HCJ 5432/03

HCJ 5477/03

SHIN, Israeli Movement for Equal Representation of Women, and 11 others (HCJ 5432/03)

Chairperson of the Knesset Committee on the Status of Women, MK Gila Gamliel and 52 others (HCJ 5477/03)

v.

1. **Council for Cable TV and Satellite Broadcasting**
2. **Adv. Dorit Inbar, chairperson of the Council for Cable TV and Satellite Broadcasting**
3. **Play TV Ltd**
4. **D.B.S. Satellite Services (1998) Ltd ('Yes')**
5. **Tevel Israel International Communication Ltd**
6. **MATAV Cable Communication Systems Ltd**
7. **Golden Channels & Co.**

The Supreme Court sitting as the High Court of Justice

[3 March 2004]

Before President A. Barak, Vice-President T. Or and Justices E. Mazza, M. Cheshin, D. Dorner, J. Türkel, D. Beinisch, E. Rivlin, A. Procaccia, E.E. Levy, A. Grunis

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

Facts: The third respondent held a concession for broadcasting the 'Playboy' channel in Israel. This channel shows material of an erotic or pornographic nature. The first respondent gave a licence to respondents 4-7 to broadcast the 'Playboy' channel, subject to a number of restrictions relating, *inter alia*, to the times when the broadcasts were permitted, the manner of subscribing to the channel, and measures that needed to be taken to ensure that the channel was not accessible to persons under the age of 18. The petitioners challenged the decision of the first respondent, on the grounds that the first respondent erred in its interpretation of the law, and that the broadcasts of the 'Playboy' channel fell within the scope of a

provision in the law that prohibits 'a depiction of a person or any part of a person as a sex object.' The petitioners further argued that the broadcasts of the 'Playboy' channel offended the feelings and dignity of women.

Held: The majority of the Supreme Court justices who heard the petition held that even pornography enjoyed the protection of the constitutional right of freedom of expression. As such, even though there were conflicting rights or interests, the first respondent's decision struck a proper balance by permitting the broadcast of the 'Playboy' channel, subject to the restrictions that it imposed. Even those minority justices who questioned whether pornographic expression fell within the scope of the right of freedom of expression accepted that there were no grounds for intervention in the decision permitting the broadcasting of the 'Playboy' channel, in view of the restrictions imposed on the broadcasts.

Petitions denied.

Legislation cited:

Basic Law: Human Dignity and Liberty.

Basic Law: Freedom of Occupation, s. 3.

Classification, Marking and Prohibition of Damaging Broadcasts, 5761-2001, s. 3(a)(4).

Communications (Telecommunications and Broadcasting) Law, 5742-1982, ss. 6Y, 6Y(2), 6Y(2)(3), 6Y(2A), 6AK, 6BE.

Communications (Telecommunications and Broadcasting) Law (Amendment no. 27), 5762-2002.

Penal Law, 5737-1977, ss. 34U, 214, 214A.

Telecommunications Law (Amendment no. 25), 5761-2001.

Israeli Supreme Court cases cited:

[1] HCJ 4267/93 *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [1993] IsrSC 47(5) 441.

[2] CrimA 4693/01 *State of Israel v. Babizaib* [2002] IsrSC 56(5) 580.

[3] HCJ 4804/94 *Station Film Ltd v. Film and Play Review Board* [1996] IsrSC 50(5) 661; **[1997] IsrLR 23**.

[4] HCJ 606/93 *Advancement Promotions and Publishing (1981) Ltd v. Broadcasting Authority* [1994] IsrSC 48(2) 1.

[5] HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [1953] IsrSC 7 871; **IsrSJ 1 90.**

[6] HCJ 4644/00 *Jaffora Tavori Ltd v. Second Television and Radio Authority* [2000] IsrSC 54(4) 178.

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

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

[9] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**.

[10] HCJ 1/49 *Bajerno v. Minister of Police* [1948] IsrSC 2 80.

[11] HCJ 7128/96 *Temple Mount Faithful v. Government of Israel* [1997] IsrSC 51(2) 509.

[12] HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board* [1989] IsrSC 43(2) 22; **IsrSJ 10 229.**

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

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

[15] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.

[16] HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [2001] IsrSC 55(4) 267.

[17] HCJ 701/81 *Malach v. Chairman of District Planning and Building Committee* [1982] IsrSC 36(3) 1.

[18] CrimFH 8613/96 *Jabarin v. State of Israel* [2000] IsrSC 54(5) 193.

[19] HCJ 2753/03 *Kirsch v. Chief of Staff, IDF* [2003] IsrSC 57(6) 359.

[20] HCJ 92/56 *Weiss v. Chairman and Members of the Legal Council* [1956] IsrSC 10 1592.

[21] CA 311/57 *Attorney-General v. M. Diezengoff & Co. (Navigation) Ltd* [1959] IsrSC 13 1026; **IsrSJ 3 53.**

[22] FH 16/61 *Registrar of Companies v. Kardosh* [1962] IsrSC 16(2) 1209; IsrSJ 4 7.

[23] HCJ 636/86 *Nahalat Jabotinsky Workers' Moshav v. Minister of Agriculture* [1987] IsrSC 41(2) 701.

[24] HCJFH 4128/00 *Director-General of Prime Minister's Office v. Hoffman* [2003] IsrSC 57(3) 289.

American cases cited:

[25] *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F. 2d 323 (1985).

[26] *Miller v. California*, 413 U.S. 15 (1973).

[27] *United States v. Playboy Ent. Gp.*, 529 U.S. 803 (2000).

Canadian cases cited:

[28] *R. v. Butler* [1992] 1 S.C.R. 452.

[29] *R. v. Hawkins* (1993) 15 O.R. (3d) 549.

Jewish law sources cited:

[30] Babylonian Talmud, Tractate *Berachot* 48a.

[31] Isaiah 11, 9.

For the petitioners in HCJ 5432/03 — Y. Abadi.

For the petitioners in HCJ 5477/03 — S. Ben-Natan.

For respondents 1-2 — A. Licht.

For respondent 3 — Z. Bar-Natan, R. Peled, A. Halfon, R. Gazit, B. Rottenberg, A. Wang.

For respondent 4 — M. Matalon, L. Porat.

For respondents 5-7 — U. Rahat.

JUDGMENT

Justice D. Dorner

The Council for Cable TV and Satellite Broadcasting permitted the broadcast of the 'Playboy' channel on cable TV and satellite. The law prohibits the depiction of 'a person or any part of a person as a sex object.' The question before us is whether permitting the broadcasts of the 'Playboy' channel was lawful, i.e., whether the broadcasts of the channel breach the prohibition prescribed by law.

The petitioners and the respondents

1. The petitioners in HCJ 5432/03 are feminist and social organizations who have joined in order to prevent pornographic broadcasts on the cable and satellite channels. The petitioners in HCJ 5477/03 currently serve, or served in the past, as Knesset members. The first respondent is a public council (hereafter — the Council), which operates pursuant to the Communications (Telecommunications and Broadcasting) Law, 5742-1982. The second

respondent, Adv. Dorit Inbar, was at the relevant times for our purposes the chairperson of the Council. The third respondent (hereafter — the Playboy company) is a private company that holds a concession for broadcasting in Israel the broadcasts of Playboy TV International LLC, including broadcasts of the 'Playboy' channel. This channel is an erotic channel, which has enjoyed great success around the world. It is broadcast in 175 countries, including the United States, Canada, Australia, England, Belgium, France, the Scandinavian countries, the countries of Latin America, Japan, Taiwan, New Zealand, Poland, Turkey, Spain and Portugal. The fourth respondent (hereafter — 'Yes') is a licensee for television broadcasts by satellite, which is operates under the name 'Yes.' Respondents 5-7 (hereafter — the cable companies) broadcast television programs on cable in accordance with a licence given to them for this purpose.

The background to the petitions

2. The possibility of broadcasting erotic and pornographic channels (hereafter — adult channels) on television began when 'Yes' came into the market and began operating digital technology that allows the separation of adult channels from other channels. In decisions of the Council dated 6 July 2000 and 9 July 2000, the 'Blue' channel was approved for broadcasting, and in its decision dated 17 July 2000, the 'Playboy' channel was also approved. In July 2000 'Yes' began marketing and broadcasting the approved channels.

MK Zevulun Orlev and MK Shulamit Aloni filed a petition to this court against the approvals that the Council gave to the 'Blue' channel only, in HCJ 5885/00, but on 3 September 2000, following the recommendation of the court, the petitioners withdrew the petition, and it was struck out.

In April and May 2001, the cable companies also began to broadcast with digital technology, and so they too obtained the possibility of marketing adult channels. In June 2001, after receiving the approval of the Council, the cable companies began broadcasting three adult channels — 'Vivid,' 'Spice' and 'Playboy' — while complying with various restrictions that the Council had stipulated. These restrictions were fully formulated on 7 June 2001, after the Council took into account the public positions that it surveyed and after it formulated a general policy with regard to the content of the broadcasting and the manner of broadcasting sexual content.

The broadcasting of the adult channels in general, and the 'Playboy' channel in particular, met with great commercial success. According to the

reports of the companies, more than 50% of the satellite subscribers and 65% of the cable subscribers bought the 'Playboy' channel broadcasts.

3. On 25 July 2001, the Knesset passed the Telecommunications Law (Amendment no. 25), 5761-2001 (hereafter — amendment 25), which changed the name of the law to the Communications (Telecommunications and Broadcasting) Law (hereafter — the Communications Law). Amendment 25 added to the law s. 6Y(2A), which prohibits the broadcast of a channel whose main broadcasts are sex broadcasts. A criminal sanction was also prescribed for a breach of this provision, in s. 6AK, and this stipulates a penalty of five years imprisonment or a fine in an amount of seven million new sheqels.

This change in legislation led the Council to hold meetings and even to announce a public hearing. On 9 August 2001, following various positions that were presented to the Council, it published a new policy, whereby the law applies to sex broadcast channels, but not to broadcasts using the 'pay-per-view' system, which allows subscribers to purchase individual broadcasts and to pay for them separately. Accordingly, the Council determined that the approvals that were given for the broadcasts of the adult channels would be cancelled, and instead it permitted the broadcast of the adult channels according to the pay-per-view system and with additional restrictions that it determined. On 26 September 2001, the adult broadcasts were stopped in the format of channels, and they were broadcast according to the new format only. Subsequently the permits were again amended in order to permit watching of the 'Playboy' channel on a 'pay-per-night' basis, namely the purchase of a whole night of broadcasts.

On 16 October 2001, the Playboy company and its main shareholder filed a petition in this court against amendment 25 of the Communications Law on the grounds that the amendment was unconstitutional in that it violated freedom of expression, freedom of occupation and property rights. In the petition, the court was asked to cancel the amendment, suspend it or order the State to pay compensation for the harm that it caused the petitioner. This petition, HCJ 8003/01, is also pending before the High Court of Justice with a panel of eleven judges, after it was amended several times as a result of the changes in the legal position, as will be set out below.

At the beginning of March 2002, the 'Playboy' channel stopped its broadcasts completely as a result of difficulties in selling its broadcasts in accordance with the conditions of the Council.

4. The legislative developments continued. On 9 July 2002, the Communications (Telecommunications and Broadcasting) Law (Amendment no. 27), 5762-2002, was passed (hereafter — amendment 27), in which s. 6Y(2) of the law was amended. The section in this version, which is also the most recent version that is in force today (hereafter — the section), prohibits broadcasts which contain obscenities, as defined in the Penal Law, 5737-1977, especially when their subject-matter is the 'depiction of a person or any part of a person as a sex object.'

As a result of the enactment of the section, all the broadcasts of the adult channels were stopped immediately. At the same time, the Playboy company applied to this court with an application to amend its petition so that it would be directed at amendment 27. In addition to the amendment of the petition, the Playboy company and the cable and satellite companies applied to the Council with a request to approve the channel. A hearing was held before the Council, and the two parties submitted to it a legal opinion. The Council also received an opinion of its legal advisors, which supported the approval of the channel. The Council went further and made a request to the Attorney-General, Mr Elyakim Rubinstein. At the end of several meetings, the Attorney-General submitted to the Council, on 24 October 2002 and 21 November 2004, his response and his clarification of the response. The position of the Attorney-General was that the law could be interpreted in different ways, and therefore the Council had the right to decide in accordance with its discretion.

In a decision dated 28 November 2002 (hereafter — the first decision) the Council prohibited the broadcast of the 'Playboy' channel within the framework of the cable and satellite broadcasts on account of the offence to women and on account of the public interest in protecting children and adolescents, stating that 'in the balance of the interests, it is possible to prohibit the broadcast of the channel.'

Following this decision, the third respondent amended its petition once again, so that it was directed against this decision of the Council. On 3 March 2003, a hearing of the petition was held, and at this counsel for the Playboy company asked that the panel should be expanded, in view of the drastic nature of the relief sought, namely the disqualification of a law of the Knesset. The application was granted, and on 25 March 2003, the President of this court decided to form a panel of eleven judges.

5. Then the Playboy company and the cable and satellite companies applied once again to the Council with a request to reconsider their application to approve the channel. In response to this, the petitioners in HCJ 5432/02

applied to the Council with a request to prevent such a further consideration. On 12 June 2003, after its legal adviser held that it was entitled to reconsider the first decision, the Council decided to approve the 'Playboy' channel. In the decision after the reconsideration (hereafter — the second decision) the Council decided that the first decision was defective and was based on an erroneous legal test. The following, *inter alia*, was written in the second decision:

> 'The Council, after it examined the scope of the possible interpretations of this term [of a "sex object"], is of the opinion that it should be interpreted as applying to situations in which a human being is treated as an object or as a tool without a personality or will of his own, and not in every case in which a person is depicted in a way intended to arouse sexual gratification or a person is depicted in a sexual context. The Council was persuaded that the purpose of the legislation that amended the law was not the desire of the legislator to prohibit every depiction of nudity or eroticism in television broadcasts, but to prevent a situation of "objectification" of the participants in those broadcasts, including a depiction of involuntary acts or physical humiliation of the participants.'

In this interpretation, the Council also took into account the restrictions that could be imposed on the pornographic channel, whose main purpose was to protect children. Therefore it decided that:

> 'In the view of the Council, the correct balance… does not prohibit broadcast of the channel… but approval of the broadcast of the channel subject to the conditions and restrictions set out below:
>
> a. The channel will be broadcast digitally only.
>
> b. The channel will broadcast only from 10:00 p.m. until 5:00 a.m. each day.
>
> c. The channel will be offered and sold within the framework of a separate channel and it will not be included in existing or future packages…
>
> d. For the purpose of purchasing the channel, a positive notice or consent of the subscriber will be required, and this will relate to

> the channel independently of any other channel or service or package.
>
> e. The licensee will adopt reasonable measures in order to ensure that the age of the subscriber purchasing the channel is over 18.
>
> f. The channel will be sold as a channel requiring payment… a separate payment will be charged for the channel…
>
> g. The channel will be encoded and encrypted in such a way that only someone with a personal decryption code will be able to watch it. Each entry into the channel will be done by means of entering a secret code with at least four digits.
>
> h. The licensee will include, in the course of the broadcasts of the channel, broadcasts that are at least 30 seconds long, explaining the prohibition against exposing children and adolescents to the channel, recommending the encryption of the channel in order to prevent it being watched by children and adolescents, and including a detailed and clear explanation of the way of blocking the channel and changing the secret code…
>
> i. No previews will be broadcast for the channel on other channels and also no content will be presented in the electronic program guide (EPG)… including visual, verbal, textual or oral expressions of sex, including expressions as aforesaid that contain full or partial nudity, with regard to the channel.
>
> j. The Council reserves the authority to order any reference to the names of programs to be deleted from the channel's information strips that are broadcast to subscribers who have not bought the channel.'

The petitions in HCJ 5432/03 dated 18 June 2003 and HCJ 5477/03 dated 19 June 2003 (hereafter — the petitions) were filed against the second decision. The hearing of the petitions was joined on 26 June 2003.

The arguments of the parties

6. The petitioners argue that the interpretation that the Council gave to the law in its second decision is mistaken as to the intention of the proponents of the law and the intention of the legislature, which was to prohibit the broadcasts of the 'Playboy' channel. This, in their opinion, is reflected by the number of Knesset members who are petitioners. In the view of the petitioners, the interpretation in the first decision constituted a proper balance between the

rights of the women who appear in the programs on the channel and women among the public, in general, to dignity, integrity of body, protection of their feelings, positive freedom and 'active' freedom of expression, and the rights and interests that conflict with these rights — freedom of property and occupation of the 'pimps.' The petitioners believe that it was actually the first decision that gave proper weight to the public interest and expressed social justice. Their position is that the pornographic and erotic industries, both softcore and hardcore — and they see no difference between them — are not entitled to the protection of freedom of expression, since in their opinion these are industries that treat women like a commercial object and fall within the scope of prostitution and obscenity. In addition they inculcate sexual discrimination in society, encourage physical and emotional attacks on women and even endanger public order. Consequently, 'true freedom' will come only from restraining the strong and from regulatory intervention in the market, as was done with regard to racism and slavery. In the view of the petitioners, the principle of proportionality allows, and even requires, the prevention of pornographic and erotic broadcasts, including broadcasts of the 'Playboy' channel, on cable TV and satellite. This is because of the accessibility of these media and because the television is a public resource supervised by the State.

According to the petitioners, the legislature chose to adopt the term 'object' which is derived in the context under discussion from radical feminism, and which is true to the teachings of Kant that regard every person as a purpose in himself, to the 'Communist Manifesto' of Karl Marx that opposes the 'objectification' of the workers (who can be compared to the slave element that remains among women), to the war against fascism and to the criticism of the school of Critical Legal Studies (CLS), and thereby to stand firm against the male capitalist outlook.

The argument of the petitioners is that the prohibition in the law, whose main purpose is to protect women, includes a depiction of women as *available* for sexual intercourse. It does not apply only to the explicit and complete depiction of sexual intercourse, and it is sufficient if the broadcast contains enough to allow male viewers to achieve sexual satisfaction in their homes. The fact that this channel does not also show male nudity makes it perhaps the 'most discriminatory channel of all.' According to the petitioners' approach, it is even possible that the softer the pornography is, the stronger the objectification is.

The petitioners also have claims that are procedural in nature. First, they argue against the willingness of the Council to reconsider the first decision and the procedures of the reconsideration. According to them, holding a reconsideration, without justification, harmed stability and the public interest. Second, their argument is that the second decision of the Council was made in an underhand manner, without a proper factual and legal basis, without giving the petitioners a right to make additional arguments as required, and that the considerations of the Council were political, irrelevant and improper. They also claim that the chairperson of the Council, Adv. Inbar, was tainted by prejudice when she expressed in public her preconceived opinion that was formed before the decision was adopted by the Council.

7. The respondents, on the other hand, support the interpretation given to the law by the Council in the second decision. According to them, there is no clear subjective purpose of the legislature, and in any event the legislative history and the language and purpose of the law, from an overall perspective, support their interpretation. On the merits, the 'Playboy' channel does not, in their opinion, contain any degradation, violence or sexual intercourse with minors, and women are not presented as empty objects devoid of will. In any event, its broadcasts do not fall within the scope of the prohibition in the law and the scope of its main purpose, namely the protection of minors. Disqualifying the channel harms the freedom of expression, the freedom of occupation, the right to privacy and personal autonomy, and it will constitute discrimination in relation to other channels that have been approved and in relation to other media, such as video and the Internet, which broadcast similar and even more hardcore content. Disqualification of the channel will lead also to heavy losses and many redundancies, after the Playboy company and the satellite and cable TV companies relied on the concessions and the permits that they received and made huge investments. In the respondents' opinion, the position of the public at large, many of whom watch the channel, should not be ignored. The 'Yes' company also said that, when interpreting the prohibition, weight should also be given to the fact that amendment 27 cancelled the transition provisions enacted in amendment 25 in order to protect its interests.

The respondents further argue with regard to the procedural claims of the petitioners that there was no impropriety in the Council's reconsideration of its decision as a result of its concern that it was not consistent with the purpose of the law. This concern arose as a result of a proceeding before this court, the attitudes of the general public and the policy formulated by the Council with regard to other channels. In changing its decision, the Council took into

account the fact that the reasonable reliance of any party should not be harmed. The respondents insist that there was also no impropriety in the proceedings in which the decision was made or in the conduct of Adv. Inbar.

Interpretation of the law

8. Amendment 27 provides as follows:

'Prohibited broadcasts

> 6Y. A licensee for cable TV [and satellite (see s. 6BE of the law)] broadcasts shall not transmit any broadcasts —
>
> …
>
> (2) that contain any obscene material within the meaning thereof in the Penal Law, 5737-1977, including broadcasts involving one of the following:
>
> (1) A depiction of sexual intercourse that involves violence, abuse, humiliation, degradation or exploitation;
>
> (2) A depiction of sexual intercourse with a minor or with a person that appears to be a minor;
>
> *(3) A depiction of a person or any part of a person as a sex object;*
>
> all of which when the broadcasts listed in sub-paragraphs (1) to (3) do not have significant artistic, scientific, newsworthy, educational or explanatory value that justifies, in the circumstances of the case, their broadcast.

[Emphasis not in the original].

As stated above, of the various subsections the one that, in the opinion of the petitioners, prohibits the broadcasts of the 'Playboy' channel is the one prohibiting 'a depiction of a person or any part of a person as a sex object.'

9. Indeed, the interpretation of this subsection, as well as the decision whether the broadcasts of the 'Playboy' channel fall within its scope, are likely to involve a degree of discretion. Nonetheless, the question of interpretation and the basic 'factual' question are legal questions. Although the legal

authorities — the legal advisers of the Council and of course the Attorney-General — may indeed take into consideration the professional media evaluation of the members of the Council, such as with regard to the anticipated effect of the channel's broadcasts, from the viewpoint of the State, the authority to interpret the law and to determine whether the prohibition in the law applies to a specific case falls to its legal advisers. See and cf. HCJ 4267/93 *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [1], at p. 473. It is therefore difficult to accept the position of the Attorney-General that since the law, in his opinion, can be interpreted in various ways, the Council may decide in accordance with its discretion. The existence of various possible interpretations is the beginning of the professional interpretive procedure, not its end. The more difficult or complex a legal question of interpretation may be, and the greater the degree of discretion, expertise and professional experience involved in solving it, the more important it is that the decision of the State should be made by its competent authorities in the relevant field, namely the law. And in cases where there is a dispute on a legal question between the State (whose position on this matter, as aforesaid, is determined by its competent legal advisers) and another party, the dispute should be referred to the court for its determination.

In such cases, as well as in the case before us, even the judicial decision is not merely judicial review of the objectivity and reasonableness of the discretion that the authority exercised with regard to the legal question. The court must, within the framework of its primary function of interpreting the law, itself consider the question and decide it.

10. Turning to the issue, the interpretation of the law on which the second decision was based, according to which the depiction of sexual intercourse or content intended for sexual stimulation does not make a broadcast prohibited, is correct. This is the case both in view of the interpretive considerations concerning the specific law and also in view of more general constitutional considerations that reflect the basic principles of our legal system and that govern the interpretation of all laws.

Specific interpretive considerations

11. With regard to the considerations of the first kind, *first*, the interpretation of the Council is consistent with the internal logic of the section. The law itself refers to 'obscenity' according to the meaning thereof in the Penal Law, and the Communications Law itself, in s. 6AK, provides that the breaches of the prohibitions therein are criminal offences. In any case the interpretation of the provisions in the law should be made cautiously, with an

awareness of the ramifications of the interpretation on the criminal liability. This is required also by the provisions of s. 34U of the Penal Law, which requires the matter to be decided '… in accordance with the interpretation that is most lenient to the person who is going to be held criminally liable under that law.' Cf. the remarks of Justice Türkel in CrimA 4693/01 *State of Israel v. Babizaib* [2], at p. 586.

Second, the other subsections in the section require an express depiction of hardcore sexual intercourse or paedophilia. A broad interpretation of the subsection of 'a depiction of a person or any part of a person as a sex object' to include any depiction of sexual intercourse or content intended for sexual gratification is inconsistent with the serious content in the other subsections, for whose broadcast a similar sanction is prescribed, and it even renders them *de facto* redundant.

Third, we must take into account the change that the Knesset made to the current version as compared with the previous version, in amendment 25, in which s. 6Y said:

> 'A licensee for cable TV broadcasts shall not transmit broadcasts —
>
> …
>
> (2A) [of]… a channel whose main broadcasts are sex broadcasts; for the purpose of this paragraph, 'sex broadcasts' — broadcasts of which a substantial part includes content concerning sex *by way of depicting sexual intercourse or by way of depicting acts intended to arouse sexual gratification* or which involve sexual humiliation or degradation or which depict a person *as a sex object* or as subject to physical or sexual abuse.
>
> …'
>
> (Emphases supplied).

The current version, which amended the version of amendment 25, omitted the phrases '… by way of depicting sexual intercourse or by way of depicting acts intended to arouse sexual gratification…', which previously were associated with the prohibition of depicting 'a person as a sex object.' It follows from this that in the view of the Knesset, there is content that depicts sexual intercourse or acts intended to arouse sexual gratification that does not fall within the scope of the prohibition of 'objectification.'

And *fourth*, the Classification, Marking and Prohibition of Damaging Broadcasts Law, 5761-2001, expressly states in s. 3(a)(4) that it applies to pornographic broadcasts, and thereby it recognizes the existence of a lawful possibility of broadcasting them.

Constitutional considerations — do pornographic broadcasts fall within the scope of a constitutional right?

12. The aforesaid outcome, according to which the law does not prohibit every depiction of sexual intercourse or content that is intended to arouse sexual gratification is also necessitated by the basic constitutional principles according to which the law should be interpreted. In this respect, it appears that pornographic broadcasts fall within the scope of at least two basic rights: freedom of expression and freedom of occupation.

In examining the right of freedom of expression the point of origin in our legal system is that every expression, whatever its content may be, is 'covered' by the constitutional protection. Indeed, 'freedom of expression, as a constitutional right, applies to every expression. "Expression" in this context is any activity that seeks to transmit a message or meaning. It extends to political, literary or commercial expression… with regard to the scope of freedom of expression, we do not examine whether the expression is true or false; we do not examine its content; we do not examine its consequences' (*per* President Barak in HCJ 4804/94 *Station Film Ltd v. Film and Play Review Board* [3], at p. 676 {34-35}). Indeed, we should adopt a broad approach in interpreting the scope of application of the constitutional right to freedom of expression, which does not require an examination of the content or a value judgment with regard to the specific expression. 'The totality of freedom of expression is necessitated by its character and its nature' (HCJ 606/93 *Advancement Promotions and Publishing (1981) Ltd v. Broadcasting Authority* [4], at p. 11).

Pornographic and erotic expression (which are hereafter, for the sake of convenience, referred to jointly as 'pornography') — including also any description of a sexual act, whether softcore or hardcore, is not different in this context. See *Station Film Ltd v. Film and Play Review Board* [3], at p. 677 {37-38}. It is part of human creativity in modern times, furthers public debate and influences the positions of those who participate therein. Indeed, the petitioners themselves, who without doubt reflect important parts of society, are fighting against the damaging consequences of those *positions* that the pornographic content represents, and thereby they recognize *de facto* the expression inherent therein. As Judge Easterbrook said:

> '... this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations' (*American Booksellers Ass'n, Inc. v. Hudnut* (1985) [25], at p. 329).

13. This broad approach to the scope of the freedom of expression is especially appropriate in Israeli law, where the protection of freedom of expression, like all other basic rights, is not absolute. The broad interpretation of freedom of expression does not determine the balance between it and other rights and interests, but merely allows such a balance so that the deliberation focuses on the degree of protection afforded to the right. This question is considered on the basis of the purposes underlying the freedom of expression, which mostly concern the self-realization of human beings, furthering democracy and enriching the marketplace of ideas that contributes to discovery of the truth. See HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [5], at p. 876 {95}. In so far as the expression realizes these purposes more completely, the degree to which it is protected will increase. Thus, for example, the protection of political expression is broader than the protection of commercial expression, which is reflected in the balancing formula between it and the competing values and interests, since 'everyone agrees that the boundaries of freedom of commercial expression, to which not all the reasons for freedom of expression are applicable, are narrower than the boundaries of freedom of political or artistic expression' (HCJ 4644/00 *Jaffora Tavori Ltd v. Second Television and Radio Authority* [6], at p. 182).

Indeed, the social value of the expression in a pornographic creation is low, and in general it is an inferior medium for transmitting its messages and positions. Pornography is also likely to cause harm and damage, and therefore it sometimes needs the restraint of the criminal law. In this it is similar to racial expression, which is also included, at least in the opinion of the majority in this court, in the freedom of expression. See CrimA 2831/95 *Alba v. State of Israel* [7], at pp. 296-297. But the harm inherent in the expression does not as a rule exclude it from the scope of freedom of expression. Thus even the criminal prohibition on the publication and depiction of pornography which amounts to prohibited 'obscenity' (ss. 214, 214A of the Penal Law) must be interpreted narrowly and comply with the terms of the limitation clause (cf. HCJ 4541/94 *Miller v. Minister of Defence* [8], at p. 138 {231}; HCJ 5016/96 *Horev v. Minister of Transport* [9], at p. 41 {193}; *Alba v. State of*

Israel [7], at p. 294). My conclusion, therefore, is that even pornographic expression falls within the scope of the basic right of freedom of expression.

It need not be said that the question whether freedom of expression is included in the rights set out in the Basic Law: Human Dignity and Liberty, with regard to which various opinions have been expressed by the justices of the court, does not require a decision or consideration in this proceeding.

14. Similarly, even the constitutional protection of freedom of occupation, which is enshrined in the Basic Law: Freedom of Occupation, gives its protection to the pornography industry. Section 3 of the Basic Law: Freedom of Occupation, states that 'every citizen or resident of the State is entitled to engage in any occupation, profession or work.' Indeed, in the renowned words of Justice S.Z. Cheshin, '… every man has the natural right to engage in the work or profession that he chooses for himself… [this is a right that] derives from the natural right of every person to seek sources of livelihood and to find for himself work that supports him' (HCJ 1/49 *Bajerno v. Minister of Police* [10], at pp. 82-83). Including an activity within the right of freedom of occupation does not involve, as a rule, any judgment as to its content or morality, and any occupation — including an occupation in pornography — is covered by the freedom of occupation.

Constitutional consideration — protection of feelings

15. Opposing the aforesaid basic rights are several considerations that may conflict with them. One prominent consideration is the public interest requiring protection against an injury to feelings. For this purpose, the question is whether the injury is 'grave, severe and serious' (*Horev v. Minister of Transport* [9], at p. 51 {204}; HCJ 7128/96 *Temple Mount Faithful v. Government of Israel* [11], at p. 523; HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board* [12], at p. 40 {253}. In the words of my colleague, the President:

> '… Only serious injuries to feelings justify a restriction of the freedom of speech and the freedom of creative expression. Indeed, in a democracy it should be recognized that there is a "level of tolerance" of injury to feelings, which the citizens of a democratic society must suffer, and which is implied by the principles of tolerance themselves. Only when the injury to feelings exceeds this "level of tolerance" is it possible to justify, in a democracy, a restriction of freedom of speech and freedom of creative expression…

…

> … This level of tolerance is positioned very high, when the injury to feelings seeks to deny protection to the freedom of speech and the freedom of creative expression' (HCJ 6126/94 *Szenes v. Broadcasting Authority* [13], at pp. 836-839 {360-364}).

This level of tolerance is normative. In considering the extent of the injury, one must take into account the nature and source of the injury. The examination does not focus on the extent of the personal suffering of the injured persons, but it is derived from the normative outlooks of society.

Thus, for example, religious feelings are given the relatively broadest protection in view of the special status of the freedom of religion. See, for example, *Horev v. Minister of Transport* [9], at p. 58 {211-212}. By contrast, an injury to feelings, even if it is acute and painful, which derives from a distorted or even untruthful depiction of events that occurred, is not given strong protection, since the basic values of our legal system require the development of tolerance and being able to stand firm against opposing and even untruthful views. Cf. HCJ 2888/97 *Novik v. Second Television and Radio Authority* [14].

In our case, I am prepared to assume that the mere broadcast of the 'Playboy' channel causes an injury to feelings. However, as a rule those persons who are exposed to the content of the channel are not a 'captive audience.' There is no obligation or necessity to watch the broadcasts; rather the opposite is the case — a positive and deliberate action is required in order to do so. In this situation, the level of protection against the injury decreases. As President Barak said:

> 'The injuries to feelings that justify injury to rights… these are injuries whose occurrence cannot be prevented; usually these are injuries to feelings of a "captive audience" ' (*Horev v. Minister of Transport* [9], at pp. 49-50 {203}).

And as Justice Or said, *ibid*., at p. 97:

> 'The injury to the orthodox Jewish public also reflects the fact that members of the orthodox Jewish public who live there are a kind of "captive audience," which is exposed against its will to activity which desecrates the Sabbath. Therefore, in principle, the right of the members of the orthodox Jewish public not to be injured in the aforesaid manner deserves consideration.'

The conclusion is therefore that the injury to feelings with regard to the existence of the broadcasts of the 'Playboy' channel in itself cannot justify an injury to the freedom of expression and the freedom of occupation that is not required by the clear language of the law.

Constitutional considerations — dignity of women

16. The essence of the right to dignity is protection against degradation. See *Miller v. Minister of Defence* [8], at p. 132 {224}. Notwithstanding, the question whether the dignity of women is harmed as a result of the broadcasts of an erotic or pornographic channel on cable TV or satellite is not a simple one, since there is fierce debate also on the question of the harm caused by the pornography *industry* as a whole. Those who support the imposition of wide-ranging prohibitions on all branches of the pornography industry constitute a broad and unique coalition of conservative and radical feminist groups, which also finds expression in the combination of the Knesset members among the petitioners before us. Opposed to these are liberal groups and also feminist groups who oppose intervention. These debates concern the nature of the rights in dispute and the harm to them, and also the effect of the pornography industry and its marketing policies on society and the public interest. See, for example: C.A. MacKinnon, 'Pornography, Civil Rights, and Speech,' 20 *Harv. Civ. Rights-Civ. Lib. L. Rev.* (1985) 1; R. Dworkin, 'Liberty and Pornography,' *The Problem of Pornography* (Belmont, ed. by S. Dwyer, 1995) 112; I. Nemes, 'The Relationship Between Pornography and Sex Crimes,' 20 J. Psych. & Law (1992) 459; C. Gilligan, *In a different voice: Psychological theory and women's development*, Cambridge, Massachusetts: Harvard University Press, 1982; N. Strossen, 'A Feminist Critique of "The" Feminist Critique of Pornography,' 79 *Virginia L. Rev.* (1993) 1099; R. Rivlin (under the supervision of M. Kremnitzer), *Pornography: Morality, Liberty, Equality — A proposal to Amend the Prohibition against the Publication and Display of Obscenity and Associated Offences* (2003), at p. 56.

Notwithstanding this debate concerning the pornography *industry*, I am also prepared to assume that pornographic *broadcasts*, including the broadcasts of the 'Playboy' channel, do indeed harm the dignity of women. Nonetheless, like the previous two rights, the right to dignity is also not an absolute right, and in any event this assumption leads to an examination of the constitutional balance between the right of women to dignity and the rights of freedom of speech and freedom of occupation.

The background to the constitutional balance — the existing reality

17. The constitutional balance must be made against the background of the prevailing social reality, which embodies the outlook of society as to what is permitted and what is forbidden. It cannot be overlooked that pornography is legal and available in a variety of media apart from cable TV and satellite, such as books and magazines, as well as video cassettes, CDs and DVDs, which are available not only in lending libraries but also at vending machines situated 'under every leafy tree.' Compare the remarks of Justice M. Cheshin in *Station Film Ltd v. Film and Play Review Board* [3], at p. 694 {64-65}. The Internet, to which there is very wide access, is especially prominent, and it allows easy access to pornographic content that is much more hardcore than that on the 'Playboy' channel. It appears that it is only a question of time until the convenience and availability of Internet content exceeds every other medium. In such circumstances, the harm to the dignity of women from the addition on cable TV and satellite of a single erotic or pornographic channel with relatively softcore content (or even the addition of more than one such channel) cannot be particularly serious.

In addition, a broad interpretation of the prohibition provided in the law, which deviates substantially from accepted social norms, will open the floodgates for the disqualification of much sexual content that is broadcast on the various television, cable and satellite channels. We must be cautious not to return to past eras of intensive censorship, which it is hard to reconcile with a democratic and open society that respects human rights.

The background to the constitutional balance — comparative law

18. As stated, there are 175 countries that permit the broadcasts of the 'Playboy' channel. There is therefore almost an 'international consensus' against imposing a prohibition on the 'erotic' pornographic content that this channel presents.

Thus, in the United States, the current test for distinguishing between the protected pornographic expression and the unprotected obscenity is the three-stage test set out in *Miller v. California* [26], at p. 24:

> 'The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest… (b) whether the work depicts or describes, in a patently offensive way, sexual conduct… (c) whether the

> work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> …
>
> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct.'

In Canada, the Supreme Court held that:

> 'Pornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing...
>
> Some segments of society would consider that all three categories of pornography cause harm to society... Others would contend that none of the categories cause harm. Furthermore there is a range of opinion as to what is degrading or dehumanizing... That arbiter is the community as a whole' (*R. v. Butler* [28], at p. 484).

This was explained by the Court of Appeal in the State of Ontario:

> 'The depiction of persons engaged in purely sexual activity through the medium of videotape films has been recognized by the Supreme Court of Canada as a form of expression whose freedom is guaranteed...
>
> Under the *Butler* test, not all material depicting adults engaged in sexually explicit acts which are degrading or dehumanizing will be found to be obscene. The material must also create a substantial risk of harm to society' (*R.* v. *Hawkins* [29], at p. 566).

Thus it can be seen that in democratic legal systems from which we derive inspiration there is a recognition that different pornographic expressions must be distinguished according to their gravity, and only a limited portion of these expressions should be restricted as prohibited 'obscenities.'

The constitutional balance — the vertical balance (proportionality) and the horizontal balance

19. Where a constitutional right conflicts with an interest that is not in itself a constitutional right, a need arises for proportionality, i.e., for vertical balancing. Proportionality involves ensuring that the harmful action is consistent with the purpose of the harm, choosing the action that causes the right a minimum of harm and ascertaining that the benefit in achieving the proper purpose is proportional to the harm caused to the right. See, for example: HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [15], at p. 423, and *Horev v. Minister of Transport* [9], at p. 64 {218-219}.

Unlike the limitation clause, which aims to minimize the harm caused by the interest to the right, in a conflict between rights we should aim to reduce the harm to the conflicting rights by means of a reciprocal concession. This is the horizontal balance. I discussed the distinction between a vertical balance and a horizontal balance in HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [16], at p. 284:

> '… The fundamental distinction between the two types of balance does not lie in the outcome of the balance in the sense of a mutual concession as opposed to a preference of one value over the other, but in its purpose, from which the criteria for the balance are derived. The vertical balance — which is applied when there is a conflict between a human right and a public interest — is intended to minimize, as much as possible, the harm to the right even when the public interest overrides it, whereas the horizontal balance — which is applied when one human right conflicts with another — is intended to reduce, as much as possible, the harm to each of the two rights.'

20. The interpretation of the Council is, in my opinion, a correct interpretation, since it realizes the required constitutional balances. It realizes the vertical balance in that the protection against the harm to feelings, which is not a basic right in itself and which reflects a public interest of limited weight, is achieved by a proportional restriction of the rights of freedom of expression and freedom of occupation. Thus there is no absolute prohibition of the broadcasts; only extreme content is prohibited, and within the framework of its discretion the Council imposed restrictions on the times when the channel may be broadcasted, the manner in which it may be marketed and sold, and the way in which people may be exposed to it.

This interpretation also realizes the horizontal balance, according to which the opposing rights yield, since Playboy, as well as the cable TV and satellite companies, cannot realize their right of freedom of expression and occupation fully, and at the same time the right to dignity withdraws, because the channel is not banned and it is allowed to broadcast relatively 'mild' content subject to the restrictions that we have mentioned.

From the general to the specific — the 'Playboy' channel

21. As the Council stated in its decision, which was based on the opinion of its experts, the broadcasts of the 'Playboy' channel should be classified into four categories: feature films or series; instructional programs that depict techniques for improving relationships or improving sex; documentaries, chat shows and entertainment programs on sexual subjects; programs that depict naked women outside the framework of a film or a series. In all of these, women are depicted 'fully naked (but without close-ups of the sexual organs and without any pictures at all of male sexual organs),' and the sex depicted is simulated only. Even the content of the tapes filed by the parties, including the petitioners, does not fall within the scope of the prohibition in the law, according to the narrow interpretation set out above.

In the classification of pornographic content, this content is relatively mild, and it does not amount to the prohibition of obscenity in the Penal Law. Cf. *United States v. Playboy Ent. Gp*. [27]. It is only natural that this is the conclusion of the 175 countries that permit the channel's broadcasts, including, as aforesaid, many democratic countries whose legal system is similar to our own.

The procedural arguments

22. In view of the fact that the decision in this petition has a legal basis, and is not a judicial review of the 'subjective' discretion of the Council and its members, there is not much importance to the procedural arguments of the petitioners against the holding of the reconsideration and against the procedures and involvement of Adv. Inbar, since an administrative authority may in certain circumstances change decisions that it has made, and examine unlawful decisions, and the principles of 'finality' do not apply to such decisions (except in cases of estoppel or similar circumstances, which are irrelevant to this case). See, for example, I. Zamir, *Administrative Power*, vol. 2, Nevo, 1996, at p. 1004; HCJ 701/81 *Malach v. Chairman of District Planning and Building Committee* [17], at p. 6. In any case, the decision on the question of lawfulness, now that the matter has reached the courts, is made

by the court — in a proceeding in which all the parties have been heard in full — and not by the Council.

Although not really required, it may also be said that from the evidence it appears that the contentions of the petitioners were heard to the extent required for making the decision, and that there was no defect in the proceedings held by the Council.

I propose therefore that the two petitions should be denied, without making an order for costs.

Vice-President T. Or

I agree with the opinion of my colleague, Justice Dorner, that the decision of the Council for Cable TV and Satellite Broadcasting, which is the subject of this petition and which permitted the broadcasts of the 'Playboy' channel, was lawful and did not breach any prohibition prescribed by law.

Justice E. Mazza

I agree with the opinion of my colleague Justice Dorner.

Justice A. Procaccia

I too agree with the opinion of my colleague Justice Dorner.

Justice E.E. Levy

I am disgusted by the content of the broadcasting channel in dispute, but in view of the importance of basic rights that are enshrined in statute and case law, and since a way has been found to prevent the channel from being accessible to everyone but rather only to persons who choose to watch it for payment, I am of the opinion that the outcome reached by my colleague Justice Dorner is inevitable.

Justice A. Grunis

I agree with the opinion of my colleague Justice Dorner.

Justice M. Cheshin

The Council for Cable TV and Satellite Broadcasting decided to permit the broadcast of the 'Playboy' channel on cable TV and satellite, and we have not found any proper reason to intervene in that decision and to prohibit what it has permitted. I agree with the conclusion reached by my colleague Justice Dorner that it is right and proper to deny the two petitions before us.

2. We are concerned with the interpretation of s. 6Y(2) of the Communications (Telecommunications and Broadcasting) Law (hereafter — the Communications Law), which states (after its amendment in 2002) as follows:

'Prohibited broadcasts

> 6Y. A licensee for cable TV broadcasts shall not transmit any broadcasts —
>
> (1) …
>
> (2) that contain any obscene material within the meaning thereof in the Penal Law, 5737-1977, including broadcasts involving one of the following:
>
> (1) A depiction of sexual intercourse that involves violence, abuse, humiliation, degradation or exploitation;
>
> (2) A depiction of sexual intercourse with a minor or with a person that appears to be a minor;
>
> (3) A depiction of a person or any part of a person as a sex object;
>
> all of which when the broadcasts listed in sub-paragraphs (1) to (3) do not have significant artistic, scientific, newsworthy, educational or explanatory value that justifies, in the circumstances of the case, their broadcast;
>
> …

We see that all of the aforesaid broadcasts are prohibited broadcasts, including broadcasts involving:

'A depiction of a person or any part of a person as a sex object.'

This formula that the law prescribes extends a net of prohibition, and the question under discussion is whether the 'Playboy' broadcasts are caught in the net or whether they slip through the holes in the net. *Prima facie*, nothing is simpler than the solution to the problem. We watch the 'Playboy' broadcasts; we place the prohibition formula next to them; we bring the two together, and the solution will present itself to us automatically, plain and simple. Is this really so?

3. We are currently considering a special kind of pornography, and we have long known that pornography is a matter of geography. Moreover it is not only a matter of geography but also of time and period. Pornography is dependent on time and place. The outlooks of society from time to time will decide the matter. *Vox populi vox dei*. The voice of the people is like the voice of God. I think that we can guess what a court in England would have decided in England in the Victorian era, or what a court would decide in a country where the spirit of Queen Victoria reigns. Were I a judge in the time of our father Abraham, I can but guess what I would decide; the same in the time of Ezra and Nehemiah; the same in the time of Rabbi Judah, President of the Sanhedrin; the same in the period of the second *Aliya*; the same in the Jewish settlement in Hebron at the beginning of the twentieth century. I am not sure whether at the end of the nineteen-forties — before the State was founded and in the early years of the State — the court would have decided as we are deciding today. And I am not referring to the constitutional winds that blow through the camp nowadays. I am referring to the voice of the people, in the simple sense of the phrase. Indeed, we are not concerned mainly with the interpretation of a law in the narrow sense; with the explanation, meaning and interpretation of language. We are also not concerned mainly with doctrines or basic principles that run through the law. Not at all. The net of the prohibition that the law spreads puts before us an 'open tapestry,' and the text of the prohibition will be filled with content that is found mainly in materials that come from beyond the precincts of the judiciary. It is incumbent upon us, the judges, to go out into the street, to literature, to poetry, to the press, to the radio and television, to day-to-day conversation.

Let us recall that in our time, not so very long ago, D.H. Lawrence's book *Lady Chatterley's Lover* was literally regarded as obscene literature, whereas today — today we think this absurd. In this regard it was said in *Advancement Promotions and Publishing (1981) Ltd v. Broadcasting Authority* [4], at p. 30:

> 'Times come and go, social arrangements are transformed, the ways of people change, fashions come and go, and our time is not like times past… we are not like our fathers, our children are not like us, and our grandchildren are not like our children. Each generation has its own teachers, each generation has its own customs.'

And as our Rabbis told us: 'Go, see how the people conduct themselves' (Babylonian Talmud, Tractate *Berachot* 48a [30]). It need not be said that understanding the voice and conduct of the people is not always an easy task, for conflicting winds blow among us. But there is a prevailing wind, and there are breezes that are not so strong.

4. Contrary to the remarks of my colleague, the statement that pornographic expression is protected by freedom of expression — namely that freedom of expression also includes pornographic expression — is not a statement that is self-evident. Moreover, not only is this statement not self-evident, but I do not know how this applies to our present case. In paragraph 12 of her opinion, my colleague cites the remarks of President Barak in *Station Film Ltd v. Film and Play Review Board* [3], at p. 676 {34-35}; her own remarks in *Advancement Promotions and Publishing (1981) Ltd v. Broadcasting Authority* [4], at p. 11; in paragraph 13 she goes on to cite additional remarks written by President Barak in *Alba v. State of Israel* [7], at pp. 296-297. Her conclusion is (at the end of paragraph 13) that 'even pornographic expression falls within the scope of the basic right of freedom of expression.'

I know of the rulings made in foreign countries, but I have difficulty in transposing them, as they are, from one legal system to another. In *Advancement Promotions and Publishing (1981) Ltd v. Broadcasting Authority* [4] I wrote the following (*ibid*., at p. 28): 'I think that everyone agrees that not every vibration of the vocal chords, nor every grumbling of the stomach is entitled to the protection of the freedom of speech. The protection is not given to a vibration that a person makes in the air, even if that vibration has acquired a meaning in the dictionary as having a certain content. This is the case with sounds emerging from the human mouth — in the literal sense — and with every other method of expression, like a written publication;' see also *Station Film Ltd v. Film and Play Review Board* [3], at pp. 690-691 {59-60}; *Szenes v. Broadcasting Authority* [13], at p. 865 {398}. I have difficulty, for example, in classifying racism, incitement, mutiny or pornography of the XXX variety as being inherently protected — even *prima facie* — by the

freedom of expression. I also have difficulty in understanding the *real and substantive* significance — beyond the legal technique — of classifying these publications one way or the other.

I should emphasize that I agree that every person has a right of expression, in the fullest sense, as long as we are referring to a right that is a freedom or liberty; a freedom like the freedom of occupation was in *Bajerno v. Minister of Police* [10], which prevailed before the Basic Law: Freedom of Occupation was enacted. I also agree that every person has an interest in expressing himself in any way that he sees fit, provided that we add and realize that this interest is a part of the marketplace of interests, and it may conflict with a more elevated interest. The legal system is a marketplace of interests that are continually struggling with one another; sometimes the interests combine with one another, sometimes they cut into each other, and sometimes they conflict directly with each other. The interest of freedom of expression is like any other interest in this struggle of interests. Knowing all this, I have difficulty in accepting, for example, that pornography — especially hardcore pornography — racism, incitement, mutiny and other similar evils enter the struggle with other social interests with the crown of freedom of speech on their heads. I have not denied — nor will I deny — the interpretation that freedom of expression has an exalted status, which gives freedom of expression a special, additional strength when it conflicts with other social interests. Indeed, the interest of freedom of expression has acquired special additional strength — an internal substantive strength — and in many cases it will easily overcome those who wish to subdue it or detract from it. But in the final analysis, the light and warmth that emanate from it are what will determine the status of freedom of expression in the Israeli legal system.

Justice J. Türkel

1. I agree with the outcome that my honourable colleague Justice Dorner reached in her opinion, namely that the petitions should be denied. I disagree with her reasoning, and the following are some of my doubts and my reasons for explaining my position.

2. No-one disputes that the right of freedom of expression is one of the most exalted of human rights. I spoke of this in one case:

> 'In my opinion, according to the criterion that has absolute freedom of expression at one end and its prohibition at the other, the point of balance should be established very close to the first

> end. In other words, we should adopt an approach that holds freedom of expression to be almost absolute' (*Alba v. State of Israel* [7], at p. 331. See also CrimFH 8613/96 *Jabarin v. State of Israel* [18], at p. 211).

And in another case I added that:

> 'Freedom of expression… is an integral part of our legal ethos, it stands in the vanguard of the freedoms on which our democracy is based, and it has a "place of honour in the sanctuary of basic human rights" (*per* President Barak in HCJ 153/83 *Levy v. Southern District Commissioner of Police*, at p. 398 {114})' (HCJ 2753/03 *Kirsch v. Chief of Staff, IDF* [19], at p. 376).

I am not certain whether the scope of the right's application is 'universal,' in the sense that it is 'like water covering the sea' (Isaiah 11, 9 [31]), or whether there are 'islands' that it does not cover (but cf. my remarks in *Alba v. State of Israel* [7], at pp. 334-335). There is also a basis for saying that pornographic expression — in words, hints or pictures — is such an 'island' that is not covered by that right, but even if pornographic expression is covered by the right of freedom of expression, it can be restricted (see the remarks of President Barak in *Station Film Ltd v. Film and Play Review Board* [3], at pp. 677-678 {37-38}). The question whether the conditions for such a restriction are fulfilled, and how they should be applied, should be considered separately.

3. One way or the other, deciding the question before us does not require this deliberation and the other clarifications and considerations that my colleague took into account. The Council for Cable TV and Satellite Broadcasting (hereafter — 'the Council') interpreted the wording of s. 6Y(2)(3) of the Communications (Telecommunications and Broadcasting) Law — 'a depiction of a person or any part of a person as a sex object' (hereafter — 'the provision') — as 'applying to situations where a person is treated as an object or as a tool without a personality or will of its own, and not in every case in which a person is depicted in a way intended to arouse sexual gratification or a person is depicted in a sexual context.' I have grave doubts as to whether this is the proper interpretation, but even if we interpret the provision as applicable to every case where a person is depicted in a sexual context, the Council has discretion as to *how the provision is to be implemented*, and according to its decision, 'nothing in the broadcasts of the "Playboy" channel… amounts to broadcasts that are included within the framework of the prohibited broadcasts in section 6Y(2) of the

Communications Law.' There is no basis for intervening in this discretion for the reason that, according to the accepted rules of this court, the court will not replace the discretion of the administrative authority that has the duty of deciding the matter with its own discretion (see, *inter alia*: HCJ 92/56 *Weiss v. Chairman and Members of the Legal Council* [20]; CA 311/57 *Attorney-General v. M. Diezengoff & Co. (Navigation) Ltd* [21]; FH 16/61 *Registrar of Companies v. Kardosh* [22]; HCJ 636/86 *Nahalat Jabotinsky Workers' Moshav v. Minister of Agriculture* [23]; HCJFH 4128/00 *Director-General of Prime Minister's Office v. Hoffman* [24]; *Kirsch v. Chief of Staff, IDF* [19]; R. Har-Zahav, *Israeli Administrative Law* (1997), at p. 436).

Indeed, I also have doubts with regard to the Council's decision in so far as the implementation of the provision is concerned. There is a basis for saying that 'programs that depict naked women outside the framework of a film or a series' as well as photographs that depict women 'fully naked (but without close-ups of the sexual organs and without any pictures at all of male sexual organs)' — as the Council described the broadcasts of the 'Playboy' channel — fall within the scope of 'a depiction of a person or any part of a person as a sex object.' Such programs and photographs involve an injury to the feelings of many women and men among the public and also to the dignity of women and even to the dignity of men, and this can be seen from the petitions and the personalities of those men and women who backed them. As stated above, this is insufficient for intervention in the decision of the Council, and there is even less basis for intervention when in its decision the Council imposed restrictions on the broadcasts of the 'Playboy' channel that make the channel's broadcasts a private matter ('The channel will broadcast only from 10:00 p.m. until 5:00 a.m. each day; the channel will be offered and sold within the framework of a separate channel…; for the purpose of purchasing the channel, a positive notice or consent of the subscriber will be required…; the licensee will adopt reasonable measures in order to ensure that the age of the subscriber purchasing the channel is over 18; the channel will be sold as a channel requiring payment…; the channel will be encoded and encrypted…').

4. Therefore I too have decided that the petitions should be denied.

Justice D. Beinisch

Like my colleague Justice Dorner, I too agree with the determination that pornographic expression is protected by the freedom of expression. In her opinion, Justice Dorner assumed that the right of women to dignity is harmed

by the pornography industry and various expressions of pornography, but she came to the conclusion, in which I join, that in so far as the matter before us is concerned — the broadcasts of the 'Playboy' channel — the proper balance between the rights is maintained. I join also in the determination that the interpretation given by the Council for Cable TV and Satellite Broadcasting to the provisions of the law and the restrictions that the Council determined for the purpose of implementing it are correct and comply with the interpretive tests in the constitutional spirit required by the nature of the rights placed on the two pans of the balance.

I will point out only that the question of the scope of the protection that should be given to pornographic expression is a complex question that does not require a decision in the case before us. The degree of legitimacy or protection that should be given to pornographic expression and the question what is pornographic expression have engaged the courts in various countries whose legal systems are similar to ours, and they have provided material for many academic articles, and this too was discussed by my colleague in her comprehensive opinion. It may be assumed that this question will return to engage us in the future, and it will be decided in each case according to the specific circumstances.

Justice E. Rivlin

I agree with the opinion of my colleague Justice Dorner and all its reasoning. I disagree with the remarks of my colleague Justice M. Cheshin, who has difficulty in classifying certain publications within the scope of freedom of expression. In this sense I disagree also with the reservation expressed by my colleague Justice Türkel. In this matter it has been held by this court, more than once, that freedom of expression, as a constitutional right, extends to every expression, whatever its content, whatever its effect, and however it is expressed (*per* Justice Barak in *Universal City Studios Inc. v. Film and Play Review Board* [12]. and in *Station Film Ltd v. Film and Play Review Board* [3], at p. 676 {35-36}). The freedom of expression extends also to expression whose content is pornography (*ibid.*, at p. 677 {36-38}). Indeed, recognizing the fact that every expression is protected by the freedom of expression does not guarantee absolute protection for every expression. The scope of the protection of freedom of expression in each case is the result of an ethical balance. In the case before us, the interpretation given by Justice Dorner to the law reflects the proper ethical balances.

President A. Barak

I agree with the opinion of my colleague, Justice Dorner, and the remarks of my colleagues Justices Rivlin and Beinisch.

Petitions denied.

10 Adar 5764.
3 March 2004.