HCJ 680/88

1. Meir Schnitzer
2. Aluf Ben, a Journalist
3. Itonut Mekomit Ltd.
v.
1. The Chief Military Censor, Mr. Yitzchak Shani
2. The Minister of Defense

The Supreme Court sitting as the High Court of Justice
[January 10, 1989]
Before Barak J., Maltz J., and Wallenstein J.

Editor's Synopsis:

The Petitioners sought to publish a newspaper article that was critical of the outgoing head of the Mossad, the Agency for Intelligence and Special Duties, on the occasion of the forthcoming appointment of a new Mossad head. The article did not mention his name or otherwise identify him. After several versions of the article were submitted for approval to the first Respondent, the Chief Military Censor, and after the Petitioners agreed not to publish certain parts of the article, the Censor forbade the publication of two matters: criticism of the head of the Mossad's effectiveness, on the ground that such criticism would affect adversely the Mossad's ability to function in general in the field of security policy; and disclosure of the impending change in leadership of the Mossad, on the ground that this could focus attention on the head of the Mossad and endanger his safety. The Chief Military Censor purported to act pursuant to authority vested in him by the Defence (Emergency) Regulations, 1945. The Petitioners sought the issuance of a rule nisi, directing the Respondents to show cause why they should not be restrained from interfering with the publication of the article, including the forbidden matter. The High Court considered the

substantive issues raised by the case as if an order nisi had been granted and issued an order permitting publication of the article in the above respects, holding:

1. Although the Defence Regulations were promulgated by the Mandatory regime, they are now part of Israeli legislation and should be interpreted in harmony with Israeli democratic values. Such values give prominence to freedom of expression and freedom of the press.

2. The scope of judicial review of "subjective discretion" does not differ from the review of any other discretion. All administrative discretion must be exercised lawfully, that is: within the authority granted by the law granting discretion, for the purpose envisioned by the grant, reasonably, in good faith, on the basis of evidence reasonably evaluated, after giving due consideration of and balancing the other values involved.

3. The values to be balanced in this matter are state security and freedom of the press. There can be no effective exercise of freedom of expression without security. But free expression and public debate contribute to state security as part of the system of checks and balances.

4. Free expression may not be curtailed unless there is a near certainty that the publication will cause substantial and grave harm to security. This is especially so in the case of a prior restraint on the publication.

5. The Military Censor did not meet the burden of proof cast upon him to establish that there exists a near certainty of harm to security if the article will be published.

Supreme Court Cases Cited:

[1] H.C. 5/48 *Leon v. The Acting Supervisor of the Tel Aviv Municipal Area,* 1 P.D. 58.

[2] H.C. 222/68 *Nationalist Groups, A Registered Association v. The Minister of the Police,* 24 (2) P.D. 141.

[3] H.C. 107/52 *Assad v. The Chief of Staff of the Armed Forces, 6* P.D. 339.

[4] F.H. 29/84 *Kossoi v. Feuchtwanger Bank,* 38 (4) P.D. 505.

[5] Cr. A. 667/83 *Borochov v. Yeffet,* 39 (3) P.D. 205.

[6] H.C. 953/87 *Poraz v. The Mayor of Tel Aviv-Jaffa,* 42 (2) P.D. 309.

[7] H.C. 73/53 *"Kol Ha-Am" Company Ltd. v. The Minister of the Interior, 7* P.D. 871.

[8] H.C. 58/68 *Shalit v. The Minister of the Interior*, 23 (2) P.D. 477.

[9] C.A. 165/82 *Kibbutz Hazor v. Revenue Agent Rehovot,* 39 (2) P.D. 70.

[10] E1. A. 2/84 *Neiman v. The Chairman of the Elections Committee for the Eleventh Knesset,* 39 (2) P.D. 225 (also reported in 8 Selected Judgments xxx).

[11] C.A. 65/57 *HaEtsni v. Ben Gurion,* 11 P.D. 403.

[12] C.A. 81/55 *Kochavi v. Baker,* 11 P.D. 225.

[13] Cr. A. 108/66 *"Dan" Cooperative for Public Transportation Ltd. v. The Attorney General, 20 (4) P.D. 253*.

[14]H.C. 262/62 *Peretz. v. The Kfar shmaryahu Local Council,* 16 P.D. 2101.

[15] H.C. 301/63 *Shitreet v. The Chief Rabbi of Israe*l, 18 P.D. 598.

[16] H.C. 243/62 *Israel Movie Studios Ltd. v. Greg,* 16 P.D. 2407.

[17]H.C. 39/64 *EI-Ard Company Ltd. v. The Supervisor of the Northern Region, Nazareth,* 18 P.D. 340.

[18] H.C. 153/83 *Levy v. The Police Commander of the Southern District,* 38 (2) P.D. 393.

[19] H.C. 14/86 *Laor v. The Council for Review of Movies and Plays,* 41 (1) P.D. 421.

[20] H.C. 644/81 *Omer International Inc. New York v. The Minister of the Interior,* 36 (1) P.D. 227.

[21] H.C. 355/79 *Katalan v. The Prisons Service,* 34 (3) P.D. 294.

[22] H.C. 234/84 *"Chadashot" Ltd. v. The Minister of Defense,* 38 (2) P.D. 477.

[23] Cr. A. 126/62 *Dissenchik v. The Attorney General,* 17 P.D. 169.

[24] Cr. A. 696/80 *Azulai v. The State of Israel,* 37 (2) P.D. 565.

[25] H.C. 253/64 *Jerris v. The Supervisor of the Haifa District,* 18 (4) P.D. 673.

[26] H.C. 448/85 *Daher v. The Minister of the Interior,* 40 (2) P.D. 701.

[27] H.C. 399/85 *Kahane v. The Managing Board of the Broadcasting Authority,* 41 (3) P.D. 255.

[28] Cr. A. 255/68 *The State of Israel. v. Ben Moshe,* 22 (2) P.D. 427.

[29] H.C. 372/84 *Klopper-Naveh v. The Minister of Education and Culture,* 38 (3) P.D. 233.

[30] C.A. 723/74 *"Ha'aretz" Newspaper Publication Ltd. v. The Israel Electric Company Ltd.,* 31 (2) P.D. 281.

[31] H.C. 1/81 *Shiran v. The Broadcasting Authority,* 35 (3) P.D.365. [32] H.C. 243/82 *Zichroni v. The Managing Board of the Broadcasting Authority,* 37 (1) P.D. 757.

[33] H.C. 554/81 *Bransa v. The Military Commander of the Central District,* 36 (4) P.D. 247.

[34] H.C. 292/83 *Temple Mount Loyalists, A Company v. The Police Commander of the Jerusalem Region,* 38 (2) P.D. 449.

[35] S.S.A. 5/86 *Spiro* v. *State Services Commissioner,* 40 (4) P.D. 227.

[36] H.C. 259/84 *Israeli Institute for the Selected Business and Product v. The Broadcasting Authority,* 38 (2) P.D. 673.

[37] H.C. 562/86 *Al Hatib v. The Ministry of the Interior Supervisor of the Jerusalem District,* 40 (3) P.D. 657.

[38] Cr. A. 495/69 *Omer* v. *The State of Israel,* 24 (1) P. D. 408.

[39] F.H. 16/61 *The Registrar of Companies v. Cardush,* 16 P.D.1209.

[40] H.C. 241/60 *Cardush v.The Registrar of Companies,* 15 P.D. 1151.

[41] H.C. 742/84 *Kahane v. The Speaker of the Knesset,* 39 (4) P.D. 85.

[42] H.C. 389/80 *Yellow Pages Ltd. v. The Broadcasting Authority,* 35 (l) P.D. 421.

[43] H.C. 910/86 *Ressler v. The Minister of Defense,* 42 (2) P.D. 441.

[44] H.C. 442/71 *Lanski, v. The Minister of the Interior,* 26 (2) P.D. 337.

[45] H.C. 361/82 *Hamry v. The Military Commander of the Judea and Samaria Area,* 36 (3) P.D. 439.

[46] H.C. *56/76 Berman v. The Commissioner of Police,* 31 (2) P.D. 587.

[47] H.C. 159/84 *Shahin v. The Commander of the I.D.F. Forces in the Gaza Strip Area,* 39 (1) P.D. 309.

[48] H.C. 46/50 *Alayubi v. The Minister of Defense,* 4 P.D. 222.

[49] H.C. 731/86 *Micro Daf v. The Israel Electric Company Ltd.,* 41 (2) P.D. 449.

[50] H.C. 393/82 *G'amaut Aschan Alm'almun Alta'unia Almahaduda Almasaulia, A Cooperative Association Legally Registered in the Command Headquarters for the Judea and Samaria Area v. The Commander of the I.D.F. Forces in the Judea and Samaria Area,* 37 (4) P.D. 785.

[51] H.C. 329/81 *Nof v; The Attorney General,* 37 (4) P.D. 326.

[52] H.C. 292/86 *HaEtsni v. The State of Israel,* 42 (4) P.D. 406.

[53] H.C. 541/83 *Asli v. The Supervisor of the Jerusalem District,* 37 (4) P.D. 837.

[54] H.C. 2/79 *Al Assad v. The Minister of the Interior,* 34 (1) P.D. 505.

[55] H.C. 488/83 *Bransy v. The Director of the Department for Visas and Citizenship,* 37 (3) P.D. 722.

[56] H.C. 306/81 *Sharon v. The Knesset Committee,* 35 (4) P.D. 118.

[57] H.C. 731/85 *The "Kach" Part v. The Speaker of the Knesset,* 39 (3) P.D. 141.

American Cases Cited:

[58] *United States v. Progressive, Inc., 467* F. Supp. 990 (1973).

[59] *New York Times Co. v.. United States,* 403 U.S. 713 (1971).

[60] *Near v. Minnesota,* 283 U.S. 697 (1931).

English Cases Cited:

[61] *Liversidge v. Anderson* [1941] 3 A11 E.R. 338 (H.L.).

[62] *Nakkuda v. M.F. De S. Jayaratne* [1951] A.C. 66 (P.C.).

[63] *Ridge v. Baldwin [1964]* A.C. 40.

[64] *Reg. v. I.R.C. Ex p. Rossminister Ltd.* [1980] A.C. 952.

JUDGMENT

Barak, J.:

What is the authority of the "Military Censor", acting pursuant to the Defence (Emergency) Regulations, 1945, to bar publication of a newspaper article that criticizes the functioning of the head of the Agency for Intelligence and Special Duties (the Mossad), while noting that the occasion for such criticism is his impending replacement - that is the question which is at the center of the petition before us.

The Petition

1. A daily newspaper called "Ha-Ir" is published in Tel Aviv by the third Petitioner. Mr. Shnitzer, the first Petitioner, is its editor. Aluf Ben (the second Petitioner) is a journalist employed by this newspaper. He prepared an article about the forthcoming changes in the leadership of the Mossad. The article was sent to the Chief Military Censor (the first Respondent) and was disqualified by him (on 3.8.88). The reason given for prohibiting publication of the article was that its publication would prejudice the security of the State. Several days later (11.8.88) the editor submitted to the Censor a different version of the article. This new version was also disqualified on the same grounds of state security. The Censor asked the newspaper to resubmit the article, and this was done (on 14.8.88), this time

containing references to persons by name. This version was disapproved for publication (on 15.8.88). Several days later (on 23.8.88), the article was submitted to the Censor in its final form. The Censor approved its publication, save for 32 paragraphs whose publication was prohibited. The petition was brought against this decision.

2. The selections whose publication was prohibited deal with three

matters: First, a description of the head of the Mossad. In the Censor's opinion, these portions could lead to his identification and thus prejudice his personal safety. Second, adverse criticism of the functioning of the head of the Mossad, including on grounds of inefficiency, which did not disclose events which had not previously been revealed. In the Censor's opinion, this criticism of the head of the Mossad would injure the Mossad's ability to function at all levels. In particular, it could harm state security insofar as contacts with parallel agencies in other countries are concerned, as well as with local field operatives. Third, publication of the expected change in the head of the Mossad. In the Censor's opinion, this would focus the attention of those interested in such matters on his person, his movements and his activities, and thereby lead to his identification, particularly abroad, which could cause substantial risk to his safety.

3. Mr. Lieblich, the Petitioners' representative, agreed that all references to the identity of the head of the Mossad should be deleted, and this is no longer an issue before us. On the other hand, it is his opinion that the two other matters - criticism of the functioning of the head of the Mossad and the date of his replacement - should be published and were

unlawfully disqualified. Mr. Lieblich emphasized the importance of freedom of expression and the public's right to be informed in a democratic regime. In his opinion, only when there exists a near certainty of prejudice to the security of the State may the Military Censor prohibit publication, and even then he must act reasonably. According to Mr. Lieblich, the publication of criticism of the head of the Mossad and the date of his replacement do not create a near certainty that state security will be prejudiced and the ban on their publication was not reasonable. In his arguments before us Mr. Lieblich stressed the public importance of the position of head of the Mossad - particularly after the Yom Kippur War - and the vital necessity that the most suitable man be appointed to this task. It was, therefore, (according to him) the Petitioners' duty to admonish and arouse those responsible so that the appointment of a new head of the Mossad would be properly weighed, and that it would not be influenced by politics, or by partisan conflicts or by an attempt to compromise by -appointing a mediocre person. Mr. Lieblich emphasized before us that the Petitioners did not mention any names in the article and did not recommend any candidates. Their intention is only to stress the duty to appoint suitable persons so that previous instances of negligence would not be repeated. Mr. Lieblich agrees that the operations of the intelligence services should be secret and protected against publication, but there is no justification, in his opinion, to prohibit publication of criticism of the head of the Mossad. Such public criticism could even result in extra vigilance on his part. Finally, Mr. Lieblich emphasized that it is permissible to publish information concerning the expected appointment of the head of the General Security Services, and there are no grounds to distinguish between him and the head of the Mossad. He also drew attention to an article published in September 1987, which the first respondent had allowed, in which reference was made to the growing agitation in Mossad circles over

the appointment of the next head of the Mossad. Mr. Lieblich also pointed out that the Military Censor does not ban publications criticizing the head of the General Security Services, the head of Military Intelligence and the Chief of Staff. In his opinion, there should be one criterion, insofar as public criticism is concerned, for all heads of security organizations.

4. In her reply, Mrs. Arad, who appeared for the respondents, noted that the Military Censor agrees that the right of expression and freedom of expression are basic principles of our system of law which should be honored. This premise has always guided his considerations. Furthermore, the Military Censor accepts the fact that the proper test to be applied in reviewing his powers is that of the near certainty that the publication would prejudice the security of the State. He also agrees that he must act reasonably. However, Mrs. Arad argued, the publication of criticism of the head of the Mossad and of his impending replacement create a near certainty that the security of the State will be harmed, and the prohibition of such publication was reasonable. We have already noted the Military Censor's reasons for his decision to forbid the publication. Mrs. Arad noted that the Military Censor did not prohibit publication of those parts of the article which criticized the Mossad and its functioning in general. He only censored criticism of the outgoing head of the Mossad. The reason for this was, as already noted, that, as long as the head of the Mossad remains in office, any references to the performance of his functions could prejudice the security of the State. She argued that there is a difference between criticism of the head of the Mossad and criticism of the heads of other security services, in light of the exceptional nature of the Mossad's work. Thus, for example, according to present practice, announcement by the Government of the appointment

of a new head of the Mossad is not accompanied by announcement of his name, while publication of his retirement is permitted together with publication of his identity for the first time. This practice is not followed in the case of the heads of other security services. Mrs. Arad added that there is public control over the appointment of the head of the Mossad, as he is appointed by the Prime Minister and functions under the control of the Prime Minister, the Government, the Foreign Affairs and Security Committee of the Knesset, the Knesset and the State Comptroller.

5. During the course of the proceedings, the "battle lines" between the parties were narrowed. The Censor withdrew his ban with respect to eight of the thirty-two paragraphs which he had previously censored; and the Petitioners agreed, of their own accord, to remove six of the remaining paragraphs. The dispute concerns, then, the remaining eighteen paragraphs, which concentrate on criticism of the functioning of the outgoing head of the Mossad and on his forthcoming replacement. The question before us is, therefore, whether the Censor's approach in these matters is lawful.

The Normative Framework

6. The "military censorship" exists by virtue of the Defence (Emergency) Regulations - henceforth the Defence Regulations. Chapter 8 of these Regulations deals with censorship. Regulation 87 (1) provides that:

> "The Censor may by order prohibit generally or specially the publishing of matters the publishing of which, in his opinion, would be, or be likely to be or become, prejudicial to the defence of Palestine or to the public safety or to public order."

The Censor is also empowered to demand that material be submitted for censorship before publication (Regulation 97). Publication of material whose publication was banned is an offense against the Defence Regulations. The Censor was appointed by the High Commissioner whose powers have now been assigned to the Minister of Defence. The Censor is an Army officer, and censorship pursuant to Chapter 8 of the Defence Regulations is performed within the framework of the Army. Hence the term "Military Censor". It should be noted that in actual fact the Military Censor's powers are not exercised with respect to those newspapers which are parties to the agreement between the Editors' Committee and the Minister of Defence (for particulars of that agreement, see Z. Chafets, "Press and Government in Israel", 14 Israel Yearbook on Human Rights (1984) 134; P. Lahav, "Press Law in Modem Democracies" (New York 1985) 265, 275). The newspaper "Ha-Ir" is not a member of the Editors' Committee and is not a party to the agreement with the Military Censor. The legality of the Censor's actions will therefore be examined directly on the basis of the Defence Regulations without any reference to the agreement with the Editors' Committee.

7. In the context of the petition before us, the provisions of the Defence Regulations which deal with military censorship give rise to four questions: first, in what

circumstances may the Military Censor prohibit publications in newspapers on the grounds of prejudice to the defense of the State or to the public safety or order; second, what are the limitations imposed on the Military Censor's exercise of his discretion; third, what is the scope of judicial review of the Military Censor's decisions; and fourth, does the Military Censor's decision in this case satisfy the appropriate tests and is there room for our intervention in his decision. I shall deal with these questions one by one.

The first question: Circumstances in which publication may be prohibited

8. The Defence Regulations were enacted by the High Commissioner pursuant to the powers vested in him by Article 6 of the Palestine Order-in-Council (Defence), of 1937. These Regulations are, therefore, part of the Mandatory legislation. However, pursuant to section 11 of the Law and Administration Ordinance, 1948, they became part of Israeli law. This change from Mandatory law to Israeli law was not a purely technical matter. A change in the framework brings in its wake, by the nature of things, a change in content. Section 11 of the Law and Administration Ordinance provides that the law which existed in Palestine on May 15, 1948, remains in force subject to "such modifications as may result from the establishment of the State and its authorities". Initially, this court held that such modifications were of a technical nature only (H.C. 5/48 [1], at p. 69). Later, it was held that such "modifications" are not of a technical nature only but also substantive (H.C. 222/68 [2]). Justice Silberg held, at pages 157-158 of the latter judgment, with reference to the technical approach of H.C. 5/48:

"With all due respect to the learned Justices, I am not convinced that the formal interpretation which they gave to these words is correct. I think there would be something of a "capitis diminutio" (diminution in value) of the great historical event - the creation of a Jewish State in Eretz Israel, if we were to say that the legislative change, after 2000 years of exile and after the establishment of our independent State, was for us, for example, merely that change in borders, in 1948, because of which the Allenby Bridge had to be removed from the list of 'lawful' points of entry into the country, published in 1943.... I admit without any shame that I am unable to grasp this idea. My heart is with those 'maximalists' who regard our national independence as the longed-for redemption, the third Temple, the rehabilitation of the nation's existence. And if this is the nature of our independence then it is possible, in principle, to examine the heartbeat of every Mandatory law in order to discover whether it complies with the spirit imbuing the laws of our independent and free state."

A colonial regime was replaced by political independence. Autocratic rule was replaced by democracy, which is the government of the people, based on representation, operating according to the will of the majority, but upholding the rights of the individual. This change, in the natural course of events, brings in its wake a new approach to law and to judicature. The results of this change vary with the circumstances. Sometimes, the change is purely technical (see H.C. 107/52 [3]). On other occasions it is of considerable

substance, resulting in the exclusion of Mandatory legislation from Israeli law (see H.C. 228/68 [2]). This would happen only on rare occasions, and has become even rarer with the passage of time (see H.C. 228/68 [2], at p. 209).

9. One of the changes that may result from the establishment of the State and its authorities is the manner of interpreting Mandatory legislation.

> "... [T]he last part of section 11 emphasizes principally the fact that political independence also brings in its wake changes in the scope of law and its interpretation. Wherever it was necessary, therefore, the basis for independent interpretation of the law and the independent crystallization of rules was created by statute." (President Shamgar in F.H. 29/84 [4], at p. 511.)

This change in the interpretation of Mandatory law is twofold. First, Mandatory legislation is not interpreted according to the rules of interpretation current during Mandatory times, but according to the rules of interpretation followed in Israel. Second, legislation is interpreted against the background of the basic principles of the legal system (see Cr. A. 667/83 [5] and H.C. 953/87 [6]). Mandatory legislation will not be interpreted against the background of the basic principles of the system of law that prevailed during the Mandate, but against the background of the basic principles of the system of law that operates in Israel. Justice Agranat noted this point in H.C. 73/53 [7], at p. 884, when he said:

"The system of laws on which the political institutions in Israel were established and now operate testifies to the fact that this is a country whose foundations are democratic. Likewise, the statements contained in the Declaration of Independence - in particular concerning the fact that the State is based on 'the foundations of freedom' and the guarantee of freedom of conscience - indicate that Israel is a freedom-loving country. It is true that the Declaration of Independence 'is not a constitutive law which lays down norms concerning the validity or invalidity of other legislation' ... but to the extent to which it 'expresses the people's aspirations and their beliefs' it is our duty to give heed to its contents when seeking to interpret and give meaning to the laws of the State, including laws enacted during the Mandate and which were adopted by the State after its establishment, through the channel of section 11 of the Law and Administration Ordinance, 1948. It is a well-known axiom that a people's laws are mirrored in their national way of life."

A legal norm - whether enacted or created by the judiciary - does not stand on its own. It is a "creation which lives in its environment" (Justice Sussman, in H.C. 58/68 [8], at p. 513). It fits into its environment, influences it and is influenced by it. The "legal environment" which influences every legal norm "includes not only the immediate legislative context but also wider circles of accepted principles, basic aims and

fundamental criteria which derive, in the words of President Landau, from 'the sources of social consciousness of the nation within which the judges live'.... It is not necessary to repeat these principles in every law; they constitute a kind of 'normative umbrella' over all legislation" (C.A. 165/82 [9], at p. 75).

> "A legislative act ... is not a one-time act cut off from the general way of life. The law takes on substance within the framework of a given legal and political system. It is one brick in an entire edifice, built on the basis of criteria of government and law which constitute the 'primary concepts of that society'...." (E1. A. 32/84 [10], at p. 307).

Therefore, a judicial norm which constituted part of the Mandatory law is absorbed into our law if it is not inconsistent with "the principles of the legal structure of our country" (Justice Landau in C.A. 65/57 [1l], at p. 409), and it continues to develop within the Israeli law against the background of the principles of that law. Its image is determined by its new environment (see C.A.81/85 [12], at p. 236). The same holds for a legislative norm which constituted part of Mandatory legislation. This nom] was absorbed into our law and if it proves to be consistent with the basic principles of our legal structure it continues to develop within Israeli law against the background of those basic principles. This is the source of the striving for "legislative harmony" (in Justice Sussman's words in Cr. A. 108/66 [13], at p. 261). Different acts of legislation, whether their historical source be Mandatory or our own independent legislation, must be interpreted together and operate as a comprehensive system (H.C. 953/87 [6], at p.

328). The nature of the basic principles can be learned from different sources, one of the most important of which is the Declaration of Independence, "which constitutes a legal charter that expresses the nation's values" (H.C. 953/87 [6], at p. 330). Justice Sussman emphasized this when he pointed out that "the way of life of the citizens of the state and the principles which every authority in the state must take as their guiding light are laid down" in the Declaration of independence (H.C. 262/62 [14], at p. 2116).

The Declaration of Independence is not the only source from which one can learn about the basic values of the state. For example, the Supreme Court refers from time to time to the "basic principles of equality, freedom and justice, which are the legacy of all advanced and enlightened states" (Justice Cohen in H.C. 301/63 [15], at p. 612) and to "basic rights which are not recorded in texts, but emanate directly from the character of our state as democratic and freedom-loving" (Justice Landau in H.C. 243/62 [16], at p. 2414).

10. The Defence Regulations were enacted by a colonial legislature and not by a democratic one. It was contended, after the establishment of the State of Israel, that their continued enforcement was not consistent with the changes resulting from the establishment of a democratic state. This argument was rejected by the Supreme Court (in H.C. 5/48 [l] and H.C. 39/64 [17]). Several unsuccessful attempts were made in the Knesset to abrogate them entirely (see A. Rubinstein, The Constitutional Law of Israel (3d ed. 1981) 219). But the Israeli legislature saw fit to repeal certain sections of the Regulations and to replace them with original Israeli provisions (see, for example, the

Emergency Powers (Arrests) Law, 1979). These legislative changes did not affect the powers of the Military Censor. Chapter 8 of the Emergency Regulations, which deals with military censorship, has therefore remained in force in Israel. However, the interpretation of the Defence Regulations must perforce differ in Israel from that given to them during the Mandate. The Defence Regulations are today part of the legislation of a democratic state. They must be interpreted against the background of the basic principles of Israeli law. The Supreme Court has acted in this manner with respect to a long list of Mandatory laws, such as the Police Ordinance [New version] 1971, (see H.C.153/83 [18]), the Cinema Ordinance (H.C. 243/62 [19]), the Public Entertainments (Censorship) Ordinance (H.C. 14/86 [19]), the Newspaper Ordinance (H.C. 73/53 [7]; H.C. 644/81 [20]), the Prisons Ordinance [New Version] 1971 (H.C. 355/79 [21]).

The same applies to the interpretation of the Defence Regulations. Justice Elon so remarked (in H.C. 234/84 [22], at p. 483):

> "The Mandatory Defence Regulations of 1945 do not always meet with our approval and we are of the opinion that they should be interpreted narrowly, as long as this is compatible with their wording, so as to make them consistent with the democratic principles on which the State of Israel is founded."

It is true that the Defence Regulations deal with the security of the State, which influences the manner in which the basic principles of our system of law are applied to

them. But this has no influence on the question whether these principles should be applied or not. Every legislative act - whether it originated during the Mandate or is purely Israeli, whether it deals with the security of the State or otherwise - must be interpreted against the background of the general principles of our system of law. State security and public order do not supplant and negate the application of basic values. They are interwoven with them, influence their nature and are balanced within their framework.

11. What are the basic values which shape the interpretation of the Defence Regulations? First and foremost come security considerations, which spread their influence across the entire scope of the Regulations. The realization of this interest concerning the defense of the State and public safety and order is the main purpose of the Regulations and they must be interpreted against the background of this purpose (compare Article 6 of the Palestine Order-in-Council (Defence)). Alongside considerations of security (in their broad sense) there are other values, in the light of which every enactment in a democratic society must be interpreted, and which the Defence Regulations affect. Thus, for example, the Defence Regulations deal with the military courts. It is only natural, in this context, that the value of judicial integrity must be taken into account (see Cr. A. 126/92 [23]; Cr. A. 696/81 [24]). The Defence Regulations contain provisions pertaining to crimes, punishments and detention prior to conviction. In this context, account must be taken, among other things, of the individual's right to personal freedom and the presumption of innocence. Another chapter of the Defence Regulations deals with Unlawful Associations. In this context account must be

taken, of course, of the basic right to freedom of association (see H.C. 253/64 [25]). Yet another chapter of the Defence Regulations deals with orders restricting the freedom of movement. In this context it is only natural that the right to freedom of movement will be taken into account (see H.C. 448/85 [26]). Defence Regulations which provide for military censorship prejudice, first and foremost, the right to freedom of expression. Censorship of publications prejudices privacy. The broad authority to search ("censorship of travelers") prejudices privacy, the dignity of man and the integrity of property and person. This list of basic values which are adversely affected by the Defence Regulations is by no means complete or comprehensive. It only serves to show how broad a range of values are promoted by the Defence Regulations (defense, public safety and order) and are prejudiced by them (judicial integrity, personal freedom, freedom of association, freedom of movement, freedom of expression, privacy, dignity of man and integrity of property and person.)

12. In interpreting the Defence Regulations account must be taken, on the one hand, of the basic values which are their raison d'etre and, on the other hand, of the basic values which every legislative act in a democratic country must be assumed to intend to promote (see H.C. 953/87 [6]). Sometimes all these values lead to the same result. But sometimes they may clash with one another. So, for example, the values concerning the security of the State and public safety and order may clash with the values of freedom of movement (see H.C.448/85 [26]), freedom of expression (H.C. 73/53 [7]), the dignity of man (see H.C. 355/79 [21]). In all such cases the court must strike a balance between the conflicting values. In the course of discussing the need to strike a balance between the

right to security and the right to freedom of expression, insofar as the powers of the Military Censor under the Defence Regulations are concerned, Justice Elon said, in H.C. 234/84 [22], at p. 483:

> "The existence of censorship and the prohibition of publication sometimes gnaw away at the basic right to freedom of expression, the right to inform and to be informed, which is one of the 'basic rights which are not recorded in texts, but emanate directly from the character of our State as democratic and freedom-loving'... One of the important missions of democracy is to find the proper balance between the existence and preservation of this right and the need to protect legitimate secrecy, in defense of the security of the State and the proper functioning of public safety and order, which also is an essential condition for the very existence of a democratic regime...".

13. In the petition before us the value of state security clashes with the values of freedom of expression and the public's right to be informed. These conflicting values are basic to our legal system. The state cannot exist without security. Nor can the social consensus upon which the state is built. So, too, individual freedoms which the state is supposed to promote cannot exist. Hence the centrality of security in the general complex of values in the legal system. Without freedom of expression, truth cannot be disclosed, the individual cannot fulfil himself and the democratic regime, which is based on the exchange of opinions, cannot continue to exist. The free exchange of information,

opinions and points of view is essential to the existence of a democratic regime, which is based on the rule of the people, by the people, for the people. Without freedom of expression democracy loses its soul (H.C. 399/85 [27], at p. 274). On more than one occasion this court has noted "the close connection that exists between the principle of freedom of expression and debate and the proper functioning of the democratic process" (Justice Agranat in Cr. A. 255/68 [28], at p. 435). It noted therefore that "freedom of expression is a condition precedent for the existence of democracy and its proper functioning" (President Shamgar in H.C. 372/84 [29], at p. 238). Freedom of expression thus has a special status. It secures the existence of a democratic regime which, in turn, secures the existence of other basic rights (see H.C. 73/53 [7] supra, at p. 878; C.A. 723/74 [30], at p. 295).

14. How is the clash between the security of the State and freedom of expression to be resolved? It seems to me that if the clash between the two values is "head-on", so that there is no possibility of co-existence between them, then the security of the State must be preferred, for two reasons: First, because the security of the State is the substantive objective of the Defence Regulations and a judge-interpreter must, first and foremost, achieve this objective. Second, because a democracy must exist in order to realize itself:

> "A democratic regime is prepared to protect freedom of expression so long as such freedom protects democracy. But when freedom of expression becomes a tool with which to injure democracy, then there

is no reason for democracy to put its head on the block for the axeman ..." (H.C. 399/85 [27] supra, at p. 287).

"A constitution is not a formula for suicide and individual rights are not a platform for national destruction" (El. A. 2/84 [10], at p. 310). "A democracy does not have to commit suicide in order to prove its vitality" (Id., at p. 315). A person cannot enjoy freedom of expression if he does not have the freedom to live in the society in which he chooses to live. The right to live in a society is prior to the right to express one's opinions therein (see *United States v. Progressive, Inc.* (1973) [58], at 995).

15. The "balancing formula" in the case of a clash between state security and freedom of expression assumes, therefore, fulfillment of the value of state security. However, because of the centrality of the basic right to freedom of expression, it seeks to limit the harm to this value as much as possible. Such harm will be allowed only if it is absolutely necessary in order to preserve the value of security. In this connection, the Supreme Court decisions stressed two main questions: first, what is the extent of the injury to state security which justifies restricting freedom of expression; second, what is the probability that state security will be injured if freedom of expression is not curbed. The approach that guides the decisions is that "the question always is, whether the extent of the injury, discounted by the possibility that it will not occur, justifies restricting the individual's right in order to prevent the danger..." (El. A. 2/84 [10] supra, at p. 311). It has been held that in a clash between state security and public safety and order, on the one hand, and freedom of expression, on the other, "freedom of expression must yield

only when the injury to the public order is severe, serious and grave" (H.C. 14/86 [19], at p. 435). Hence, only when the injury to the public order is severe and substantial will it justify curbing freedom of expression. Likewise, it has been held that the probability of injury which would justify limiting freedom of speech must amount to a "near certainty". "For this court to prohibit a person in charge of public broadcasting from publishing a particular matter, such extreme circumstances must exist as to constitute a real and nearly certain danger to the safety of the public at large..." (President Shamgar in H.C. 1/81 [31], at p. 378); "According to Justice Agranat (as his title then was), the important right of freedom of expression yields to the public interest when there is a 'near certainty' that the exercise of this right in a particular instance would endanger the public or the security of the State..." (Justice D. Levin in H.C. 243/82 [32], at p. 766). Such a probability does not exist when it is possible to take other measures - apart from restricting personal freedom and freedom of expression - in order to minimize the danger. Curbing freedom of expression should not be the first means; it should be the last means (see H.C. 153/83 [18] supra, at p. 407; H.C. 14/86 [19] supra, at p. 437; H.C. 554/81 [33], at p. 252). "I consider censorship a measure to be used only in the rarest of cases when there is no alternative". (Justice Witkon in H.C. 243/62 [16] supra, at p. 2425).

16. We have seen that in different statutory contexts (such as the Police Ordinance [New Version], the Newspaper Ordinance, the Broadcasting Authority Law, 1965, the Public Entertainments Ordinance (Censorship)) this Court adopted an interpretive approach in accordance with which freedom of expression may be restricted in order to

protect the security of the state and public order only when there is a near certainty that substantial injury will occur to such state security and public order if freedom of expression is not curbed. Does this approach apply to the interpretation of the Defence Regulations? Counsel for both sides answered this question affirmatively, and I agree with them, for four reasons. First, from the semantic point of view, the Military Censor's authority is conditioned on belief that the publication is likely to prejudice security. This term, "likely", is the same term which was the basis for the "near certainty" formula in H.C. 73/53 [7]. Second, the interpretive approach referred to above is not based only on the word "likely" in the Defence Regulations. It reflects a principled approach to the comparative weight of the values of state security and public order, on the one hand, and freedom of expression, on the other hand, and to the proper balance between them. Justice Landau emphasized this in H.C. 243/62 [16], at p. 2418:

> "In the 'Kol Ha-Am' case, the court interpreted the specific statutory provision in section 219(2)(a) of the Newspaper Ordinance, whereas here we are dealing with administrative discretion which is not further defined in section 6(2) of the Cinema Ordinance. But the decision in 'Kol Ha-Am' was reached on a broad conceptual basis which is just as applicable to the matter before us".

In quoting Justice Agranat in H.C. 73/53 [7], in connection with the test of near certainty, Justice D. Levin pointed out, in H.C. 243/82 [32], at p. 765:

> "These penetrating and instructive words have become a corner-stone in our judicial system, and the principles contained in them are accepted by everyone, without any reservations".

This court adopted this approach in additional cases (see H.C. 292/83 [34], at p. 456; S.S.A. 5/86 [35], at p. 237; H.C. 448/85 [26] supra; H.C. 1/81 [31] supra; H.C. 259/84 [36]; see also P. Lahav, "Freedom of Expression in Supreme Court Judgments", 7 Mishpatim (1976-77) 375).

Third, there is nothing special about the Defence Regulations and therefore no reason to deviate from the general conception accepted in Israel in similar matters. There is no substantive difference between "military" censorship and "civil" censorship, and the same weight should be given to state security, on the one hand, and freedom of expression, on the other, in both. There is no real difference between a "military" officer and a "police" officer in matters concerning the security of the state and public safety vis-a-vis freedom of expression. It is true that the dangers to security which the Defence Regulations seek to prevent may sometimes - but not always - be more severe than the danger to the public order which other laws seek to prevent. This relative difference will be expressed in the fact that it will be easier to show that the danger of injury to state security is substantial and severe and that the probability of its occurrence is nearly certain (see, for example, H.C.562/86 [37]). There is no reason, however, why this difference in the gravity of the danger that exists in some cases should result in the application of different fundamental tests. Therefore, when the question arose as to what

test should be applied in deciding what information should not be published by the Broadcasting Authority in connection with interviews with a representative of the P.L.O., this court applied the test of "near certainty". Justice D. Levin pointed out that "the important right of freedom of expression yields to the public interest when there is a 'near certainty' that the exercise of this right in a specific instance is likely to endanger public safety or the security of the state..." (H.C. 243/82 [32], at p. 766). President Shamgar reiterated the same approach when he pointed out that "no right should be denied in advance save when there is a near and inevitable certainty that a crime will be committed or that security or public safety will be injured..." (El. A. 2/84 [l0] supra, at p. 266). Fourth, on its merits, it seems to me that the test of near certainty of substantial damage to the security of the state is the desirable one. It expresses correctly the comparative social importance of the conflicting principles, according to the standards of the "enlightened public" - the standard we use in similar circumstances (H.C.58/68 [8] supra, at p. 520). "The court must determine the borderline between what is permitted and what is forbidden in every case according to its judgment, guided by the enlightened concepts that prevail in modern society, while remembering that every limitation of freedom of expression exudes an odor of censorship, and in borderline cases the tendency should therefore be to permit rather than to prohibit" (Justice Landau in Cr. A. 495/69 [38], at p. 41l). This test protects the security of the state and public safety, on the one hand, since it prevents a publication that entails a near certainty of substantial damage to these values. At the same time, this test protects freedom of expression in broad and comprehensive areas, and allows thereby the achievement of the aims which freedom of expression seeks to achieve. Any attempt to apply a test that is more

restrictive of freedom of expression could have harsh results both for freedom of expression and for democracy. It should not be forgotten that we are dealing with censorship which prevents publication in advance, and thereby not only "chills" freedom of expression but "freezes" it (see A.M. Bickel, The Morality of Consent (New Haven, 1975) 61). This freezing effect is done without any judicial process or judicial decision. It is, therefore, especially important that the denial of information to the public should occur only in exceptional and unusual circumstances. The near certainty test expresses this approach. It is not superfluous to note that the test in cases of prior restraint is much more stringent in the United States. The rule there is that prior restraint is forbidden, except when the publication affects the security of the state directly, immediately and unavoidably, as for example, the physical safety of participants in a military operation *(New York Times Co. v. United States* (1971) [59]; *Near v. Minnesota* (1931) [60]). We have not adopted this test in Israel. But we have pointed out that the distinction on which it was based - between prior restraint of publication and punishing the publisher after the fact - justifies adopting the "near certainty" test in Israel rather than a more lenient one. Justice Agranat noted this consideration in H.C. 73/53 [7], at p. 886:

> "We have dwelt on this Anglo-American approach to the use of prior restraint because it demonstrates very well that - insofar as the tendency to protect the interest of freedom of expression is concerned - this is a very strong and extreme measure. If the Israeli legislator nevertheless saw fit to leave intact the powers defined in section 19(2)(a), it must be understood that it did so because of the state of

emergency the country has known ever since its establishment. But, on the other hand, the Israeli legislator should not be assumed to have intended to give the authority in charge of implementing these powers - particularly since they are so severe and drastic - the right to cease publication of any newspaper merely because the matters published therein appear to it to tend to endanger the public safety but do not constitute direct incitement to this end, or at least encouragement, as could bring that result substantially closer in the circumstances. It would be out of the question to attribute such an intention to the Israeli legislator since, on the one hand, as we have already said, Israel is founded on principles of democracy and freedom, and, on the other hand, adopting such an abstract and obscure test as 'a bad tendency' would inevitably open the door wide to the influence of the personal opinions of the person entrusted with the above powers - however noble his aspirations might be - when evaluating the danger feared, as it were, to the public safety as a result of the publication concerned".

Consequently, Israeli society of today, which sees the need to protect security and public safety on the one hand and freedom of expression on the other hand, cannot find a better balance between them than in the formula of a "near certainty". President Shamgar discussed this in El. A. 2/84 [10] supra, at p. 265:

> "If there be a near certainty that the exercise of a particular right in a concrete case will injure public safety and order, then the statutory authority so empowered may restrain the exercise of the right in the said circumstances".

Absent a near certainty of real danger, it is important that there be a free exchange of opinions and ideas. This is important in matters of security no less than in other matters. Precisely because security matters affect the very existence of society, it is important that the public be informed concerning the various problems, so that it may reach intelligent decisions on problems which concern it.

> "On matters affecting the national interests, the people must be provided with all the pertinent information so that they can reach intelligent, responsible decisions. The first constitutional principle is that a self-governing people must have a thorough knowledge and understanding of the problems of their government in order to participate effectively in their solution... In the absence of strong and effective governmental checks and balances in the areas of national defense and international affairs, the only effective restraint on executive power lies in a well-informed citizenry. Without an alert, free and diligent press there cannot be a well-informed citizenry. Only if the government is vigorously and constantly cross-examined and exposed by the press can the public stay informed and thereby control their

government" (R.F. Flinn, "The National Security Exception to the Doctrine of Prior Restraint", 13 Wm. & Mary L. Rev. (1971-72) 214, 223).

Precisely because of the implications for the life of the nation contained in decisions of a security nature, the door should be opened to a free exchange of opinions on matters of security. In this connection it is particularly important that the press be free to serve as a forum for the exchange of opinions and for criticism in matters of vital interest to the public and the individual. It appears to me, therefore, that the near certainty test is the proper test to be applied when examining the Military Censor's powers under the Defence Regulations.

17. To summarize: the Mandatory Defence Regulations must be interpreted against the background of Israel's values. In interpreting them one must balance state security and public safety and order, on the one hand, and freedom of expression, on the other. This balance means that freedom of expression can be restrained, as a last resort, only when there is a near certainty of substantial danger to state security and public order.

The second question: Restrictions on the exercise of discretion

The Military Censor's discretion is subjective. He may prohibit publication of material which "in his opinion, would be, or be likely to be or become, prejudicial" to the public safety or order. Does this discretion render the examination of criteria for

the determination of the existence of danger superfluous? Could it not be said that all that is required is that this discretion be exercised in good faith? The answer to these questions is in the negative. Subjective discretion is not absolute. It does not empower the holder of the discretion to choose whatever alternative is in his opinion correct. Subjective discretion is limited (see F.H. 16/61 [39]). Just as any other discretionary power, it must comply with the following demands: first, it must be exercised within the limits of the enabling law that grants the discretion; second, the person who has the discretion must act subjectively to fulfil the objective criteria which fix the conditions for the exercise of the discretion; third, the person who has the discretion must choose one of the various legal options available to him in good faith, without caprice, after weighing only the relevant considerations, and reasonably; fourth, the selection from among the various possibilities must be based on reasonable evaluations and on facts established on the basis of convincing and credible findings, which do not leave room for doubts. I shall deal briefly with each of these requirements.

19. Subjective discretion must be exercised within the limits of the : enabling law. So said President Agranat in H.C. 241/60 [40], at p. 1162:

> "The general principle is that every administrative authority must act within the limits of the purpose for which the law has granted it the particular power; and this rule also applies to a power which it may exercise according to its 'absolute discretion'".

Justice Sussman repeated the same idea in F.H. 16/61 [39], at p. 1216:

> "Discretion which is granted to an administrative authority - even if it be absolute - is always linked to a duty which the authority must fulfil - that is, to the administrative tasks for the purpose of which the authority was empowered to act in its discretion. However extensive the freedom of choice may be, it is never unlimited".

> "Statutory discretion can be broad or narrow, but it is always limited. The number of possible choices available to the decision-maker may be many or few, but it is never unlimited. In this way the law protects the freedom of the individual... Even the most absolute of discretion must confine itself to the framework of the law which gave it life" (H.C. 742/84) [41], at p. 92).

Therefore, whoever is vested with discretion by the Defence Regulations may exercise this power in order to realize the aims that underlie the Regulations, but not to realize any extraneous aims (see H.W.R. Wade, Administrative Law (Oxford, 5th ed., 1982) 394).

20. Every administrative power is subject to certain conditions and demands. The legal application of the authority requires that these conditions and demands be observed

in practice. The subjectivity of the person in authority must be aimed at implementing these conditions and no others. Therefore, if the correct interpretation of section 87 of the Defence Regulations is that a newspaper publication may be prohibited only if the Censor believes that there is a near certainty that the publication will cause substantial injury to security, then the Censor's thoughts must be directed toward the issue whether such a near certainty exists. If, therefore, the Censor prohibits a publication without being satisfied that it creates a near certainty of danger to security, he has not exercised his discretion lawfully.

21. The exercise of discretion assumes freedom to choose between lawful options. The exercise of subjective discretion assumes that the choice between options will be based on the authority's evaluation of the options. This evaluation must be conducted in accordance with the rules of administrative law. It must therefore be made in good faith, without being arbitrary or discriminatory and on the basis of all the relevant considerations, and these alone. Furthermore, evaluation of the options and the selection of the preferred option must be done reasonably (H.C. 389/80 [42]). Subjective discretion and the objective test of reasonableness are not incompatible, but are complementary. Establishing the lawful option must be done according to the test of reasonableness. The power of discretion does not authorize an administrative authority to fashion an unreasonable option. Sometimes there are several options, all of which are reasonable. A range of reasonableness is created. Discretion allows the administrative authority to choose one of these options. Therefore, the Military Censor must consider whether there exists a near certainty that a newspaper publication will cause substantial

injury to security. This must be done reasonably, taking into account the needs of security, on the one hand, and freedom of expression on the other, achieving a balance between them in accordance with the test of "near certainty" (see H.C. 910/86 [43], at p. 48l). This process may raise a number of possibilities, all of which satisfy this test. A "range" of lawful possibilities is then created. The discretion to choose the correct option in this range is given to the Military Censor. He has the power to choose whatever option appears best to him from the options in this range. He has no discretion to select an option that is outside of the range.

22. Regulation 87 of the Defence Regulations provides that the Military Censor may prevent publication if in his opinion the publication is likely to prejudice - that is, if there is a near certainty of substantial damage to - the security of the State. What does it mean to say that the decision concerning the existence of prejudice - that is of a near certainty of substantial damage - is in the discretion of the Chief Censor? It means that the Censor - and only the Censor - has authority in this matter, and if there be several legal choices, only he may make the selection. This provision does not mean that the Chief Censor may reach his decision in any manner which he chooses. The Censor's decision must be reasonable. In other words, it must be assumed that a reasonable censor would have made such a decision in the circumstances of the case. I elaborated on this point in another case:

> "Discretion concerning the existence of near certainty and the gravity of the danger is vested in the Council. It must exercise this discretion

> reasonably. There are often several reasonable options, which all accord with the said test. A range of reasonableness is created, within which the court will not interfere... But it will interfere if the Council chooses an option which is not within this range. The Council does not have the discretion to choose an option which does not constitute a near certainty and does not contain an element of grave danger. The mere fact that the Council subjectively believes that the danger is grave and that the likelihood of its occurrence is nearly certain is not decisive. The test whether there exists a near certainty of grave danger is objective. The court must be satisfied that a reasonable council could have reached the conclusion that the danger was grave and that its occurrence was a near certainty on the basis of the facts available to it" (H.C. 14/86 [19], at p. 438).

In determining the reasonableness of the Military Censor's decision, account must be taken of the complex of facts, on the one hand, and of their evaluation in accordance with the test of near certainty of substantial harm to security, on the other. In every case the question is whether a reasonable Military Censor could conclude, on the basis of the given facts, that the publication was likely to cause - in other words, that there exists a near certainty that it would cause - grave or substantial damage to the security of the State.

23. The Military Censor's decision concerning the existence of danger to the security of the State must be based on facts and on evaluations. As to the facts, they are determined by the Chief Censor on the basis of the evidence before him. The determination of the facts must be done according to the usual criteria of administrative law. The test is whether a reasonable governmental authority would have regarded the material before it as having sufficient probative value (H.C. 442/71 [44]; H.C. 361/82 [45], at p. 442). The reasonableness of the decision is a function of the values involved in the decision. Therefore, if the exercise of administrative discretion would prejudice human rights, then persuasive and credible evidence, which leaves no doubt, would be required. Justice Shamgar noted this in H.C. 56/76 [46], at p. 692:

> "It is true that evaluation of the evidence is, first and foremost, within the prerogative of the authority... But if the authority seeks to deny recognized rights, then while the authority need not base its decision on previous court judgments, still, convincing evidence, which leaves no room for reasonable doubts, is required".

President Shamgar repeated the same idea in H.C. 159/84 [47], at p. 327:

> "H.C. 56/76... dealt with the question of denial of existing rights, and it was held there that to reach a decision the authority had to have before it convincing and credible evidence, which leaves no room for doubt. I agree with this test. When dealing with the denial of

> recognized rights or of basic rights ... the evidence required in order to satisfy a statutory authority that it is just to grant a deportation order must, generally, be clear, unequivocal and convincing".

Therefore, the finding that if the publication will not be prohibited there will be a near certainty of substantial injury to the security of the State must be based on clear, unequivocal and convincing evidence. Still, one must not forget that the finding that there exists a near certainty of substantial damage to security must, by its very nature, be based not only on facts but also on the evaluation of future developments. While this evaluation must be based on clear, unequivocal and convincing evidence, nevertheless it must, by its very nature, look to the future and it must necessarily deal with both risks of danger and favorable possibilities. All that can be required in this connection is that the examination of the matter be reasonable. One cannot demand that the Military Censor be imbued with the gift of prophesy.

The third question: the Scope of judicial review

24. After the establishment of the State it was held that the scope of judicial review of the powers of authorities that operate under the Defence Regulations is extremely limited. Justice Agranat noted this in H.C. 46/50 [48], at pp. 227-228:

> "This court's jurisdiction, when reviewing the acts of the competent authority under the Defence (Emergency) Regulations, 1945, is

> extremely limited. When the regulation in question empowers the authority to act against an individual whenever that authority is "of the opinion", or "it appears to it", that conditions exist which so require, then the competent authority itself generally has the last word concerning the question whether those conditions exist. In such cases, this court can only examine whether the said authority exceeded the powers vested in it by the regulation under which it presumed to act, whether it took account of all the factors fixed by law, and whether it acted in good faith. As it is subject to this limited power, the court cannot review the reasons which induced the competent authority to issue the order in question."

This approach was based on the subjective nature of the authority, on its "security" nature and on the English precedents which were current at the time and which took a similar position (primarily *Liversidge v. Anderson* (1941) [61]).

25. With time there came a gradual broadening of the scope of judicial review. This was the result of developments concerning the nature of subjective discretion and the understanding of judicial review. Considerable judicial experience also accumulated, which enabled expansion of the scope of judicial review of administrative discretion in security matters. Similar developments occurred in England itself where, in the course of time, it became clear that subjective discretion is not essentially different from any other discretion. Justice Sussman noted this in F.H. 16/61 [39] supra, at p. 1218:

> "I doubt whether there be any difference in principle between 'ordinary' discretion and absolute or 'subjective' discretion. Several objective tests have been established for subjective discretion as well, such as that the absence of good faith, arbitrariness or deviation from the purpose entrusted to the authority would lead to annulment of the administrative act."

Hence, even when exercising subjective discretion, the government authority has the "objective" duty to observe the provisions of the law. Moreover, subjective discretion is flawed not only by "subjective" defects in the authority's acts, such as lack of good faith or arbitrariness. Subjective discretion must be exercised reasonably. Thus, the subjective factor in discretion, too, is measured by objective criteria (H.C. 389/80 [42] supra). There is, therefore, no basis to restrict judicial review or to examine only "subjective" defects such as malice or lack of good faith. This approach is reinforced in the light of our understanding of the essence of judicial review, which draws its force from the principle of separation of powers and the need to ensure governmental legality (see H.C. 910/86 [43] supra). There is no reason why an administrative court should not examine the full scope of administrative discretion according to the test of legality, for otherwise certain areas of discretion would be immune to judicial review. This immunity would ultimately lead to infringement of the law, since where there is no judge there is no law. Therefore, administrative discretion should be examined from the perspective of the laws which determine its legality. If the jurisprudence of

administrative discretion (both substantive and procedural) determines that there is a defect in a particular exercise of discretion, then the administrative court should be prepared to review the legality of that exercise of discretion. There is no reason why certain fields of administrative discretion should not be subject to judicial review (subject, of course, to claims of lack of standing, or lack of jurisdiction or other such preliminary claims). Hence there is no basis for the view that the subjectivity of administrative discretion limits the scope of judicial review to certain defined issues. The proper conception is that it is the jurisprudence of discretion which fixes the conditions which determine when the exercise of discretion is legal and judicial jurisprudence establishes that the court has the power to examine whether these conditions are met. It is not the scope of judicial review which determines the legality of administrative discretion but, rather, the legality of the administrative discretion determines the scope of the judicial review (compare H.C. 731/86[49], at p. 458). Judicial review of administrative discretion has been expanded hand in hand with the development of administrative law concerning subjective discretion and the broadening of the legal demands upon administrative discretion. It is interesting to note that as early as H.C. 73/53 [7], which held that the exercise of subjective discretion by the Minister of the Interior had to pass the test of near certainty, Justice Agranat pointed out that:

> "The expression 'in the opinion of the Minister of the Interior', referred to in section 19(2)(a), requires that we hold that evaluation of the publication's influence on public safety in the circumstances is

> always the exclusive prerogative of the Minister and, therefore, the High Court of Justice will not interfere with his exercise of discretion unless, in making his evaluation, he deviated from the test of 'near certainty', in the light of the meaning of 'danger to the public safety'; or he paid no attention - or at best only a modicum of attention - to the important interest of freedom of the press; or he erred in the exercise of his discretion in some other way because he was carried away by trivial, untenable or absurd considerations".

This formula accorded well with the law of administrative discretion as it was developed more than thirty years ago. In the meantime the jurisprudence of discretion has been developed. It has been held, inter alia, that an unreasonable decision is unlawful, even if it is not untenable or absurd. Parallel to this development has come the development of the law of judicial review, and it has been held that judicial review may also be invoked when administrative discretion has been exercised unreasonably. The subjectivity of the Military Censor's discretion cannot, therefore, limit the scope of judicial review. Such review must attend to every one of the elements which govern the legality of the Military Censor's exercise of his discretion. There is no room for any "dead space".

26. Considerations of security have deterred judicial review of administrative discretion in the past. It was thought that judges should not interfere since they are not experts in security matters. But in the course of time it has become clear that there is

nothing unique about security considerations, in so far as judicial review is concerned. Judges are also not administrative experts, but the principle of separation of powers requires that they review the legality of the decisions of administrative officials. In this connection, security considerations have no special status. They, too, must be exercised lawfully and they, too, are subject to judicial review. Just as judges can examine the reasonableness of professional discretion in every other field and are required to do so, so can they examine the reasonableness of discretion in security matters and must do so. From this it follows that there are no special restrictions on the judicial review of administrative discretion in matters of state security. I so held in another case in which I said that:

> "There is a great deal of power concentrated in the hands of the military government and, for the rule of law to hold sway, judicial review must be applied in accordance with the usual tests" (H.C. 393/82 [50]).

The court does not hold itself out as a security expert and it does not replace the security discretion of the competent authority with that of a judge. The court examines only the lawfulness of the security discretion, including its reasonableness. In this connection, there is no difference between the scope of review of security discretion and the scope of review of any other administrative discretion. The court never becomes a supra-governmental authority, but only reviews the lawfulness of the exercise of governmental discretion. In this sense, security considerations are not special. The scope

of judicial review should be uniform for all government authorities. In the absence of any express provision of law it is not desirable that certain government authorities should enjoy immunity from judicial review. Similarly, it is not desirable, for example, to limit the scope of judicial review of the Attorney General's discretion to the question whether he acted in good faith. I pointed out that:

> "With regard to the scope of the court's intervention, there is no difference between the Attorney General and any other public functionary. The one, like the other, must exercise discretion fairly, honestly, reasonably, without arbitrariness or discrimination, after weighing relevant considerations only. All are subject to judicial review, and just as there is no special law for the Attorney General concerning the court's jurisdiction, there is no special law for him concerning the scope of judicial review..." (H.C. 329/81 [51], at p. 334; see also H.C. 292/86 [52]).

The same rule applies to a government authority that has security powers. There is only one rule for all with respect to the scope of our intervention. All are subject to the rule of law and to judicial review, in accordance with the usual and accepted grounds for review which reflect the legal demands of administrative law. Thus, when we reviewed the scope of the District Commissioner's powers under the Defence Regulations to cancel a permit to publish a newspaper, we held in H.C. 541/83 [53], at p. 840:

> "... Once the Commissioner has given the reasons for his decision, these reasons are subject to judicial review as any other exercise of administrative discretion...".

This same approach applies to the present matter as well. Once the Military Censor has given the reasons for his decision, these reasons are subject to judicial review the same as any other exercise of administrative discretion (compare also H.C. 2/79 [54]; H.C. 488/83 [55], at p. 725).

27. It should be noted that the limitation of the scope of judicial review over the exercise of discretion in matters of security, within the framework of the Defence Regulations, was based in the past largely on the majority decision in the House of Lords in the *Liversidge* [61] case. The Supreme Court relied on that decision when it held that "the power of this court, when called upon to review acts of the competent authority acting under the Defence (Emergency) Regulations, 1945, is extremely limited" (H.C. 46/50 [48], at p. 227). Since then, however, there has been an important development in England itself. The majority decision in the *Livelrsidge* case no longer reflects the current rule. This was stated in a series of judgments (see, for example, *Nakkuda v. M.F. De S. Jayaratne* (1951) [62]; *Ridge* v. *Baldwin* (1964) [63]). Lord Diplock's words in this connection are characteristic:

> "For my part I think the time has come to acknowledge openly that the majority of this House in Liversidge v. Anderson were expediently and,

> at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right" *(Reg v. I.R.C., Ex. p. Rossminister Ltd.* (1980) [64], at 10/l).

Since then the English courts do review security acts of authorities with powers based on defence regulations or emergency legislation (see Wade, supra, at 394). In Israel it has been held that the Supreme Court no longer follows the majority decision in the *Liversidge* case. President Shamgar noted this in H.C. 554/81 [33], at p. 251:

> "There is no doubt that the above Regulation 110 grants far-reaching powers, which must be used with proper caution, while taking scrupulous care to observe the preconditions which justify their use. Therefore, the court will examine the exercise of these powers with proper vigilance and will not follow those restraints and limitations which previously characterized the English judgments dealing with the exercise of similar powers in England *(Liversidge v. Anderson and another* (1941)), which also found an echo in H.C. 46/50 supra".

The very far-reaching character of government security power and the harm which the exercise of this power can cause to basic human rights require - as Justice Shamgar noted - that this court examine the exercise of the power "with proper vigilance".

The fourth question: Review of the Censor's decision

28. The Military Censor is empowered to prohibit publication of an article if there is a near certainty that its publication will cause substantial injury to the security of the State. It is within the Censor's discretion to decide whether such a near certainty exists and he must exercise this discretion reasonably. The question before us is whether the Military Censor's decision with respect to the subject matter of the petition before us complies with these tests. In order to answer this question we must distinguish between the Censor's decision to prohibit publication of criticism of the head of the Mossad and his decision concerning the timing of his replacement. We shall deal with each of these decisions separately. It should be noted that the parties now agree that publication of facts which could lead to identification of the head of the Mossad is forbidden, since such publication meets the required test.

Criticism of the head of the Mossad

29. The Military Censor's position is that "criticism of the head of the Mossad, as such, as well as criticism of the efficiency of his performance and the legitimation of such criticism which would derive from permitting its publication in Israel (as distinguished from its publication abroad) injures the functioning of the Mossad at all levels, including but not limited to, the field of state security and its connections with parallel organizations in other parts of the world and with its own field operatives". He stresses that "by way of contrast, those parts of the article containing expressions of the author's opinion and criticism of the Mossad and its functioning in general were not disqualified".

He summarizes his stand on this matter by noting that "the essence of the matter is not in the prohibition of a publication because of any personal prejudice to the person referred to in the publication, but rather because, so long as the person concerned serves in his position, any factual reference to him as such, to his functioning or to the results thereof in the field - amount to prejudicing the security of the State, because of substantial relevant considerations".

30. Examination of the Military Censor's reasoning shows that he does not complain that the newspaper article contains references to Mossad activities, or those of its head, whose publication could harm the security of the State. The Censor's explanation is directed at prejudice to the effectiveness of the head of the Mossad's functioning if such criticism may be published. In this connection, the Military Censor distinguishes between criticism of the head of the Mossad which, in his opinion, prejudices the security of the State and is therefore not permitted, and criticism of the Mossad itself, which would not be prohibited. In my opinion this reasoning does not stand up. Publication of criticism of the functioning of the head of the Mossad does not create a near certainty of substantial harm to the security of the State. We have here a remote possibility - "a bad tendency" in the words of Justice Agranat in H.C. 73/53 [7] – which has no place in our system of law. On the contrary: in a democratic society it is only right to allow criticism of persons fulfilling public functions. Of course, criticism is not pleasant, and sometimes it can even cause harm. That is true of criticism of the head of the Mossad or of the Prime Minister or of any other office holder. But this unpleasantness is not reason to silence criticism in a democratic society, which is built on the exchange of opinions and public debate. It

may be assumed that criticism of the Prime Minister, for example, creates some possibility of causing damage to his functioning, to public confidence in him and to his ability to conduct negotiations with heads of other countries. This possibility does not provide a sufficient basis for prohibiting publication of the criticism. Freedom of expression is also freedom to criticize and and the freedom to harass public functionaries with bothersome questions. Occasionally the criticism is not justified. It is sometimes petty. Sometimes it injures. That does not justify prohibiting its publication. It is worth repeating and and emphasizing Justice Landau's penetrating words in H.C. 243/62 [16] supra, at p. 2416:

> "A governing authority which takes unto itself the right to decide what the citizen ought to know, will eventually decide what the citizen should think; and there is no greater contradiction to true democracy, which is not 'guided' from above".

Justice Witkon repeated a similar idea when he said that:

> "All serious and relevant criticism is entitled to be protected against government intervention (unless it reveals vital secrets)..." (A. Witkon, "Thoughts and Memories From Childhood Concerning Freedom of the Press", in Law and Judging; Collected Articles (Schocken Press, A. Barak, M. Landau, Y. Neeman, eds., 5748) 168, 180).

In deciding to prohibit publication of criticism of the head of the Mossad's performance, the Military Censor did not give sufficient weight to the principle of freedom of expression. True, the Censor repeatedly declared before us that "on no account does he dispute the fact that the right of expression and freedom of expression must be honored - in our case, in the press - as they lie at the foundation of our system, and that he was guided by this in his considerations". But rhetoric is not enough. The basic principle must shape the actual decision. It is not enough to say that freedom of expression is a basic principle in our system. Practical significance must be given to this statement. Justice Bach rightly noted, in referring to freedom of expression, that :

> "The principles upon which this court has insisted in the past ... may not be used merely as an ideological flag to be waved externally, but must also actually guide us in fact in our day-to-day decisions" (H.C. 243/82 [32] supra, at p. 784).

And I added, in another case, that if we do not do so, then

> "everything that we established on the normative level will disappear in the world of practical reality. The court must examine not only the law but its implementation as well, not merely rhetoric, but also practice..." (H.C. 14/86 [19] supra, at p. 439).

31. A democratic regime is a regime of checks and balances. These checks and balances are, first and foremost, the product of the mutual relations between the governing authorities - the legislative, the executive and the judicial - among themselves (see H.C. 73/85 [57]). In a democratic society there are other checks as well. The State Comptroller is in charge of oversight. But such checks are not exclusively those of the governmental authorities. There are other checks, outside of the ruling framework itself. Among these, the press performs a vital function. Its task is to expose failings and to protest against them. A free regime cannot exist without a free press. The press must therefore be allowed to fulfil its function, and only in exceptional and special cases, in which there exists a near certainty that substantial harm will be caused to the security of the State, is there room to prohibit publication of information in the press. In principle, it is difficult to imagine a case in which criticism - as distinguished from the disclosure of facts - could provide a basis for the existence of near certainty of substantial harm to the security of the State. The burden of proof in this connection must rest on the Censor. He has failed to satisfy it. On the contrary, we are persuaded that the probability of harm to the security of the State is remote and the harm is not substantial. Indeed, it is, difficult to accept the position that criticism of the Mossad itself does not create a near certainty of substantial harm to the security of the State, but criticism of the head of the Mossad does create such a risk. This distinction appears to me to be artificial; just as criticism of the Mossad itself does not create the near certainty required to allow prior restraint on freedom of expression, so too, criticism of the head of the Mossad does not meet the test required for justifying restriction of freedom of expression. In the *New York Times Co.*

case [59], at 714, the United States Supreme Court noted, in quoting a previous decision, that:

> "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity".

The same holds true in this case. Every prior restraint of freedom of expression carries a heavy presumption that it is unlawful. One who seeks to show that the prior restraint of freedom of expression is lawful carries a heavy burden. The Military Censor did not sustain this burden.

Publication of the timing of the replacement of the head of the Mossad

32. The Military Censor forbade the Petitioners from publishing details concerning the timing of the replacement of the head of the Mossad. The reason given was that -

> "there are those who concern themselves with such matters who could more easily focus on the person [the head of the Mossad], his movements and his activities and put this information to practical use to identify the head of the Mossad, particularly abroad. This poses a real danger to his security".

In my opinion this reason, too, cannot stand up to review. The possibility that publication of the date of the forthcoming replacement of the head of the Mossad would increase the danger to his security appears to me to be purely speculative. No data whatever were brought before us - save for the above evaluation - which support this claim. Is it argued that hostile elements could identify the head of the Mossad because there would be an increase in overseas flights? This is a baseless argument in my opinion. But even if we assume that there is some merit to this argument, is it not possible to take precautions so as to reduce the risks? It appears to me, therefore, that in this case, too, the Military Censor did not give sufficient weight to the value of freedom of expression. The exchange of opinions concerning the desired qualities of the head of the Mossad is particularly important when a new appointment is imminent. It sharpens the public perception of the vital nature of the office and of the qualities which the holder of the office should have. By this means - and by public debate - it may influence the decision of those in charge of making the said appointment. The very knowledge that the appointment will be the subject of the public exchange of opinions and pubic criticism affects the considerations of those empowered to decide and can prevent an undesirable appointment. Such debate will be effective if it is conducted before the appointment, not after it. It is, therefore, important that the public know of the forthcoming appointment. This is one manifestation of the importance of freedom of expression and the public's right to know. Of course, if there is a near certainty of substantial harm to the security of the State, there is no escape from prohibiting publishing the fact of the forthcoming appointment. But, as already said, I am not at all satisfied that such a near certainty in

fact exists. Indeed, the Censor himself allowed publication of the following article in one periodical:

> "Generally, as the termination of the office of head of the Mossad draws near, there is a growing amount of agitation concerning the appointment of the next head of the Mossad. A group of ex-Mossad members sought a meeting, at their own initiative, with people at the political level in order to prevent the appointment of a candidate they considered unsuitable."

When the Military Censor was asked about this publication he replied that the article in question "dealt with what happens before termination of the office' in general'". Also, that article does not contain any concrete reference to the timing of the termination of the office, as in our case. The Censor's explanation is not convincing. Examination of the article reveals clearly that a group of ex-Mossad members asked for a meeting at a specific time in the present, and it is difficult to distinguish between that article and the one in our case. The difference between the two articles is so slight that one cannot justify any distinction between them, either from the point of view of security of the State or from that of the interest of freedom of expression.

33. It might be argued: the Military Censor believes that there is a near certainty of harm to state security if criticism of the head of the Mossad and the fact of his impending replacement are published. That is sufficient to justify prohibition of the

publication, even if the court thinks that a near certainty does not exist. This argument is unacceptable, as we have already seen. The Censor's position that there exists a near certainty of real damage to state security must be reasonable. His evaluations - based on strong evidence - must be reasonable. In our opinion, the Censor's position and his evaluation are not reasonable. In adopting this approach we are not turning ourselves into a super-censor. We are merely holding that a reasonable censor, functioning in a democratic regime and required to strike a balance between security and freedom of expression, would not arrive at the same conclusion as the first Respondent.

Conclusion

34. Before concluding I would like to state that I do not wish to cast any doubt whatever concerning the Military Censor's good faith. He has a difficult task, which he has to discharge under difficult conditions. Still, it is important to reiterate that the Defence Regulations - even though their source is Mandatory-autocratic - are applied in a democratic country. In these circumstances, their character must be fashioned against the background of their new democratic environment. Of course, democracy is entitled and obliged to defend itself. The democratic state cannot be established without security. But it should not be forgotten that security is not only the Army. Democracy, too, is security. Our power lies in our moral strength and our adherence to democratic principles, precisely when we are surrounded by great danger. Security is not an end in itself, but a means to an end. The end is the democratic regime, which is the rule of the people and which respects the rights of the individual, among which freedom of

expression occupies an honored place. Everything must be done, therefore, to minimize the possibility that security considerations will restrict freedom of expression, which is one of the principal values which security is supposed to protect. The way to achieve this balance between security and freedom of expression is to maintain freedom of expression and restrict it only when there is a near certainty of substantial harm to security and there is no other way to prevent the danger while preventing the injury to freedom of expression. The Military Censor must reach his difficult decisions against the background of this basic understanding.

The result is that we make the order nisi absolute to the effect that publication of those parts of the article containing criticism of the head of the Mossad or references to his forthcoming replacement may not be prohibited. We reiterate that publication of any matter that could lead to the identification of the head of the Mossad is forbidden. We also assume that those parts of the article, the publication of which the Petitioners agreed not to publish, during the course of the proceedings before us, will not be published, while those portions, whose publication the Respondents permitted in these proceedings will be published.

The Respondents will bear the Petitioners' costs in the amount of NIS 3,000, including advocates' fees. This amount will bear interest and be linked until payment.

Maltz J.: I concur.

Wallenstein J.: I concur.

Decided as stated in Justice Barak's judgment.

Judgment given on January 10, 1989.