The Supreme Court

CFH 2121/12

Petitioner: Anonymous

v.

Respondents: 1. Dr. Ilana Dayan Orbach

2. Telad Studios Jerusalem Ltd.

Further Hearing on the judgment of the Supreme Court of Feb. 8, 2012, in CA 751/10, CA 1236/10, and CA 1237/10 (Deputy President E. Rivlin, and Justices U. Vogelman and Y. Amit).

Before: President A. Grunis, Deputy President M. Naor, Justice (Emerita) E. Arbel, Justice E. Rubinstein, Justice S. Soubran, Justice Y. Danziger, Justice N. Hendel, Justice U. Vogelman, Justice Y. Amit

Judgment

President A. Grunis:

1. The underlying tension of defamation law is expressed in full force in this Further Hearing before the Court. On one side stand the dignity and good name of the person harmed by a publication, and on the other side stand freedom of speech and freedom of the press, with all their significance for the individual journalist and the public at large. The legal questions raised in this proceeding go beyond the borders of the particular case that engendered them. *Inter alia*, we must address questions concerning the nature of "truth" in the legal sphere, the role and

duties of the press in a democratic society, and striking a proper balance among the rights and interests concerned in the specific context before us. We will address all of these in this Further Hearing.

Factual Background and History of the Proceedings

2. On Nov. 22, 2004, the television program "*Uvda*" ["Fact"] with Ilana Dayan" (hereinafter: *Uvda*) aired an investigative report (hereinafter: the report) prepared and delivered by Dr. Ilana Dayan-Orbach, Respondent 1 (hereinafter: Dayan). The report was preceded by "promos" by Respondent 2, Telad Studios Jerusalem Ltd., which was the Channel 2 concessionaire at the time (hereinafter: Telad). The report and the promos concerned an incident that occurred in an IDF installation in the Gaza Strip in 2004. The details of the incident were addressed at length in the prior proceedings, and in additional legal proceedings, and certain aspects continue to be disputed. Therefore, I will suffice with a very brief description of the matter, based upon the findings of the courts that addressed these proceedings. On Oct. 5, 2004, a suspicious entity was spotted near the installation, which was at a high state of alert. After the fact, it turned out that it was a girl named Iman Al-Hams, a resident of Rafah, who was thirteen years and ten months old (hereinafter: the deceased). There was weapons fire from the installation, the alarm was sounded, and the public address system was turned on. The deceased threw down her bag, fled, and took cover behind a sand berm. The commander of the company manning the installation at the time – the Petitioner – was alerted, and he ran toward the entity. It should be noted that at the time of the incident, shots were fired from the vicinity of Rafah in the direction of the Petitioner and his soldiers. The Petitioner fired two shots in the direction of the deceased, and retreated. He then retraced his steps, and fired a burst toward the area to the east of where she lie. As a result of the shots fired in the course of the event, the deceased was killed.

3. The report, which was some 18 minutes long, addressed the said event, which was termed "the kill confirmation affair". The report was described in detail in the prior proceedings, and I will, therefore, only summarize its main points. The report described the unfolding of the event from the moment the suspicious entity was identified by the installation; the gunfire in her direction from the installation; her flight; the assault in her direction by the force led by the Petitioner to "confirm the kill"; the Petitioner's fire at her; and, ultimately, the removal of the

deceased's corpse from the area. Among other things, the report noted that the incident concerned a little girl who was on her way to school. In addition, the report described the identification of the deceased by the installation's spotters, the soldiers' conjectures as to her age, as well as in regard to her being hit, and her condition. The report also stated that the installation was in a evident state of security readiness and tension, and that the soldiers, including the Petitioner, thought that they were concerned with a terrorist event. In addition, Dayan pointed out that the recording from the communication network ended "with these words, that for some reason it was urgent for the company commander [the Petitioner – A.G.] to communicate now with the HQ". Then the Petitioner was heard stating over the communications network: "This is leader. Anyone that moves in the area, even if it is there years old, has to be killed. Over." The report made use of recordings from the installation's communications network, video clips recorded by the installation's security towers at the time of the incident, and testimony of soldiers serving in the company. Illustrative pictures and videos clips showing company life, recorded by the soldiers in various contexts, were also included. In this context, a video clip was presented that shows a kind of party held by the soldiers in their room, and it was stated that these pictures appeared immediately after the shooting incident on the videotape recorded by the soldiers.

4. The report also addressed developments and investigations that followed the incident. It criticized the army's investigation of the incident, which found that the Petitioner had acted appropriately. In this regard, it mentioned claims by soldiers that they lied in the investigation out of fear of the Petitioner. In addition, the report described the ugly state of affairs in the company. It was noted that "when they [the Petitioner's soldiers – A.G.] see him shooting at the little girl's corpse, they are sure that he carried out a kill confirmation". In this regard, it was stated that "it is not certain that this story would have gotten out were it not for the state of affairs in the company". It was further noted that the Petitioner was placed under arrest, and that he was interrogated by the Military Police, and video clips of that interrogation were shown in which he explained, among other things, that he acted to neutralize a threat. It was also reported that an information was filed against the Petitioner in the military court on the day of the report was broadcasted. Finally, the responses of the Military Spokesperson and the deceased's family were shown. It was also stated that the Petitioner had not yet been given permission to be interviewed, although the representatives of *Uvda* asked to interview him.

5. In the broadcast of *Uvda* that was aired a week later, Dayan added a number of clarifications and emphases in regard to the report. *Inter alia*, it was emphasized that the installation was operating under threat warnings, and the threats under which the soldiers were operating were mentioned. In addition, further clips from the communications network at the time of the incident were aired. Among them were estimates as to the deceased's age, and it was noted that one of the questions to be answered is who heard that. Dayan emphasized that the report accurately portrayed the events, but clarified that there was one mistake in the report. According to her, the video clip in which a soldier is seen shooting from a position in the installation was not related to the incident. Nevertheless, it was stated that there is no dispute that there was heavy fire from the positions in the installation, which continued for an extended period.

6. On July 5, 2005, in an end-of-season review of *Uvda*, a four-minute summary of the report that is the subject of these proceedings was broadcasted. It was accompanied by remarks by Dayan at the beginning and the end of the report, in which, *inter alia*, she presented an update of the developments since the original broadcast (hereinafter: the review report). The content of the review report will be described at length below. I would already state that the editors of *Uvda* approached the Petitioner prior to the broadcast of the review report. In response, the Petitioners attorneys claimed that the broadcast was defamatory, and demanded that the review report not be aired, or in the alternative, that their full response be presented.

7. As noted, on Nov. 22, 2004, an information was filed against the Petitioner in the Military Court on five charges: unlawful use of a firearm, for the two shots fired in the direction of the deceased; unlawful use of a firearm, for the burst he allegedly fired at her; obstruction of justice; deviation from authority creating a life-threatening danger as a result of the rules of engagement that he allegedly issued to his soldiers; and conduct unbecoming. On Nov. 15, 2005, the Military Court acquitted the Petitioner on all counts. The Petitioner then filed suit against the Respondents in the District Court, under the Defamation Law, 5765-1965 (hereinafter: the Law, or the Defamation Law).

The Judgment of the District Court

8. The Jerusalem District Court (Judge N. Sohlberg) found in favor of the Petitioner, in part (CA 8206/06 of Dec. 7, 2009). It held that the report constituted defamation of the Petitioner, who was presented as having acted in a cruel and evil manner, and the soldiers under his command were presented as having maintained heavy fire at the deceased without regard for the possibility that she might be killed. It was held that this was done in a manner that affected the Petitioner's good name. In addition, the court ruled that the report gave the impression that the Petitioner forced his soldiers to lie in the military enquiry, that the suspicions against him were whitewashed in the enquiry, and that he feigned innocence in his interrogation and refrained from presenting a consistent version of the events. The District Court held that this, too, constituted defamation of the Petitioner. It was held that the Respondents could not claim the plea-of-truth defense under sec. 14 of the Law, nor the plea-of-good-faith defense under sec. 15 of the Law. Therefore, they were ordered to pay damages to the Petitioner in the amount of NIS 300,000, and it was ordered that the *Uvda* program would correct the impression that the report created. In that context, the Respondents were ordered to report the fact of the Petitioner's acquittal, as well as the main points of the Military Court's judgment, to explain that the report had conveyed a mistaken impression in regard to the Petitioner and in regard to the incident, and to report the outcome in the District Court. All of the parties appealed the decision.

The Judgment on the Appeals

9. On Feb. 8, 2012, judgment was handed down on the appeals (CA 751/10, Deputy President E. Rivlin, and Justices U. Vogelman and Y. Amit; hereinafter – the Appeals Decision or the Decision). All of the justices of the panel agreed that the report that was broadcasted constituted defamation of the Petitioner. However, they were of the opinion that liability should not be imputed to Dayan, inasmuch as she enjoyed a defense under the Law. The justices were divided as to which defense applied. Deputy President Rivlin and Justice Amit were of the opinion that the report met the conditions of the plea-of-truth defense under sec. 14 of the Law. They held, pursuant to CFH 7325/95 *Yediot Aharonot Ltd. v. Krauss*, 52 (3) 1 (1998) (hereinafter: *CFH Krauss*), that the first condition of this defense – the truth of the publication – was met in the sense that the publication was "true at the time". Deputy President Rivlin explained that "the picture of reality as portrayed by the report as a whole is not substantially

different from the truth as it was known at that time, as best as could be ascertained with the investigative tools available to a reasonable journalist" (para. 97 of his opinion). That was the case, *inter alia*, considering that the facts grounding the report at the time of the broadcast also served as the grounds for the charges brought against the Petitioner. Justice Amit concurred with Deputy President Rivlin on this point. He emphasized that the media cannot be demanded to meet "an absolute standard of pure truth" (para. 14 of his opinion). He was of the opinion that in this case, the condition of truthful publication was met, inasmuch as the report reflected the truth as it was known to the investigating authorities and the prosecution at the time of the broadcast. Both justices held that the second condition of the truth defense – a public interest in the publication – was also met. Justice Vogelman, however, was of the opinion that Dayan could claim the good-faith defense under sec. 15(2) of the Law, in circumstances in which the relations between the publisher and the audience to which the publication was addressed "imposed on him a legal, moral or social duty to make the publication". The Appeals Decision held that the time had come to recognize, in the framework of sec. 15(2) of the Law, a broader journalistic obligation than that previously recognized in CA 213/69 *Israel Electric Corporation Ltd. v. Haaretz Newspaper Ltd*., IsrSC 23 (2) 87 (1969) (hereinafter: the First *Haaretz* case). This, while establishing appropriate conditions for the application of the defense. Justice Vogelman was of the opinion that such an obligation would arise upon meeting two conditions. The first is the presence of a significant public interest in the publication, and the second, that the publication is the result of careful, responsible journalistic work. Additionally, Justice Vogelman made a non-exhaustive list of auxiliary tests as aids in ascertaining the meeting of these criteria.

10. The result was that Dayan's appeal was granted (CA 1236/10), and the judgment of the District Court in her matter was reversed. As opposed to that, the Court held that the defenses under the Law did not apply to the program's promos. That being the case, the Court did not find grounds for intervening in regard to Telad's liability. As a result, the Court decreased the damages awarded against it to NIS 100,000, and rescinded the obligation to publish a correction. Telad's appeal (CA 1237/10) was granted in part. The Petitioner's appeal in regard to the damages awarded to him (CA 751/10) was denied.

The Petition for a Further Hearing

11. Following the Appeals Decision, the Petitioner submitted a petition for a Further Hearing. After considering the petition and the responses of the Respondents, on Oct. 3, 2012, I ordered a Further Hearing on the Appeals Decision, in accordance with my authority under sec. 30(b) of the Courts [Consolidated Version] Law, 5744-1984 (hereinafter: the Courts Law). In my decision of Nov. 25, 2012, the issues that would be addressed in the Further Hearing would be as follows:

> (a) Can the phrase "the matter published was true", in sec. 14 of the Defamation Law, also be construed to mean "true at the time", and if so, under what conditions?
>
> (b) Can the requirement, under the above sec. 14, that "the publication was in the public interest" not be met when legal proceedings are pending in the matter that is the subject of the publication?
>
> (c) Can a journalist, as a journalist, enjoy the defense under sec. 15(2) of the Defamation Law, 5725-1965, and if so, under what conditions?

Pursuant to that, the parties submitted supplementary pleadings, and a hearing was held before us. Following are the main arguments of the parties.

…

Justice Rubinstein

…

On Defamation in the Jewish Law Ethos

3. Before doing so, I would first recall where, in my opinion, the historical ethos of Jewish law stands in this area – as we are a Jewish and democratic state, and Jewish law holds an important place among the sources of Israeli law, see: AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW, 452-453 (2003) (Hebrew) [English: AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW, (Princeton: Princeton University Press, 2005)]; AHARON BARAK, THE JUDGE IN A DEMOCRACY, 290 (2004) (Hebrew) [English: AHARON BARAK, THE JUDGE IN A

DEMOCRACY, (Princeton: Princeton University Press, 2006)]; and see my article, "*Malkhut Yisrael Le'umat Dina deMalkhuta*," 22 (2) MEKHKAREI MISHPAT 489, 496-498 (Hebrew). No proof is required of the fact that our exposure to various kinds of electronic and virtual communication, including television, radio, internet, in addition to the print media, is tremendous, unforeseen by our predecessors, and continuously growing. What seemed like high waves before the internet age, is now an unfathomable ocean and a rising spring. It is an appropriate time for a brief study of the approach of Jewish law and halakha to defamation, and further on, I will return to the Jewish law approach to the defenses. I would first note that Jewish law served as one of the sources of the Defamation Law, 5725-1965, see the Defamation Bill, 5722-1962, *H.H*. 504 (5722) 142, 145, 147; and see: LCA 531/88 *Avneri v. Shapira*, IsrSC 42 (4) 20, 25-26; and see: N. RAKOVER, JEWISH LAW IN KNESSET LEGISLATION, 631-639 (1988) (Hebrew), and the references there. The late Professor Elon noted that "this is an example of a respected halakhic institution that served as inspiration for legislation in the criminal field, not in terms of its details, but rather in terms of its general approach" (M. ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES, 1380 (1973) (Hebrew) [English: M. ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (Jewish Publication Society, 2003)]).

Indeed, much of what is openly declared in public is protected by Israeli law as part of freedom of expression, or under other defenses provided by the Defamation Law. Even if that does not mean that a person whose reputation is tarnished has no legal remedy – and there are no few possibilities under the Defamation Law – still, especially where the media is concerned, those remedies are becoming fewer and fewer as a result of judicial interpretation. Jewish law is meticulous in regard to a person's dignity – human dignity, and respect for a person in the plain sense – including in regard to one's reputation, and thus its view of disparagement is more extreme than that of the Defamation Law. Its rules concerning defamation form a significant chapter, and the District Court addressed this in the matter before us, in the context of "constructive defamation", as I shall explain.

4. The Hafetz Hayim, Rabbi Yisrael Meir Hakohen of Radun, a leading Jewish personage in Russo-Poland in the 19th-20th centuries, until his death in 1933, and author of the books *HAFETZ HAYIM* and *SHEMIRAT HALASHON* placed the subject of *lashon hara* [literally: "evil speech", i.e., defamation –trans.] at the center of his toraitic works (he would also write the *MISHNE BERURA*,

which may be described as the authoritative commentary to the *SHULHAN ARUKH: Orah Hayim*, and more) and endeavors. His book *HAFETZ HAYIM* (which was initially published anonymously in the early 1870s) presents the rules of *lashon hara* in comprehensive detail, while his book *SHEMIRAT HALASHON*, which compliments it, and which was published in the latter half of the same decade, provides aggadic [non-halakhic, rabbinic exegetical texts – trans.] sources and moral insights in regard to the prohibition of defamation and rumor mongering. At the beginning of his book *HAFETZ HAYIM*, [literally: "Desires Life" – trans.], which draws its name from the verses "Which of you desires life, and covets many days to enjoy good? Keep your tongue from evil, and your lips from speaking deceit. Depart from evil, and do good; seek peace, and pursue it" (Psalms 34:13-14), the author lists seventeen negative commandments, fourteen positive commandments, and four instances of "cursed be" that a person may transgress in the framework of *lashon hara* and gossip. *HAFETZ HAYIM* examines the laws of *lashon hara* and gossip in detail, and provides an accompanying commentary ("*Be'er Mayim Hayim*"), while *SHEMIRAT HALASHON* [lit. "Guarding the Tongue" – trans.], whose title is a reference to the verse "He who guards his mouth and tongue, guards himself from trouble" (Proverbs 21:23), completes it, thus constituting an indispensable pair of compositions for anyone who seeks to observe the halakha in this area (many summaries have been written over the years, e.g., *Ikarei Dinim* by Rabbi Shmuel Huminer). The Hafetz Hayim deemed guarding one's tongue as possible, despite the widespread phenomenon of defamation, or at least of "quasi-defamation" ["*avak lashon hara*", literally "dust – i.e., a "tinge" or "trace"— of *lashon hara*"—trans.] and gossip, on the presumption that the Torah does not impose obligations and prohibitions that cannot be observed.

5. The primary, direct prohibition in the Torah is to be found in the verse "You shall not go up and down as a talebearer among your people: neither shall you stand against the blood of your neighbor" (Lev. 19:16). Rashi explains (*ad loc*.): "since all those who instigate disputes and speak *lashon hara* go into their friends' houses in order to spy out what evil they can see, or what evil they can hear, to tell in the marketplace". And as the Hafetz Hayim (Negative Commandments 1) explains, following Maimonides (*Hilkhot De'ot* 7:2): "Who is a gossiper? One who collects information and goes from person to person, saying: This is what so and so said about you, and this is what I heard that so and so did to you. *Even if the statements are true*, they bring about the destruction of the world. There is a much more serious sin than this, which is also included in this prohibition, which is *lashon hara*, that is also comprised by this

prohibition, and which is relating deprecating facts about another, even if he speaks the truth. But one who tells a lie, defames his colleague's good name" (emphasis added – E.R.). And further on (*Lashon Hara*, Principle 5:2), the Hafetz Hayim states: "And needless to say, if the matter is false or partly true and he exaggerates it more than it is, this is surely a very great sin, which is more severe than plain *lashon hara*, and it is in the category of defaming a person's name, because he humiliates his friend by his lies. Even if it is the absolute truth, all the Rishonim [halakhic scholars active in the 11th-15th centuries, prior to the publication of Joseph Karo's *SHULHAN ARUKH* – trans.] have established that … it is *lashon hara* even if it is true". This is intended to remind us that we are not concerned with a solely moral issue, as one might mistakenly imagine, but rather with a clearly halakhic issue. And note that the Torah compares gossip, which is the lowest level in the laws of defamation, to standing "against the blood", and no less, and that *lashon hara* is prohibited even if true, and thus Jewish law is, as noted, more strict than the prevailing Israeli law.

The Gemara (TB Arakhin 15a-b and 16a-b) addresses *lashon hara*. The Mishna that is the basis for the discussion (15a) states: "Thus we also find that the judgment against our ancestors in the wilderness was sealed only because of their evil tongues, as it is written: you have tried me these ten times … (Numbers 14:22)." Those words referred to the affair of the ten spies who spoke ill of the Land of Israel, and R. Eliezer b. Perata says (*ibid.*), "Come and see how great the power of an evil tongue is. Whence do we know? From the spies [the spies that Moses sent, and who spoke ill of the Land of Isral – E.R.]: for if it happens thus to those who bring up an evil report against wood and stones, how much more will it happen to him who brings up an evil report against his neighbor". We also find there: "Of him who slanders, the Holy One, blessed be He, says: He and I cannot live together in the world" (*ibid.*, 15b). And on the verse "Death and life are in the power of [literally: "in the hand of" – trans.] the tongue" (Proverbs 18:21) the Talmud states (*ibid.*): "Has the tongue a hand? It tells you that just as the hand can kill, so can the tongue … One might say that just as the hand can kill only one near it, thus also the tongue can kill only one near it, therefore the text states: 'Their tongue is a sharpened arrow' (Jeremiah 9:7) [in other words, lashon hara reaches and causes harm even at a distance – E.R.]".

The Sages also said that all are guilty of "*avak lashon hara*" ["the tinge of defamation" – trans.] (TB Bava Batra 165a), in other words, no one (or at least, almost no one) is entirely innocent of *lashon hara*. Pursuant to the Gemara in Arakhin (*ibid*.), Maimonides states (*Hilkhot De'ot* 7:3): "Our Sages said: There are three sins for which retribution is exacted from a person in this world and he is denied a portion in the world to come: idolatry, forbidden sexual relations, and bloodshed, and *lashon horah* is equivalent to them all … Our Sages also said: *Lashon hara* kills three, the one who speaks it, the one who listens to it, and the one about whom it is spoken. The one who listens to it more than the one who speaks it." Maimonides is of the opinion that transgressing this prohibition may lead to bloodshed – "A person who collects gossip about a colleague violates a prohibition, as it says: Do not go around gossiping among your people. And even though this transgression is not punished by lashes, it is a severe sin and can cause the death of many Jews. Therefore, it is placed next to: Do not stand against your neighbor's blood …" (*Hilkhot De'ot* 7:1; and see: *SEFER MITZVOT GADOL* (R. Moses b. Jacob of Coucy, France, 13th cent.) Prohibitions 9). According to *SEFER HAHINUKH* (R. Aaron Halevy of Barcelona, 13th cent.), the justification for the prohibition is that "God wishes the good of His creations, and instructed us by this that there should be peace among us, because gossip leads to dispute and strife" (*ibid*., Commandment 236), in other words, preventing arguments and disagreements in society, and see: I. WARHAFTIG, THE RIGHT TO PRIVACY IN JEWISH LAW, 233-235 (2009) (Hebrew); S. Aharoni-Goldenberg, "On-Line Privacy from Jewish Law Perspective," 52 (1) HAPRAKLIT 151, 162-164 (2013) (Hebrew). On *lashon hara*, also see my article *Bad Reports – On the Continuing Struggle for the Dignity and Good Reputation of Others*, *PARASHAT HASHAVU'A BERESHIT* (A. Hacohen & M. Vogoda eds.), 211 (Hebrew), also published in my book PATHS OF GOVERNMENT AND LAW, 336 (2003) (Hebrew); N. Sohlberg, *On Lashon Hara, "Lashon Tova", and Damages – Money isn't Everything*, *ibid*., *Vayikra* 117 (Hebrew); M. Vigoda, *Do Not Stand Upon Your Neighbor's Blood – The Duty to Rescue and its Limits*, *ibid*., *Vayikra* 150, 151 (Hebrew); N. Sohlberg. *The Right to Reputation – Freedom of Expression and Defamation for a Constructive Purpose*, *ibid*., *Bemidbar* 59 (Hebrew); M. Vigoda, *How Beautiful are Your tents O Jacob – Privacy and Freedom of Expression*, *ibid*., 208 (Hebrew); RABBI Y. UNGER & PROF. Y. SINAI, EXPOSING THE IDENTITY OF A SUSPECT BEFORE FILING AN INFORMATION, (Center for the Application of Jewish Law, Netanaya Academic College, Elul 5774).

6. In his monograph THE DEFENSE OF PRIVACY (2006) (Hebrew), Professor Rakover notes that "anything that can cause a person sorrow falls within the scope of *lashon hara*, even if it is not denigrating in any way" (p. 31). He adds that "a broad definition of the prohibition of gossip and *lashon hara* can even comprise a violation of a person's privacy, inasmuch as every person is sensitive to intrusions into his personal life, and does not consent to his private matters being in the public domain" (*ibid*., p. 32).

In his well-known letter, R. Elijah of Vilna wrote that "…as our Sages said (Tosefta Pe'ah 81), the sin of *lashon hara* in its entirety … 'and *lashon hara* is equivalent to them all', and what need is there for me to elaborate on this sin that is the worst of all transgressions".

In his writings, the Hafetz Hayim went above and beyond, and as R. Israel Salanter, one of the founders of the Musar Movement, wrote of him, "he took … one Torah verse, and created an entire *Shulhan Arukh* around it". And note that that Hafetz Hayim's approach did not oppose freedom of expression, but rather sought to combat its abuse, with deep understanding of the complexity of the human experience, but in his view "the prohibition upon *lashon hara* is so great that the Torah prohibited it even in regard to the truth and in every form …" (*HAFETZ HAYIM*, Principle 3:16). Moreover, according to him – and let us think of the media in this regard – "the greater the number of listeners, the greater the sin of the speaker (*HAFETZ HAYIM, Hilkhot Issurei Lashon Hara*, Principle B:1). Thus, as noted, Jewish law goes to the extreme.

7. In a eulogy of the Hafetz Hayim, one of his students said that "his circumspection in speaking was beyond human understanding … and he never made any expression of anger or even *avak lashon hara*…" (quoted in Rabbi Israel Joseph Bronstein, *HANHAGOT HAHAFETZ HAYIM*, 279 (5767) (Hebrew)). Many stories are told of him, like, for example, that he went so far as to refuse to stay in a home in which he heard *lashon hara* (*ibid*., 280-281). His son-in-law, Rabbi Menachem Mendel Zaks, related that "he told me several times, 'Thank God that I was always careful in regard to *avak lashon hara*'" (*ibid*., 280). In other words, the Hafetz Hayim lived as he preached. Rabbi Yehudah Segal of Manchester, one of the most ardent activists for distributing the book *HAFETZ HAYIM*, said that a person who is circumspect in his speech acquires the Hafetz Hayim as his advocate. No less.

Indeed, Jewish history is full of incidents in which *lashon hara* "killed" people. For example, Rabbi Meir Leibush Wisser, the Malbim (1809-1879), was forced to leave his position

as Chief Rabbi of Romania when a public smear campaign depicting him as a dark, boorish character, and the enemy of progress and Jewish integration in general society led to his dismissal. Rabbi Jonathan Sacks (former Chief Rabbi of the United Hebrew Congregations of the Commonwealth) wrote in *The Plague of Evil Speech* (*Metzorah*, 5768) [http://rabbisacks.org/covenant-conversation-5768-metsorah-the-plague-of-evil-speech/]:

> For a people of history, we can be bewilderingly obtuse to the lessons of history … Jews have continued to excoriate, denounce, even excommunicate those whose views they did not understand … Of what were the accusers guilty? Only evil speech. And what, after all, is evil speech? Mere words …Words wound. Insults injure.

The number of people now studying the Hafetz Hayim's books *HAFETZ HAYIM* and *SHEMIRAT HALASHON* has increased. It would seem to me that even if it is difficult to completely free ourselves of *lashon hara* in a world like ours in which the possibilities for expressing *lashon hara* are so great, and so many are harmed for no reason, and only the rare few can succeed, we may still benefit from its study. In my opinion, contending with this is, in sum, the challenge before the Court in this case as in other defamation cases, and the question is whether or not we will contribute to creating a more decent, moderate society.

8. In addition, the prohibition upon causing embarrassment is another aspect of protecting a person's reputation. Of this it was said that a person who embarrasses his fellow in public has no place in the world to come (Mishna Avot 3:11), and "when a person who embarrasses his fellow in public, it is as if he has shed blood" (TB Bava Metzia 58b), and it is also said that "It is better for a man that he should cast himself into a fiery furnace rather than that he should put his fellow to shame in public" (TB Berakhot 43b). And see: THE TALMUDIC ENCYCLOPEDIA, vol. 9, *s.v. Halbanat Panim*; and see: A. Cohen, *Have Everyone withdraw from Me*, *Parashat Hashavua* (5767) 273 (Hebrew). However, despite the great weight and importance attributed to reputation, even the prohibition upon *lashon hara* in Jewish law is not absolute, and as the Hafetz hayim states in the preface to his book *HAFETZ HAYIM*, if the approach were absolutely strict "it would not be possible to live in this world in this regard, without entirely withdrawing from worldly matters". Even in Jewish law, the laws of defamation do not exist in a vacuum, and there may be

cases – exceptions – in which the prohibition upon publishing *lashon hara* will retreat before other vital interests.

On Freedom of Expression in the Jewish Law Ethos

9. Jewish law indeed recognizes the great importance of freedom of expression against the government, and as Deputy President Elon pointed out: "The prophets of Israel and their prophecies have long served as the paradigm of impassioned and uncompromising rebuke of governmental abuse of might and power, and of a corrupt public or individual. They condemn oppression of the poor and exploitation of the widowed, the repression of individual and community rights, and deviation from the spirit and substance of the Torah and halakha. The firm stand and struggle of the prophets of Israel, even when they evoke severe and angry reactions, has been an inexhaustible source of inspiration in the struggle for freedom of expression and for contemporary enlightened democratic regimes" (EA 2/84 *Neiman v. Chairman of the Central Elections Committee*, IsrSC 39 (2) 225, 294 [English: http://elyon1.court.gov.il/files_eng/84/020/000/Z01/84000020.z01.pdf]; and see CFH 7383/08 *Ungerfeld v. State of Israel* (2011)), paras. 2-3 of my opinion; A. Cohen, *Jewish Law and Freedom of Expression*, *Parashat Hashavua* (5765) 205 (Hebrew); H. Cohn, *On Freedom of Opinion and Speech in Jewish Law*, *Parashat Hashavua* (5762) 78 (Hebrew)). Here is but one example from among many. In the first chapter of his book, the prophet Isaiah, incisively criticizing the rulers of Jerusalem, states: "Hear the words of the Lord, you chieftains of Sodom … devote yourselves to justice, aid the wronged, uphold the rights of the orphan, defend the cause of the widow … Your rulers are rogues, and cronies of thieves, every one avid for presents and greedy for gifts; they do not judge the case of the orphan, and the widow's cause never reaches them" (Isaiah 1:10, 17,23). Harsh criticism, without fear. In LCrimA 10462/03 *Harar v. State of Israel*, IsrSC 60 (2) 70, 92 (2005), I stated that "the idea of freedom of expression is not, in my opinion, conceptually at odds with the approach expressed in Jewish sources in regard to euphemistic language". However, despite the importance that Jewish law attributes to freedom of expression, there is no denying that the default position – when *lashon hara* is concerned – is refraining from publication, except in exceptional cases in which the *lashon hara* is intended to be constructive, to which I will return. Indeed, in our world, refraining from publication is an

impractical utopia, but with the help of the courts, it is possible to restrict *lashon hara*, except when it is constructive, and not broaden it.

…

25. As noted, the judgment that is the subject of the Further Hearing held that the rule established in the *Ha'aretz* case should be changed. It was held (para. 26 of the opinion of Justice Vogelman) that "the phrase 'moral or social duty' that appears in sec. 15(2) of the Law is an 'open canvas' to which the Court must give meaning in accordance with the proper balance among the conflicting rights, values and considerations", and that the *Ha'aretz* rule "no longer reflects the proper balance between freedom of expression and freedom of the press, and the right to dignity, reputation and privacy". It was further stated that the proper solution "is protection of *good-faith* publication by the media that is of a *significant public interest*, when it is a publication that meets the strict standards of *responsible journalism*" (emphasis original). This holding was based, as arises from what I stated above, primarily upon a change in the conception "in regard to the status of freedom of expression in Israeli law, which has been recognized as being of constitutional status" (para. 5 of the opinion of Justice Vogelman), and the change that has occurred in England and the Common Law countries in regard to the application of the "obligation to publish" in regard to factual publications in the media (para. 14). Deputy President Rivlin noted (para. 119) that in view of this conceptual change – in the context of which freedom of expression was recognized as being of constitutional supra-legal status, together with the recognition of the importance of the free press – the *Ha'aretz* rule has largely become obsolete. In the view of Justice Amit (para. 17 of his opinion), the change of the rule is required in view of the "changing times, and the vicissitudes that have taken place over the last decades, both on the normative-legal plane and in the communications media". That is, essentially, also the view of the President and those who concur with him in the Further Hearing.

26. *With all due respect, I take a different view*. I am of the opinion that even the changes and vicissitudes that have occurred in the world do not justify a change of the *Ha'aretz* rule, and it would not be superfluous to say that the force of the matter before us – defamation of an IDF officer in a case concerning nothing less than human life – is more serious than the situation in the *Ha'aretz* case, as described, without taking that affair lightly. I am, as stated, of the opinion that even in the balance between a person's – any person – right to his good name and freedom

of expression, the latter should not be preferred *a priori*. The grounds for my position are to be found in the exalted value of human dignity, which has been raised to the level of a Basic Law over two decades ago. Human dignity, and a person's right to his reputation are also related to the approach of Jewish law to *lashon hara*, as described above. In my opinion, the rule established in the judgment that is the subject of this Further Hearing, and that arises from the opinions of my colleagues in the Further Hearing, may lead – even though this is clearly not the intent – to the trampling of the dignity and reputation of a person, to a "doormat", as Justice E. Goldberg put it in CFH 7325/95 *Yediot Aharonot Ltd. V. Krauss*, IsrSC 52 (3) 1, 106 (1998) (hereinafter: CFH *Krauss*). I will now turn to address the balancing of interests and rights in the Defamation Law – the right to one's good name on one side, and freedom of expression and freedom of the press on the other. But before proceeding, I would note that in my opinion – absolutely clearly – the *Ha'aretz* rule should not be viewed as being "archaic". Is it archaic to hold that in the legal framework of defamation, the purpose of the press, as important as it may be, does not rise to the level of a duty that permits telling a falsehood? My colleagues who are of that opinion surely refer to the strengthening of the status of the media and to developments in the general and legal world. But do values that hold fast to the remnants of reputation and defend human dignity in its *plain* sense belong in the archives? I do not think so. The justices of the Supreme Court in the sixties and seventies were not conservative dinosaurs that could not see the light. The strengthening of the media does not imply a weakening of the need to insist upon the truth. There are values that are steadfast, for what have not changed at all in the last forty years are the nature and the errors of humanity, which remain as they were since Creation, while the means have become more developed, and what was once available only to the relatively few, now spreads like a brush fire in the electronic and virtual world.

…

30. On the other side of the scales is freedom of expression, the importance of which is undeniable. Freedom of expression is one of the central, most important values of a democratic regime. It has been described as a "superior right" (HCJ 73/53 *"Kol Ha'am" Company Ltd. v. Minister of the Interior*, IsrSC 7 (2) 871, 878 (1953) [http://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior]), and as the "apple of democracy's eye" (CrimA 255/68 *State of Israel v. Ben Moshe*, IsrSC 22 (2) 427, 435 (1968)). Thus it was prior to the enactment of Basic

Law: Human Dignity and Liberty, and so it is thereafter (see, among many, the *Szenes* case [HCJ 6126/94 *Szenes v. Broadcasting Authority*, IsrSC 53 (3) 817, [http://versa.cardozo.yu.edu/opinions/szenes-v-matar]], at pp. 828-830, para. 9 of the opinion of Barak P.); the *Ben Gvir* case [LCA 10520/03 *Ben Gvir v. Dankner* – trans.], at para. 13 of the opinion of Procaccia J). For my part, I had the opportunity to point out that "freedom of expression is a supreme right of a citizen in a democratic society, in order to free the human spirit, and combat tyranny and silencing opinions, to facilitate public discussion in the marketplace of opinions, to help liberty conquer oppression and totalitarianism" (LCrimA 10462/03, above, at p. 90). Of course, first and foremost is its importance for criticizing government.

31. Freedom of the press derives from freedom of expression (CA 723/74 *Ha'aretz Newspaper v. Israel Electric Corporation*, IsrSC 31 (2) 281, 298 (1977) [http://versa.cardozo.yu.edu/opinions/haaretz-daily-newspaper-ltd-v-israel-electric-corporation]). This Court has addressed the importance of freedom of the press in many decisions. Thus, for example, in CFH *Krauss*, at p. 53, Justice Zamir wrote that "a free press is not only a necessary result of democracy, but a necessary condition for democracy. It is a necessary condition for a representative regime, for good, proper governance, and for human rights. In practice, it can serve as a litmus test of democracy: if there is a free press – there is democracy; if there is no free press – there is no democracy. One of the main tasks of the press in a democracy is to continuously and efficiently monitor all of the state institutions, first and foremost the government". In LCrimA 761/12 *State of Israel v. Makor Rishon HaMeuhad (Hatzofe)* (2102) [http://versa.cardozo.yu.edu/opinions/state-v-makor-rishon-hameuhad-hatzofe-ltd] (hereinafter: the *Makor Rishon* case)), I wrote: "The press is meant to function as the long arm of the public, and is charged with gathering and publicizing information; the free exchange of opinions is a fundamental condition for a democratic society … A democracy that wishes to enjoy ongoing public debate and discussion of national issues cannot be satisfied with freedom of expression that exists only in theory; the state authorities, including those involved in the criminal and administrative fields, must limit the exercise of their powers, in order to enable the practical exercise of the constitutional right" (para. 73). However, as I noted in my article *Stains in the Press* (Hebrew), "The problems in the field of freedom of expression that now face us are different from those we have become accustomed to confronting in the past. Today, the

competition is not – primarily – between the right to freedom of expression and governmental interests for which the government wishes to limit that right. Today, we can say that in the relationships between the individual and the government, freedom of expression has attained an established status in our society and legal system. The historical fear of government that tyrannically shuts mouths is no longer – not in the electronic media (ever since the Broadcasting Authority Law), nor in the print media. The power of censorship has been reduced incredibly in the era of Basic Laws, and even enforcement in regard to the exposure of secrets is quite rare" (pp. 199-200). Who can seriously say that there is no freedom of the press in Israel? Indeed, criticism of the government is rooted in our national ethos. As noted, the Prophets of Israel raised their voices against the government, and even with the reservation, i.e. that the Prophets spoke as God's mouthpiece and not of their own (see: A. Hacohen, *On the Principles of Freedom of Expression and its Limits in Jewish Law*, *Parashat Hashavua Vayikra* 137, 136), in any case, criticism of the government is not like criticism of an individual. And as Prof. A. Barak wrote (HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND ITS DAUGHTER RIGHTS, vol. 2, p. 723 (2014) (Hebrew), [published in English as HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (2015)], "…the scope of the individual's right of expression against the state is more comprehensive than an individual's right to freedom of expression against another individual"; and see *ibid*., 588-599: "an individual's right too human dignity in regard to the state differs from that individual's right to human dignity in regard to another individual. Against the state, the individual's right to human dignity applies in to the full extent of the ideal it is meant to achieve. But against another individual, the individual's right is subject to a process of balancing and limiting in view of its engagement with other constitutional rights or the public interest"; and see Justice Sohlberg's opinion in CA 8954/11 *Anonymous v. Anonymous* (April 4, 2014), para. 122. Indeed, in these contexts, Jewish law, at the very least, sets boundaries for freedom of speech, as A. Hacohen describes in the aforementioned essay, and see the references there.

…

40. Thus, Basic Law: Human Dignity and Liberty expressly established human dignity, including the right to reputation, as a constitutional right, and in my opinion, the time has come

to reexamine the balance struck prior to the Basic Law in the *Avneri* case, so as to reinforce reputation. The clear, express words of Basic Law: Human Dignity and Liberty cannot remain merely declaratory, and remain without practical effect. The Court is required to defend human rights, rights that include the right to one's good name. It must stand up to the erosion of human dignity not only in respectful, beautiful words. In other words, it must ensure that every woman and man know that a person's good name is not a doormat. Once the legislature established – in express words, and by all that is holy, and no one can possibly argue that a person's dignity does not, first and foremost include his reputation – that a person's right to a good name is a constitutional right, we must give that real, practical content. In my opinion, real content in the context with which we are concerned – the laws of defamation – would mean changing the balance, and returning to the balance rule established in the Further Hearing in the *Electric Corporation* case, i.e., freedom of expression should not be deemed a superior right that stands above the right to a good name, but on the contrary, where there is doubt, it would be better *to err in favor of a good name.* I would stress that I have no desire to harm freedom of expression and freedom of the press, which are held undisputedly high in Israeli law and reality. On the contrary, I hold them in high regard. They have a very important role in protecting democratic society, and I am the last who would not contribute to that. However, in my opinion, "freedom of expression is not an unbounded, theoretical concept. The prohibition of defamation is one of the significant boundaries, and the question is how to interpret defenses and licenses in regard to defamation. I believe that Basic Law: Human Dignity and Liberty should play a part in that" (LCA 1104/07 *Hir v. Gil* (2009), para. 29 of my dissent). "Freedom of the press also applies to biting journalism, but that does not mean that the freedom is unlimited … the basic presumption of freedom of the press is also responsible journalism. A person's good name is not at forfeit" (the *Makor Rishon* case, para. 73). The approach protecting a person's good name is my consistent approach, even when I am in the minority (see my opinion in LCA 4447/07 *Mor v. Barak E.T.C.* (1995) (hereinafter: *Mor v. Barak*). A person's good name is a constitutional right of the highest order, and as such, we are required to accord it its rightful place. This is particularly the case when we are speaking, as in this case, of a suit concerning a story/report that has been published, and not – as was the case in in the *Avneri* case – a restraining order to prevent publication (on the distinction between preventative relief and retroactive sanctions in these contexts, see CA 409/13 *Keshet Broadcasting Ltd. v. Cooper* (April 11, 2013) para. 16 of

the opinion of Grunis P.). I would reiterate that, in my opinion, freedom of expression, which is necessary for the oversight of governmental authorities (as see, *inter alia*, RE'EM SEGEV, FREEDOM OF EXPRESSION AGAINST GOVERNMENTAL AUTHORITIES (Israel Democracy Institute, 2001), is not, as noted, identical – and certainly not necessarily so – to freedom of expression against a person who is not a governmental personage, and see para. 31 above. Indeed, Israeli law protects untrue publications when there is a legal *obligation*, no less, to publish them (sec. 15(2) of the Defamation Law). Has *freedom* of journalistic expression attained the level of an *obligation* that permits untruth and defamation? In my view, it has not. Before explaining why, in my opinion, a journalistic obligation should not be read into sec. 15(2), I will present the Jewish law approach to constructive *lashon hara* (which, in some cases, may attain the level of an obligation).

Constructive Lashon Hara

41. Indeed, there are possible situations in Jewish law in which refraining from *lashon hara* may cause harm, and the prohibition upon *lashon hara* is overridden in such situations due to the attendant benefit: "And know that in interpersonal matters, such as *gezel* [theft], *oshek* [exploitation], *nezek* [damage], *tza'ar* [suffering], and *boshet* [shame], and *ona'at devarim* [verbal deception], one may inform others, and even a pious individual will tell, in order to help the guilty party, and from a devotion to truth" (*SHA'AREI TESHUVA* by R. Jonah b. Abraham Gerondi (Spain, 13th cent.) 3:221); "Along with His [God – E.R.] command against gossip, came the proviso that you shall not stand against your neighbor's blood, so that if one see that a group wishes to commit murder, he must inform the interested party in order to save his life, and should not think that this is gossip, as if he does not tell his fellow and he is killed, the warning of you shall not stand is abrogated, etc. We can learn from the story of Gedaliah ben Ahikam (Jeremiah 40) who was told, but when he did not heed, what happened (that is, Gedaliah ben Ahikam was warned that he was in danger, but he did not believe the warning, and was ultimately murdered – E.R)]" (and see: *OR HAHAYIM* (R. Haim ibn Atar, a.k.a. Or HaHayim HaKadosh, 17th-18th cent.) *Vayikra, Kedoshim* 19:16 (Hebrew)). It would seem that in such circumstances, the case of Gedaliah ben Ahikam raises the matter to the level of a duty.

42. The Hafetz Hayim ruled that "if someone witnessed another person harming his fellow, by theft or exploitation, or injury – whether or not the victim of the theft or the harmed person is aware of the damage or theft or not – or by shaming, or causing him suffering, or exploiting him, and the witness knows that the offending party did not return the theft, pay damages, or request forgiveness, etc., even if he was the sole witness, he may discuss the incident with others in order to help the guilty party and also to publicly denounce such evil behavior. However, he must take care that the seven conditions that follow are met" (*HAFETZ HAYIM, Hilkhot Lashon Hara* 10:1), that is, conditions were established in order to limit the possibility of unnecessary harm. The Hafetz Hayim warns (*ibid*., 15): "Now see, my brother, how carefully one must weigh how to relate the matter. For when he speaks he is in grave danger of transgressing the laws of *lashon hara*, if he is not careful in regard to all the details". In THE RIGHT TO PRIVACY IN JEWISH LAW (p. 244), the learned Dr. Itamar Warhaftig summarizes the Hafetz Hayim's provisos for permitting *lashon hara*: the speaker must carefully weigh whether harm may be caused; must not exaggerate, i.e., not make the wrong appear greater than it was; that his intention be only to help; that he must make sure that there is a reasonable possibility that his actions will, indeed, be helpful; that there is no alternative for preventing the harm; that his words will not cause substantive harm to the person about whom he tells *lashon hara*; and that what he says is in regard to what he has clear knowledge, and not hearsay (in greater detail, see: *HAFETZ HAYIM, Hilkhot Lashon Hara*, Principle 10, and *Hilkhot Rechilut*, Principle 9 (Hebrew)); And see: RABBI Z. GREENWALD, *TAHARAT HALASHON – MADRIKH LEHILKHOT LASHON HARA UREKHILUT*, 109 (Hebrew) [English: ZE'EV GREENWALD, TAHARAS HALAHON – A GUIDE TO THE LAWS OF LASHON HARA AND RECHILUS (David Landesman, Trans.) (Feldheim, 1994)]. For further reading on the provisos, see N. Sohlberg, *A Person's Right to Good Name, Freedom of Expression and Constructive Lashon Hara*, *PARASHAT HASHAVUA* 29 (5761) 29 (Hebrew)). Constructive *lashon hara* may serve educational purposes, or deterrence from the commission of offenses, under the above conditions (also see: RABBI Y. UNGER & PROF. Y. SINAI, EXPOSING THE IDENTITY OF A SUSPECT BEFORE FILING AN INFORMATION (para. 5, above). For my part, I would stress the proviso that permission is granted in a situation in which *lashon hara* may be constructive, "but if in his estimation it will certainly not be of benefit … even if all the details are verified, it is still forbidden to say anything" *HAFETZ HAYIM, Hilkhot Lashon Hara*, Principle 10:4).

43. The learned Prof. N. Rakover (ON LASHON HARA AND ITS PUNISHMENT IN JEWISH LAW (5722) (Hebrew)) gives several examples of exceptions to the prohibition of *lashon hara* for constructive purposes: telling *lashon hara* in order to save the victim, and *lashon hara* out of a commitment to truth; telling *lashon hara* to prevent damage; telling *lashon hara* by means of a complaint; telling *lashon hara* about a recidivist offender. According to him, "There are occasions when a person may relate the matters, and may even be obliged to make them public. Such situations also provide the framework for a legal, moral or social obligation to publish *lashon hara*"; see additional examples in WARHAFTIG, pp. 244-258, and see Rabbi M. Bareli, *Publishing Lashon Hara about Elected Officials*, 33 TEHUMIN 136 (5773) (Hebrew), according to whom there may even be an assumption of forgiveness for the publication of criticism of elected officials, since there would appear to be implied consent on their part, provided that there is benefit in the publication (and see the conflicting view of Dr. I. Warhaftig, *ibid*., p. 149); on the problematics, also see Rabbi A. Katz, *Lashon Hara in Public Databases and Archives*, 27 TEHUMIN 180 (5767) (Hebrew)).

44. Thus, there may indeed be cases in which permission to convey *lashon hara* may become an *obligation* – an *obligations of expression*. In general, this is the case in which telling *lashon hara* is necessary to save another person from harm or injury. Maimonides ruled: "Whenever a person can save another person's life, but he fails to do so, he transgresses 'Do not stand against the blood of your neighbor'. Similarly, when a person sees another drowning at sea or being attacked by robbers or a wild animal, and he can save him himself or can hire others to save him, but does not save him, or he hears gentiles or informers conspiring to harm him or planning to entrap him, and he does not notify him of the danger, or when a person knows of a gentile or a belligerent man who has a complaint against another, and he can appease the aggressor on his behalf but he fails to do so, and in all similar instances, a person who acts thus transgresses the commandment: 'Do not stand against the blood of your neighbor'" (MAIMONIDES, *MISHNEH TORAH*, *Hilkhot Rotze'ah uShemirat Hanefesh* 1:14). We are not concerned only with saving lives, but also with preventing damage. Thus, the Hafetz Hayim ruled: "If one knows that his friend wishes to do something with someone else, and he believes that his friend would definitely incur some harm by this bad thing, he must inform his friend in order to save him from that harm" (Hafetz Hayim, *Hilkhot Rekhilut* 9:1), all subject to the aforementioned conditions.

45. Dr. M. Vigoda summarized the approach of Jewish law in his aforementioned essay "Privacy and Freedom of Expression," *PARASHAT HASHAVUA BEMIDBAR* 208, 214-215 (Hebrew):

> The scope of freedom of expression in matters concerning other persons is very limited, and exists only in regard to generic matters the exposure of which would not be likely to cause either emotional or monetary harm to the other. Inasmuch as such matters are very rare, it may be concluded that Jewish law severely restricts permission to reveal matters concerning another. As opposed to this, at times, it requires that a person reveal something whose non-disclosure is likely to cause harm to a third party. In such matters, we are not speaking of freedom of expression, but rather of an obligation of expression, inasmuch as in such situations, silence is wrongful.

…

On the Absence of Humility and Modesty

60. *Lashon hara* has a sister – arrogance. All the justices of the panel in the judgment that is the subject of this Further Hearing, each in his own way, addressed the message conveyed by the television program, which was presented most forcefully and absent any modicum of modesty. Indisputably, the media, printed, virtual, and particularly electronic – television – has tremendous power. "The medium is the message," said Marshall McLuhan. It is easy for the media to fall into the trap of "my own power and the might of my own hand" (Deut. 8:17), "I am, and there is none but me" (Isaiah 47:8), and the Bible also states (Psalms 36:12) "Let not the foot of the arrogant tread on me", and our Sages said (Ethics of the Fathers 4:4) "Be exceedingly lowly of spirit", and see (TB Sota 4b). Every human being is given to arrogance, particularly those whose words travel from one end of the earth to the other in a matter of seconds ("Sin crouches at the door" (Genesis 4:7). The opposite of this in Jewish morality and law is humility. Our Sages said: "What wisdom makes a crown upon its head, humility makes a heel beneath its sole (TJ Shabbat 1:3). In his book of morality *MA'ALOT HAMIDOT*, R. Yechiel b. R. Yekutiel b. R. Binyamin Harofeh (Italy, 15th-16th cent.) devotes a chapter to humility, and quotes the Sages: "What is the quality of humility? One with whom all are at ease, and anyone who is not arrogant towards others…" In his renowned letter, Nahmanides (R. Moses B. Nachman, Spain, 13th cent.) writes that humility is "the best of all qualities, as it is written: The effect of humility is fear of the Lord

(Proverbs 22:4)". R. Moshe Chaim Luzzatto (the "Ramhal", 18th cent.) devotes two chapters of his *MESILAT YESHARIM* to humility, as the opposite of arrogance, writing (chap. 22): "For it is wisdom that has a greater tendency to bring a person to arrogance and pride … while a person of common sense, even if he is a great genius, will observe and contemplate and realize that there is no place for pride and arrogance … This is the examination and contemplation that is proper for every person of common sense …then he will be called truly humble, when he is humble in his heart and being". Rabbi Yochanan said of God (TB Megilla 31a) "In every place that you find God's grandeur, you find His humility". On humility and arrogance in Judaism, see: BERAL WEIN & WARREN GOLDSTEIN, THE LEGACY, 78-80 (2012). At his swearing in ceremony (Feb. 21, 2012), our colleague Justice Zylbertal said: "As part of our duty to conduct ourselves with humility, we must recognize *error* as inherent to the act of judging. President Barak addressed this in his speech in a ceremony swearing in new judges: 'Only a judge who admits that he is not the epitome of perfection, but that like every human being, he too may err, can correct his judgement and thus approach perfection. Opposite the truth stands error – not lies – and recognizing error brings one closer to the truth' (A. Barak, On Law, *Judging and Truth*, 27 MISHPATIM 11 (5756)".

61. What is good for judges is also appropriate for the media. Of what relevance is this for the matter before us? I, too, am not of the opinion that the story reflected a lack of good faith. But it did reflect an exaggerated self-confidence that resulted in a lack of appropriate sensitivity for the Petitioner. "What is hateful unto you, do not do to your neighbor," said Hillel the Elder (TB Shabbat 31a). Respondent 1 should ponder how she would like to be treated herself. And the absence of amends for *lashon hara*, even after-the-fact, makes the problem worse. The words of the Deputy President in para. 123 of the judgment that is the subject of this Further Hearing are appropriate here, as well: "Indeed, some of Dayan's statements in the course of the broadcast were gratuitous, to say the least. It would have been better had she adopted a greater degree of self-restraint and modesty in view of the inherent problem in seeing the whole picture prior to the broadcast of the story". Modesty and humility are appropriate for us all.

62. In my article *Stains in the Press* (p. 204) I quoted Walter Cronkite, one of the greatest American television journalists of the last generation, who wrote in A REPORTER'S LIFE (p. 289): "Press freedom is essential to our democracy, but the press must not abuse this license. We must

be careful with our power. We must avoid, where possible, publicity circuses that make the right of fair trial a right difficult to uphold … Liberty and, no less, one's reputation in the community are terribly precious things, and they must not be dealt with lightly or endangered by capricious claims of special privilege." To which I added *(ibid*.): "Moderation is a good quality indeed, and it is also good for the press. I believe that there is nothing wrong if, a moment before publishing a story, the reporter and editor take a timeout to consider: Is the report sufficiently grounded to risk the harm that its publication may cause this person?" And further on I wrote (pp. 206-207): "… the duty to report on the basis of reliable, verified information, to report the truth, is a basic requirement that every journalist must observe. The public's right to know is not the end all, nor unrestricted. Trial by the press can lead to tragedy. This raises the issue of the responsible use of the nearly limitless power of the media. At times, one may observe this in terms of 'judge not others until you have stood in their place' (Ethics of the Fathers 2:4), when a journalist or editor is the victim of press reports, and his reaction reflects frustration just like that of any other person, as has happened".

…

64. I, of course, do not deny that there are also many responsible journalists, and I would not cast aspersions on the media in their entirety, which would, itself constitute *avak lashon hara* if not more than that. However, I am sure that when some members of the media read the majority opinion in this case, they will smile with relief, and express wonder at judicial naiveté.

65. My colleague Justice Hendel notes in regard to establishing a duty under sec. 15(2), that "if the journalist sets lying or deceiving as an objective, then clearly the good-faith defense will not serve him"(para. 6). Of course, and I too am of the opinion that the press must not be deterred from criticizing the government. But the question arises in those gray areas in which you – the reader – do not know the true story, while the journalist is aware of background that he does not publish, such that the product presented to the public is nothing but a half truth, which is worse than a lie. We should remember the "coddling" of a particular politician – a tactic that a well-known media personality openly recommended – that is, the "obligation" and the attendant truth are set aside in favor of a political interest, such that certain facts may intentionally be blurred so as not to harm a political objective. Are we acting responsibly when we make many presumptions to the benefit of the media, even to the point of an "obligation", when they are

accompanied by an inadequate ability to protect a person's good name, and it is swept under the rug? Does the life's breath of democracy justify that the individual, at times, be "knocked to the canvas"?

66. My colleague Justice Hendel (paras. 2 and 8) calls for developing an independent "Israeli approach". He does not explain what that might be. I would like to join him, but explain that, in my humble opinion, the ethos and culture of Jewish law argue for greater sensitivity to a good name than that resulting from this decision. Perhaps we should create a "good name *à la* Israel", a Jewish and democratic state. At this point, I will briefly state that I was glad to learn from my colleague of additional Jewish law sources in regard to constructive *lashon hara*, from which he attempts to show that even when journalistic publications comprise *lashon hara*, they may be beneficial in certain cases. The sources are alluring, but I fear that they are peripheral to the subject, and my colleague is aware that he raises questions that await answers, and in my opinion it would be difficult to attribute what may derive from his arguments to the core of Jewish law. The sources he presents are fascinating, but are peripheral, and I am very fearful of a slippery slope in the overall context. I would add that pursuant to reading my colleague's opinion, I read Rabbi Ari Shevet's interesting article *Newspapers and News – Obligation or Prohibition* (Hebrew), and I very much appreciated the many sources included there, and the lovely breeze – mixed with a positive innocence and "happy are those whose way is blameless" (Psalms 119:1) – that wafts from it in regard to the positive potential of journalism (as in the words of Rabbi Isaac HaKohen Kook that he quotes), and clearly, wise contemporary Torah scholars cannot ignore the media and their importance in our daily lives, although the Hafetz Hayim (in his book *ZECHOR LEMIRIAM*) warned not to waste time reading newspapers (in their then limited form, so what might we say nowadays). But when the author moves from the light to the shadows, his solutions – imposing a duty of care upon journalists – ultimately lead to the statement (para. 5 of the conclusion): "In the current format, it may be that journalists are to be 'deemed bearers of *lashon hara'*, and it is therefore better to listen to the news over the radio". And further: "Our suggestion is not, by any means, intended to detract from the severity of the prohibition upon gossip, *lashon hara*, and bearers of *lashon hara*. We must remember the words of the Pele Yoetz (R. Eliezer Papo, Greece-Bulgaria, 19th cent. – E.R.) (*PELE YOETZ*, s.*v. Lashon Hara*) that it is better to "flee through one hundred gates of permission so as to avoid entering one gate of prohibition". I am not naïve, and I am well aware of the power and ability of the media, but I do

not believe that opening the gate of "obligation" that arises from the majority decision will benefit reputation and basic human dignity, inasmuch as it comprises too many assumptions, as already detailed. It is easy to foresee the dangers, but will we merit "responsible journalism"?

67. Finally, my colleague Justice Danziger (para. 5) explains the need for distinguishing the expression of opinion and facts in the media. I agree with that distinction, even if our era is characterized by post-modern "narratives" that combine the two, such that it is sometimes difficult to distinguish.

Justice N. Hendel

…

An article published several months ago by the Columbia University School of Law addressed the relationship between freedom of speech and the state of mind or intent of the publisher. The question was raised as to the relevance of these to defamation. The author's answer was that the prohibition of defamatory speech is not meant to be absolute. Therefore, the system does not suffice in examining only the publication, but also examines various subjective aspects of the publisher. Moreover, and this is the important point for our discussion, emphasis was placed upon the chilling effect of over extending the prohibition of defamation. From this perspective, it is not enough to examine what was published, but also what would not be published if the law were more strict with the publisher – including the journalist (Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255 (2014); for an example that examines the matter empirically, see ERIC BARENDT, LAURENCE LUSTGARTEN, KENNETH NORRIE & HUGH STEPHENSON, LIBEL AND THE MEDIA: THE CHILLING EFFECT (1997)).

The position according to which the press would be endowed with the crown of a "social obligation" also imposes a duty upon the journalist. It is not a one-way street that benefits only the journalist at the expense of another publisher. A note must be paid on demand. And what is the demand? First, as my colleagues held, that the obligation relates to a publication that is of significant public interest, and not merely any public interest. In addition, legitimacy was given

to the demand that a journalist act responsibly – "responsible journalism" in the words of my colleagues. I will address these matters below.

In this context, I will briefly address the approach of Justice Rubinstein in regard to the relationship between the right to one's good name and freedom of expression. According to his approach, despite the importance of the latter, it is a lower level on the constitutional scale than the right to one's good name. For my part, I would add my voice to that of President Shamgar (FH 9/77 *Israel Electric Corp. Ltd. v. Ha'aretz Daily Newspaper Ltd*., IsrSC 32 (3) 337 (1978) [http://versa.cardozo.yu.edu/opinions/israel-electric-corp-v-haaretz]), and to that of Justice Rivlin in the appeal (para. 77), according to which, despite the importance of the two values, freedom of expression is principal. Both according to the approach of Justice Rubinstein and the opposing view, that does not mean that one of the rights "subsumes" the other in every collision. But the argument is of importance in borderline cases. My colleague is of the opinion that in a borderline case, the scales should tip in favor of protecting reputation. I disagree, and thus join the opinion of Justice Rivlin in the appeal, that "to the extent that there may be doubt in regard to whether disputed speech is protected, it is better to err on the side of freedom of expression and freedom of the press" (para. 79, citing Justice Harlan F. Stone).

I will permit myself to add that this argument is somewhat abstract. But the matter is neither abstract nor theoretical. Following the enactment of Basic Law: Human Dignity and Liberty over twenty years ago, it is, in my opinion, appropriate both for the development of Israeli constitutional law and practically, that such issues as these be considered. Moreover, as I explained in detail in the judgment in the matter of the Nationality Law, in the United States constitutional rights are categorized into three levels for the purpose of establishing the strictness of the required judicial review (HCJ 466/07 *Galon v. Attorney General*, para 4 (Jan. 11, 2012) [http://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary]). Lastly, the case before us comprises liminal elements, as the President pointed out in his opinion. The general view in regard to the proper balance between freedom of the press and the right to one's good name may, in my opinion, explain the different positions adopted in this Court and in the District Court. To illustrate the matter, even justice Rubinstein noted in his opinion that "I, too, am not of the opinion that the story reflected a lack of good faith". Thus, the dispute concerns the legal test –

the existence or non-existence of a social obligation – and not the professionalism of the publication.

As for my position in all that regards the constitutional hierarchy between the right to reputation and freedom of the press, I will suffice with a few comments. Indeed, "a good name is better than fragrant oil" (Ecclesiastes 7:1). But I would not go so far as to say that a good name and human dignity are one and indivisible (paras. 35-36 of the opinion of Justice Rubinstein). We are not speaking of alternative terms, despite the strong bond between them. That is not the main thing. As my colleague pointed out, the two competitors – good name and freedom of expression – do not expressly appear in Basic law: Human Dignity and Liberty. But they may be said to derive from human dignity (HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND ITS DAUGHTER RIGHTS, vol. 2, 616, 708 (2014) (Hebrew), [published in English as HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (2015)]. I would go one step further and say that freedom of expression – especially journalistic – has been recognized as a supra-legal basic right from the earliest days of our legal system. It was held that this right constitutes the source of other rights (the *Kol Ha'am* case, *ibid*.).

…

In Ireland, as opposed to Israel, freedom of expression appears in a somewhat circumscribed form. Thus, article 40.6.1 of the constitution establishes: "the State shall endeavour to ensure that organs of public opinion shall not be used to undermine public order or morality or the authority of the State". In Australia, there is no constitutional or statutory provision protecting freedom of expression, and it was the case law that developed the subject was (see, for example, in regard to freedom of political speech: *Australian Capital Television v. Commonwealth* (1992) 177 CLR 106; *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520). As opposed to this, in Canada freedom of expression expressly appears in sec. 2(b) of the Charter of Rights and Freedoms: "Everyone has the following fundamental freedoms: […] (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". This freedom is, of course, subject to the Reasonable Limits Clause (sec. 1). Canadian case law in this regard is most varied. Thus, I would note the *Zundel* case, which voided sec. 181 of the Canadian Criminal Code that prohibited knowingly publishing a false statement – e.g., denying the Holocaust – because the criminal prohibition improperly

violated freedom of speech (*R. v. Zundel* [1992] 2 S.C.R. 731). Lastly, in South Africa, freedom of expression is expressly anchored in sec. 16 of the constitution. The right is broad. Interestingly, one exception is incitement to imminent violence, and another is advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

I have presented the matter in a nutshell only to illustrate my view that we must act in accordance with an internal Israeli system, although I agree that examining the situation in foreign legal systems would enrich the discussion. I would add my personal view that much can be learned from the American legal system's approach to freedom of speech – which is very developed – and the relationship between it and the strength of democracy there is worthy of thought and admiration.

9. I would make two points in concluding my remarks on the term good faith. The President is of the opinion that in examining a journalist's good-faith defense, weight should also be given to the motivation for publication – for example, was the motive a desire for increased ratings or to publish a ringing scoop. The President is correct in that it is good that every professional examine his motives so that the desire for success not clash with the sanctity of the work. However, in my opinion, there is a long way between that and finding that considerations of ratings and scoops constitute a legal accessory for ascertaining good faith.

There is nothing new in saying that a person is a complex being. Often, a person's motives are mixed: they comprise both the desire to realize some proper, external objective, and the desire for personal success and advancement. The Sages of Jewish law were also aware of this, and observed that "the jealousy of scribes increases wisdom" (TB Bava Batra 22a). "The jealousy of scribes" and the natural desire to succeed more than others were deemed as means or catalysts for increasing Torah scholarship. In that context, Rabbi Mosheh Lichtenstein, Head of the Har Etzion Yeshiva, noted that King Solomon learned how to properly direct his personal ambitions, and devoted his exceptional talent to the building of the Temple (Mosheh Lichtenstein, *The Mishkan of God and the Mikdash of Shelomo* (http://ftp.vbm-torah.org/en/teruma-mishkan-god-and-mikdash-shelomo).

Against this background, I am of the opinion that the desire for personal advancement does not, in and of itself, testify to an absence of good faith. However, such an "egotistical

interest" may compromise the principle of good faith if expressed in other forms of conduct, for example, not properly checking sources of information. Only then will *those* other omissions catch the judge's eye in reaching a decision.

The other point concerns the disagreement between the President and Justice Vogelman in regard to the "geometric location" of the responsible journalism requirement. I will briefly state that I concur with the approach of the President that it would be better to examine this requirement in the framework of the good faith element, rather than in the framework of the obligation. That is primarily so as not to blur the difference between fulfilling the obligation and the manner of its fulfillment (and see para. 79 of his opinion).

…

E. *Jewish Law*

11. A unique characteristic of the Israeli Defamation Law is that it is rooted in Jewish law. Even the name of the tort [*lashon hara*] reflects this. But we should not suffice with that. Basic Law: Human Dignity and Liberty has achieved primacy in examining basic rights and conflicts between them. It defines Israel as a Jewish and democratic state. My colleague Justice Rubinstein, as is his practice, provided a fine, broad survey of the laws of *lashon hara*. I can only add my admiration for the range of sources and their clear presentation. For my part, I would like to emphasize a particular aspect of the Jewish law approach: the application of the laws of *lashon hara* to the press in a democratic society. In my opinion, this aspect requires a broader view for three reasons. First, the precedents of the Torah and the oral law. Second, the exceptions to the prohibition upon *lashon hara* arising from halakha, including the writings of the Hafetz Hayim. Third, the laws pertaining to the public in general (as opposed to halakhic decisions concerning individuals), and the State of Israel, in particular.

12. On the basis of the verse "You shall not go up and down as a talebearer among your people" (Lev. 19:16), Maimonides distinguishes three prohibitions. The first – "Who is a talebearer? One who collects information and goes from person to person, saying: This is what so and so said, and this is what I heard about so and so. Even if he tells the truth, it destroys the world" (*MISHNE TORAH*, *Sefer Hamada, Hilkhot Deot* 7:2). A talebearer is, therefore, one who trades in information, even though it is not disparaging (see the commentary of the *Kesef*

Mishne, a scholar of the Land of Israel of the 15th cent. [sic] [R. Joseph Karo, 1488-1575 — trans.] *ad. loc*.), and even of no benefit. The second – *lashon hara*: "and he speaks deprecatingly of his fellow, even though he speaks the truth" (*ibid.*, 7:2). And third: "but one who tells a lie is called a defamer of his fellow's good name" (*ibid*.). It should be emphasized that gossip [tale bearing] and *lashon hara* concern "telling the truth".

Nahmanides disagrees as to the source of the prohibition. According to him, the prohibition is based upon the conduct of Miriam, and the Torah's injunction: "Remember what the Lord your God did to Miriam on the journey" (Deut. 24:9). That refers to the story in Numbers: "Miriam and Aaron spoke against Moses because of the Cushite woman he had married" (Numbers 12:1). Miriam challenged her brother Moses as to why he did not maintain family relations with his wife as Aaron did with his wife, and Miriam with her husband.

Nahmanides' approach includes two interesting points. One:

> In my opinion, this is actually a positive commandment, like "remember the Sabbath day to sanctify it", "remember this day, on which you went free from Egypt" … which are all commandments. If so, this verse, too, is like those, it being an admonition against speaking *lashon hara*. He commanded by way of a positive commandment that we remember the great punishment that God imposed upon the righteous prophetess who spoke only about her brother for whom she showed mercy and loved as herself. She said nothing to his face that would shame him, nor in front of others, but only in private, between herself and her holy brother. Yet all her good deeds were of no avail to her. And you, too, if "you are busy maligning your brother, defaming the son of your mother" (Psalms 50:20) you will not be saved… And how is it possible that there is no explicit negative commandment against *lashon hara* in the Torah, nor even a negative commandment derived from a positive commandment, when it is equated to bloodshed? But this verse comprises a great warning to refrain from it both in public and in private, whether or not to cause harm and shame. And this is one of the 613 commandments (Nahmanides' commentary on Deuteronomy. 24:9).

Like Maimonides, Nahmanides deems the prohibition upon *lashon hara* as particularly severe. But he wonders why the matter is related in a story rather than as an explicit command. It should

be noted that even according to Maimonides, the explicit Torah prohibition is of gossip, whereas *lashon hara* is a type of subcategory. One might say that the prohibition is introduced by appending it to a story, contrary to the usual biblical practice, in order to emphasize the uniqueness of the prohibition upon *lashon hara* as one that arises in the context of social interaction. Moreover, the matter is dependent upon circumstances. From the Bible, it appears that Miriam's intention was constructive – to help her sister-in-law. She raised the matter, together with Aaron, only before Moses. However, in view of Moses' humility, as is related further on, she should have been less hasty in judging as she did in presenting the matter to Moses.

Whatever the case may be, the second point is the one relevant to the matter before us, and is expressed in another of Nahmanides' insights:

> In the matter of Miriam, we were commanded to inform our children and tell it for the generations. And even though it would have been proper to conceal it so as not to deprecate the righteous, Scripture commanded that we make it known and reveal it so that the warning against *lashon hara* will be in their mouths, because it is a great sin and causes many evils, and people always stumble in its regard (Nahmanides' commentary to Deuteronomy 25:17).

In other words, if the prohibition is so severe, and those involved were only these three sibling prophets, is not the injunction to remember the incident not itself a form of *lashon hara*? Is this not something of a contradiction? Nahmanides' answer is that it is important from an educational perspective to present the matter so that we may learn the about the nature of the prohibition, and that is the source for permitting its publication for posterity. The Bible provides many examples of this approach of not refraining from criticizing the nation's great leaders – even Abraham, David and Solomon.

An example of the application of this approach can be found in the Talmud. In the *parashat Balak* [sic][1] in Numbers, we are told of the gatherer of sticks on the Sabbath who was put to death [Numbers 15:32-36]. His name does not appear in the Bible. Rabbi Akiva teaches us

[1] Should be *parashat Shelah Lekha.*

that the man was non other than the father of the five women who requested an inheritance, and their request for non-discrimination against women was accepted. The Talmudic sages were not pleased with Rabbi Akiva's novel idea. As the Talmud states:

> Our Rabbis taught: The gatherer was Zelophehad, and it is said (Numbers 15:32): and while the children of Israel were in the wilderness, they found a man [gathering sticks, etc.], while later it is said (Numbers 27:3): our father died in the wilderness, etc. Just as there it is Zelophehad, so here it is Zelophehad. This is R. Akiva's view. R. Judah b. Batera said to him: Akiva, in either case you will have to give an account. If you are right, the Torah hid him, while you reveal him. And if not, you denigrate a righteous man (TB Shabbat 96b).

Rabbi Judah b. Batera's claim is that Rabbi Akiva's statement is merely a conjecture, and the claim that Zelophehad died in the desert as a result of his sin is not necessarily true. In either case, if Rabbi Akiva told the truth, why did he reveal what the Torah had hidden, and if it was not the truth, why impugn Zelophehad? Nevertheless, and even though neither Rabbi Akiva nor any other rabbis reply to Rabbi Judah b. Batera, the view according to which Zelophehad had sinned has been preserved over the generations. This is not unique to that story. Many midrashic narratives and Torah commentaries are not complimentary to a particular person, and are not necessarily based upon some objective, verifiable truth.

13. As noted, not only biblical precedent, but the laws of *lashon hara*, as well, open the door for qualifying the prohibition upon *lashon hara*.

The first rule is that of "publicly known". As stated in the *Be'er Mayim Hayim*: "No proof can be brought … from what is written in *Arvei Pesahim* … since this may be publicly known, and *lashon hara* is not applicable" (commentary of the Hafetz Hayim on his book, *Hilkhot Lashon Hara* 4:41). In other words: "In any case, everyone saw" (*ibid*. 5:8). This principle is expressed in a situation of "before three", regarding which Maimonides ruled: "If such statements were made in the presence of three people, it has already become public knowledge. Thus, if one of the three relates the matter a second time, it is not considered *lashon hara*" (*MISHNE TORAH, Hilkhot De'ot* 7:5). According to this exemption, a private discussion differs from a one that has been made public, even if only partly (three people). This exemption

is subject to conditions, but it may be relevant to information that, in any case, is in the public domain.

To this we can add the exemption in regard to preventing harm, and even more so, to prevent harm to many, on the basis of the commandment "you shall not stand against your neighbor's blood" that is the continuation of the verse "You shall not go up and down as a talebearer among your people" (Lev. 19:16). As the author of *ARUKH HASHULHAN* who lived at the beginning of the 20th cent. [Rabbi Yechiel Michel Epstein, 1829-1908.—trans.] wrote: "When a person sees another drowning at sea or being attacked by robbers or a wild animal, or other types of evil, and he can save him himself or can hire others to save him, but does not save him, or he hears haters conspiring to harm him, and he does not notify him, or when a person knows of a harmful man who wishes harm his fellow, and he can appease him but he fails to do so, and in all similar instances, transgresses the commandment: 'Do not stand against the blood of your neighbor' … *and all the more so he is obliged to rescue his fellow from any harm or damage that other seek to cause him, and all the more so he is obliged to prevent harm to the many, and must prevent it if he is able to prevent it*" (*Hoshen Mishpat* 426:1) (emphasis added).

It should be noted that the prohibition upon telling *lashon hara*, despite its severity, may retreat before another commandment – "Do not stand against the blood of your neighbor". Last in this context is *lashon hara* for a constructive purpose, which I will address below. I would note at this stage that none of the four parts of the *SHULHAN ARUKH* – one of the primary legal codices – treats of the laws of *lashon hara*. This can be explained. Although *lashon hara* constitutes a legal obligation, it is also viewed in terms of a virtue. That would, therefore, appear to be why Maimonides classified *lashon hara* under the category of *hilkhot de'ot* [laws concerning matters of personal development – trans.], and the great moral scholars addressed this in their works (see, e.g., chap. 11, "Details of the Virtue of Cleanliness", in *MESILAT YESHARIM* by Rabbi Moshe Chaim Luzzatto (the Ramhal, Italy, 18th cent.)). The merger between halakha and the duty to distance oneself from vices lead to the situation wherein when the two are in conflict, for example, a negative statement for constructive purpose, the prohibition upon *lashon hara* may be altered and become permissible and even a *mitzvah* in the framework of a desire to repair.

14. Notwithstanding the possibility of developing the laws of defamation on the basis of the halakhic tools cited in the previous section, that it not the heart of the matter. In law, including Jewish law and halakha, a precise definition of the question is essential for an appropriate resolution. The Hazon Ish [Rabbi Abraham Yeshayahu Karelitz, 1878-1953 – trans.] stressed that often the main problem in legal decision making is not knowing the law, but rather recognizing the reality and factual aspect of the decision (*IGGEROT HAHAZON ISH* 31 (Bnei Brak, 5737) (Hebrew)); and see Rabbi Yehudah Amital, *Not Everything is Halakha*, 13 *ALON SHEVUT BOGRIM* 97-98 (5759) (Hebrew)). The laws of *lashon hara* are well and good, and they can change the social fabric and the relations among the people living in it. Is suffices to recall the statement that because of baseless hatred and *lashon hara* "the Temple was destroyed [the Second Temple] and we were exiled from our land" (from the preface to *HAFETZ HAYIM*). Still, the question before us does not concern the obligations of individuals, although that is the primary halakhic concern and focus of *HAFETZ HAYIM – SHEMIRAT HALASHON*.

The issue before is different. We are concerned with the halakhic limits upon the free press in a democratic society. This is not a question concerning the individual, but the public. In fact, not only the public, but the state. And not just the state, but the State of Israel. The consideration of preventing damage is known to all, and the halakhic considerations are given to change. Halakha recognized the status of the public as a factor in various connections. This would appear to be particularly true when halakhic scholars address the challenges presented by the State of Israel for the law applicable to the public. The religious view is that halakha has the power to adapt itself to changing realities.

We will suffice with a few examples. Rabbi Shaul Yisraeli – a member of the Supreme Rabbinical Court in Jerusalem, rabbi of Kfar Haroeh, and Head of the Mercaz HaRav Yeshiva, who died some 20 years ago – addressed the issue of police activities of the Sabbath. In the course of raising several authorizations, including several types of ongoing activities, Rabbi Yisraeli emphasized the principle that "it would not be at all unreasonable to say that all agree with the basic principle that the harm of many is equivalent to saving the life of an individual … saving the public from harm … is a consideration of saving life" (*AMUD HAYEMINI* 17).

Rabbi Yechiel Weinberg – author of *SERIDEI EISH*, who died in Switzerland some 50 years ago – was asked by the Chief Rabbi of Israel, Rabbi Yehuda Unterman, for his opinion on

performing autopsies for medical purposes in Israel. Rabbi Weinberg stressed the general prohibition, but wrote that he did not think it proper that a rabbi who did not live in Israel should decide the matter for the Chief Rabbi of Israel. Nevertheless, he was willing to state his personal opinion, adding:

> In out day, the question of autopsies is a state question, and a question for those living in that state. This question was addressed by the great Noda BiYehuda [Rabbi Yechezkel ben Yehuda Landau, 1713-1793 – trans.] as a private question, and he was thus correct in his instruction. Today, it is a question for the entire nation, and a question of the state and for its status in the greater world that listens attentively to everything that occurs in the Land [of Israel]. Needless to say that the way the civilized word relates to our new state is one of the important factors that preserve our country, and one of the most important conditions for the security of the state and the people who reside in it (published in 12 *TEHUMIN* 382, 384 (5752) (Hebrew)).

Another aspect of the health system in halakha was addressed in a book published this year by Rabbi Re'em HaCohen, Head of the Otniel Yeshiva and community rabbi of Otniel. The book treats entirely of the issue of *pikuah nefesh* [saving life]. It explains that *pikuah nefesh* must be addressed in the context of the public – whether in regard to public systems, the removal of corpses on the Sabbath, and in regard to desecrating the Sabbath for the purpose of treating mental health issues in an emergency situation (*RESPONSA BADEI HA'ARON: RESPONSA ON CONTEMPORARY ISSUES – PIKUAH NEFESH*) (Hebrew)).

On the basis of the halakha of the public and the state, Rabbi Ben-Zion Meir Hai Uziel, the first Sephardi Chief Rabbi of Israel, was willing to be lenient in regard to the admissibility of the testimony of a person who was not halakhically Jewish. Chief Rabbi Isaac Halevi Herzog ruled similarly in regard to the halakha if the Pope were to contact the Ministry of Foreign Affairs requesting to join with leaders of other religions in the war declared against communism. The responsum was published in 1950, in answer to a question posed by the rabbi's son Ya'akov, who then served in the Ministry of Foreign Affairs (DECISIONS AND WRITINGS, vol. 2, Responsa on the Laws of Orah Hayim, 112) (Hebrew)). These examples demonstrate that, in appropriate cases, the question of the law applicable to the public or the state may be addressed differently,

with the decisor taking account of broader considerations. The difference is not in the halakha, but rather in a question that may lead to a different answer.

Can a similar argument not be made in regard to the rules of *lashon hara* and the press? Would the definition of benefit necessarily be the same from the perspective of the state as opposed to an individual? Let us not forget that the rabbis throughout of each generation recognized the uniqueness of the press. Rabbi Jacob Reischer, who lived in Prague in the 17th century, noted that the desire to know what is happening in the state and the world is a human need (RESPONSA SHEVUT YAAKOV, III:23) (Hebrew)). Rabbi Jacob Emden, who lived in Germany in the 18th century, permitted reading newspapers on the Sabbath both because prohibiting it would cause suffering, and because there is enjoyment in reading them (REPONSA YAAVETZ, I:162) (Hebrew)). Rabbi Isaac HaKohen Kook, the first Chief Rabbi of Israel, encouraged the establishing of a daily newspaper, but turned down an offer to serve as editor in chief due to his many responsibilities (*IGGEROT HARAV KOOK*, I:185) (Hebrew). As for the appropriate content of newspapers, Rabbi Kook was of the opinion that it should treat of a variety of matters, "and clearly such an organ should not ignore any aspect of life in its entirety, even those that do not directly concern religion" *IGGEROT*, I:277). Moreover, like the popular Talmudic expression: "Go forth and see how the public are accustomed to act" – nowadays, even hareidi journalism is thriving, and it is not limited to matters of Torah, but deals with "matters of the world" and "matters of the country". Is it even imaginable that an investigative report about a public figure would receive no coverage until after the conclusion of his trial? Is such a report, which may uncover wrongs and injustice in regard to some group, not of great benefit?

This may be of consequence for the boundaries of constructive *lashon hara*. Some of the rules that have been established may be relevant, including the requirement not to increase the wrong beyond what it is, and that the publisher intend benefit (*HAFETZ HAYIM*, *Hilkhot Lashon Hara*, 10:2) (Hebrew). We should note in this regard a ruling by Rabbi Ovadia Yosef according to which a person who knows that an applicant for a driver's license suffers from some hidden, undisclosed condition, he must inform the Licensing Bureau of what he knows (*YEHEVE DAAT*, IV:60). We would similarly recall the ruling of Rabbi Chaim Halevi, Chief Rabbi of Tel Aviv, who died some 15 years ago, that it is not prohibited to work as an informant for the tax

authorities, even for pay (*ASEH LEKHA RAV*, I:70). These questions also relate to public aspects of *lashon hara*.

I admit that the matters are very complex. At most, I have indicated different directions for questioning, rather than answers. Much has been written of the subject from the halakhic perspective. See, for example, the article published about a year ago by Rabbi Meir Bareli in 33 *TEHUMIN* on the subject of publishing *lashon hara* about elected officials (p. 136). In the author's opinion, an exemption can be found in certain situations on the basis of the principle that entering the public arena constitutes implied consent – consensual *lashon hara* in certain circumstances. And see additional halakhic articles (*ibid*., fn 2; and see the article by Ari Yitzhak Shevet, which I found very helpful both conceptually and for its extensive bibliography – *Newspapers and News: Obligation or Prohibition* (Hebrew); Steven Oppenheimer, *Journalism, Controversy, and Responsibility: Halachic Analysis*, 41 JOURNAL OF HALAKHA & CONTEMPORARY SOCIETY (2001); Rabbi Alfred Cohen, *Privacy: A Jewish Perspective*, 1 JOURNAL OF HALAKHA & CONTEMPORARY SOCIETY 53 (1981). However, it would appear that none of these provide a halakhic ruling. It is not my intention to innovate in this decision, but rather to ask whether it may be possible to consider the issue in broader terms from the perspective of Jewish law. As for the answer, I can only but make recourse to the approach of the Head of the Har Etzion Yeshiva, Rabbi Aharon Lichtenstein, which I have cited in the past in the context of internet theft (CA 9183/09 *The Football Association Premier League v. Anonymous* (May 13, 2012)). I will state it *mutatis mutandis*: In the changing technological and social reality in which the press achieves growing influence, and bearing in mind the potential advantages of this tool, its importance and contribution to democratic life, and its broad readership, on the one hand, and the unquestionable prohibition upon *lashon hara*, on the other, what is the proper halakhic balance? "The question is posed, the authority exists, and eyes are uplifted. If the great halakhic decisors will succeed in making a decision on the matter", they will make a real social contribution, "and if they succeed, they will simultaneously contribute to admiration of Torah" (A. Lichtenstein, *LECTURES OF RABBI AHARON LICHTENSTEIN: DINEI DEGARMEI*, 200 (5760) (Hebrew)).

In conclusion, I do not believe that the approach of a good-faith defense for responsible journalism in matters of significant public interest contradicts the principles of Jewish law. In my humble opinion, there is a positive aspect to such an approach.

After these Things

15. After writing my opinion, I had the opportunity to read the comments of my colleague Justice Rubinstein. I will address them in brief.

My colleague is of the opinion that the Jewish law sources that I cited are peripheral. I would respond that I am not concerned with the margins but with the core. We are concerned with freedom of journalistic expression on subjects of significant public interest. The issue does not concern a question of private halakha. It is part of state halakha, or more precisely, the halakha of the State of Israel. This is a public issue. I pointed out several examples in areas of importance in Jewish law in which the rabbis of the time found that this is a consideration that defines the answer, and that may lead to different results than those concerning individuals. Can the importance of investigative journalism in a democratic society be denied? I also pointed out that in the framework of the question I present, religious society in all its variety, and with the consent of its rabbis, does not reject reading newspapers, and is even involved in journalism from its own perspectives. That journalism comprises not only Torah subjects, but also news and subjects that have not as yet been resolved and are still under investigation. The solutions for discourse among individuals on the private level are not necessarily identical to those applicable to public discourse. It would seem to me, for example, that the approach cited, *inter alia*, by my colleague, according to which journalists are deemed bearers of *lashon hara*, and that it is better to listen to the news on the radio, does not reflect the practice of the religious world, does not express the advantages presented by a free, investigating press, and most of all, does not adequately contend with full variety and complexity of the subject.

Lastly, my colleague referred to my call for the development of an independent Israeli legal approach to the subject, and notes that I do not explain what it might be. I can only refer to what I wrote in my opinion, above. In my view, an independent Israeli legal approach would recognize the necessity of a responsible press, and that we are concerned with a public duty that grants protection to a journalist, subject to an examination of his good faith. Such a development, proposed by my colleague Justice Vogelman in the judgment under appeal, is appropriate to the

present. As for the future, this field is dynamic. It is my hope that the Israeli system will succeed in adopting the positive aspects of the American approach, which has proved its ability to integrate a very robust democratic society and freedom of expression, combined with the approach of Jewish law, along with a serious, thoughtful consideration of the halakha applicable to the state, and its influence upon the laws of defamation. There is much to be done. But that is the present reality, and this is the hope for the future, as is appropriate for the State of Israel as a Jewish and democratic state, in accordance with the Basic Law.