IN THE

SUPREME COURT OF THE STATE OF ISRAEL

MP 298/86
MP 368/86

Before: **The Hon. President M. Shamgar**

Appellants: **1. Ben Zion Citrin**
2. Yifat Nevo

v.

Appellees: **1. Disciplinary Court of the Bar Association in the District of Tel Aviv**
2. Tel Aviv District Committee of the Bar Association

The Supreme Court of Israel
[April 7, 1987]
The Hon. President M. Shamgar

Facts: The two consolidated appeals requested the cancellation of fines imposed upon reporters who refused to reveal their sources of information upon being subpoenaed to testify before the District Disciplinary Court of the Israeli Bar Association. The main issue was whether the two reporters had an obligation to answer questions regarding their sources, or whether they enjoyed a privilege allowing them to refuse.

Held: The Court noted that there is no Israeli statute explicitly granting immunity to reporters and that such an immunity is not included in the 5731/1971 Evidence Ordinance, which does acknowledge other privileges. After considering the development of the issue through English and US case law, the Court has determined that reporters enjoy partial immunity from being forced to reveal their sources. It noted that the interest of protecting reporters' sources stems from freedom of the press and from freedom of expression, which is a prerequisite for the guarantee of most of the other fundamental rights of citizens. The Court ruled that the right to protect reporter's sources of information is a public interest and weighed it against the public interests of doing justice, preventing crime and acts against public order. It

determined that the reporters' immunity is partial and not absolute. The Court may instruct the witness-reporter to answer a question. President Shamgar ruled that the reporter should not be forced to reveal its sources unless it is relevant to the legal procedures and the Court thinks it is necessary and important in order to do justice in an essential matter. The Court clarified that this refers to severe offences that have significant results or implications, or to serious wrongdoing that requires the revelation of the source in order to do justice. In the case in question, the Court decided that, while the reporters' sources were relevant to the disciplinary trial, it was not a matter that justified curbing the freedom of the press and dismissing the reporters' immunity. Therefore, the appeal was accepted. It was held that the two Appellants were permitted to refuse to answer questions regarding their sources of information and the fine was overturned.

Attorneys for the Appellants: M. Mozer (M.R. 368/86); H. Shtenger and A. Horowitz (M.R. 298/86)

Attorneys for the Appellees: S. Ben-Yaakov and A. Ben-Yaakov

JUDGMENT

1. We have consolidated two appeals into one case regarding a fine imposed upon two reporters who were subpoenaed to testify before the District Disciplinary Court of the Israeli Bar Association, which operates under the 5721/1961 Bar Association Act. They were asked to testify about their sources of information for articles they wrote for the newspapers they work for. In one case, the article covered an alimony claim filed by an artist against the father of her daughters in which the names and photographs of the litigating attorneys were publicized. In the other case, a woman was forcibly institutionalized under the 5715/1955 Treatment for the Mentally Ill Act, and the question for the disciplinary hearing was whether the attorney who represented the patient was the source for the article. In other words, in both cases, the reporters were asked to reveal their sources of information regarding issues which the Bar Association considers to be ethics violations committed by the attorneys standing trial.

2. As I have mentioned, the reporters refused to turn over their sources and as a result the Disciplinary Court of the Bar Association imposed a fine upon them pursuant to their authority under Section 66 of the Bar Association Act, which states that Sections 9 – 11 and 27(b) of the 5729/1968 Investigative Commissions Act apply to a Disciplinary Court as if it were an investigative commission, with the necessary adjustments. The relevant provisions of the Investigative Commissions Act as referred to by the Bar Association Act are those found in Section 11(a)(4) of the Investigative Commissions Act. This provision states that one who is lawfully subpoenaed to answer questions and does not do so or answers evasively may be fined, even in absentia, pursuant to Section 40(2) of the 5737/1977 Penal Code, by the Chairman of the Committee and with the approval of the Committee (which, in this case, is the District Disciplinary Court). The Bar Association Act limits the fine to a maximum of 300 old shekels.

Section 11(b) of the Investigative Commissions Act states that the Chairman of the Committee, with the approval of the Committee, may grant a request for a hearing by someone who is fined in absentia under Section 11(a) to lower or cancel the fine. The fine may be canceled if the Chairman is convinced that the potential witness did not testify because of circumstances beyond his control. In this case, the chief judge of the disciplinary Court makes such a decision with the approval of the other judges, in place of the Chairman and the other members of the Committee.

Section 11(c) of the Investigative Commissions Act states that if a fine is imposed pursuant to subSection (a), the President of the Supreme Court must be notified in writing, and he, or another Supreme Court Justice, may, either upon request or even without it, reduce or cancel the fine.

As I have mentioned, the two reporters were fined for refusing to reveal their sources of information for their newspaper articles; the two appeals before me ask that the fines be canceled.

3. I have no intention of deciding the two appeals before me according to the question of whether the proper procedures were followed under Section 11(b), which is an issue that was brought up, among others, by one of the reporters; or according to the question of whether the Disciplinary Court stayed within the bounds of the maximum fine it is authorized to impose, because, as we shall see, these are not the main issues of this case.

However, I add that the issue of the maximum fine that may be imposed pursuant to Section 66 of the Bar Association Act requires some adjustments that should be tended to by those authorized to do so. The first problem stems from the relatively low fine set by the law. Section 66(a)(2) of the Bar Association Act, which incorporates Section 11 of the Investigative

Commissions Act into the procedures of the Bar Association's Disciplinary Court, states that, "The fines imposed by the Disciplinary Court under the aforementioned Section 11 cannot be more than 300 (old – M.S.) shekels…" In this law, the legislature wished to impose a fine above that set forth by the Investigative Commissions Act which carried a fine of up to only 200 Israeli Liras (*see* the 5740/1980 Bar Association Act (amendment 13) (April 13, 1980)).

Over the years, inflation levels grew and the Justice Minister increased the maximum fine available under Section 11 of the Investigative Commissions Act to 10,000 old shekels (5744/1984 Penal Order (adjusting fine amounts); the order was published on February 12, 1984 and went into effect 30 days later), pursuant to his authority under Section 64 of the Penal Code. The problem is that the Justice Minister did not enact a similar amendment to the Bar Association Act, which created an unreasonable situation in which the maximum fine under Section 66 remained a relatively low 300 old shekels (Section 61 of the Penal Code cannot apply here because of a limitation in subSection (4)).

Another problem stems from Section 21 of the 5744/1984 Judiciary Act (amendment 19) which references the fine set in Section 11 of the Investigative Commissions Act to the fine set in Section 40(2) of the Penal Code. It would seem that from this date on there would be no need to update the set fine stated in Section 11, and it would suffice to merely update the fine set by Section 40 of the Penal Code. Despite this, the Justice Minister updated the fine set forth by Section 11 of the Investigative Commissions Act even though it should no longer be in effect. *See* 5745/1985 Penal Order (adjusting fine amounts); 5746/1985 Penal Order (adjusting fine amounts).

4. The main issue before us in this case is whether the two reporters have an obligation to answer questions in a Disciplinary Court, or whether they enjoy, as they claim, a privilege

allowing them to refuse to answer questions regarding their sources. To answer this question, we need to first examine the 5731/1971 Evidence Ordinance (new version).

Section 1 of the Evidence Ordinance states that a Court has the authority to subpoena anyone who is relevant and admissible and who is not barred by another rule of evidence to testify; therefore we see that there are two conditions necessary for a subpoena: the witnesses must be relevant and admissible.

Section 66 of the Bar Association Act authorizes a Disciplinary Court adjudicating a disciplinary action to subpoena anyone in Israel to testify or provide documentation other than who is exempted by law. The Disciplinary Court may also obtain any testimony, both written and oral, and question witnesses. The authority to subpoena witnesses and obtain testimony stems from its auxiliary authority under Section 66(a) which, as previously noted, incorporates Sections 9 – 11 and 27(b) of the Investigative Commissions Act. Under Section 9 of the Investigative Commissions Act, the Chairman of the Investigative Commission, with the approval of the Commission, can subpoena a witness to testify or produce documents or other forms of evidence. Section 10 states that one who is subpoenaed to testify or produce documents or other forms of evidence before the Investigative Commission, has the same obligations as someone investigated under Section 2 of the Criminal Procedure Ordinance (testimony). Section 2(b) of the Criminal Procedure Ordinance states that someone being interrogated must honestly answer all questions asked [of him] by police or another authorized official, except for questions whose answer places him in criminal jeopardy. Section 47 of the Evidence Ordinance, which applies to testimony presented to a Disciplinary Court, also states that a person is not obligated to provide evidence if it will implicate him in a crime he has either been indicted for or stands to be indicted for.

The Disciplinary Court certainly has the authority to subpoena the two reporters and question them as they would any other witness. The question now is, first, was the question [asked] of them relevant under Section 1(a) of the Evidence Ordinance (new version)? And, do these two reporters enjoy reporter's privilege, which would allow them to refuse to answer any question asking them to reveal their source? As regards the relevance of the questions, we can deduce from the facts of the case that the issue of the reporters' sources are relevant to the issue adjudicated in the Disciplinary Court, which is whether the attorneys in question are the cause for the publication [of their names]. This brings us to the second issue of immunity.

5. There is no Israeli statute explicitly granting immunity to reporters, nor is there any legislation which addresses the matter. Chapter 3 of the Evidence Ordinance (new version) lists who is legally immune from testifying. Section 44 of the Ordinance speaks about immunity for the good of the country, Section 45 speaks about about immunity for the welfare of the public and, as we have already said, Section 47 deals with immunity for incriminating evidence. As Regards the status of certain occupations, Section 48 recognizes immunity for attorneys under certain circumstances, Section 49 for doctors, Section 50 for psychologists and Section 51 for clergy. Section 52 qualifies the immunity in question by stating that the immunity discussed in Chapter 3 applies to evidence both before a court or tribunal and before a government authority, body or an individual authorized by law to collect evidence. Any reference in the Chapter to a "Court" includes also "tribunal", "body" or "individual" authorities authorized to collect evidence. Therefore, there is no doubt that Chapter 3 of the Evidence Ordinance (new version) also applies to evidence presented to the Disciplinary Court of the Bar Association. However, the problem is that Chapter 3 does not say anything about any such privilege for reporters.

I should point out that the attorney/client and doctor/patient immunity is a privilege granted to the client and to the patient, not to the attorney or the doctor. *See* Prof. A. Harnon, *Protecting Relationships of Trust: Should we Recognize Reporter's Privilege?* 3 Iyunei Mishpat 542, 552 (5733 – 34). This is significant because if the client or the patient waives this privilege, the attorney or the doctor can no longer claim it. Furthermore, when dealing with privileges associated with medicine, psychology or religion, we must take into account the fact that the privilege [between a doctor and a patient] of a doctor, for example, is not absolute, as it is not the doctor's privilege. If the Court decides that the need to reveal the privileged information, for the sake of administering justice, outweighs any interest there may be in allowing the information to remain privileged, it may do so. A similar provision exists in Section 50 regarding a psychologist's privilege.

6. No one argues that the Evidence Ordinance (new version) does not explicitly address the issue of reporter's privilege. However, the attorneys [for the reporters] argue that such a privilege has developed and has been recognized by caselaw, despite the fact that it is not included in any statute.

Because this Court has not yet addressed this issue, for comparison purposes, I will briefly refer to the development of this idea in other countries which have a similar legal system.

7. The issue of immunity has been adjudicated in English caselaw during the National Investigation Committee's investigation into the Vassall espionage case. *See Attorney General v. Mulholland,* (1963) 1 All ER 767 (Q.B.); Attorney General v. Clough, (1963) 1 All ER 420 (A.C.). The courts in those cases addressed the claims of reporters who refused to reveal their sources relating to their reporting of the Vassall case, and claimed they had legal privilege. They argued that the existence of such a privilege is a means which allows them to investigate the

truth. The public has an interest in reporters having access to such information. However, they can only succeed in accomplishing their goal so long as their sources of information can maintain their trust that their identity will not be revealed, thereby allowing the public to gain access to information to which they are entitled. In this way, reporters can reveal criminal activities, injustices and [acts of] negligence in the course of their job, [whereas without such a privilege] such [information] would remain unexposed. Unless they are able to keep their sources a secret, reporters will simply be unable to provide such information. Whistleblowers will remain silent if they know that their identity will be revealed. The claims in those cases were similar to the issue raised in this case, which is essentially that reporters are entitled to refuse to answer questions asking for the identity of their sources.

In *Clough*, Chief Judge Lord Parker rejected the claim that English law recognized absolute immunity for reporters, drawing upon, among others, the Australian decision of Justice Dixon in McGuinness v Attorney-General (1940) 63 CLR 73. For the purposes of his case, he distinguished between the nature of obligations during the discovery phase of the case and actual testimony. Lord Parker states (at 427 – 28):

> In those circumstances, I have without the slightest hesitation come to the conclusion that in regard to the press, the law has not developed and crystallised the confidential relationship in which they stand to an informant into one of the classes of privilege known to the law. As I have said, it would still, as I conceive it, remain open to this court to say in the special circumstances of any particular case that public policy did demand that the journalist should be immune, and I, therefore ask myself whether, in the circumstances of the present case, it is necessary from the point of view of public policy that I should recognise the claim of immunity which is raised.

This means that the Court does not recognize absolute immunity, but will exercise discretion in considering each claim on its own merits and decide whether to recognize reporter's immunity on the basis of public policy considerations.

Likewise, in *Mulholland*, Lord Denning rejected a claim for reporter's privilege, because under English law (unlike ours, as stated above) only attorneys have such privileges regarding information exchanged within the context of a relationship with a client. With regards to reporters, he added (at 771):

> The judge will respect the confidences which each member of these honorable professions receives in the course of it, and will not direct him to answer unless *not only it is relevant* but *also it is a proper and, indeed, necessary* question in the course of justice to be put and answered. *A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests* – to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done… (emphasis added – M.S.)

The judge must weigh the conflicting interests and decide whether the circumstances tilt the scale towards granting immunity in order to protect the relationship of trust between the reporter and the source, or whether the public interest requires the identity of the source to be revealed.

Lord Denning clarifies that if a judge decides that the reporter must answer the questions, claiming immunity will not help him. He notes that in some slander cases, the courts did not require reporters to testify, but that this was not because reporters enjoy absolute immunity, but rather because the proper balance of interests tilted in their favor. As he states, "On *weighing* the considerations involved, the *balance* is in favour of exempting the newspaper from disclosure" (emphasis added – M.S.). As he explains, in a slander trial, the claim is against the newspaper and there is no need to sue the source. In such a case, it is in the public's best interest that the journalist not divulge his source, as L.J. Buckley stated in Adam v. Fisher, (1914) 288 T.L.R 30 (U.K.); however, Lord Denning qualifies the application of the privilege by stating, "Unless, I would add, the interests of justice so demand."

Justice Donovan, who also sat in the *Mulholland* case, based the guiding principal of judicial discretion upon a limited form of reporter's privilege. He states (at 772), "While the journalist had no privilege entitling him as of right to refuse to disclose the source, so, I think the interrogator has no absolute right to require such disclosure."

Therefore, reporters do not have the absolute right to refuse to disclose their source, and, at the same time, courts cannot view the obligation to answer as absolute. Instead, courts can determine whether an obligation to answer exists in light of the circumstances of the case based upon the significance of the answer to the administration of justice. The decision is left to the discretion of the judge, similar to other circumstances where a judge may warrant a decision to disallow a particular question because the answer may do more harm than good. The judge concludes his position by stating (at 773), "For this reason, I think that it would be wrong to hold that a judge is tied hand and foot in such a case as the present and must always order an answer or punish a refusal to give the answer once it is shown that the question is technically admissible."

In sum, in the aforementioned cases [reporters] enjoy partial immunity which is determined by balancing the public welfare with the demands of justice.

In the cases regarding the Vassall case, the Court found that the journalists had to divulge their sources because of the severity of the case as an espionage case endangering national security and its level of importance to the public. Without the information being turned over to the Investigative Commission, the Commission would have never been able to know whether what was published in the newspaper was fiction, mere gossip or reliable.

In 1980, the issue reemerged in the U.K. in the case of *B.S.C. v. Granada Television*, (1981) 1 All E.R. 417, 435, 453 (Ch., A.C., H.L.), when the Court dealt with the question of

what is the proper balance between maintaining the anonymity of a reporter's source and the trust between an employer and employee. The case arose as a result of a TV program prepared by the respondent, a TV network, about a general strike in 1980 at the factories of the British Steel Corporation, a government owned company established after the nationalization of the steel industry. An employee, who objected to and criticized the management of the company's affairs in general and particularly the strike, handed over documents to the TV station which he obtained through his position at the company, upon receiving a guarantee that the station would not reveal his identity. The steel company, during the course of legal proceedings, asked that the name of the particular employee be revealed. The case made its way up the judicial ladder (Chancery Division, Court of Appeal Civil Division and the House of Lords) and all the courts – with the exception of a dissenting opinion by Lord Salmon in the House of Lords – reached the same conclusion that the TV station must divulge the source.

As the Court there held, courts generally wish to respect the confidentiality between a journalist and his source of information. However, reporters do not enjoy, under the Evidence Ordinance, any privilege based on public interest allowing them to refuse to divulge their sources if the Court believes that doing so is in the best interests of justice. Lord Denning, sitting in the Court of Appeal, said the following (at 441):

> The public has a right of access to information which is of public concern and of which the public ought to know. The newspapers are the agents, so to speak, of the public to collect that information and to tell the public of it. In support of this right of access, the newspapers should not in general be compelled to disclose their sources of information. Neither by means of discovery before trial. Nor by questions or cross-examination at the trial. Nor by subpoena. The reason is because, if they were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up…
> Nevertheless, this principle is not absolute. The journalist has no privilege by which he can claim — as of right — to refuse to disclose the name. There may be exceptional cases

> in which, on balancing the various interests, the court decides that the name should be disclosed… Have we any [scales] by which to determine which cases are exceptional? It seems to me that the rule (by which a newspaper should not be compelled to disclose its source of information) is granted to a newspaper on condition that it acts with a due sense of responsibility. In order to be deserving of freedom, the press must show itself worthy of it. A free press must be a responsible press. The power of the press is great. It must not abuse its power. If a newspaper should act irresponsibly, then it forfeits its claim to protect its sources of information.
>
> To show what I mean by irresponsibility, let me give some examples. If a newspaper gets hold of an untrustworthy informant and uses his information unfairly to the detriment of innocent people, then it should not be at liberty to conceal his identity. If it pays money to an informant so as to buy scandal, and publishes it, then again it abuses its freedom. It should not be at liberty to conceal the source.

In this case, the courts held that Granada acted irresponsibly towards the steel industry and the government, and thus, played a part in the injustice. In doing so, the TV station lost its ability to claim reporter's privilege as Lord Denning states (at 442), "This protection is given only on condition that they do not abuse their power. Here Granada have abused it."

In the House of Lords, Lord Wilberforce clarified that the words of Lord Denning are a restatement of what was decided in *Mulholland*, and did not in any way broaden the existing law. He states (at 457):

> I do not think that Lord Denning M.R. should be understood as departing from his judgment in *Mulholland* and from every reported case. Such a reversal would place journalists (how defined?) in a favoured and unique position as compared with priest-confessors, doctors, bankers and other recipients of confidential information and would assimilate them to the police in relation to informers. I can find nothing to encourage such a departure even with the qualifications sought to be introduced to the general principle asserted.
>
> Lord Denning MR's judgment in Mulholland makes two further points. First, that it is not for the media alone to be the judges of the public interest. That is the task of the courts. Second, the qualification is made, and strongly stated by Lord Denning M.R., that disclosure must be necessary to enable justice to be done. The same point is made by Dixon J. in 63 C.L.R. 73, 102 – 03.

A short time after the *B.S.C.* case, England passed the 1981 Contempt of Court Act, which at Section 10 states:

> Sources of information
>
> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Regarding the application of this provision, *see* Secretary of *State v. Guardian Newspapers Ltd.*, (1984) 3 All E.R. 601 (H.L.). This Section codifies the rule set forth by the aforementioned cases, granting a limited privilege [to reporters] which is conditioned upon the demands of justice, discovering criminal activity, preventing torts and maintaining public order.

8. There is no federal legislation on this issue in the United States. However, similar to what we said earlier, the approach that has evolved in the U.S. places the privilege of protecting the trust [of reporters] as a public interest, so long as certain conditions are met:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) The element of *confidentiality must be essential to* the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) *The injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW vol. 8, 527 (J.T. McNaughton ed., 1961); *see also*, C.T. MCCORMICK, ON EVIDENCE 171 (E.W. Cleary ed., 3d ed., 1984).

The purpose of the privilege is to protect a relationship which society is interested in protecting, and [the Court] must take this into consideration by weighing the potential damage to the relationship against the benefit to justice should the information be divulged.

The main United States Supreme Court decision on this topic is *Branzburg v. Hayes*, 408 U.S. 665 (1972), where the Court determined the limits of reporter's privilege by applying a balancing test according to which the Court has the discretion to balance the need to reveal the evidence in question in order to obtain justice and the need to protect the identity of the source. *See also, Garland v. Torre*, 259 F.2d 545 (1958).

Branzburg dealt with a reporter from Kentucky who refused to disclose information regarding two people he covered in an article who had made hashish from marijuana. He also refused to disclose names of people interviewed for a piece he wrote on the world of those who consume drugs. Another reporter, Pappas, was also joined into the proceedings after sitting in on a Black Panthers event at its main branch and refusing to divulge to a grand jury what he saw and heard regarding alleged crimes against public order. A similar case regarding information held by a reporter named Caldwell about the Black Panthers was also adjudicated at the same time as *Branzburg*.

All three of these reporters based their claim of privilege on the first amendment to the U.S. Constitution. The case states that the issue is (at 679 n. 16):

> Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles.

Justice White, who wrote the majority opinion, noted that there is no doubt as to the importance of freedom of speech and freedom of the press, and that collecting information in

order to exercise these freedoms is included in the first amendment because without such protection, freedom of the press cannot exist. However, according to Justice [White], the question is not whether it is permitted to use unrevealed sources or whether journalists must reveal their sources, but rather, whether a journalist has the right to refuse to comply with a subpoena to appear before a grand jury to answer questions about a criminal investigation.

The journalists claimed that if they were to reveal their sources, the sources will refrain from providing information in the future. To this claim, Justice White responded (at 682 – 85):

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press v. NLRB*, 301 U. S. 103, 132 - 33 (1937)…
>
> The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. *See New York Times Co. v. Sullivan*, 376 U. S. 254, 279 – 80 (1964)… A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. *Craig v. Harney*, 331 U. S. 367, 331 U. S. 377-378 (1947)…
>
> It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.

Justice White held that a privilege whose purpose is solely to evade criminal accountability cannot be recognized; however, the obligation to disclose sources of information about criminal activity is not absolute either. The government's interest in having the

information disclosed must be paramount or compelling in order to require compliance. The state must demonstrate a clear connection between the information requested and some paramount and compelling state interest (like revealing drug trafficking or preparations for violence) as was the case in *Branzburg*. As the decision states (at 709 – 10):

> [T]he Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith, he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash, and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.
>
> In [*Branzburg*], journalists were subpoenaed to testify before a grand jury regarding their sources of information. Justices Douglas, Stewart, Brennan and Marshall wrote dissenting opinions, expressing their concern that forcing journalists to testify will harm their constitutional right to freedom of the press. Justice Douglas held that the first amendment of the constitution grants journalists absolute immunity. The other judges voting with the minority held that while the first amendment does extend a measure of immunity it is not absolute.

To summarize, in the U.S., the first amendment does not grant reporters immunity, but, according to the majority opinion, courts may not subpoena them in large numbers, but must rather carefully consider the circumstances of each case in order to strike a proper balance between freedom of the press and the need to compel the testimony because criminal activity is suspected and justice demands the testimony. Even the majority opinion advocated a certain

amount of immunity, while the dissent lends more weight to freedom of the press and holds that only in the rarest of circumstances may reporters be compelled to testify. Practically speaking, no absolute criteria were established, and the decision was largely ad-hoc.

9. In Israel there is no statute addressing the issue of reporter's privilege. Theoretically, we can look at the third Chapter of the Evidence Ordinance as denying such a privilege because it does not include it among those listed as entitled to a privilege. I see no reason to reach such a conclusion on the basis of statutory law. In our legal system, where the rules of evidence are largely a result of a collection of judicial decisions and we do not have an exhaustive and comprehensive codification of Evidence Law, there is no reason why we cannot recognize the existence of a rule of evidence, even though it does not appear in legislation, but whose development is similar to the method by which many other rules of evidence developed, especially since it draws upon our basic constitutional principles. In other words, recognizing a rule pertaining to evidence which grants partial privilege to reporters is a natural result of the matter before us. We are not dealing with a steadfast rule pertaining to evidence, but rather we must look at the broader legal implications which must reflect our recognition of basic liberties, especially freedom of speech and freedom of the press.

10. We now must analyze the issue according to the following guidelines: (1) the significance of the fact that there is no statute granting such a privilege to reporters; (2) the connection between our understanding of constitutional rights and the recognition of such a privilege; (3) the importance of the obligation to provide testimony; (4) legal standards; and (5) the application of such standards to the circumstances of the case.

11. The lack of legislation addressing the issue: The legislature's silence on the issue and the legislative history tells us that the legislature debated the issue, but declined to legislate.

However, if we are to conclude that the lack of a statute amounts to the negation of such a privilege, we may come to a skewed understanding of our constitutional principles and may even violate a right, which carries much weight from the public's perspective. In such a case, it is preferable to allow for judicial discretion than to come to the absolute conclusion that no such privilege exists.

In a similar vein, Professor L.H. Tribe, on how to approach an issue which the legislature has remained silent, writes that:

> In such a grammar, I believe that silences can properly have only two sorts of significance: (a) a significance as *operative legal facts* that is derived not from the internal states of mind that various silences may be thought to manifest, but from external constitutional norms; and (b) a significance as parts of the historical *context* of actual enactments

As for the constitutional problems he adds:

> I would agree with the view I take to be at least implicit in Justice Douglas' opinion – *namely, that the guide to the meaning of certain congressional silences is the constitution itself.*

L.H. TRIBE, CONSTITUTIONAL CHOICES 36 – 37 (Cambridge and London, 1985) (emphasis added).

I would say that this means that the interpretation of the legislature's silence on a particular issue can be found within constitutional concepts and legal principles.

When addressing the issue of silence, Justice Jackson called it "the great silence of the constitution," and wrote:

> Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the constitution.

Hood & Sons v. Du Mond, 336 U.S. 525, 69 S.Ct. 657 (1949).

When we examine the absence of a rule in the Evidence Ordinance regarding immunity for reporters, while it may seem that statutorily they are not entitled to any such privilege, we need to take into consideration the ramifications this may have on fundamental freedoms and its place in our constitutional system.

12. The connection between our understanding of constitutional principles and the recognition of immunity [for reporters]: In HCJ 372/84 *Klopfer-Naveh v. Minister of Education and Culture*, IsrSC 38(3) 233, 238 – 39, we stated that freedom of speech is a prerequisite for a properly run democracy. The unrestrained free exchange of ideas between people is an absolute precondition for a political and social regime in which a citizen can fearlessly analyze the different sides of an issue and make up his own mind about what is best for society and for himself as an individual and how to ensure the continued existence of the democratic regime and of the state. As I stated in CA 723/74 *Haaretz Newspaper Ltd. v. Israel Electric Company Ltd.*, IsrSC 31(2) 281, freedom of expression is a prerequisite for the guarantee of most of the other fundamental rights of citizens and, without it, other rights are in danger of falling away.

As mentioned in HCJ 372/84 Klopfer-Naveh, the democratic process is conditioned upon the ability to conduct open dialogue regarding the problems facing the state on a day to day basis and the ability to freely exchange opinions. HCJ 73/53 *Kol Ha'Am Co. and Al Etihad Newspaper v. Interior Minister*, IsrSC 7 871, 876; E. BARKER, REFLECTIONS ON GOVERNMENT 36 (London, 1942). The media fills a very important role in this dialogue. It allows for the dissemination of information on all areas of life, which makes it accessible to all. It is the main medium for explaining various perspectives in public dispute.

The interest of reporters in protecting their sources of information stems from their desire to safeguard freedom of the press, which includes the right to gather information. About this

James Madison said, "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." WRITINGS OF JAMES MADISON vol. 6, 398 (Hunt ed., 1906).

J.B. Kuhns lists four assumptions regarding the protection of reporter's sources of information:

> *The right to confidential informer-reporter relationship follows logically from the right to gather news when four factual assumptions are accepted: (1) newsmen require informants* to gather news; (2) *confidentiality* (the promise that names and certain aspects of communications will be kept off the record) *is essential to the establishment* of a *relationship* with many informers; (3) the *use of an* unbridled *subpoena power* will *deter potential sources* from divulging information; and (4) the use of an unbridled *subpoena power will deter reporters* from gathering or publishing information which might lead to a demand for complete compulsory disclosure. If these factual assumptions are correct, the press will be less effective in uncovering criminal activity, corruption, government mismanagement, and other matters of public interest, unless the right to protect the confidentiality of news sources is created. Much discussion will be stifled concerning socially controversial activities, such as illegal abortion and drug usage, for individuals will avoid the possibility of public identification with illegal conduct. Some persons will be reluctant to voice their opinions without assurances of anonymity for fear of harassment and reprisal.

J.S. KUHNS, REPORTERS AND THEIR SOURCES: THE CONSTITUTIONAL RIGHT TO A CONFIDENTIAL RELATIONSHIP, 80 YALE L.J. 317, 329 (1970 – 71) (emphasis added).

A free and democratic political system cannot be without the means to gather and disperse information. The right to gather information includes the need to protect the source of information. This stems from reporters' reliance upon their sources, the trust relationship necessary in order to gather information and the deterrent effect that might result from an unlimited obligation to reveal sources. This suggests that the journalist's right to privilege against the obligation to reveal his sources stems from freedom of expression and therefore constitutes an important aspect of the rights and liberties upon which our society is based.

13. The obligation to testify: against that, it is only natural that every so often a reporter is a valuable source of information to investigative authorities and the judiciary, in light of the facts gathered by the reporter during the course of his investigation. This includes information not made public by the journalist or information he casually came across (T.B. CARTER, N.A. FRANKLIN, J.B. WRIGHT, THE FIRST AMENDMENT AND THE FIFTH ESTATE 561 (New York, 1985)). As Lord Parker stated in *Clough* at 424, "Any privilege which exists constitutes a shackle on the discovery of the truth and an impediment on the true administration of the law."

Furthermore, we must not forget that the obligation to testify is one of the touchstones of the judicial process. Without it, the process goes from being one which aims to discover all relevant information, to one which only uncovers random information from those willing to volunteer it. The interest of litigants wanting to uncover the truth is generally that anyone able to testify to the facts of the case must do so. Moreover, the right to call relevant witnesses to testify is not only that of the litigants, but that of the public as well. Social order is conditioned upon, among other things, the existence of proper judicial procedure which attains its goals. Providing testimony is an integral part of this process, without which, the process would be ineffective. Therefore, we should view the obligation to provide testimony as a public interest rather than the narrow interest of the litigants involved. This is what Wigmore meant when he quoted Lord Hardwicke, "The public has a claim to every man's evidence." Wigmore, *supra* at 71; *see also, U.S. v. Bryan*, 339 U.S. 323, 70 S.Ct. 2961 (1977) (Vinson, J.).

14. We see that two distinct public interests are at issue here. The public has an interest in obtaining all types of information in order to properly conduct judicial proceedings; however, the media is also part of the public which acts to gather information whose publication benefits the public by maintaining a society with free expression and a transparent government. As stated in

HCJ 372/84 Klopfer-Naveh, the media is the medium which assists the average citizen in shaping his views and allows him free consideration and choice, while knowing what is occurring, and an ability to evaluate every event, suggestion and criticism.

It is in the public's interest, and not a particular matter for the newspaper or reporter, to protect sources of information, which is necessary to perform the journalistic role, including the protection of the trust and promise that the source will not be revealed, upon which the information is handed over. Because of the nature of this interest, it is also natural and logical to view it within the complex and combined system of all other public interests. In other words, because this is something that the public has an interest in safeguarding, it should be left to the public to decide how much protection such an interest is entitled to; where the interest stands relative to other matters which also have national-social meaning, and to the extent that this interest or other interests should retract from one another, [such a retraction] is in order to achieve a proper balance and co-existence, to the extent desired for a free public anxious to preserve its freedom and the tools meant for its preservation. Other interests which must be balanced against the interest of protecting sources of information are doing justice, preventing criminal activity and protecting people from torts and from severe acts against public order. These are also essential interests, without which a civilized society which protects human rights and dignity cannot exist. It is therefore legitimate for society to find the proper balance between these interests, which will establish which of these interests take precedence over the other when they conflict.

When analyzing the nature and the boundaries of reporter's privilege, the Court must take into account the fact that there is another important interest which, unfortunately, conflicts with this privilege from time to time. Lord Parker, whose words were quoted above, said that any

privilege granted to a potential witness handcuffs those trying to do justice and restrains the ability to uncover the truth and is a barrier to fully doing justice. Opposite this consideration stands the important interest of having information flow freely, which is a precondition for freedom of expression in general and specifically for freedom of the press. In other words, on one hand we have the public interest in doing justice to a party involved in a dispute with another or with the government, and on the other hand, we have the fundamental constitutional right to a freedom of the most central type.

As I have said, the necessary conclusion to this conflict is clear and simple. The privilege cannot be absolute, but rather must be limited to constraints whose general aim is as I wrote above. Conversely, the ability to compel a reporter to reveal his sources of information cannot be absolute and must be limited to certain constraints as I will explain and whose aim I have explained earlier.

The proper balance between the different interests as it was implemented in England before the amendment to the 1981 statute, was described, among other [descriptions], by Lord Diplock in *D. v. N.S.P.C.C.*, (1977) 1 All E.R. 589, 594 (H.L.):

> The private promise… must yield to the general public interest that in the administration of justice truth will come out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant, a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law.

According to Lord Diplock, our goal should be to reveal the truth by obtaining testimony, unless there is an overriding public interest which demands that the source of information be protected. *See Guardian Newspapers Ltd.*

15. I believe that we must recognize a privilege which allows reporters testifying at a trial to refuse to reveal their sources. This privilege is not absolute, but rather relative and should be left

to the discretion of the Court. If, [however], the Court orders the witness to answer the question presented to him, he must do so.

So what is the test that must be applied by the Court? Does every crime or tort justify the exercise of the Court's authority to order a reporter to reveal his source?

The answer is no. Compelling the testimony of reporters to reveal their source in every case, regardless of the circumstances, would contradict the realization of freedom of expression, which can only be done through freedom of the press. Freedom of speech and its derivative rights have an important status in our legal system as was stated in CA 723/74 at 295:

> Freedom of expression and a statute limiting free speech are not equal. We will always prefer an interpretation of a statute in a way which preserves freedom [of speech] over one which limits it. In sum, the standard by which freedom of speech must be safeguarded is that it should be the first consideration taken into account when it conflicts with another right. It is fitting that it not only be at the forefront when the legislature legislates, but also when statutes are interpreted and applied to circumstances when its applicability is put to the test.

As we have repeatedly held, freedom of speech carries with it the promise that the status and the rights of an individual will be safeguarded and honored and that he will not be discriminated against and that the truth will be sought and revealed. As we said in HCJ 372/84 Klopfer-Naveh, this is a precondition for a properly functioning democracy, which plants the seeds of advancement and human development both intellectually and socially.

Therefore, when a reporter is subpoenaed to reveal his source we cannot limit his right to free speech unless the information is both *relevant* to the proceedings according to the accepted legal tests and *essential and of the utmost importance to performing justice in a significant matter* according to the judgment of the Court. Thus, compelling a reporter to reveal his source in a case in which any crime, even a light misdemeanor, is alleged would not be consistent with the significance of free speech. The significant matter requirement means that the case must be

one where a felony is alleged, or a significant misdemeanor or a severe tort action which requires the identification of the source in question or justice cannot be done. In such a situation the Court may decline to allow the reporter to claim the privilege.

The absence of a statute addressing the matter does not take away from the Court's authority. The Court may recognize reporter's privilege with the aforementioned limitations because of the general rules that stem from freedom of expression and the rights associated with it. *See* HCJ 337/81 *Mitrani v. Transportation Minister*, IsrSC 37(3) 337, 355 n.7.

To illustrate, a reporter can be compelled to disclose information regarding a drug dealer or burglars; however, even in such a case, the Court must use its discretion by considering the facts and the nature of the case to determine how relevant the information in question is to the case and how essential the information is to doing justice. After taking all this into consideration, the Court may compel the testimony and the reporter will not be able to claim reporter's privilege.

This example demonstrates how the right to preserve the identity of the source is to be taken seriously and only denied when necessary because of the nature of the case and the weight of the need for the testimony. As I have explained in detail, the test is a relative one and the considerations must justify overriding the privilege. The test has three prongs:

(a) First, the relevance of the information in question must be tested;

(b) Second, we must test whether the issue is significant enough [to compel such testimony];

(c) Third, we must test whether the information is absolutely necessary to adjudicate the issue, namely whether there is no way to rely upon other evidence without compelling the revelation of sources.

16. We will now turn to the case before us. What is the status of a disciplinary law being applied against an attorney who allegedly made a self advertisement? The relevant Sections of the Bar Association Act are the following:

> Safeguarding the Integrity of the Profession
>
> 53. An attorney must safeguard the integrity of the profession and refrain from any act that harms its integrity.
>
> Prohibition against Advertising
>
> 55. An attorney may not advertise his services as an attorney. The cases and methods in which an attorney may or is required to identify himself and his profession will be explained in the rules.
>
> Disciplinary Infractions
>
> 61. The following are disciplinary infractions:
>
> > (1) Violating any one of the instructions in Sections 53 – 60 or another rule obligating or prohibiting an attorney with regards to his profession;
> >
> > (2) Violating a rule of professional ethics established in Section 109;
> >
> > (3) Any act or omission that is not befitting the legal profession.

Rule 15 of the 5726/1966 Rules of the Bar Association (Professional Ethics) which was in effect during the time of the two disciplinary hearings at issue state:

> Prohibited Actions
>
> 15. An attorney may not initiate, willingly participate or consent to any of the following actions:
>
> > (1) Those whose goal is to advertise one's services as an attorney;
> >
> > (2) Those which cause unfair competition with colleagues or obtaining clients in a way which is not befitting the profession.

Rule 16 adds other activities which are considered prohibited advertising. I will not go into detail explaining the nature and purpose of Rule 15, which has since been abolished

(however, Section 55 is still valid and has *not* been amended). For the purposes of background information regarding professional ethics, I quote the following:

> The argument… amounts to basically this: advertising is undignified and 'commercial;' it is also unworthy in that it suggests that one professional man is better than another which, though true, is insulting to one's learned and honourable friends; moreover, the claim to specialist abilities may be either wholly false, or else misleading in that there may be others even more expert; self-advertisement provides no safe basis upon which a client may choose his professional adviser. The best and only desirable basis is personal recommendation or at least knowledge that the adviser is properly qualified.

M. ZANDER, LAWYERS AND THE PUBLIC INTEREST: A STUDY IN RESTRICTIVE PRACTICES 209 (London, 1968).

In England, two Commissions were established in recent years to research the issue of advertising: The 1976 Monopolies and Mergers Commission and the 1978 Royal Commission on Legal Services (the Benson Commission). The first Commission concluded that the rule against advertising has caused some harm as it prevents the public from obtaining information and minimizes competition, efficiency and the incentive to produce good work. It determined that because of the rule, there were fewer opportunities for attorneys to obtain work and it was harder for people to find an attorney when the only method of doing so was word of mouth. It therefore recommended that advertising be permitted so long as it is not misleading, does not make comparisons to other attorneys and does not give the profession a bad name.

Additionally, the Benson Commission recommended that advertising be permitted and noted that advertising "is inherent in any free or mixed economy and helps the consumer to exercise choice in such economies." The recommendations of the Commissions caused the rule against advertising to be somewhat lifted. J.A. Attanasio, *Lawyer Advertising in England and the United States*, 32 AM. J. COMP. L. 493, 495 – 502 (1984).

In the United States, the question of advertising was analyzed under the first amendment. Justice Blackmun of the U.S. Supreme Court determined that attorneys acting together in order to provide services at lower prices may advertise such services because such advertisements serve the public's interest of arriving at a well informed decision. *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2961 (1977). He even quoted the decision of the English Monopolies and Mergers Commission which also supported attorney advertisements.

17. For obvious reasons, I am not going to adjudicate the substance of the two cases involving the alleged advertising by the attorneys standing trial. The first question in this case is, whether the reporters' sources are relevant to the disciplinary trial of the attorneys. The answer to this question is yes, because we cannot deny the logical connection between the question of whether there was a prohibited advertisement and determining whether the attorneys in question provided the information for the article.

The second and more [important] question is whether the circumstances of the case are such that freedom of the press must be curbed because of the need to do justice in a significant matter. With all due respect to the legitimate efforts of the Bar Association to take disciplinary action, I am not convinced that this is an issue which can override reporter's privilege. This case does not allege a felony or even a serious misdemeanor carrying significant consequences, nor does it involve an infringement of public order. The procedure in this case cannot tip the scales against reporter's privilege which is essential for maintaining freedom of the press and is derived from the principle of free speech. There is, therefore, no need to analyze the third prong which is whether the information is essential to the case.

As Justice Musmanno wrote in *In re Mack*, 386 Pa. 251, 126 A.2d 679 (1956), I would like to again state that denying reporter's privilege causes people to refrain from providing

information, which in turn prevents information from being made public. Journalism without sources is like a dried up river and freedom of the press becomes pointless.

18. Thus, I have decided to accept the position of the Appellants and overturn the fine. Given the circumstances of the case, it is appropriate that the Disciplinary Court recognize reporter's privilege and that the two Appellants be permitted to refuse to answer questions regarding their sources of information.

Decided today, 8 Nissan 5747 (April 7, 1987).