ad-

66. *Id.* at 15-17.

67. H.C. 4453/95, *Society for the Public's Right to Know v. Israeli Broadcasting Authority* (unpublished decision).

68. *Id.*

69. *Id.*

70. H.C. 2888/97, *Novik v. Second Authority for Radio & Television* (unpublished decision that may be found in 97 TAKDIN ELYON 510).

71. *Id.*

72. *Id.*

73. *Id.*

ministrative regulations, and in internal guidelines. In addition, it has been imposed on broadcasters by the courts.⁷⁴

The legal provision dealing with the right of reply is article 47(b) of the Second Authority for Radio and Television Law.⁷⁵ The article states that the council needs to set rules concerning the right of reply to those who may have been harmed or might be directly harmed by the broadcasts.⁷⁶ The council enacted the required regulations⁷⁷ with the following principles: (1) a comment of a person who may be harmed by a broadcast should be sought in advance and broadcast together with the harming broadcast;⁷⁸ (2) a comment of a person who may be *seriously* harmed by a broadcast should be sought in a reasonable period of time in advance and adequate time should be provided for the offended to *appear in the broadcast* and present his or her case;⁷⁹ (3) a person harmed (and not contacted beforehand) may request the franchise holder to broadcast his reply within a reasonable period of time;⁸⁰ (4) a person *seriously* harmed (and not contacted beforehand) may demand to appear in a broadcast set in a time and receiving prominence as the original harming broadcast;⁸¹ and (5) the broadcaster has the right to decide (in both serious and nonserious cases) whether to broadcast the reply and in what format. One possible reason not to broadcast the reply would be if the harming materials were factually true.⁸²

The Cable Television Council formulated a different set of rules with different emphases. Originally, in the council regulations published in 1987, the rule was that a franchise owner will broadcast a succinct notice concerning the reaction of a person wishing to contradict the truthfulness of factual information about himself that has already been broadcast.⁸³ In 1991, the council amended its regulations and added the following provi-

74. It is important to note here that providing the right of reply is considered a measure of innocence in the Israeli defamation law, but that aspect of the law, which is not limited to media, will not be dealt with in this Article.

75. Second Authority for Television and Radio Law, 1990, S.H. 59, art. 47(b).

76. *Id.*

77. Second Authority Regulations (Ethics in Television and Radio Broadcasts), 1994, K.T. 5580, 636.

78. *Id.* art. 10(a).

79. *Id.* art. 10(e).

80. *Id.* art. 10(b).

81. *Id.* art. 10(f).

82. *Id.* art. 10(c), (g).

83. Telecommunications Regulations (Broadcasts by a Franchise Operator), 1987, K.T. 5064, 138, art. 10.

sions: "The harmed person is not confined to contradict the truthfulness of the information but may also add information that could set the facts in a 'considerably different light.'"⁸⁴

The franchise holder is required to broadcast the reply in a similar broadcast, as close in time to the original as possible.⁸⁵ Still, the franchise holder was left with the discretion to time the length of the reply or not to broadcast the reply at all when the broadcaster feared abuse of the right of reply or when the reply itself seemed to be untrue.⁸⁶

The Israel Broadcasting Authority, free to regulate itself, has for many years held the right of reply within its own guidelines. As of 1997, these particular guidelines became officially published regulations.⁸⁷ This was the outcome of court deliberations in a series of petitions whose aim was, among other things, to have the Authority make all of its guidelines part of the official public record.⁸⁸ The Authority agreed to publish, and subsequently did, only that part of the guidelines it deemed had an effect on the well-being of the public by providing the public specific rights in relation to the Authority's broadcasts. The rules outlined the following principles: (1) the right of reply was granted broadly to all that may be harmed;⁸⁹ (2) the Authority was left with the discretion not to broadcast a reply if it was found to be unworthy of broadcast or if it abused the right of reply;⁹⁰ (3) in case a reply could not be received prior to the broadcast, the Authority found itself bound to notify the public of this fact and to allow the injured to reply later;⁹¹ and (4) the Authority also provided its Ombudsman with the right to order broadcast of a reply that the editorial staff had rejected.⁹²

These rules live alongside the internal guidelines of the Authority in which the issue of personal attacks and the right of reply are mentioned.⁹³ The guidelines, rewritten in 1995, state that if a participant in a broadcast

84. Telecommunications Regulations (Broadcasts by a Franchise Operator) (amend.), 1991, K.T. 5397, 429, art. 11(a).

85. *Id.*

86. *Id.* art. 11(b).

87. Broadcasting Authority Regulations (Right of Reply), 1997, K.T. 5816, 466.

88. H.C. 1397/95, 1732/95, 7735/95, *Greenboim v. Israeli Broadcasting Authority* (unpublished decision that may be found in 96(1) TAKDIN ELYON 236).

89. Broadcasting Authority Regulations (Right of Reply), 1997, K.T. 5816, 466, art. 2.

90. *Id.*

91. *Id.* art. 3.

92. *Id.* art. 4.

93. See ROGEL & SCHEJTER, *supra* note 26.

has severely hurt the dignity of another participant or nonparticipant in the broadcast, the attack should be edited from the broadcast.⁹⁴ These types of attacks should also be prevented in live broadcasts when possible. The obligation to correct wrong information should be fulfilled as close as possible to the broadcast of that information.⁹⁵

D. Court Interpretations of the Scope of the Personal Attack Rule

The personal attack rule, though not immediately, has also entered the Israeli courtroom using the American fairness doctrine. The idea of providing an injured person with a right of reply was first mentioned in "*Hachayim*" *Book Publishers v. Broadcasting Authority*.⁹⁶ Justices H. Cohen and Elon on the one hand, and Justice Ben Porat on the other, differed over the question of whether the power of television alone granted the appellants the right of reply they could not obtain based solely on defamation law.⁹⁷ All of the justices agreed that such a right existed regardless of the power rationale. Justice Cohen stated that although the court lacked the jurisdiction to force the Authority to broadcast the reply, it should do so based on its "intelligent discretion."⁹⁸ Justice Elon thought that fair play and good taste rendered such a right,⁹⁹ and Justice Ben Porat stated that "criticism invites a reply";¹⁰⁰ and, thus, if the appellant wishes to reply to the accusations, it should be granted that right. Still, all three justices left this rule to the discretion of the Authority and denied the petition.

Following *Hachayim*, the courts were required to discuss the right of reply in connection with the fairness doctrine on two occasions involving television consumer programs. In *M.I.L.N. v. Israel Broadcasting Authority*, Justice Ben Porat stated: "It is obvious, that at the same time the sense of justice provides, whether according to the 'fairness doctrine' and whether without it, to give the first plaintiff a proper opportunity to respond."¹⁰¹

Supreme Court President Shamgar, presiding over *Eldori v. Israel Broadcasting Authority*, questioned whether the right of reply still existed

94. *Id.* at 31.

95. *Id.* at 15.

96. C.A. 7/79, "*Hachayim*" *Book Publishers v. Broadcasting Authority*, 35(2) P.D. 365.

97. *Id.*

98. *Id.* at 368.

99. *Id.* at 369.

100. *Id.* at 370.

101. H.C. 259/84, *M.I.L.N. v. Israeli Broadcasting Authority*, 38(2) P.D. 673, 686.

nine years after a degrading program was broadcast.¹⁰² In his analysis, Justice Shamgar brought up the fairness doctrine as a set of rules developed in the United States in order to ensure the public's right to receive full and varied information and to prevent the arbitrariness of broadcasters' decisions.¹⁰³ Information is as full as possible, he states, when a reply is alongside criticism.¹⁰⁴ In this particular case, however, because of the time that had passed between the broadcast and the court proceedings, Justice Shamgar found that there was no substance in implementing "an analogous rule to the fairness doctrine."¹⁰⁵

Thus, the Israeli courts have not had an opportunity to question the application of the different right of reply rules that have emerged in the Israeli media regulatory regime over the years. Still, they have found a strong connection between application of the rule and its American counterpart, the fairness doctrine.

V. SURVIVING THE "AMERICAN WIND": THE NATURE OF THE FAIRNESS DOCTRINE UNDER ISRAELI LAW

It is indisputable that the fairness doctrine, born and bred in the American legal system, has been adopted, at least by name, into the Israeli legal system. At the same time, it is as certain that the nature of what Israelis call the fairness doctrine is very different from the original concept. Not only has the original doctrine been eliminated in the United States while continuing to thrive in Israel, it also looks very different from the way it looked when it still lived in the United States. In the words of Supreme Court President Shamgar in *Cohen v. Israel Bar Association*,¹⁰⁶ "[c]hanges in the direction of the wind in the United States need not shake the branches of the trees in this land."¹⁰⁷

The political speech aspect of the doctrine has taken a very different road than the original. This different path should be seen in the context in which the doctrine was first brought into the Israeli system. Cases like *Shirani*,¹⁰⁸ *Zichroni*,¹⁰⁹ and *Kahane*¹¹⁰ were dealt with when the IBA was Is-

102. H.C. 76/89, Eldori v. Israeli Broadcasting Authority, 34(1) P.D. 798.

103. *Id.* at 801.

104. *Id.*

105. *Id.*

106. H.C. 6218/93, Cohen v. Israel Bar Ass'n, 49(2) P.D. 538.

107. *Id.* at 544.

108. H.C. 1/81, Shiran v. Israeli Broadcasting Authority, 35(1) P.D. 365.

109. H.C. 243/82, Zichroni v. Israeli Broadcasting Authority, 37(1) P.D. 757.

rael's sole broadcaster. The fairness doctrine was thus imposed on it because it was the only broadcaster and was consequently scrutinized for its obligations as a public organization. The ideological basis for the ruling was unclear. It was not based on spectrum scarcity, as in the United States, but rather on broadcaster scarcity. Moreover, the fairness the broadcaster was required to practice was not a broadcaster's fairness but a public authority's fairness. In other words, Israeli Supreme Court justices sought an American solution to a system that looked more European—European solutions may have been more applicable.

As a result, in *Cohen*, the Court discussed the doctrine at length, even though the case dealt with a print publication, a contradiction to the American system.¹¹¹ The dichotomy created was not between broadcast and print media, but between public and private media. Even though the Court had decided in the end to reject Cohen's request, the mere fact that it was given such long consideration implies that a different conclusion is possible. This is also possible due to the prominence of Chief Justice Barak in the Supreme Court and his informal thoughts on the issue.¹¹²

The Israeli courts chose to interpret the issue of fairness in broadcast media through a set of rules similar to those in the United States. This may be an appealing thought if one bases the whole system on the American idea of free speech, but this is not the way Israeli legislators and regulators see the media, and it does not resonate with their rules and laws.

The idea of free speech was imported into the Israeli system through a series of court decisions that the Knesset never challenged.¹¹³ In the case of the adoption of the fairness doctrine into the Israeli system, the assumptions the courts made were wrong. While the Israeli system does provide for a rule of fairness in its broadcast media, it is not the same fairness the American system provides, but rather the one the continental systems provide—the concept of impartiality. Israeli broadcasters cannot editorialize or promote their own political beliefs in any way. They are obliged to present opinions prevalent in society, which have nothing to do with their own.

Israeli fairness cannot be interpreted the American way because it did not develop on the same constitutional grounds. Freedom of speech or of the

110. H.C. 399/85, *Kahane v. Israeli Broadcasting Authority*, 41(3) P.D. 255.

111. H.C. 6218/93, *Cohen v. Israel Bar Ass'n*, 49(2) P.D. 538.

112. Barak, *supra* note 64, at 3.

113. Historically, freedom of speech was declared a part of the system in the landmark decision of H.C. 73/53, *Kol Ha'am v. Minister of the Interior*, 7 P.D. 871.

press is not safeguarded by the nonexistent Israeli constitution or by the base laws enacted in order to serve as its building blocks. Thus, fairness, or the provision of a forum to another during airtime a broadcaster lawfully has discretion over as to content, does not seem to obstruct free speech. What emanates, therefore, is that the Israeli system enforces fairness on broadcasters, and perhaps other media as well. This is justified on the grounds that it provides free speech to the underrepresented. The broadcaster is never referred to as someone whose own rights have been breached. The attempt, therefore, to name Israeli broadcast impartiality as fairness is conceptually wrong. Nothing has been taken from broadcasters; no constitutional freedom has been breached; and the regulation of broadcasting is designed around a completely different logic.

VI. CONCLUSION

There is a growing "McDonaldization" of public life in Israel. Party and ideological politics have been replaced by direct personal elections. Ideological election platforms and heated controversy have been taken over by soundbyte politics. Western values have been enforced on a society that has not yet willfully adopted the basic tenets of the enlightenment.

The adoption of the fairness doctrine into Israeli law is another example of this phenomenon. Although it has been almost two decades since the doctrine was first mentioned as an idea to be attended to by the legal system, no deep discussion of its proper place within the system has taken place. Despite the lack of deep discussion, fairness became a superficial element in a system that has yet to fully embrace such basic values as freedom of speech, press, and expression. Because the system adopted its superficial form, its deeper importance goes unnoticed. All prevalent opinions feel safeguarded by it, and those underrepresented tend to create alternative, and sometimes illegal, forms of media in which fairness is not even a faint dream. Because there was never discussion of its actual existence in the system, the possible downside of the doctrine that brought it down in its country of origin has also been disregarded.

The Israeli legal system needs a shake up in the way rules pertaining to freedom of expression have been implemented. A rethinking of the fairness doctrine and a rewriting of its rules so that they serve the system they are written in is by now a must.