At the Supreme Court sitting as the Court for Civil Appeals

C.A. 8954/11

Before:	The Hon. Deputy Chief Justice M. Naor The Hon. Justice S. Joubran The Hon. Justice N. Sohlberg
The Appellant:	John Doe
	V e r s u s
The Respondent: The formal Respondent:	1. Jane Doe 2. Jane Doe
	An appeal on the judgment of the Jerusalem District Court in C.C. 3213/09, dated October 11, 2011, by Justice Gila Knafi-Steinitz
On behalf of the Appellant:	Adv. Ephraim Abramson, Adv. Yifat Aran
On behalf of the Respondents:	Adv. Amir Fischer

Judgment

Justice Noam Sohlberg:

"All human beings have three lives: public, private, and secret".

(-*Gabriel Garcia Marques*-)

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Prologue

1. An appeal on the judgment of the Jerusalem District Court in C.C. 3213/09, (Justice **Gila Knafi-Steinitz**) which granted the Respondent's motion for the issuance of a permanent injunction to prohibit the Appellant from publishing and distributing a book written by him. In addition, the Appellant was charged to pay damages to the Respondent in the amount of ILS 200,000 for her non-pecuniary damages.

2. The core issue at the center of the discussion is the question of the proper balance between the right to freedom of expression and artistic freedom on the one hand, and the right to privacy and a good reputation on the other.

The Parties and the Main Facts

3. The Appellant – a married man and father of children, who lived with his family in Jerusalem, is the author of the novel contemplated in this suit (hereinafter: the "**Novel**").

4. The Respondent was employed in a cinema in Jerusalem during 2001, was at that time a student in an art institute, and was living with her partner in the vicinity of the Appellant's neighborhood in Jerusalem. The details of her life were the Appellant's inspiration in writing the Novel; the Formal Respondent – the publisher – published the Novel.

5. In 2001, the Appellant met the Respondent at her workplace in the cinema. With time, the connection between the two deepened, and turned from an "acquaintance" to a close and intimate relationship, which lasted some five years – first in secrecy, then disclosed to the people close to them, and eventually published in the Novel. Following the exposure of the romantic relationship between the two, the Appellant divorced his wife and the Respondent separated from her partner.

6. In the midst of the romantic relationship, the Respondent was diligently preparing her graduation project, as part of her last year of studies, which mainly focused on a relationship developing between a man and a woman.

7. At the end of 2004, the Appellant began a work of his own, a first novel focusing on the "**drama of breaking up a family**" (as stated on the back of the book). The Novel describes an emerging intimate relationship between a man of the Appellant's age, who is discouraged by a non-fulfilling marriage, and a young student, starting with their first meeting at a cinema. The male-protagonist's occupation is identical to that of the Appellant; the cinema is the one in which the Respondent was employed. In the Novel, at the beginning of their acquaintance, the male-protagonist is a married man, father of children and living with his family in Jerusalem, whereas the female-protagonist, a single young-adult woman, rents an apartment in Jerusalem, close to the home of the male-protagonist, where she lives with her partner. Upon the completion of the exhausting work of writing, the Novel was published. The publication of the Novel was accompanied by a marketing campaign in the media, including an interview in the weekend supplement of a widely distributed newspaper, a TV interview and articles in newspapers and various websites.

8. Immediately upon the publication of the Novel, the Respondent contacted the Appellant and the Publisher and demanded to immediately stop the marketing and distribution of the Novel, to recall all copies already distributed, and to compensate her for her damages. According to her, the book is an accurate autobiographical description of the author's life, and it includes descriptions pertaining to the intimate aspect of the relationship between them, while severely violating her privacy and committing libel and slander: **"in writing and publishing the book you breached the law, fatally violated her privacy pursuant to the provisions of Sections 2(8), 2(9), 2(10) of the Protection of Privacy Law… and published libel against her under Sections 1 and 2 of the Defamation (Prohibition) Law…"** (letter of the

Respondent's attorney, Adv. Amir Fishcer). The Respondent further claimed that the unlawful use of her personal letters for the purpose of writing the Novel establishes an independent cause of action under the Copyright Law.

9. Upon receipt of the said demand, the publisher notified the Respondent, in an unusual step, and without admitting to her claims, that it decided to temporarily cease the distribution of the Novel until the dispute is resolved. To that end, the publisher contacted the retail chains and bookstores and asked to retrieve the copies of the Novel that were yet unsold.

10. After some communication between the parties, and as the Respondent's said demands were not entirely fulfilled, the suit contemplated herein was filed to the Jerusalem District Court. On **June 9, 2009**, the Jerusalem District Court (Justice **H. Ben Ami**) granted the Petitioner's motion for a preliminary injunction prohibiting the distribution of the Novel written by the Appellant (M.C.M. **7649/09**). A motion for permission to appeal, which was filed with this Court (L.C.A. **5395/09**), was denied by Justice (his former title) **A. Grunis**, in his decision dated **August 27, 2009**.

The Parties' Main Arguments in the District Court

11. The Respondent's position is that the publication of the Novel and the its distribution severely infringe on her right to privacy, in violation of the Protection of Privacy Law, and further blemish her reputation in violation of the Defamation (Prohibition) Law. According to her, other than changing the names of the protagonists of the Novel, there is complete congruence between herself in her real life and the literary character of the female-protagonist of the Novel. For example, according to the Respondent, the book describes in an autobiographical manner and in "**frightening accuracy**" the Appellant's life during the time he had an intimate relationship with the Respondent; the female-protagonist's character includes many identifying details that are unique to the Respondent and enable members of her family and acquaintances to easily identify her; in addition, the author did not withhold the internal and external realms of the Respondent's life, including her body, feelings, weaknesses, her most private secrets, her sexual activity and preferences, as well as her most intimate relationships. Moreover, according to the Respondent, the Appellant in his book, made breaching use of both her letters and her art from the graduation project, without obtaining the required consent and in violation of the provisions of the Copyright Law. With respect to the Publisher's responsibility, the Respondent argued that it knew, or at least should have known, that this is obviously an autobiographical book, and is therefore also liable for the offense and tort. With respect to the damage, the Respondent mentioned the distress caused to her, and the concomitant injury to her future personal and professional life.

12. On the other hand, the Appellant argued that the Novel he wrote is merely a **fictional composition**, that the real-life persons were nothing but an inspiration, and that the Novel most certainly is not a complete autobiographical and true description of the author's life. Two opinions were submitted on behalf of the Appellant by two experts of the highest caliber in the field of literature: Prof. Ariel Hirschfeld and Prof. Hannan Hever. Prof.

Hirschfeld summarized his opinion in several conclusions, *inter alia*, that "**Reading the Novel… it is absolutely clear that it has no pretense to reflect or record actual reality**" (para. 32); "**Accepting the claim would be a far-reaching precedent, whereby the mere possibility to identify any realistic model for a fictional character, even in the private context known to just a few, will be a violation of the law. In such case, the judicial authority undertakes the re-definition of literature and its boundaries, thus damaging the deep and essential principle of fiction, that which enables the freedom to create and interpret the human reality in its entire complexity**" (para. 34). Prof. Hever summarized his opinion with the conclusion that "**reviewing the aggregate weight of the existing hints… unequivocally indicates that the book deals with a creation of fiction, rather than real-life reality, and that no 'autobiographical contract' is entered into by the author and his readers. Such conclusion rebuts any claim which is based on such argument**" (para. 3.3).

13. The Appellant argues that the source of the identification of the Respondent is the "**confirmation bias**" – a phenomenon whereby people adhere to similarities and ignore the existence of differences. The Appellant further argued that the Respondent gave her consent and even her blessing to the writing of the Novel. The Respondent read parts of the draft of the book and knew it would be about the affair she had with the Appellant, and therefore will naturally also include intimate details. The Appellant argued that attention should be paid to the fact that the Respondent refrained from reading the book prior to its publication, and thus waived the option to control its content. Moreover, the Respondent's acts amount to "false representation" to the Appellant that she will not deny the publication. According to him, once the Respondent's consented to the publication of the Novel, her argument regarding violation of her right to privacy is precluded. With respect to the Respondent's argument regarding her right to good reputation, the Appellant relies on the testimony of the author Mira Magen, whereby the personality of the female-protagonist, as it is portrayed in the Novel, is endearing in the eyes of the readers. According to him, this is not a humiliating expression, thus, it does not constitute defamation. The Appellant further noted that the Respondent submitted no evidence of the possibility to identify her, and therefore no "**actual**" injury to privacy had been proved. The Appellant further claimed that insofar as any damage had been caused to the Respondent's privacy, it should be balanced against his freedom of expression and artistic freedom. In such a balance, the freedom of expression prevails. In response to the Respondent's argument with respect to copyrights of her letters, the Appellant argued that their use in his book falls within "fair use". Alternatively, he argued that the Respondent gave her consent for such use. To conclude, the Appellant noted that taking the book off the shelves is inconceivable, for that is a serious and severe injury to freedom of expression and artistic freedom.

14. The Publisher repeated in its arguments some of the arguments raised by the Appellant, and emphasized that he presented the Novel to it as a **fiction**, hence it did not know, nor could it know, that the Novel is actually based on real events. The Publisher further noted that the Appellant stated, within the

agreement therewith, that "**his book is a fiction novel… the characters mentioned in it are fragments of the author's imagination**. **Any resemblance to reality or to real people is completely coincidental and resulting from the author's imagination or the acquaintances he had in the course of his life**" (Section 1.1a of the agreement). The Publisher further noted its fair conduct, from the moment it learned of the Respondent's claims, upon which it put halt to the sales of the book and had it removed from the shelves.

Abstract of the District Court Judgment

15. The District Court first reviewed the main argument of the experts on behalf of the Appellant, Messrs. Hirschfeld and Hever that "**the mere publication of a composition as a work of fiction, which has the common literary characteristics of a work of fiction, creates an inseparable border between the content of the work and reality, and bars the review of the content of that composition as a documentary work which records reality**" (para. 30 of the Judgment). In addition, the Court addressed the experts' main concern whereby "**adopting the alternative position, whereby a work of literature, even when declared to be fictional, might be perceived as a violation of privacy, may lead to a slippery slope…**" (*ibid*). In the second stage, the District Court noted that in this case there is "**a dilemma, pertaining to the tension between two important values, which are perceived as two basic rights in a free and democratic society: artistic freedom on the one hand, and the right to privacy on the other**" (para. 31 of the Judgment). At the third stage, the District Court ruled that "**neither one of these rights can be granted absolute protection, and it is therefore also not possible to adopt the sweeping position that mere publication as part of a work of literature is sufficient to bar consideration of the violation of privacy argument on its merits. The same position was adopted by the legislator"** (para. 36 of the Judgment). The District Court thus denied, *de facto*, the argument that a fictional novel in itself – by virtue of its literary definition – grants its author absolute protection against any claim of violation of privacy. At the same time, the District Court reserved and stated that "**the argument of violation of privacy based on fictional literature will not be easily accepted. The author's argument of fiction… is a weighty argument which has a substantial contribution to the prevention of the violation of privacy**", however, it is not enough to exclude it altogether (para. 37 of the Judgment). "**A claim of privacy violation based on fictional literature will only be accepted when the argument of fiction is *prima facie* unequivocally rebutted by the work itself**" (*ibid*).

16. Thereafter, the District Court reviewed the contemplated literary work itself, i.e. – is this a **fictional** novel, or "**documentary literature disguised as a fictional novel**" (para. 37 of the Judgment). Following a meticulous review, the District Court ruled that the "**character of the female-protagonist in the book includes many unique identification details that identify the Plaintiff therewith in a definite and unequivocal way**" (para. 40 of the Judgment). Such unique details include her "…**physical appearance, informative details regarding her age, unique occupation, place of studies, work place and**

residence, details pertaining to her unique art work, identifying details of the defendant, her partner, and events that took place in reality in the presence of third parties…" (*ibid*). The inclusion of the said identifying details led the District Court to the conclusion that "**the Respondent's family members, associates and acquaintances, will unquestionably identify the Respondent as the female-protagonist of this book**" (para. 41 of the Judgment). The District Court further stated, in response to the Appellant's argument, that in order to prove the identification, there is no need to present witnesses who will expressly identify the literary character with the Respondent. Such identification transpires, according to the District Court, from the book itself.

17. Having reviewed and considered the parties' arguments with respect to the **violation of privacy**, the District Court concluded that the violation of the Respondent's privacy derives from the aggregate weight of two main components:

    a. The numerous identifying details that indicate that the Respondent, who is not a public figure, is unmistakably the female-protagonist of the Novel written by the Appellant;

    b. The number of issues exposed in the book that pertain to the core of the individual's privacy, and their scope and nature.

    The aggregate weight of these two factors, according to the District Court, "**rebuts the author's fiction argument** " (para. 51 of the Judgment), and turns the Novel to a documentary book disguised as a fictional composition. In other words, the author "**abused the characteristics of fictional literature, in order to document his relationship with the Plaintiff, while severely damaging her privacy**" (*ibid*). The District Court emphasized that the violation of the Respondent's privacy could have easily been avoided "**insofar as her character… would have been camouflaged and made indistinct by disguising details**". However, the District Court noted that the Appellant's insistence on including in his book many details that identify the Respondent as the female-protagonist of his book, and his choice to stay as close to reality as possible work against him: "**instead of 'distancing' the work from the Plaintiff, and detaching it from the milestones of the reality of his relationship… the Defendant chose to firmly anchor it in a specific reality, known and recognized not only to himself and the Plaintiff, but also to numerous third parties**" (para. 52 of the Judgment).

18. The District Court denied the Appellant's argument that the Respondent ostensibly gave her consent to the publication of the Novel. Relying on an "**array of evidence**" it was held that the Appellant failed to prove that the Respondent indeed gave her "**informed consent, whether expressly or implicitly, for publications that contain violation of her privacy**" (para. 59 of the Judgment). **First**, the book, in its full version, was never submitted for the Respondent's perusal – neither in its original nor in its final version – and her consent for its publication was not requested (*ibid*); **second**, the Appellant admitted that he initially considered publishing the book under a pseudonym, and contemplated this option up until the book’s publication (para. 60 of the

Judgment); **third**, the Respondent's objection, prior to the book's publication, to mentioning the name of the institute where she studied (para. 61 of the Judgment); **fourth**, the Appellant's response to the Respondent's arguments following the book's publication (para. 62 of the Judgment); **fifth**, the "charged" and impressive testimony of the Respondent in the District Court (para. 63 of the Judgment). In conclusion, the District Court ruled that "**not only did the Plaintiff not give informed consent to the violation of her privacy, but she clarified to the Defendant, prior to the publication, that she forbids him to include any detail that might lead to her identification in the book.**" (para. 65 of the Judgment).

19. Regarding the right to a reputation, the District Court ruled that the question whether the Novel refers to the Respondent in a "humiliating, offensive or demeaning" manner shall be decided according to an objective standard of the reasonable person. The mere fact that the Respondent is described in the Novel as "**someone who carried an intimate relationship with a married man, and did that in parallel to the relationship with her partner at the time… someone who will trample anything in her way to reach her goals, and someone who is using people 'as if they were objects'"** (para. 68 of the Judgment) in itself constitutes defamation.

20. The District Court denied the Appellant's arguments that various defenses are available to him under the Protection of Privacy Law and the Defamation (Prohibition) Law. Regarding the defense of **public interest** under Section 18(3) of the Protection of Privacy Law, the District Court held that "**the Law… does not extend absolute protection to any literary composition… the Law only extends protection to the infringement of privacy when there is 'a public interest which justifies the infringement under the circumstances'**" (para. 72 of the Judgment). The Appellant failed to establish any reason to justify the satisfaction of his freedom of expression in such an offensive manner, and it could have easily been satisfied by publishing the Appellant's artistic work without infringing the Respondent's privacy. Regarding the defense of good faith under Section 18(2)(g) of the Protection of Privacy Law and Section 15(6) of the Defamation (Prohibition) Law, the District Court held that the violation was not in good faith. The Appellant acted to publish the Novel in its full version, and paid no attention to the Respondent's demands to refrain from publishing it.

21. With respect to the Respondent's arguments regarding violation of copyright of her letters, the District Court held that the proof of the infringement of privacy and the remedies resulting therefrom render the need to decide on the issue of copyright to the letters redundant. The District Court noted that even if the Appellant's acts do constitute a violation of the Respondent's copyright "**this does not justify compensation beyond the compensation that was determined**" (para. 80 of the Judgment).

22. Regarding the liability of the Publisher, it was ruled that its acts do not establish legal liability under Section 31 of the Protection of Privacy Law and Section 12 of the Defamation (Prohibition) Law. "**In the matter herein, Defendant 2 did not have to know, on the basis of the facts available to it**

at the time of the book's publication… that the book includes a violation of privacy with respect to the Plaintiff" (end of para. 85 of the Judgment).

23. Therefore, the District Court prohibited the publication of the book and its distribution. The monetary compensation to the Respondent, for her non-pecuniary damages, was set at ILS 200,000, after the District Court had considered the scope of the violation of the Respondent's privacy, nature of the publication, number of books distributed, pain and suffering caused to the Respondent, the Appellant's behavior, insisting on the publication of the Novel even after her requests and demands to refrain therefrom, and additional considerations.

The Main Arguments of the Appellant in the Appeal

24. According to the Appellant's position, the District Court erred in its interpretation of the Protection of Privacy Law. According to him, "**the status of fictional works does not depend on the ability to identify their sources of inspiration but rather on the probability that their content would be attributed to the Plaintiff as a true description**". In other words, "**fictional compositions have a special status because of the interpretation of the text and not because the lack of identification of the sources of inspiration**". The Appellant argues that "**under the existing legal status, the attribution of the published content**" to the Respondent requires the fulfillment of two cumulative conditions: **first**, the identification of the real character with the fictional one; **and second**, the interpretation of the literary text as a "true description" pertaining to the real person. However, according to the Appellant – **in terms of what the law ought to be** – the proof of another element should be required: "**the proof of malicious intent on the author's part**". Alternatively, the Appellant argues that lack of fulfillment of the said second condition is seemingly sufficient to grant the appeal herein, while reversing the judgment of the District Court.

25. The Appellant further notes that the common position in case law is that the Defamation (Prohibition) Law can be considered as a helpful tool in the interpretation of the Protection of Privacy Law. Pursuant to Section 3 of the Defamation (Prohibition) Law (concerning "**means of expressing defamation**"), omitting the name of the party injured by the publication "**does not preclude defamation, provided that the content pertains to him**"; i.e. – according to the Appellant, the Respondent must prove that the combination of the published content with external circumstances, indeed leads to the attribution of the published content to her. The Appellant further refers to the ruling of the District Court, whereby "**A claim of privacy violation based on fictional literature will only be accepted when the argument of fiction is *prima facie* unequivocally rebutted by the work itself**" (see Para. 16 above). According to the Appellant, "**reasonable reading of the Novel, which takes into account its metaphoric nature… does not lead to the conclusion that the content of the book is true and reflects the reality of the Respondent's life**" (para. 39 of the Appellant's summations).

26. According to the Appellant, the test of the "**ability to identify the injured person**", which was adopted by the District Court, cannot be used as a single

condition for the classification of a literary composition as a documentary text, for the purpose of implementing the Protection of Privacy Law and the Defamation (Prohibition) Law. Even more so, according to him, the sources of a fictional composition can almost always be identified. "**The unwritten common contract between artists and art consumers in the western culture is that all those books that are published and distributed under the title of "Fiction" do not document reality but are a fiction for all intents and purposes**". Moreover, the Appellant warns against the adoption of a legal policy that encourages lawsuits against authors, requiring them to "**confirm or deny the degree of similarity between the book's plot and the reality of their lives**". According to him, this state of affairs places authors in an inherently inferior position, i.e. – the similarity is more easily noticed than the differences, in view of the proven existence of the psychological phenomenon called the "**confirmation bias**".

27. The Appellant argues that the discussion in the District Court's judgment "**was flawed by over-interference in considerations of artistic editing**", and ignored the fact that, in any case, there was no proximate cause between the inclusion of the details in the Novel and the identification of the female-protagonist with the Respondent. According to him, the District Court erred in accepting the argument that his choice to write the Novel under his own name, rather than under a pseudonym, precipitates his identification with the male-protagonist, and consequently – the identification of the Respondent with the literary character of the female-protagonist.

28. The Appellant further disagrees with the District Court's ruling that the violation of the Respondent's privacy could have easily been avoided by blurring and camouflaging identifying details. According to him, such ruling is based on "**retrospective wisdom**", and therefore cannot attest to his "**offensive**" intent. In this context, the Appellant further notes that the Respondent's consent to a detailed description of her unique work of art in the Novel, realizing that the readers may associate her with the literary character, cannot be ignored.

29. According to the Appellant, the District Court erred in giving no weight to autobiographical artistic freedom. According to him, the book contemplated herein is nothing but a fictional Novel, and in any event the Court must balance the Appellant's autobiographical artistic freedom against the Respondent's right to protection of privacy. Denying the Appeal at bar, according to him, may put an end to autobiographical writing as a whole.

30. Moreover, the Appellant argues that the District Court erred in applying, *de facto*, a vertical balancing of rights rather than horizontal balancing; i.e. – prioritized the Respondent's right to privacy over the Appellant's freedom of expression. According to him, the District Court used a "**statistical formula**" whereby there is high probability that the Respondent will be identified in a manner that may lead to a violation her privacy. Alternatively, the Appellant argues that horizontal balancing implies that he should be allowed to make corrections to his work. In support, the Appellant notes that in the hearing held on June 13, 2011 before the District Court, he offered to delete parts of his

book and change the characteristics of the female-protagonist, as will be required.

31. According to the Appellant's position, the District Court erred in ruling that the Novel is excluded from the defense of good faith under Section 18(2)(g) of the Protection of Privacy Law in the circumstances of Section 15(6) of the Defamation (Prohibition) Law. The Appellant supports his arguments, *inter alia*, on the testimony of his friend, who noted that the Appellant acted "**under the belief that the Plaintiff will be glad and proud of the character whose creation was inspired by her, and of the entire Novel, which is an expression of appreciation of her graduation project**". Therefore, according to the Appellant, the District Court erred in ruling that the "**violation was not in good faith. The Appellant was informed that the Plaintiff objects to the publication, and he therefore cannot claim that he believed in good faith that he was entitled to do so**".

32. The Appellant argues that "**the appropriate balance between artistic freedom and the protection of privacy, in lawsuits pertaining to an argument of violation of privacy in fictional compositions, will be obtained by a test that will focus on the question whether the author acted with malicious intent**". According to him, the factual matrix indicates that he had no "**malicious intent**" in publishing the book contemplated herein or at least in the humiliation of the Respondent. On the contrary, the close acquaintance with the Respondent and her behavior during their relationships "**caused the Appellant to truly believe that the Respondent does not recoil from exposure**", and even more so from the publication of a Novel for which she was the inspiration. Thus, this is not a violation of the Respondent's privacy that will prevail over the Appellant's freedom of expression. Moreover, the Appellant argues that mere negligence is insufficient in itself to hold the author of the composition liable, due to fear of "**abuse**" of fictional literature. However, under the circumstances herein, the District Court held that the Appellant's negligence in obscuring the identity of the source of inspiration for a character in the book is sufficient to justify the prevention of its publication and the prohibition of its distribution.

33. Based on the defense of "**public interest**" under Section 18(3) of the Protection of Privacy Law, the Appellant argues that there is "**public interest**" in the publication of the Novel contemplated here. "**The Novel concerns a universal issue: romantic relationships, the world the man and the world of the woman, marriage, parenthood, love and its collapse… at the center of public discourse…**". As evidence, the Appellant refers to readers' letters sent to him following the publication of the Novel which describe "**a deep sense of identification with the protagonists**". According to the Appellant, the position adopted by the District Court, whereby "**literature will not be harmed if writers are prohibited from including [in the composition] details that enable the identification of the sources of inspiration**" in fact seeks "**to eat the cake and leave it whole**". Adopting a judicial policy in the spirit of the aforesaid position, might condition on the artistic freedom of writers by stating: "**you [authors – N.S.] may develop the fictional characters as you please, with the exclusion of details that later, potential**

injured persons may appear and argue to be exposing their identity". The Appellant again notes that he proposed to the District Court to allow him to edit the Novel such that details which may be viewed as "**lacking public interest**" will be omitted, and therefore, the extinction of the Novel as a whole is a disproportionate judicial ruling.

34. According to the Appellant, the District Court erred in imposing the entire legal liability on him. He believes that "**pursuant to the consideration of fairness, he who benefits from an activity should bear the consequences thereof**". The Appellant thus insinuates, indirectly, that liability should have been imposed on the Formal Respondent, as the publisher who gained most of the royalties resulting from the publication of the Novel. The Appellant further notes that "**contributory fault, implied consent or at least voluntary assumption of risk** on the Respondent's part **should be added in the matter at hand**" as she knew for three years that he was writing a Novel inspired by the relationship he had with her.

35. The Appellant further complains on the lack of balance, according to him, in the remedies ordered by the District Court. He believes that the District Court erred in not issuing a more proportionate injunction, i.e. – 'limited in time', or alternatively one that conditions the publication of the Novel on the omission or re-editing of parts thereof. The Appellant further challenges the amount of monetary damages awarded, which is not based on proven damage to the Respondent, and does not properly weigh additional considerations.

The Main Arguments of the Respondent in the Appeal

36. According to the Respondent, the Appellant, who neglected to attach his affidavit to the Exhibit Volume on his behalf, does not dispute the factual findings determined in the judgment of the District Court. Under these circumstances, his arguments related to the legal conclusions at the basis of the Judgment creates a difficulty with the line of argument on which his appeal is based.

37. The Respondent further notes that the District Court rightfully denied the Appellant's argument, whereby the publication of an intimate relationship guised as a literary Novel is allegedly sufficient to make the protection against an expected violation of privacy redundant. According to her, the Appellant seeks to add an "**artificial defense**" to the provisions of the Protection of Privacy Law and the Defamation (Prohibition) Law, in contrary to the position of the legislator.

38. The Respondent relies on the ruling of the District Court whereby the fiction argument used by the Appellant is an "**empty shell**" and that the Novel's storyline is an exact reflection of reality, including many events which took place and were experienced by the Appellant and the Respondent in the presence of third parties. The Respondent supports her arguments on the reasoning of the District Court’s Judgment for the denial of the Appellant's position that the Novel is a fictional composition, and in the holding that the Appellant's arguments regarding the tests that should be applied in the deliberation of a fictional composition are baseless.

39. The Respondent further argues that the Appellant's position that "**lawsuits for damage to reputation and violation of privacy that pertain to fictional compositions, will only be accepted in exceptional and rare cases**" does not contradict the judgment but rather supports it. The issue at bar is indeed an "**exceptional and rare case**".

40. The Respondent also refers to additional factual arguments raised by the Appellant, including the passing of time between the beginning of the intimate relationship between the Appellant and the Respondent, and the publication of the Novel. However, there is no need to provide further details within the Appeal herein. Moreover, the Respondent argues that the Appellant's attempted "**comparison**" – i.e. the comparison of his personal liability to that of the publisher, is irrelevant.

41. According to the Respondent, the Appellant's fear that "**similarity is far more evident than differences**" was considered by the District Court, which specifically qualified and clarified that "**a claim of privacy violation based on fictional literature will only be accepted when the argument of fiction is *prima facie* unequivocally rebutted by the work itself** " and where there is, in addition, "**clear and inevitable identification**".

42. The Respondent argues that the absurd expected outcome of "**burial of masterpieces of the Hebrew Literature**" described by the Appellant with respect to the Judgment of the District Court – has no grounds and is argued in vain. According to her, **freedom of expression and artistic freedom** will only be limited under "**exceptional and extreme circumstances of certain and inevitable identification, and when the scope of the violation of privacy and damage to reputation and its magnitude, are that severe**".

43. With respect to the Appellant's argument that a "**third element**" should be required – **the establishment of malicious intent on the part of the author** – the Respondent argues that such requirement imposes too heavy of a burden on the injured party – "**to prove the veiled inner motivations of the perpetrator**". Under the circumstances of the Appeal at bar, the Respondent believes that in light of her repeated pleadings not to publish the novel, the "**malicious intent of the Appellant, and at the very least, his total apathy in view of the damage caused to the Respondent upon the publishing of the book – was also proven**".

44. According to the Respondent, the Appellant's decision to publish the Novel under his own name contributed to her identification with the female protagonist of the Novel. According to her, the rulings of the District Court should not be viewed as "**over-interference in considerations of artistic editing**" but rather as an "**obvious logical conclusion**". The Respondent further denies the Appellant's argument that the District Court allegedly founded its conclusions on "**hindsight**", since "**had she known of the many, more specific, details included in the book which lead to her identification, she would have overtly objected to the publication of the book**". Not only did the Appellant deny the Respondent's pleas, he also ignored the pleas of his former wife and mother of his children, who appealed to him to avoid the publication of the Novel.

45. With respect to her alleged consent to include a detailed description of her unique work of art in the Novel, the Respondent refers to the factual ruling of the District Court in this respect: "**all that was presented to her was a paragraph pertaining to her work**". According to her, it was proved to the District Court that she had no knowledge of the Appellant's intention to include in the Novel descriptions that would violate her privacy and damage her reputation.

46. According to the Respondent, the superiority of the freedom of autobiographical expression in the American Law, on which the Appellant relies, exists "only **in cases where it is intended to promote a justified public interest**". Regarding the issue of **public interest** in publishing the Novel contemplated herein, the Respondent refers to the Judgment of Justice (his former title) **A. Grunis** in L.C.A. **5395/09: "In the matter at bar, the publication of the book does not reflect a public interest of high importance. The Respondent is not a public figure. The events which are argued to be described in the book occurred in private circumstances. The public has no special interest in these details**" (*ibid*, Para. 6). Moreover, review of the judgments referred to by the Appellant clearly indicates that the infringements described therein are limited – in both scope and magnitude – in comparison to the damage caused to the Respondent; in any case – these are foreign judgments that do not bind the courts in Israel, which "**already deliberated – in three different tribunals – the facts of the specific case at bar, and fully denied the thesis at the basis of the Appeal**".

47. The Respondent argues that horizontal balancing between rights does not mean orders will be issued regardless of applicable law, but rather balancing between rights of equal standing and deciding which one will prevail under the circumstances of the case at hand. According to her, the District Court rightfully ruled that the Novel inflicts severe damage to her privacy and reputation, and that the Appellant and his book are not protected by the defenses prescribed by law. Moreover, the Respondent claims that the Appellant's proposal to allow the publication of the Novel subject to changes is merely a "**manipulative empty proposal**"; and putting a time limit of the publication, as he proposed, is expected to backlash in the future and hit her "**again, and perhaps more severely than the first time**".

48. With respect to the defense of good faith, the Respondent notes that this is a typical factual question that was discussed and decided by the District Court, and in which the appellate jurisdiction should not interfere. Moreover, according to the Respondent, the testimony of the Appellant's friend regarding his intentions in publishing the Novel is not free of doubt. The Appellant knew of the Respondent's demands and requests to refrain from publishing the Novel, thus it is unclear how he can "**hold the stick at both ends**". According to her, the Appellant's criticism regarding the requirement of the artificial foundation to prove "**malicious intent**" in publications, should "**be directed at the legislature that determined the limitations of the defense of good faith**", and not at the Court.

49. With respect to the defense of "**public interest**", the Respondent claims that the Appellant relies in his arguments on the online response of an anonymous

reader who said the book moved him. According to her, the Appellant's interpretation of the said term strips it of any content or meaning, and in any event – there is no room for comparison between the public interest and damage to the reputation of Captain R. (see C.C. (District Jerusalem) 8206/06 **Captain R. v. Dr. Ilana Dayan** (December 7, 2009); C.A. 751/10 John Doe v. Dr. Ilana Dayan (February 8, 2012) (hereinafter: "**re. Captain R.**") and the public interest in the publication of the Novel and the degree of the violation of the Respondent's privacy and damage to her reputation. In this context, the Respondent again refers to the above cited dictum of Justice (his former title) **A. Grunis**, that "**the publishing of the book does not reflect a public interest of high importance**".

50. According to the Respondent, the Appellant's argument that "**he who gains from the activity**" should be held liable is unclear, and in any event – is not supported by the letter of the law. The Respondent further notes that attributing contributory fault to her own acts is inconsistent with the factual findings determined in the Judgment of the District Court.

51. The Respondent claims that the Appellant failed to present pertinent case law to support his argument that the monetary compensation awarded does not represent proper balance and proportion. On the contrary – the only judgment discussed in the Appellant's summation is the aforementioned re. Captain R., in which the District Court awarded non-pecuniary damages in the amount of ILS 300,000, which was later reduced by the Supreme Court to the amount of ILS 100,000. According to her, the scope of interference of the appellate jurisdiction in damages of that kind is restricted to exceptional cases only. Furthermore, according to the Respondent, the damages set by the District Court are significantly lower than the rate of statutory damages to which she is entitled in view of the magnitude of the violation of her privacy and damage to her reputation.

52. The Respondent further notes that the District Court refrained from deciding the **copyright infringement** cause of action on its merits. According to her, the Appellant's arguments with respect to both the issue of "**fair use**" and her alleged consent to the publication of the Novel, are inconsistent with the factual findings as determined in the judgment of the District Court. Additionally, as aforesaid, the District Court did not rule on the independent cause of action of copyright infringement, as it was content with the proof of the violation of the Respondent's privacy. However, the Appellant, on his part, did not bother to address this cause of action in his summations, and therefore, even on such grounds alone, his appeal cannot be accepted.

<u>The Normative Framework</u>

53. The decision regarding the nature of the relationship between "**freedom of expression**" and "**the right to privacy**" and the balance between them, is at the core of the social treaty. Section 1 of the Basic Law: Human Dignity and Liberty prescribes that "**The fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights will be upheld in the spirit of the principles set forth in the Declaration of the**

Establishment of the State of Israel”**.** The "**values of the State of Israel as a Jewish and democratic State**" are embedded in the Basic Law (Section 1A) and they will guide us. We must turn to explore the fundamental principles at the basis of our legal system. Many pens have been broken, and many keyboards will be worn out in the attempt to define the proper balance between the contemplated basic values. The burden imposed on judges in decisions of a constitutional nature is a heavy one. The fear to possibly damage the freedom to create art, compositions which express the inner desires of the artist and are an inspiration the public, a model to be followed and identified with and at times even spark for social change, weighs against the fear to permit an invasion into the private realms of the individual. "**The blessing is only found in that which is kept out of sight**" (Bavli, Taanit H, B) with respect to issues pertaining to the inner-personal sphere of the individual. Emergence into the world, untimely and without the full consent of an individual, can actually destroy lives.

54. The proper judicial balance will be decided after examination of the conflicting rights in each case on its merits. The Appeal at bar concerns artistic freedom, including the autobiographical composition. Setting the boundaries of the exact applicability of this right, in consideration of its siblings in the family of rights – the right to a reputation and the right to privacy – is the essence of the Appeal at bar.

Freedom of Expression and Artistic Freedom

55. As is well known, freedom of expression is one of the pillars of our democratic governance, and is one of the basic anchors of the society in which we live. The importance of freedom of expression is amplified in the Israeli society, which is characterized by substantial, even polar, conflicts of opinion, on issues pertaining to the roots of human existence. Israeli law embodies perennial Jewish tradition which encourages dialogue, as concisely verbalized by the expression "**these and these are the words of the living God**" (both interpretations are legitimate) (Bavli, Eiruvin, 13, 2). Viewing the freedom of expression as a "superior" right (H.C.J. **73/53 "Kol Ha'Am Ltd. v. the Minister of Interior Affairs**, PDI 7 871, 878 (1953) (hereinafter: "**re. Kol Ha'Am**") and as the "**heart and soul of democracy**" (Cr.A. **255/68 "the State of Israel v. Avraham Ben Moshe**, PDI 22(2) 427, 435 (1968)) is grounded in the reality of life in Israel, as well as in the sphere of faiths and opinions which is at the basis of the definition of the State of Israel as a Jewish State.

56. In this sense, freedom of expression serves as a cultural anchor that is partially rooted in the democratic foundation of the State of Israel – "**democracy is first and foremost a governance of consent – the opposite of a government based on force. The democratic process is therefore a process wherein the common goals of the people and the way to achieve them are selected through deliberation and verbal negotiation, i.e. by way of open settlement of the problems on the agenda of the State and free exchange of opinions in respect thereof**" (re. **Kol Ha'Am** above, p. 876); the freedom of expression is also partially rooted in the Jewish foundation of the State – "**and the entire dispute between the Tanaim, the Amoraim, the Gaonim**

and the Poskim, is in fact the words of the living God, and the Halacha includes them all; Moreover, this is the glory of the Holy Torah, whereas the Torah is read as singing, and the beauty of the song is the disparity of voices. This is the essence of music" (Aruch HaShulchan, Hoshen Mishpat, introduction). "**Just as their facial features differ from one another, so their opinions are not identical, but rather they each have an opinion of their own… since Moses asked God, at death's door he said to him: oh Lord, the minds of each and all are revealed before you, and they are not one. When I pass, I plead you to appoint a leader that will be able to handle each and every one of them in accordance with his own mind**" (Numbers Rabbah (Vilnius), Pinchas, Section 21; for further detail see the dictum of Justice (his former title) M. Alon in E.A. **2/84, Neiman v. the Chairman of the Central Election Committee for the 11th Knesset** PDI 39(2) 225, 294-297 (1985); Aviad HaCohen "Freedom of Expression, Tolerance and Pluralism in Jewish Law**" 45 Mincha le'Menachem** (Hana Amit, Aviad Hachohen and Haim Be'er editors, 2007)**.**

57. Hence, the freedom of expression in Israel stands on two foundations – **Judaism** and **democracy** (see the dictum of Justice (his former title) **A. Barak** in H.C.J. **6126/94 Senesh v. the Israel Broadcasting Authority** PD 53(3) 817 (1999) (hereinafter: "**re. Senesh**").

58. Freedom of expression extends to artistic expression. This form of expression has unique characteristics, that require unique protection. The importance of art is in the development of human culture, and in being a means to express and execute one's inner wishes; its importance gives art its unique status. In his artistic work, the private boundaries of an artist are broken and place the artistic freedom as a social value. "**Freedom of expression is the artist's freedom to open his heart, spread his wings and set his mind free**" (H.C.J. **14/86 La'or v. the Council for the Review of Films and Plays** PD 41(1), 421, 433 (1987). With respect to the scope of artistic freedom, it was held as follows: "**Such freedom is more than the freedom to express commonly accepted opinions. It is the freedom to express deviating opinions, with which the majority disagrees. It is the freedom to not only praise the government, but also to criticize it. It is the freedom to create any work of art, whether of a divine artistic value and whether of no artistic value whatsoever, and even if it is – as the Council found – 'an offensive paste of erotica, politics and perversions of all sorts and kinds'**" (*ibid*; on creation in Jewish law see: Alexander Ron "On Artistic Creation and Artistic Freedom" **Parashat Ha'Shavua 63** (Truma, 5762)).

59. The status of artistic freedom is established, according to one doctrine, in the freedom of expression**,** i.e., freedom of expression in itself yields "**the freedom of artistic work including literature and the various displays of visual art**" (see: H.C.J. 806/88 **Universal City Studios Inc. v. the Council for the Review of Films and Plays**, PD 43(2) 22, 27 (1989)); according to another doctrine, the unique characteristics of the artistic expression require that artistic freedom be an independent right. "**It can be seen as a standalone constitutional right. It is based in the perception of humans as autonomous creatures who are entitled to self-realization, both as creators**

and as consumers of art. Indeed, artistic freedom is the freedom of an artist to create. It is the freedom of choice with respect to the topic and its presentation, and the freedom of others to hear and comprehend" (H.C.J. **4804/94 Station Film Co. Ltd. v. the Council for the Review of Films and Plays**, PD 50(5) 661, 677 (1997)).

60. I find no real difference between those who think that the status of the right to artistic freedom is that of a "**primary right**" and those who think it is merely a "**secondary right**" (for the distinction between a "**primary right**" and a "**secondary right**" see: Aharon Barak **Proportionality – Constitutional Rights and Their Limitations** 76-78 (2010) (hereinafter: "**Barak, Proportionality"**). Whether you support this position or the other, it is necessary to define and limit the characteristics of the right. This will be done according to the unique rationales on which it is founded. Such rationales form the "**genetic code**" of the right, and determine the scope of its applicability. They are conceived in the theoretical legal laboratory and move to the world of practice. The justifications can be viewed as the **scalpel and hammer** in the hand of the sculptor, assisting to clearly chisel the image of the right and distinguish between similar issues; "**like silver touched by the silversmith – alloying and merging as he pleases**" (the liturgical poem "like substance touched by the artist", Yom Kippur prayer). In the realm of rights, the rule of "**complete separation of realms**" (Bavli, Brachoth 48, 2) does not apply. On the contrary, the rights are combined and integrated, sometimes to an inseparable degree. Chiseling is not an easy task, and it can occasionally upset one of the rights and its beneficiaries. The Court will not easily decide the exact scope of applicability of the right. Decisions of this kind have deep and wide impact, and may affect social life, commerce, culture, art, politics and more.

The Autobiographical Composition

61. Freedom of expression stands on three pillars: the **exposure of the truth**, **personal wellbeing** and its **value in the democratic regime** (see Aharon Barak "The Tradition of Freedom of expression in Israel and its Problems" Mishpatim 27, 223, 227-228 (5757)). These pillars do not equally support each and every instance of freedom of expression. Some instances are supported by all rationales; others are only sheltered by some. The strength of the rationales at the basis of each instance also varies. Examining the rationales and their strength will determine the level of protection extended to the expression. "**Not all rationales [supporting the freedom of expression – N.S.] are equally present in all types of expressions. If an expression does 'not fall under' the rationales for freedom of expression, this may influence the degree of the legal protection extended thereto**" (H.C.J. **606/93 Kidum Entrepreneurship and Publishing (1981) Ltd. v. Israel Broadcasting Authority**, PD 48(2) 1, 12 (1994) (hereinafter: "**re. Kidum**"). The status of the autobiographical artistic freedom will be determined in light of the "**quality**" and "**quantity**" of rationales at its base. Prior to examining these rationales, we wish to post the following words as a guiding road sign: "The **literature, painting and sculpture manifest the spiritual values which are inherent to the human soul; so long as there is a single drawing still**

concealed in the depth of our souls and yet unplaced on paper, art is obligated to produce it" (Rabbi Kook, Olat Reaya 2, p. 3).

62. The justification of personal wellbeing emphasizes that "**without allowing people to hear and be heard, to read and to write, to speak or be silent, one's humanity is flawed, since his spiritual and intellectual development are based on his ability to freely form his perspective**" (see: H.C.J. **399/85 Kahana v. Israel Broadcasting Authority**, PD 41(3) 255, 274 (1987) (hereinafter: "**re: Kahana**"). And elsewhere: "**The importance of the principle [freedom of expression – N.S.] also lies in the protection that it extends to a distinctly private interest, i.e. the interest of each individual, by virtue of his humanity, to fully express his qualities and personal virtues; to nurture and develop its *self* to the maximum; to voice an opinion on any matter which he considers vital for him; in short – to speak his heart, so that life seem worthy to him** (re: **Kol Ha'Am** p. 878). Case law further emphasized the close connection between this pillar of the freedom of expression – man's personal realization – and human dignity (see: Aharon Barak **Human Dignity** 717-721 (2014) (hereinafter: "**Barak, Human Dignity**")); it was held that "**this argument [of personal wellbeing – N.S.] ties the freedom of expression to human dignity**" (re. **Kahana** above, p. 273) and "**what is human dignity without the fundamental right of a person to hear his fellow humans and make himself heard; develop his personality, form his perspective and achieve self-realization?**" (P.P.A 4463/94 **Golan v. Israel Prison Service** PD 50(4) 136, 157 (1996)).

63. The autobiographical artistic freedom is in fact a manner of expression which materializes this justification almost in its entirety. Autobiographical writing is personal, intimate writing, which expresses the writer's life story. Such writing is a basic human need that is veiled in the hearts of many people. The execution, the relief experienced by the author when the drawing of ideas from the depths of his soul is completed, is the strongest evidence of the importance of the publication of an autobiographical composition. The expansion of the phenomenon of autobiographical writing, across all walks of life, is yet another evidence of the importance thereof to human development. We are no longer in the era when autobiographical writing is the realm of the few, those outstanding people who were lucky to describe, through the telling of their personal story, the story of their generation. Nowadays, every person with an internet connection and a keyboard can write his life story and publish it on the global network. Stories that were once secluded now move forward to the front of the stage, and stories that were previously published and famous now retreat into the background. Autobiographical writing is therefore of great importance, to the individual and society, for self-realization and the promotion of literary creation.

64. As aforesaid, the justification of the right to autobiographical creation does not end with the **personal** justifications for freedom of expression; **societal** justifications provide another plentiful source from which this right flows. Pursuant to the justification of exposure of truth "The **freedom of expression must be guaranteed in order to enable the competition between various and diverse perspectives and ideas. From this competition – rather than**

from the dictation of a single governmental "truth" –the truth will arise, as the truth is destined to prevail in the battle of ideas" (re: **Kahana**, p. 273). The right to autobiographical artistic freedom assists the realization of this rationale. Seemingly, as the number of people who write their life stories will grow, human knowledge will grow respectively, as will the ability to reach the bottom of truth. Human knowledge is not equally dispersed in the town square. Groups with better exposure and accessibility to media have greater ability to communicate information. The existence of autobiographical writing will help us to break the "**monopoly of knowledge**" and also obtain information from non-conventional channels (for additional information see: Sonja R. West., **The Story of Me: The Underprotection of Autobiographical Speech**, 84(4) WASH. U.L. Rev.905, 944-948 (2006)) (hereinafter: "**West**").

65. The importance of autobiographical artistic freedom is also rooted in the democratic justification. "**Freedom of expression is a pre-condition for the existence of democracy and its proper operation. Free voicing of opinions and their unlimited exchange between fellow men is a *contitio sine qua non* for the existence of social and political governance in which a citizen may fearlessly consider, through the study of information, what is required, as per his best understanding, for the benefit and wellbeing of the public and of individuals, and how the existence of the democratic governance and the political structure in which he lives can be secured… the democratic process is conditioned, as aforesaid, on the possibility to hold an open discussion of the problems on the agenda of a State, and the free exchange of opinions in respect thereof… it cannot be perceived that elections in a democratic regime be held if they are not preceded by an opportunity to exchange opinions and attempt mutual persuasion and without holding the deliberations and discussions that form public opinion, which has a vital role in every free regime. The above, as aforesaid, is as valid during elections as it is in other times**" (H.C.J. 372/84 **Kloppfer Nave v. the Minister of Education and Culture**, PD 38(3) 233, 238-239 (1984)). The autobiographical artistic freedom cherishes the importance of the direct flow of information between the author and the public. Public channels of information are supervised by several "**veto players**" which prevent the free flow of information. Media, governmental censorship, the legal system and the laws, access to wealth – are just some of the barriers confronted by owners of information who seek its publication. The autobiographical artistic freedom gives importance to the direct encounter between author and readers. Furthermore, the autobiographical artistic freedom assists in making free expression more available to social and cultural minorities, which are under-represented in the central media, thus enriching the variety of voices heard in public. We have just recently witnessed the empowering and catalyst effect of autobiographical expression of experiences online on social and political revolutions in the neighboring Arab countries. This right is reinforced in this era of internet, where electronic means and media such as "Twitter", "Facebook" and blogs implement this idea in practice. Many scholars noted the connection between a wide spectrum of opinions heard in public and the existence of a lively and healthy democracy. **The rules of democratic decision-making are the body; the freedom of**

expression is their soul. A democracy without freedom of expression is like a body without a soul. The autobiographical artistic freedom not only enables each citizen to vote and be elected, but also to influence society's cultural fabric (for an extensive review of the basis of the right to autobiographical writing, see: **West**, p. 948-957). Hence, the autobiographical composition is closely connected to the abovementioned three rationales of freedom of expression.

66. Its importance notwithstanding, freedom of expression, including the autobiographical artistic freedom, is not an absolute right, and it is not immune to restriction. "**The freedom of expression and the artistic freedom are not the only values to be considered. A democratic society is based on a variety of values and principles, of which freedom of expression and artistic freedom are just a part of. The implementation of these diverse values and principles naturally mandates the restriction of the protection extended to the freedom of expression and the artistic freedom, to the scope that is required to protect such values and principles. My freedom of movement stops where your nose begins; my freedom of expression does not justify slander or libel against another person; it does not justify disclosing top state secrets or disturbing the peace; freedom of expression is not the freedom to give false testimony in court**" (re: **Senesh**, p. 830). With this warning in our saddlebag, we will now review the right that collides with the autobiographical artistic freedom in the Appeal at bar – the right to privacy.

The Right to Privacy

67. The right to privacy is a constitutional right. Section 7 of Basic Law: Human Dignity and Liberty instructs that:

> "**(a) All persons have the right to privacy and to intimacy.**
> **(b) There shall be no entry into the private premises of a person who has not consented thereto.**
> **(c) No search shall be conducted on the private premises of a person, nor in the body or personal effects.**
> **(d) There shall be no violation of the confidentiality of conversation, or of the writings or records of a person**."

The status of the right to privacy is also expressed in the case law of the Supreme Court as "**one of the freedoms that shape the character of the regime in Israel as a democratic regime, and one of the supreme rights that establish the dignity and liberty to which a person is entitled as a person, as a value in itself**" (Cr.A. 5026/97 **Gilam v. The State of Israel** (June 13, 1999) (hereinafter: "**re. Gilam**"); for further details, see HCJ 8070/98 **The Association for Civil Rights in Israel v. The Ministry of the Interior**, PDI 58(4) 842 (2004)).

68. The proper balance between the right to privacy and other rights was determined by the legislature in the Protection of Privacy Law. With respect to the interpretation of the act, case law has already been established whereby laws that were passed before the enactment of the basic laws will be

interpreted in the spirit of the provisions of the basic law. "**This law (Basic Law: Human Dignity and Liberty – N.S.) granted a super-statutory constitutional status to the right to privacy. This status should affect the interpretation of all of the laws, both those passed before the legislation of the basic law and those legislated thereafter. This constitutional status of the right to privacy should also affect the interpretation of the Protection of Privacy Law**" (HCJ 6650/04 **Jane Doe v. The Netanya Regional Rabbinical Court**, PDI 61(1) 581, 602 (2006) (hereinafter: "**re. Jane Doe**"); for further details see F.Cr.H 2316/95 **Ganimat v. The State of Israel**, PDI 49(4) 589 (1995)).

69. The law's protection of the right to privacy is relatively new. It began approx. one hundred years ago. The starting point of the discussion regarding the right to privacy, its status and its justifications was expressed in an important article from the beginning of the last century, in which Justices Warren and Brandeis pointed to the existence of the right to privacy (Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (hereinafter: "**The Right to Privacy**"). The innovation of the authors was not reflected in the creation of a right "*ex nihilo*", but rather in conceptualizing its various appearances in legislation. This approach does not recognize the benefit inherent in defining privacy as an independent right. Privacy is limited to how it was defined in legislation and in case law, which must be interpreted narrowly in order to prevent double protection in view of the basic assumption that the legislature does not waste ink. A similar approach was initially established in the case law of the Supreme Court: "**The Protection of Privacy Law is intended to create and define new boundaries, and there was therefore, no need to redefine existing offences as prohibited acts… why would the legislature deem fit to once again prohibit in later legislation acts of violence that have already been determined as criminal offences in the existing penal law, only to include them in the definition of a new prohibited act, alongside which a maximum penalty is set, which does not exceed the penalty for any one of the existing violent offences. This is double legislation, which is entirely unnecessary**" (see the opinion of Justice (former title) **M. Shamgar** FH 9/83 **The Military Appeals Court v. Vaknin**, PDI 42(3) 837, 853 (1988); for further details see L.Cr.A 9818/01 **Biton v. Sultan**, PDI 59(6) 554 (2005)). The concept that deems the right to privacy as a right limited solely to its appearances in legislation and to a narrow interpretation thereof, did not last forever. The right to privacy soon acquired a permanent status in the family of constitutional rights. Buds of this concept are found in the opinion of Justice (former title) **A. Barak** in HCJ 2481/93 **Dayan v. Major General Wilk, Jerusalem District Commander**, PDI 48(2) 456 (1994) (hereinafter: "re. **Dayan**"): "**Every person in Israel is 'entitled to privacy' (Section 7(a) of Basic Law: Human Dignity and Liberty)… now that is has been afforded a statutory constitutional basis, it must be interpreted from a 'broad perspective' 'and with the understanding that we are concerned with a provision that determines ways of life'… a constitutional provision must be interpreted 'with a broad outlook, and not technically'… hence the approach – which is accepted in enlightened democratic countries – that constitutional provisions must be interpreted 'generously'… with a substantive approach and not a 'legalistic'**

approach… with a pertinent approach and not a 'technical' or 'pedantic' approach… against the background of this approach it may be ruled that the constitutional right to privacy extends, *inter alia* – and without any attempt to delimit the right with all of its aspects – to a person's right to conduct the way of life he wishes behind closed doors, without outside interference. A person's home is his castle, and within its confines he is entitled to be left to his own devices, for development of the autonomy of his will" (*ibid*, on page 470).

70. Indeed, "**The kids which you left have become goats with horns**" (Bavli, Brachot 63 p. A), the buds sprouted, and received precise and clear expression in the opinion of Justice (former title) **A. Barak** in re. **Jane Doe** (above, on pages 595-597): "**The right to privacy is one of the most important human rights in Israel… its roots are deeply embedded in our Jewish heritage… it is therefore called for by the values of Israel as both a Jewish and democratic state. It is recognized by Israeli common law as a human right… in 1981 the Protection of Privacy Law was enacted. Privacy was defined in the law (Section 2) in a manner which does not 'cover' all accepted forms of privacy. With respect to a violation of privacy over and above the definition in the law, Israeli common law continues to apply… in 1992, a material change occurred in the status of the right to privacy… Basic Law: Human Dignity and Liberty explicitly recognized a constitutional right to privacy… a constitutional right to privacy was thus recognized at a broader scope than the scope of privacy in the Protection of Privacy Law. Indeed, by virtue of the basic law, privacy became a super-statutory constitutional right… any and all government authorities – including any court and tribunal in the state – must honor it**".

71. The right to privacy is a constitutional right. It must be interpreted in a "**generous and broad**" manner, according to its justifications, in order to realize the purposes underlying it. However, the scope of the protection of privacy will not be determined broadly or narrowly but rather precisely. For the purpose of balancing between clashing rights, when the court is faced with a decision which calls for the drawing of the exact outlines of the rights, the court will employ strict interpretation, examining which of the rationales realized in the manifestations of the rights before it must be preferred (see: Aharon Barak, **Interpretation in Law**, Vol. 3: Constitutional Interpretation 83-84 (1993) ("**Interpretation in Law** (Constitutional Interpretation); and – Aharon Barak, **Proportionality in Law** 94-97 (2010)). The accepted opinion in our law is that the scope of the constitutional right should not be reduced in order to take into consideration the collective or the right of others. These will be taken into account at the following stages of the constitutional analysis (*ibid*). Israeli law therefore distinguishes between the application of the right and its protection. The mere application of the right does not necessarily guarantee a comprehensive protection of it. Application is one thing and protection another. Broad interpretation does not equal full protection.

<u>The Right to Privacy – Scope</u>

72. The ambiguity of the right to privacy is well-known (see for example: Re'em Segev "Privacy, its Significance and Importance" **Privacy in an Era of**

Change 25, 26 (Tehilla Shwartz Altshuler editor, 2012) and the authorities therein) (hereinafter: Segev "**Privacy, its Significance and Importance**""). This ambiguity, which in the opinion of some of the scholars is derived from the social character of the right and from its technological context, makes it difficult to define the exact boundaries of privacy (see for example: Michael Birnhack "Control and Consent: The Theoretical Basis of the Right to Privacy" *Mishpat Umimshal* 11 9, 13-19 (2008) (hereinafter: "**Control and Consent**")). "**The right to privacy is a complex right, whose boundaries are not easily determined**" (see HCJ 1435/03 **Jane Doe v. The Haifa Civil Service Disciplinary Court**, PDI 58(1) 529, 539 (2003)).

73. In this appeal, we are exempt from deciding the definition of the exact boundaries of the right to privacy. We are concerned – in the book at bar – with the core of the right to privacy. "**With respect to situations of 'classic privacy', there appears to be broad consent. For example, we agree that it is appropriate to protect the acts of a person in his own home, the content of telephone conversations or of sealed envelopes, and certain types of information, such as our medical condition, our sex life, … when an outside agent intervenes without our permission in any of the above, we feel that our privacy has been violated**" (see 'Control and Consent' above, on page 13).

The Justifications for the Right to Privacy

74. Many justifications have been given in literature and case law for the right to privacy. There are those that rest on a personal basis and those that are based on social values. These justifications can be split into two separate categories: the first, intrinsic-inherent justifications; the second, instrumental-purposeful justifications. The distinction between the types of justifications is clear: the intrinsic justification deems the right as a purpose in itself; the instrumental justification deems the right as a means of achieving a nobler purpose.

The Intrinsic Justification

75. The intrinsic justification for privacy asserts that a violation of privacy is equal to a violation of a person's dignity, welfare and his ability of self-realization. This outlook is based on the moral theory of the philosopher Immanuel Kant. According to Kant, man exists as an end in himself. Use of man as an object for the purpose of achieving another purpose constitutes a violation of his dignity:

> "Man, and in general every rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. He must in all his actions, whether they are directed to himself or to other rational beings, always be viewed at the same time as an end… Persons are, therefore, not merely subjective ends, whose existence as an effect of our actions has a value for us; but such beings are objective ends, i.e., exist as ends in themselves." (Immanuel Kant, Groundwork of the Metaphysic of Morals, 428 (H. J. Paton trans., 1964)).

76. A person is not an "object"; he should not be used as a means to achieve other purposes. A person has emotions, feelings and desires. Blatantly ignoring these and crudely trampling them is intolerable. The mere violation of a person's privacy is the prohibited act. Intrusion into and exposure of the private space renders the person a means for fulfilling the purposes of the exposer and intruder. Privacy is the heart and core of human autonomy. This is the space in which everything dear to a person, his emotions, his inner desires, his innermost secrets, are found; all of these are part of the heart and core of the right to privacy. Violation of these is a grave violation of the person's dignity. In the words of the scholar Bloustein:

> "The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered." (Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 1003 (1964) (hereinafter: "Bloustein").

And in the words of the scholar Benn:

> "To conceive someone as a person is to see him as actually a chooser, as one attempting to steer his course through the world, adjusting his behavior, as his appreciation of the world changes, and correcting course as he perceives his errors. It is to understand that his life is for him a kind of enterprise, like one's own… To respect someone as a person is to concede that one ought to take the account of the way in which his enterprise might be affected by one's own decisions. By the principle of respect for persons, then, I mean the principle that every human being, insofar as he is qualified as a person, is entitled to this minimal degree of consideration" (Stanley I. Benn, *Freedom, and Respect for Persons*, in Privacy & Personality 1, 9 (J. Roland Pennock and John W. Chapman eds., 2009)).

77. Indeed, the right to privacy is derived from the right to dignity and is closely related to it. "**The right to privacy therefore concerns the person's personal interest in developing his autonomy, his peace of mind, his right to be with himself and his right to dignity and liberty**" (see C.A. 8483/02 **Aloniel Ltd. v. McDonald**, PDI 58(4) 314, paragraph 33 of the judgment of Justice **E. Rivlin** (March 30, 2004)); for further details see re. **Jane Doe** above in paragraph 10 of the judgment of Chief Justice **A. Barak**; Ruth Gavison "The Right to Privacy and Dignity", **Human Rights in Israel – An Essay Collection in Memory of H. Shelah** 61 (1988)).

Instrumental Justifications

78. Further justifications deem the right to privacy as a means to achieve substantive purposes. The right to privacy is perceived as the basis of the individual's wellbeing; as vital to ensuring relationships of trust between people, and particularly intimate relationships; as a means of ensuring proper community life; as a basis for the existence of a democratic regime.

79. Several theories point to the fact that privacy is important for the purpose of improving people's personal wellbeing, and for the possibility of maximum self-fulfillment. Private space gives a person the possibility to meditate and challenge the common world view of the society to which he belongs. Private space allows a person to design his private home as he wishes. This space sometimes expresses the innermost secrets that a person, for his own reasons, does not wish to publicly reveal. A person is entitled to the possibility of building his world as he wishes, which cannot be done when he is being watched from all around. The social view is sometimes paralyzing, preventing the individual from undertaking original and bold action. Private space is where the individual can break the fixed social boundaries. Violating the private space denies the individual the possibility of creating a unique and individual personal world. Unique literary expression of this concept is found in George Orwell's book "1984", which has become one of the world literature's invaluable assets. See the opinion of Justice Brandeis:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men." (Olmstead v. United States, 277 U.S. 438, 479 (1928).

And in the words of the scholar Bloustein:

> "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality… Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones" (Bloustein, 1003).

For further details on the issue of personal wellbeing, see: R. v. Dyment, [1988] 2 S.C.R. 417. For further authorities, see: Michael Birnhack, **Private Space: Privacy, Law & Technology** 117-120 (5771) (hereinafter: "Birnhack, **Private Space**").

80. A violation of privacy is a violation of **personal autonomy**. Tearing down the screen separating the private and the public realms violates a person's right to conduct his life as he wishes. Some wish to conduct their lives on the radio waves, in the 'big brother house', or on the pages of the newspaper; others wish to live their lives peacefully and modestly, far from the spotlight, from the public eye, and from the lens of the camera. Exposure of privacy by another violates a person's right to conduct his life as he wishes. "…**The right to privacy draws the line between the individual and the public, between 'me' and society. It delineates a defined area in which the individual is left**

alone, to develop his 'self', without the intervention of others…" (re. **Dayan** above, on page 471).

> "Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. One may wish to live a life of toil, where his work is of a nature that keeps him constantly before the public gaze, while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from this liberty" (Pavesich v. New England Life Insurance Co., 50 S.E. 68, 71 (Ga 1905)).

81. Note, the freedom of expression and the right to privacy do not merely clash; they also complement one another. A violation of privacy is sometimes also equal to a violation of the freedom of expression. The existence of a protected private space, to which the individual may withdraw, be alone, is sometimes a condition to the existence of creative activity. Creativity, which deviates from the existing social order, struggles to emerge under the penetrating gaze of the community. The screen of privacy protects the existence of the internal world. This world will be exposed to the audience when the screen goes up. Premature exposure and without consent of the unfinished product, will lead to failure; or as in the theatre world, will lead to harsh reviews which might leave the creative work in its unripe stage, and prevent its coming to fruition. Personal space is vital for the development and emergence of different ideas in the public realm. Individuals with free opinions are an essential ingredient for the existence of democracy. Without freedom of thought, made possible where there is a personal space, a healthy society cannot be developed. Indeed, the right to privacy is not necessarily contrary to the freedom of expression and creation, it also serves them.

82. The Torah describes the public setting in which the first Tablets of Stone [*Luchot HaBrit*] were given, and the breakage; and the second tablets that were given to Moshe Rabbeinu (Moses) alone, and were a masterpiece. The first tablets were given "**amid great pomp and circumstance**" (Rashi, Shemot 34, C) on Mount Sinai in front of the entire Jewish nation. The second tablets were given to Moshe Rabbeinu in silence: "**No man may ascend with you nor may anyone be seen on the entire mountain. Even the flock and the cattle may not graze facing that mountain**" (Shemot 34, C). It was stated thereon in Midrash Tanchuma ((Warsaw) Ki Tisa, 31): "**The first tablets were given in public, and therefore the evil eye had control over them and they were broken, and here G-d told him there is nothing better than modesty**". We can see that modesty and personal space may produce great creation. The creation is not necessarily the result of the freedom of expression. It is actually the scaling down, the privacy, the modesty, that may

be fertile ground for growth and renewal. The secret of the dialogue and actions taken between is the proof. Needless to say, humans, the crown of creation, are the result of the most intimate relationships. This teaches us that infinite exposure is not always a guarantee for creation; on the contrary, there are concealed areas that we must strictly preserve as such, not only as protection against harm, but in order to ensure productivity, creation and fulfillment. "**And it is written 'with the modest is wisdom' (Mishlei 11, B), since wisdom connects two things, and it is the primordial power, as is known, and through this things change from one state to another, and this is the meaning of the verse 'with the modest is wisdom'. Therefore, when you want to plant a seed and want it to change its form, you conceal it and insert it into the ground, so that it may arrive at its primordial state, which is wisdom, as is recalled**" (Torat Hamaggid, Torah, Parashat Balak).

83. Harav Kook (Orot Hakodesh C, Part Two, Vol. Three, Title E) addresses the required balance between a person's need to be alone and his need for company: "Out of these two opposing judgments, the noble person must stand in the midst of two tendencies: to separate himself and to draw close. With this, he attains conceptual purity, on the one hand, and the natural strength that exists in simplicity and natural freshness, on the other". Harav Kook further eloquently writes in his essay "A time to be silent and a time to speak" (Orot Hakodesh, Part Two, Vol. Three, Title H): "The structures of a person's spirit suffer great destruction when the inner light of "a time to be silent" appears, when the holy and supernal muteness in the splendor of its glory and the gravity of its burden fills his entire soul. If he rebels against it and breaches it, this rebellion against the sovereignty of silence destroys all of its structures, all of the treasury of innocence and uprightness, of profundity and supernal connection, these are all shattered. And he will later need, if he wishes to build his ruins, to reestablish everything anew, and the wise person will be silent at that time. However, if a person gives silence its due when it first appears, it will perform its duty, establish its muteness, penetrate in its profundity and reach the perplexities of its depths, from which it will bring forth mighty foliage and branches with the power of great and fresh blossoming. The leaves will be filled with power and the expression of his lips will emerge. Then the "time to speak" will begin in its glorious majesty and the spirit of silence will be the angel that acts upon the outpouring of speech, which will flow like streams, with great abundance and all beauty. '[I] create the speech of the lips. Peace, peace, to the distant and to the near,' says Hashem, 'and I will heal him'. Its fruit will be for food and its leaf for healing, freeing the mouth of the mute".

84. The democratic regime also requires the existence of the right to privacy. The existence of a private living space that is not under the beady eye of the state is vital to the existence of a pluralistic society which gives a stage to the variety of voices amongst it. Political criticism will not emerge where human lives are monitored by various means. The existence of a private space is essential for the development of unique positions which can later gain political expression. This position was recognized in the past by this court, which held that the right to privacy is "**one of the freedoms that shape the character of the regime in Israel as a democratic regime**" (see Paragraph 9 of the judgment of Justice

H. Ariel in re. **Gilam**; see also: *Campbell v MGN Ltd.* [2004] UKHL 22 (hereinafter: "re. **Campbell**"). For an extensive review see: Annabelle Lever, *Privacy Rights and Democracy: A Contradiction in Terms?* 5 Contemporary Political Theory 142 (2006)). And note, the right to privacy does not merely serve the person as a person. It has a broad social significance, over and above the right of the individual. Its value is great and important for the mere existence of human society.

The Right to Privacy and Intimate Relationships

85. Further justification for the right to privacy is found on another level of the human existence – interpersonal relationships. "**It is not good that man be alone**" (Bereishit B, 18); "**human beings are by nature political animals**" (Aristotle, **Politics**, Book A, 27-28 (Rachel Zelnick-Abramovitz Editor, Nurit Karshon translator, 2009)); "**either companionship or death**" (Bavli, Taanit 23, p.1). These are a few of the texts written throughout the generations to describe the importance of relationships in the lives of humans. Each one of us is involved in many relationships: family; work; friends; acquaintances; neighbors; service providers. All of the above and many others encircle and surround our daily routine. **Just as their facial features differ, their relationships differ**. And in the case at bar: a father-son relationship does not resemble a relationship between husband and wife; between friends, between distant and close acquaintances; etc.

86. There are "**certain relationships that require background conditions of privacy to enable their optimal existence**" (Birnhack, **Private Space** above, on page 120). Deep friendships and connections between couples are built and based on keeping the most intimate of secrets. A world in which privacy is trampled and secrets become common is a world in which people will refuse to bare their soul to their friends for fear of it being exposed to the entire world. The same is true to professional relationships and friendships, *a fortiori* with respect to romantic relationships. In such relationships, couples mutually reveal to one another their most secret desires, wishes and aspirations. A partner also reveals to his partner his positions and opinions regarding work colleagues, family members, friends and previous partners. This sensitive information is given to the other partner on a silver platter, under the assumption that he will act as a loyal ally and confidant. This is the "**unwritten**" contract between partners in a long-term romantic relationship. These are the "**terms of employment**". Any sensible person knows this. "**The growth of a couple's relationship… needs, *inter alia*, the couple's privacy from the outside world. The privacy enables intimacy, which is a necessary condition for a couple's relationship… the privacy allows trust between the couple and creates the space… where they can be authentic and gain each other's support**" (Birnhack, **Private Space** above, on page 121; for further references, see: Segev, **Privacy, its Significance and Importance** above, on pages 83-86).

87. A special place is kept for intimate long-term relationships between couples, and particularly for married life. The commitment created between two spouses is not limited to economic arrangements. These constitute the **body** of the marriage, while the trust and love create its **soul**. Marriage is based on

"**love, friendship, peace and companionship**". One acts as the other's "**confidant**". The self-sacrifice, the strong friendship, the endless empathy, these are the essence of married life. "**Therefore a man shall leave his father and his mother and cling to his wife and they shall become one flesh**" (Bereishit B, 24). **The separateness becomes oneness**. The day-to-day challenges that couples face, maintaining the relationship, household, professional career and childrearing, all constitute a quasi- "**melting pot**" for this personality merger. Many studies have indicated that the mental identity of spouses changes with time. The partners go from separate beings to a single family unit (see, for example: Milton C. Regan, Family Law and the Pursuit of Intimacy 147 (1993)). Spouses are exposed to one another, in happiness and in sadness, in times of hardship and crisis, as well as in times of success and comfort. They share with one another their thoughts and feelings about what goes on around them. In many relationships, spouses read one another, like an open book - "**no secrets escape them**". True in this regard are the words appearing in the traditional deed of conditions: "**and from this point forth, the said couple will act jointly with love and affection, and will not conceal or hide or lock away from one another…**" (Q&A Nachlat Shiva, Shtarot, Part I). It would not be superfluous to note in this context the degree of closeness between a husband and wife, *inter alia*, in relation to the laws of testimony (disqualification of a husband's testimony also disqualifies the wife's testimony) and the laws of agency (a husband is appointed as an agent for his wife for things that others cannot do as her agent). I will also mention the provisions of Section 3 of the Evidence Ordinance [New Version], 5731-1971 that "In a criminal trial, one spouse is not competent to testify against the other".

88. The right to privacy in its romantic form is in fact the right of the spouse not to be exploited by his spouse. A situation in which one spouse reveals to the other spouse everything that is on his mind, and the other spouse uses the information for his own purposes – is intolerable. A legal regime that does not prevent this does not protect the unwritten contract of marriage. The privileges between various individuals in society are regulated in legislation. Is it conceivable that the law, which regulates attorney-client relations; doctor-patient relations; psychologist-patient relations; bank-customer relations; will not extend its protection and defend the most sensitive relationship in a person's life – between man and wife, between spouses?! (For further details, see: Hanoch Dagan & Carolyn J. Frantz, *Properties of Marriage* 104 Colum. L. Rev. 75, 82-83 (2004) and the authorities appearing therein). It is for good reason that the "**public hearing**" principle which was set forth in Section 68(a) of the Courts Law [Consolidated Version], 5744-1984, whereby "**court hearings will be open to the public**", retreats in "**family matters, within the meaning thereof in the Family Court Law, 5755-1995**", pursuant to the provisions therein in Section 68(e)(1).

89. The culmination of the joint spousal relationship is embodied in long-term relationships, with a joint economic regime, regardless of whether we are concerned with the institution of marriage or with common-law partners. These relationships include an increased duty of care vis-à-vis the joint intimate space of the couple. Even romantic relationships that are not

characterized by a full economic partnership establish an individual 'fiduciary duty' to protect the spouse's intimate space. The opening of the intimate space to the other partner occurs in the early stages of the relationship. The protection of this space will emerge at the initial stages of the intimate relationship.

90. These are the main justifications for the right to privacy. However, before we begin discussing the proper balance, we will take a look at comparative law for support in deciding the legal issue that was placed at the center of the appeal at bar.

English Law

91. In the past decade, the right to privacy has acquired a place of honor in English case law. In the past, the only grounds for a suit for a violation of the right to privacy was a breach of confidence, which requires three separate elements to be proven: (1) the nature of the information that was revealed mandates protection of its confidentiality; (2) the information was transferred under circumstances which establish a duty of confidence; (3) misuse or unauthorized use of the information (for further details, see: The Law of Privacy and the Media 163-222 (Mark Warby, Nicole Morehman and Iain Christie eds., 2011 (hereinafter: "The Law of Privacy and the Media")). However, in 2008, the House of Lords adopted, in re. Douglas v. Hello! Ltd. [2008] 1 A.C. 1 (H.L. 2007) (appeal taken from Eng.), an additional independent cause of: 'misuse of private information'. While the cause of breach of confidence emphasizes the breach of the confidential relationship between the parties, the cause of misuse of private information "highlights" the violation of privacy even without the existence of a confidential relationship. See Paragraph 51 of the opinion of Lord Hoffmann in re. Campbell (above):

> "The new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people."

92. The said legal development expresses the rise of the importance of the right to privacy in English law. This right, which was defined, in practice, as a right pertaining to an '*in personam*' relationship became an '*in rem*' right. The cause of 'misuse of private information' requires the following two conditions to be proven: (1) the information that was misused is indeed information that is protected by the right to privacy, as it appears in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the "European Convention for Human Rights"); (2) examination of the balance between the freedom of expression and the right to privacy, as they appear in the European Convention for Human Rights, tips the scale in the direction of the right to privacy (see, for example: re. Campbell above and: The Law of Privacy and the Media above, 226).

93. In the said re. Campbell, the House of Lords required The Mirror magazine to pay model Naomi Campbell damages following publications regarding drug rehabilitation treatments which she underwent – a publication that amounts to a violation of her privacy. The judgment discusses at length the nature of the cause of 'misuse of private information'. With regards to the first condition, which concerns the **definition of the information** that is protected by the right to privacy, the House of Lords referred to the "**reasonable person**" test, which was determined around a decade prior thereto in re. ABC, in which the motion of a plant owner to identify the methods of killing opossums at his plant as information protected by the right to privacy was denied:

> "There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behavior, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private. (*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63).

[Emphasis added – N.S.].

94. On a side note, we will mention that the same test was adopted in the case law in New Zealand (see, for example: P v D [2000] 2 NZLR 591) and it is also supported in academic literature (see, for example: William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 396-397 (1960)). Moreover, see Paragraphs 20-21 of the opinion of Lord Nicholls of Birkenhead in re. Campbell, in which it was held that in terms of the question of whether the information is protected under the right to privacy, the rights of others or other interests that may be harmed due to prevention of the publication should not be taken into account. These will be considered at the stage of the balancing of the rights. The guiding question at the initial stage is whether the injured party had a "reasonable expectation of privacy" with respect to the facts that were exposed:

> "20. … article 10(2), like article 8(2) [of the European Convention for Human Rights – N.S.] recognizes there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. When both

> these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life.
>
> 21. Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy".

[Emphasis added – N.S.]

95. It was further held in re. Campbell that the manner in which the clashing rights will be balanced will be decided in each case on its merits. Freedom of expression does not prevail in principle over the right to privacy. It is necessary to meticulously examine the clashing rights in each and every case, and to refrain from determining a generic hierarchy between the two rights (see, for example: In re S [2004] Fam 43 (C.A. 2003)). In balancing between the two rights, i.e. the protection of privacy on the one hand, and the freedom of expression on the other, it is necessary to examine whether the infringement of privacy is supported by the existence of a 'sufficient public interest'. Against the background of the aforesaid, it appears that reporting on a private person who is undergoing rehabilitation treatments, although they are a public figure, does not fulfill the said condition:

> "I shall first consider the relationship between the freedom of the press and the common law right of the individual to protect personal information. Both reflect important civilized values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favor of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. If one takes this approach, there is often no real conflict. Take the example I have just given of the ordinary citizen whose attendance at NA is publicized in his local newspaper. The violation of the citizen's autonomy, dignity and self-esteem is plain and obvious. Do the civil and political values which underlie press freedom make it necessary to deny the citizen the right to protect such personal information? Not at all. While there is no contrary public interest recognized and protected by the law, the press is free to publish anything it likes. Subject to the law of defamation, it does not matter how trivial, spiteful or offensive the publication may be. But when press freedom comes into conflict with another interest

> protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right. In the example I have given, there is no public interest whatsoever in publishing to the world the fact that the citizen has a drug dependency. The freedom to make such a statement weighs little in the balance against the privacy of personal information".

(Re. Campbell above, in Paragraphs 55-56 of Lord Hoffmann's judgment).

[Emphasis added – N.S.].

In other words:

> "The weight to be attached to these various considerations is a matter of fact and degree. Not every statement about a person's health will carry the badge of confidentiality or risk doing harm to that person's physical or moral integrity. The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it."

(*Ibid,* in Paragraph 157 of the judgment of the Baroness Hale of Richmond).

96. Re. McKennitt, the circumstances of which are relevant to the appeal at bar, discussed the suit of Ms. McKennitt, a Canadian folk singer, whose main claims were based on an infringement of her privacy (see Mckennitt v. Ash [2008] QB 73 (C.A. 2006) (hereinafter: "re. Mckennitt")). In 2005 (before the House of Lords adopted, as stated in Paragraph 91 above, an additional independent cause of 'misuse of private information'), the singer's friend published a book which exposed extensive parts of her private life, including: details regarding her relations with her late fiancé, her health, and details about her sex life. It was ruled that because of the trust relationship that prevailed between the singer and her friend, the publication of the book fell under the duty of confidence (the 'breach of confidence'), and that it fulfilled the following three elements: (1) a friendship trust relationship existed between the parties; (2) the nature of the information that was published mandates maintaining its confidentiality; (3) misuse and unauthorized use was made of the information.

97. However, in another case, English case law recognized 'the right to tell one's own story' where the information is "**joint**" and was acquired in an experience common to the two partners. A v B [2003] Q.B. 195 (C.A. 2002) (hereinafter: re. A v B). At the center of the case was a famous soccer player who had casual extramarital sexual relations with two women, and petitioned against a newspaper article based on their testimonies. It was ruled that the women have the right to publish their story, and it prevails over the soccer player's right to prevent the publication. The freedom of expression was preferred over the right to privacy. The main grounds for dismissing the soccer player's petition were based on the short acquaintanceship between the couple, which did not

establish for any one of the parties an expectation of a 'fiduciary duty' (*ibid*, in Paragraph xi):

> "The fact that the confidence was a shared confidence which only one of the parties wishes to preserve does not extinguish the other party's right to have the confidence respected, but it does undermine that right. While recognizing the special status of a lawful marriage under our law, the courts, for present purposes, have to recognize and give appropriate weight to the extensive range of relationships which now exist. Obviously, the more stable the relationship the greater will be the significance which is attached to it".

[Emphasis added – N.S.].

98. Thus, in re. McKennitt above, the court distinguished the case before it from the A v B case, ruling that the latter concerned a casual sexual relationship, and as such does not prevent either one of the partners from describing his story at the expense of the other party. However, it was clarified that in a stable and lasting relationship, by virtue of which a 'duty of confidence' arises, the right to privacy will prevail over the freedom of expression:

> "…the relationship between Ms. Mckennitt and Ms. Ash…was miles away from the relationship between A and C and D. In the preceding paragraph I deliberately and not merely conventionally described the latter as a relationship of casual sex. A could not have thought, and did not say, that when he picked the woman up they realized that they were entering into a relationship of confidence with him …" (Paragraph 30).

99. On a side note we will point out that the fundamental position of the English legal system with respect to the status and scope of the right to privacy was adopted, with minor changes, by other common law courts (see, for example: Canada – Aubry v Les Éditions Vice Versa Inc [1998] 1 SCR 591; New Zealand – Hosking v Runting [2005] 1 NZLR 1).

The European Court of Human Rights

100. '**Privacy**' law developed in English law under the patronage of the European Convention for Human Rights and its interpretation by the European Court of Human Rights. It is only natural that we examine the position of the 'bride' in the issue laid before us.

101. Re. *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08 ECHR 2012 (hereinafter: "re. Von Hannover") concerned the claim of several members of the Monaco royal family against a German newspaper which published their pictures while they were on a private vacation. It was ruled that in the clash between the freedom of expression and the right to privacy, it is necessary to consider the following criteria: (1) the extent of the contribution to public debate; (2) whether the person is a public or private figure; (3) the conduct of the person with respect to violation of his privacy prior to the

publication; (4) the content, form and consequences of the publication; (5) the circumstances in which the information was obtained.

102. We will now explore the nature of these criteria: (1) it was ruled that the contribution to public debate is not limited to political matters or to matters pertaining to crime and corruption. Information that is relevant to the field of entertainment and sport also contributes to public debate. However, rumors regarding marital difficulties of a public figure or financial difficulties of a person from the field of entertainment are not protected by this defense; (2) it was ruled that reporting on a person holding a public position is not similar to reporting on a private person. While reporting on a public figure is indeed essential to the existence of a democratic society, reporting on a private person is not required to such an extent; (3) it was ruled that past cooperation of the subject of the publication with the media will work against him. However, not all cooperation with the media can serve as an argument that legitimizes the publication; (4) and (5) it was ruled that the other elements serve as indicators that attest to the extent of the violation. Thus, for example, a publication in a national newspaper is in no way similar to a publication in a journal intended only for workers of a certain sector.

103. In re. Axel Springer AG v. Germany [GC], no. 39954/08 ECHR 2012, a similar suit was heard regarding the publication of a report on the arrest of a German celebrity. The European court reiterated the tests determined in re. Von Hannover above, stating (in Paragraph 93) that in balancing between the rights, both the manner in which the information reached the publishing party and the extent of its credibility must be addressed.

Continental Law

104. The **German** legal system developed a three-stage test in order to handle situations in which it is alleged that the right of a person to privacy has been violated. First, the extent of the violation of privacy is examined; second, the justifications for the violation are examined, for example: public interest and the consent of the subject of the publication; third, an examination is carried out of the proper balance between the violation of privacy and the right exercised, while addressing the manner and scope of the publication and subjective matters (such as: intention to harm). However, insofar as the violation of privacy touches on the "**core of human life**", the said balancing will not be conducted at all, and the publication will be prohibited (for an extensive description regarding the development of the German law and further authorities, see: Paul M. Schwartz & Karl-Nikolaus Peifer, Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?, 98 Cal. L. Rev. 1925 (2010) (hereinafter: "Prosser's Privacy"). Translations of the judgments are taken from this article). As a consequence, a violation of the core of the right to privacy will not be allowed, even where it is balanced against a broad public interest:

> "Even serious public interests cannot justify encroachments of this area; an evaluation according to the principle of proportionality does not take place" (BVerfGE 80, 367 (1998) NJW 1990 563)".

105. In 2008, the German Federal Constitutional Court issued a judgment in a similar case to the case at bar: (BVerfGE 119, 1 (Ger.) 61 NJW 39 (2008) (Ger.)) (a detailed description of the judgment appears in Prosser's Privacy above on pages 1932-1937). According to the facts of the judgment, Maxim Biller (hereinafter: "**Biller**") published, in 2003, a novel revolving around a romance between an author by the name of 'Adam' and an actress by the name of 'Esra'. The novel describes the gamut of difficulties faced by the couple, and references, *inter alia*, the character of 'Esra's' family and her fatalistic personality, including: her mother's arrogant character; details regarding her daughter who was born from her first marriage, and a description of the sexual relationship between them. According to Biller's former partner, there is a considerable similarity between her character in real life and the character of the protagonist as described in the story's plot ('Esra'). According to her, the novel contains many intimate details in connection with the relationship she had in the past with the author of the work – Biller, without obtaining appropriate consent. Her mother further stated that the novel contains intimate details that publicly expose her personality which is presented in the novel in a negative light.

106. At the initial stage, the court dealt with the examination of the artistic medium through which the violation of privacy was committed. Ostensibly, the book written by Biller is a fictional novel, any connection between which and reality is completely coincidental. However, according to his former partner, the novel contains precise details and in fact constitutes a 'memoir' (i.e. an autobiography) in the guise of a novel. At the second stage, the court examined whether readers belonging to the broad social circle of the average person (such as: the injured party), as distinguished from the circle of celebrities and public figures, could indeed identify her by reading the novel. Examining the extent of the novel's classification as fiction or biographical will be examined in view of the social circle, i.e. – identification of the character described in the novel by the social circle, is nothing but a presumption that the novel is based on real life – 'roman à clef'. Case law has developed a dual test intended to help identify the character described in the novel: **One**, the degree of similarity between the literary character and the real character; **two**, the degree of the violation of privacy. An intermediate violation of privacy may be remedied by a weak likeness between the literary character and the real character; and vice versa, a weak violation of privacy may be remedied by a stronger similarity between the real character and the literary character. Consequently, German case law developed a two-stage test: (a) is the literary character indeed identified by the close social circle; (b) is the degree of the violation of privacy neutralized through the 'fictionalization' of the character described in the plot. We therefore have a quasi-'**parallelogram of force**' between the extent of the identification and the severity of the violation.

107. After examining the evidentiary matrix, the claim of Biller's partner that she may be identified by reading the novel, was accepted. Conversely, her mother's claim was rejected. Once it was ruled that it was indeed possible to identify Biller's partner, the court examined the violation of the right itself.

Due to the fact that the violation is at the core of the right to privacy, and as such cannot be remedied, the publication of the novel was prohibited.

108. From inspection of **French** case law, a similar approach can be identified (for a specification, see: The Law of Privacy and the Media above, on pages 155-159 and the authorities cited therein) (the article below: *Privacy in Europe and the Common Law*). The source of the protection of the right to privacy is embedded in Section 9 of the Code Civil [C. CIV.] (in its translation into English):

> "Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order."

109. Throughout the years, the French courts have developed two main principles when dealing with a violation of privacy: (a) there is no hierarchy among the competing rights; each competing right has the same normative status; (b) all measures taken in the course of the balancing must be proportional.

110. Against the background of the said principles, it was held that freedom of expression will prevail where there is a public interest with respect to a certain event ('fait d'actualité') or when there is a significant contribution to public debate. Examination of the existence of the public interest in the framework of French law is similar to examination of the public interest in the case law of the European Court of Human Rights, as specified above. The right to privacy will prevail over freedom of expression only where the violation is in the '**intimate dimension of private life'** (for further details and references, see: Helen Trouille, *Private Life and Public Image: Privacy Legislation in France*, 49 (1) INT'L & COMP. L. Q. 199 (2000), and: *Privacy in Europe and the Common Law* above, on pages 155-159).

U.S. Law

111. Freedom of expression is established in the First Amendment to the Constitution, an amendment which has received immortal status in U.S. case law, to the point that it is hard to overstate its importance (see, for example, U.S. law on prior restraint: Near v. Minnesota, 283 U.S. 697 (1931)). In contrast, the right to privacy is not established in the Constitution. Indeed, since the above key article of Justices Warren and Brandeis (*The Right to Privacy* above) the status of the right to privacy has changed. However, it still remains constitutionally inferior to the freedom of expression.

112. U.S. law recognizes four tort causes of action for a violation of privacy (see Restatement (Second) of Torts, § 652 (1977)). From the causes of action, the one relevant to the case at bar is: 'public disclosure of private facts'. The cause of action is defined thus (*ibid*, 652D):

> "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public".

In order for a cause of action by virtue of 'public disclosure of private facts' to rise, the plaintiff is required to prove that: (1) the publication concerns matters pertaining to his private life; (2) the information that was published is highly offensive to a reasonable person; (3) the information that was published is not of legitimate public concern.

113. U.S. case law has focused on the definition of legitimate public concern. Its existence is dependent on proving a logical nexus between the private information that was exposed and the existence of a legitimate public concern (see, for example: Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980)) (hereinafter: "re. Seabury"). This causal link was generously and broadly interpreted in case law (*ibid*).

114. In a series of judgments concerning the publication of autobiographical works, it was explicitly held that the existence of a 'legitimate public concern' prevails over a person's right to privacy. Thus, for example, in the said re. Seabury, a suit was heard in connection with the exposure of information relating to the conduct of the plaintiff's marital and domestic life. In the book, which was published by her former husband's brother and focused on the relationship between the two brothers, details were included pertaining to her marital life. She, on her part, petitioned the court to prevent the publication and distribution of the book. However, her suit was dismissed with prejudice in view of the existence of a 'logical nexus' which falls under the constitutional protection:

> "A review of the record in this action clearly shows the requisite logical nexus. An account of the author's close association with his older brother certainly is appropriate in the autobiography. Likewise, accounts of his brother's marriage as they impacted on the author have the requisite logical nexus to fall within the ambit of constitutional protection" (*ibid*, on page 397).

[The emphases have been added – N.S.].

115. In 2004, another lawsuit was heard concerning a violation of privacy, following the publication of an autobiographical work (Bonome v. Kaysen, 17 Mass. L. Rep. 695 (Mass. Super. Ct. 2004)). 'Kaysen', a well-known author, wrote a book entitled 'The Camera My Mother Gave Me', which describes her coping with severe pain in her genitals. The book documents the impact of her said medical condition on the intimate relations with her partner, 'Bonome'. 'Bonome' is presented in the book in a negative light, and it is suggested that he attempted at one point to rape Kaysen, after she refused to have sexual relations with him. 'Bonome's' claim against the publication and distribution

of the book was dismissed with prejudice because there was a 'legitimate public interest' in the publication of 'Kaysen's' autobiographical book. The court addressed the difficulty inherent in an autobiographical story containing the experiences of two separate partners. Although the autobiographical story of one is a violation of the other's privacy, recognition of 'Kaysen's' right to expose the private information establishes the logical nexus required between the information exposed and the public interest, in order to justify the publication thereof.

> "As noted above, there is an additional interest in this case: Kaysen's right to disclose her own intimate affairs. In this case, it is critical that Kaysen was not a disinterested third party telling Bonome's personal story in order to develop the themes in her book. Rather, she is telling her own personal story – which inextricably involves Bonome in an intimate way. In this regard, several courts have held that where an autobiographical account related to a matter of legitimate public interest reveals private information concerning a third party, the disclosure is protected so long as there is a sufficient nexus between those private details and the issue of public concern. Id.; Anonsen, 857 S.W.2d at 705-06; Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980). Where one's own personal story involves issues of legitimate public concern, it is often difficult, if not impossible, to separate one's intimate and personal experiences from the people with whom those experiences are shared. Thus, it is within the context of Bonome and Kaysen's lives being inextricably bound together by their intimate relationship that the disclosures in this case must be viewed. Because the First Amendment protects Kaysen's ability to contribute her own personal experiences to the public discourse on important and legitimate issues of public concern, disclosing Bonome's involvement in those experiences is a necessary incident".

Interim Summary – Foreign Law

116. The case law in England, Germany, France and of the European Court of Human Rights leans towards granting extensive protection to the **right to privacy** versus the **freedom of expression**. Conversely, the U.S. system has adhered to granting a weak status to the **right to privacy**.

We will now examine our "**homegrown**" law on the issue of the relationship between the **right to privacy** and the **freedom of expression**.

The Normative Balance between the Rights

117. The **right to privacy** is a relative right. **Freedom of expression** is also not an absolute right. As such, it is necessary to balance them, one against the other, and against parallel rights and other interests. In the appeal at bar, we are witnessing a "**frontal clash**" between the right to privacy and the freedom of expression. What is the law when two constitutional rights clash with one another? The freedom of expression and the right to privacy are rights that are

shaped as principles, and hence the clash between them is not an abstract clash, without any foundation in legislation. On the contrary, the parties' claims are based on and supported by the legislation itself. Section 2 of the Protection of Privacy Law prescribes that the "**publication of a matter pertaining to the private life of a person, including his sexual history, or his health, or what he does in private**" is included in this violation. The law does not deem this determination to be an absolute matter, and instructs in Section 18(3) of the Protection of Privacy Law that the violation is permitted if there is a "**public interest therein that justifies it under the circumstances, and provided that if the violation was by way of publication – the publication was not false**". We therefore have before us a question regarding the interpretation of the provision of the said Section 18(3). This balance is, naturally, an interpretational-constitutional balance. "**It takes into consideration the in-principle importance of each one of the rights and its weight at the point-of-decision. It reflects the balance conducted within the bounds of proportionality in its narrow sense in the limitation clause**" (see Barak, **Proportionality in Law** above, on pages 124-125).

Proportionality in the Narrow Sense – a Balance of Profit and Loss

118. The test of proportionality in the narrow sense examines the existence of "**a proper correlation between the benefit that the policy produces and the damage that it causes**" (see HCJ 3648/97 **Stamka v. The Minister of the Interior** PDI 53(2) 728, 782 (1999)). "**It is necessary to examine whether a proper ratio exists between the public benefit derived from the act of legislation whose legality is considered and the damage to the constitutional right caused by such act of legislation**" (see HCJ 2605/05 **College of Law & Business v. The Minister of Finance**, Paragraph 50 of the judgment of Chief Justice **D. Beinisch** (November 19, 2009)).

119. At the center of the proportionality test – in its narrow sense – is the following question: does the weight of the benefit derived from the realization of one right exceed the weight of the damage that will be caused to the other constitutional right. This weight is neither measurable nor quantifiable, but rather metaphorical weight derived, *inter alia*, "**from political and economic ideologies, from the unique history of each and every country, from the structure of the political and governmental system**" (see Proportionality in Law above, on page 431) from the specific legal tradition and various social values.

120. We are not concerned with comparing the weight of the two constitutional rights themselves, i.e. the weight of the right to privacy on the one hand and the weight of the freedom of expression on the other. The question put to our decision is different and limited in scope: is the weight of the marginal benefit derived as a result of realization of one right greater than the marginal damage that will be caused to the other right. As stated at this court in another case: "The question is whether the blanket prohibition is proportionate (in the narrow sense)? Is the correlation between the benefit derived from achieving the proper purpose of the law (to reduce as much as possible the risk from the foreign spouses in Israel) and the damage to the human rights caused by it (a violation of the human dignity of the Israeli spouse) a proportionate one? The

criterion we must adopt is a value one. We must balance between conflicting values and interests, against a background of the values of the Israeli legal system. We should note that the question before us is not the security of Israeli residents or protecting the dignity of the Israeli spouses. The question is not life or quality of life. The question before us is much more limited. It is this: is the additional security obtained by the policy change from the most stringent individual check of the foreign spouse that is possible under the law to a blanket prohibition of the spouse's entry into Israel proportionate to the additional violation of the human dignity of the Israeli spouses caused as a result of this policy change? (HCJ 7052/03 **Adalah The Legal Center for Arab Minority Rights in Israel v. The Minister of the Interior**, PDI 61(2) 202, Paragraph 91 of the judgment of Chief Justice **A. Barak** (2006)).

121. The question at the center of the appeal at bar is not which is preferable, freedom of expression or the right to privacy; but whether the weight of the benefit that will grow from the prevention of publication of the book at bar – which violates the right to privacy – is greater than the weight of the damage that will be caused to the freedom of expression as a result of the prevention.

122. In determining the weight of the rights placed on the scales, three criteria must be addressed: the importance of the right; the probability of the violation or realization of the right; the magnitude of the violation or the realization. With respect to the importance of the right, it has already been ruled that despite the identical constitutional status of the members of the family of rights, the social objectives established and protected by such rights are not identical. "**Not all constitutional rights are equal in importance, and consequently nor is their specific weight. The importance of a constitutional right and the importance of preventing its violation are determined according to the basic perceptions of society. They are impacted by the cultural history and the character of each and every society**" (see Barak **Proportionality in Law** above, on page 443). There is another distinction between the **core** of the right and its **margins**. Protection of the core of the right is not the same as protection of its margins. Relevant in this regard is the opinion of Justice (former title) **A. Barak** in HCJ 5016/96 **Horev v. The Minister of Transportation**, PDI 51(4) 1, 49 (1997): **"Within** the confines of a given right, various levels of protection may be allotted. Thus, for instance, the protection offered **to** political expression is superior to that allotted commercial expression**. In the context of a certain aspect of a right (such as political speech), a violation at the core of the right is not the same as a violation in its margins**".

123. The "geographic location" of the specific case is determined in view of examination of the rationales underlying the manifestation of the right with which we are concerned. "**Although all expressions are included in our system in the one 'category' of freedom of expression, not all types of expressions enjoy equal protection. The basic criterion for determining the extent of the protection for a certain expression is the social importance of the expression, and particularly its importance in realizing the objectives underlying the freedom of expression**" (F.Cr.H 7383/08 **Ungerfeld v. The State of Israel**, Paragraph 28 of the judgment of Justice

(former title) **E. Rivlin** (July 11, 2011); for example: protection of the freedom of commercial expression is not the same as protection of the freedom of artistic expression; their importance is different (the above re. **Kidum**; see and compare: HCJ 5432/03 **Shin - The Israeli Movement for Equal Representation of Women v. The Council for Cable TV and Satellite Broadcasting**, PDI 58(3) 65, 82 (2004); HCJ 4644/00 **Jafora-Tabori Ltd. v. The Second Authority for Television & Radio**, PDI 54(4) 178, 182 (2000)). Similarly, the protection of freedom of expression in relations between individuals is not the same as protection of freedom of expression in relations between an individual and the government: "**The scope of the individual's right to freedom of expression against the state is more extensive than the individual's right to freedom of expression against another individual**" (Barak **Human Dignity**, above on page 723).

124. Note, it is necessary to be careful of being 'swept away' in the ideological level. The **value** must not serve as a veil against an **interest**. Sometimes, the ideological robe, the shell, the external covering, is void of any moral content and is actually an interest-oriented (financial, personal or other) dispute. In situations such as these, there is nothing in the manifestation of the right with which we are concerned other than what it comprises. In this case, values which do not underlie the limited manifestation should not be read into it in an artificial and forced manner. These are the situations in which the right of one individual to personal wellbeing clashes with the right of another individual to personal wellbeing. In such a case, we should not wear ideological dress nor be blinded by an ideological argument. The **value** is, as a matter of fact, **an interest**, and the Talmudic question then arises "**why do you think your blood is redder than anyone else's**" (Bavli, Pesachim 25, B). In these situations, there is no need to examine the "clash of civilizations" between the basic rights. The specific issue of division of the "personal wellbeing" between the litigants may be decided without requiring the in-principle decision.

125. The probability of the violation in the realization of the right, and the magnitude of the injury, also affects the relative weight of the rights on the constitutional scales. A highly probable violation is not the same as an improbable violation; the violation of a single right is not the same as a violation of many rights; a severe injury is not the same as a minor injury; the violation of a right in relations between individuals is not the same as a violation of a right in relations between an individual and the government.

Freedom of Speech and the Right to Privacy

126. In the proper balance between the right to privacy and freedom of speech, it is first necessary to examine the degree of compatibility of the right at hand with the rationales it is based upon. Accordingly, first to be examined is the extent of the expression's contribution to public debate against the severity of the infringement on the right to privacy. An expression that greatly contributes to public debate will be given priority on the constitutional scale when weighed against a medium-level invasion of privacy; infringement on the core of privacy will be afforded protection from a medium-level infringement on

freedom of speech. Indeed, an issue that is important in and of itself is the existence of a parallel infringement, similar in degree, such as a collision between an expression that greatly contributes to public debate and severely impinges on the core of privacy. I need not resolve this issue in this appeal. Such a decision will require a meticulous examination of the details of the case in question. The appropriate balance, to my mind, is this: **preferring an infringement on the fringes of the right to privacy to the alternative of an infringement on the core of freedom of speech, and preferring an infringement on the fringes of freedom of speech to the alternative of an infringement on the core of the right to privacy.**

127. An aid as to the degree of infringement on the right to privacy is to be found in the examination of numerous characteristics, including: (1) the "geographic" location of the infringement on the right, at its core or on its margins; (2) the nature of the relationship and the duties of trust between the parties; (3) the publicness or privacy of the figure; (4) the manner of publication; (5) the way in which the information came to the knowledge of the promulgator; (6) the conduct of the person with respect to invasions of his privacy prior to the publication; (7) the infringement, whether one-time or continuous. These criteria and others like them assist the presiding judge in deciding the severity of the injury.

128. In deciding the matter at hand, we have adopted an arrangement similar to the one practiced in the European legal systems. These legal systems are better suited to our legislative and constitutional structure. Let us keep in mind and give heed: turning to comparative law harbors both peril and blessing. The blessing lies in learning from the experience of others, as articulated by Justice Holmes "The life of the law has not been logic, it has been experience" (Anonymous [Holmes], *Book Notices*, 14, Am. L. Rev. 233, 234 (1880)). Comparative law allows us to enrich our world, learn and acquire knowledge. However, alongside the blessing, there is also danger - "**The root of faith is the root of rebellion**" – learning in the "**copy-paste**" method is not appropriate. Each and every system has its unique characteristics: the values underpinning the system, a legislative and constitutional structure, national history, political ideologies and more. These unique elements affect the rulings of the court: "**It is a burden that we bear to be careful not to be captivated by foreign legal systems, and primarily – to know to distinguish and choose between principles and doctrines and manners of thought and solution techniques – in which inspiration and wisdom can be found – to specific solutions and details that we will leave unnoticed. Indeed, comparative law expands the mind, it enriches with knowledge and wisdom, rescues us from provincialism, yet, at the same time, let us not forget that it is ours and our situs that we are dealing with, and let us beware of an imitation of assimilation and self-deprecation**" (L.Cr.A. 8472/01 **Maharshak vs. the State of Israel**, PD 59(1)442, 474 (2004)); and in other words: "**This comparative law – whether on the international level or the state level – holds great importance … however, every country has its own problems. Even if the in-principle considerations are similar, the balance between them reflects the uniqueness of every society and the characteristics of its legal arrangements … indeed, that is the power and**

these are the limits of comparative law. Its power lies in the expansion of the interpretational field of vision and horizon. Its power lies in the guidance of the interpreter as to the normative potential held by the legal system … its limits are in the uniqueness of every legal system, its institutions, the ideology that characterizes it and the manner in which it treats individuals and society. Indeed, comparative law is like an experienced friend. It is advisable to listen to his good advice, but it should not replace self-decision" (see H.C.J. 4128/02 **Adam Teva V'Din – Israel Union for Environmental Defense vs. the Prime Minister of Israel**, PD 58(3)503, 515-516 (2004)).

129. As aforesaid, the American legal system places supreme importance on freedom of speech. Only rarely will freedom of speech retreat therein before the right to privacy. This legal perception is not in line with the common standard in common law and continental law jurisdictions. It is based on the First Amendment to the Constitution, whose status and importance in American case law and culture is a well-known fact that requires no proof. American legal policy reflects, *de facto*, a nearly **generic** preference of freedom of speech over the right to privacy.

130. Should we learn from the European legal systems or follow in the footsteps of their American counterpart? As for myself, the answer is clear, and results from the remoteness of the American system from the Israeli constitutional tradition, from the legal framework and from our Hebrew legacy (see and compare: Eli Salzberger and Fania Oz-Salzberger, "**The Tradition of Freedom of Speech in Israel**", **Quiet, Someone is Talking! The Legal Culture of Free Speech in Israel**, 27 (Editor: Michael Birnhack, 2006)).

131. On the **constitutional** level – the status of the right to privacy as a basic right is established in Section 7 of Basic Law: Human Dignity and Liberty. Freedom of speech is absent from this law. Without delving into the thick of the question – of whether freedom of speech is included in the constitutional rights contained in the Basic Law – it is undisputed that "**Freedom of speech is not within the rights explicitly enumerated in the Basic Law**". Even those who include freedom of speech in the Basic Law believe that it is derived from the principle of human dignity and self-fulfillment (see: **Interpretation in Law** (Constitutional Interpretation) above, on pages 427-428). For details and references on this matter see also: Hillel Sommer "The Non-Enumerated Rights – of the Scope of the Constitutional Revolution" *Mishpatim* 28 257, 318-322 (5757)). The adoption of an outlook that grants freedom of speech "supreme status" over the right to privacy has no footing either in the constitutional text itself or in its reasoning. As may be recalled, when the Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation were legislated, the Basic Law: Freedom of Speech and Organization Bill was also submitted, but failed to pass into a law in the Knesset (see *Bills* 5754 101).

132. On the theoretical level, it is possible to base a chronological approach of "**[T]urn from evil and do good**": preventing an invasion of privacy first and

realizing artistic freedom later. This, in order to prevent creative work whose glory would come from trampling over others: "**Man is like the tree of the field and speech is his fruit…and just as a bad fruit does not emerge from a good root and a good fruit does not emerge from a bad root, so is man's speech when he quarrels with his fellow man and insults him, this indicates that the root from which the insult comes is bad, and therefore the insult is within him, because the bad thing coming out of him is present in him, and where the trunk of the tree is flawed so is what will come out of it**" (the MaHaRal, *Netivot Olam* [Paths of the World] *B*, *Netiv HaShtika* [Path of Silence], Chapter A). This issue deserves thought and contemplation, as to both theory and practice. As for me, I agree with the words of Justice **I. Amit** in Re. **Captain R.** (above, in paragraph 5 of the judgment): "**Since the legislature has chosen, in the Basic Law: Human Dignity and Liberty, to elevate the right to dignity and understate freedom of expression, I believe weight should be ascribed to that, in the sense that it may not be predetermined that in a collision between the two, the weight of the right of expression will prevail. I will note that in many judgments we find reliance on the judgment in Re. Avneri as part of the reasoning for a preconceived preference of freedom of speech, but one should bear in mind that this judgment was rendered prior to the enactment of Basic Law: Human Dignity and Liberty. In my mind, when the matter at hand pertains to a collision between freedom of speech and the right to a good name in a private lawsuit under the Defamation Prohibition Law – to be distinguished from a collision between freedom of speech and other values, such as the protection of public feelings – the balance should be carried out *ad hoc*, and one should beware of a formula that includes a "coefficient" or "power multiplier" that favors freedom of speech**". These words also coincide with the aforementioned statements by Prof. Barak, whereby "**The scope of the individual's right to freedom of speech against the State is more comprehensive than the individual's right to freedom of speech against another individual**" (Barak, **Human Dignity**, above on page 723). Hence, in the balance between the freedom of speech of one individual and the privacy of another individual, freedom of speech is not to be given automatic precedence nor granted "super-status".

133. On the **legislative** level – the Protection of Privacy Law prescribes in Section 18(3) that "**In any criminal or civil proceeding for infringement of privacy one of the following may constitute a good defense … there is public interest in the infringement which justified it under the circumstances of the case**". The language of the law does not provide a sweeping protection to any infringement that has a **public interest**. This language expressly deviates from its American counterpart, which offers protection to any expression of public interest and spares any further examination of the magnitude of the infringement. This is not our way. We hold America in esteem, but we do not acquire all of the goods it offers. It is not for naught that the Israeli legislature rejected the proposal to omit the words "**which justified it under the circumstances of the case**" (see: Eli Halm **Protection of Privacy Law** 235 (2003)) (hereinafter: "**Protection of Privacy Law**"). Case law states: (C.A. **Registrar of Databases vs. Ventura**, PD 48(3)808 827 (1994)): "**The question that needs to be examined in order to establish the protection of**

Section 18(3) of the law is not whether the public has an interest in the information, but rather whether there is a cause that justifies the invasion of a person's privacy in order to satisfy such public interest". This position has also been expressed in literature: "**It is not sufficient that the invasion pertained to a public interest, but rather it has to be clear that there was a public interest in the invasion itself. That is to say, the fact that the subject-matter of the publication in general is of public interest will not lead to the application of the protection. The person advocating it will need to persuade that the public interest required him to invade another's privacy. The question of existence of a public interest cannot be examined by the court merely according to a general formula, and it will need to give heed to the circumstances of the matter adjudicated before it, in order to decide whether the invasion of privacy is justified under such circumstances**" (Ze'ev Segal "**The Right to Privacy versus the Right to Know**", *Iyunei Mishpat* 9 175 193 (1983)). For additional information see also: Ruth Gavison "**Prohibition on a Privacy Invading Publications – the Right to Privacy and the Public's Right to Know**" Civil Rights in Israel – a Collection of Essays in Honor of Haim H. Cohn 177, 204-214 (Editor: Ruth Gavison, 1982)).

134. **Our Jewish Heritage** – the right to privacy seeps through the slits of the comprehensive writings of Jewish law. Prohibitions on defamation, gossip, *Herem De-Rabbeinu Gershom* [Ban of our teacher Gershom], *Heizek Re'iyah* [damage by seeing], are only a few of the many appearances of the right to privacy in Hebrew law (see, for example: Nahum Rakover **Protection of Privacy** (2006); Itamar Warhaftig **A Person's Privacy– the Right to Privacy in the Halacha** (2009)). We cannot specify and enumerate its various appearances here, and we will therefore make do with a brief review of an issue that is close to the matter at hand – the **"*Bal Ye'amer*" [not to be told]** prohibition. This prohibition is defined in the *Talmud* (*Bavli*, *Yoma* D, B) as follows: "**Whence do we know that if a man had said something to his neighbor the latter must not spread the news until he tells him 'go and say it'? From the scriptural text: The Lord spoke to him out of the tent of meeting, le'emor [saying]** ". This prohibition was interpreted in the answers of Rabbi Haim Palachi (Q&A *Hakakei Lev*, Part A, *Yoreh De'ah*, Title 49 (hereinafter: "**Hakakei Lev Q&A**"): "**And it further appears to my humble mind to say that even if a person sends a letter to his friend, the friend who received the letter is forbidden to disclose the contents of the letter to others. Even if it concerns nothing unusual, contains no secret nor something indecent nor damage to the writer of the letter, there is a prohibition to disclose, as stated in the *Gemara*, [when] anything told to a friend is not to be told, until he says so. All the more so where disgrace or a secret are concerned, and damage arises when it is disclosed**". Indeed, under Jewish law, a person is prohibited from revealing the secrets of his fellow man, not only on grounds of gossip, but also in order to prevent harm. As articulated by Rabbi Yonah Girondi: "**And a person must conceal the secret his friend will confidentially reveal to him, even though revealing that secret is not a matter of gossip, because revealing the secret will cause harm to its owner and a reason to breach his intentions… because the person revealing the secret has only just left the path of modesty, and here**

he is violating the will of the owner of the secret" (*She'arei Tshuvah* Part C, Title 225). Therefore, revealing a secret is not only a betrayal of trust, but also a blatant invasion of the private space of the owner of the secret and a "breach of his intentions", i.e., - impingement on his liberty. Another opinion was expressed by Rabbi Haim Palachi, whereby the person who discloses the secret of another person, steals the other person's proprietary right to the secret he told him: "**Veritably stealing his mind, which is at the hidden depths of his heart**" (Q&A *Hakakei Lev* above, *ibid*).

135. The formal course for our reference to Jewish law, Section 1 of the Foundations of Law Act, 5740-1980, prescribes as follows: "Where the court, faced with a legal issue requiring determination, finds no answer thereto in the statues or case law or by analogy, it will determine in the light of the principles of freedom, justice, equity and peace of Israel's heritage". Basic Law: Human Dignity and Liberty outlined, in Section 2, its purpose to establish "T**he values of the State of Israel as a Jewish and democratic state**". It appears unnecessary to discuss the level to which Jewish law **is obligatory** in the Israeli legal system. It is our **privilege** that the tradition of Israeli law does not begin in 5708, upon the establishment of the State of Israel, but is rather rooted in a tradition of thousands of years. A proper Israeli legal policy is one that lends an ear and listens to the sentiment of Jewish law and holds the protection of a person's privacy in high regard. As articulated by Chief Justice **A. Barak**: "**Reference to the fundamental values of Jewish law is not reference to comparative law. It is a reference to the justice of Israel. It is a mandatory reference**" (Aharon Barak **A Judge in a Democratic Society** 290 (2004)).

136. The proper position in a collision between the rights in question – I believe it is the one warranted by reality – is the examination of every case on its merits, without an in-principle ruling as to the precedence of one right over the other. **A severe infringement of freedom of speech would outweigh a light and a medium infringement of the right to privacy; a severe infringement of the core of privacy would outweigh a light and a medium infringement of freedom of speech**. This rule must be put into practice whenever the rights collide with one another. It is not for us to complete the task, but neither are we free to avoid it.

<u>From the General to the Particular – the Right to Privacy and Freedom of Speech</u>

137. We must take several steps in order to analyze the novel at the center of the appeal before us, determine the severity of the infringement on rights, the damage of the collision between them and the balance required under the circumstances of the matter: **firstly**, we will discuss the degree of fictionalization of the protagonist and the similarity to reality; **secondly**, we will examine whether the invasion of the Respondent's privacy is at the core of the right to privacy or at its margins, and discuss the degree of the injury; **thirdly**, we will examine the severity of the possible violation of freedom of speech.

Degree of Fictionalization

138. Two opinions by senior scholars in the field of global and Hebrew literature – Prof. Ariel Hirschfeld and Prof. Hannan Hever – have been placed before the District Court. In the opinions, the scholars impressively explained why the novel in question belongs to the category of fiction literature and is not classified under the autobiographic-historic category. Whilst "**The historian claims that what he writes really happened**", the novelist claims "**that what he wrote did not happen but rather could have happened**". In short, "**The historian has a truth claim. The novelist has no truth claim**" (see **Hirschfeld**, in Sections 7 and 8). Hirschfeld continues to examine in detail the creative work of the Appellant and proves, based on its internal and external attributes, the elements of pattern and style thereof, that this text belongs to the literary-fictional type. His fellow scholar, Prof. Hannan Hever, reaches a similar conclusion. According to his position "**The distinction between an autobiographic novel and a fictional novel does not depend upon the closeness or remoteness of its plot from the reality of the novelist's life. It is an objective test that is derived from the interpretation of the reasonable reader to the gamut of indications in the novel**". After "**considering the cumulative weight of the indications found in the novel**" Hever reached the conclusion that these indicate "**unequivocally that the book deals with the construction of fiction rather than actual reality and that no 'autobiographical contract' was reached between the writer and his readers**". Prof. Hever even went as far as to say that "**this conclusion refutes any claim based on this argument**" (see **Hever**, in Section 3). A similar conclusion was expressed in the affidavit of the writer Mira Magen, who accompanied the Appellant in the "labor pains" of the book.

139. The coming together of different worlds of content harbors both a blessing and a peril. The blessing – in mutual enrichment, in learning from the different and the similar; and the peril – the blurring of the lines that separate the disciplines. Different purposes lie at the basis of law and literature. The roles of law – the resolution of disputes, the imposition of order and the administration of justice – are not in keeping with the objectives of literature, which are the creation of art in and of itself and the creation of meaning for man, as Prof. Hirschfeld says. At times, law and literature go hand in hand, and then law girds up its loins and fights in the defense of literature, but at times – it fulminates against it. The definition of a creative work as fictional, in one area – literature – does not compel a similar definition in another area – law. "**Every State in its own script and every people in its own language**". The basic assumptions that underlie the different disciplines sometimes lead to opposite definitions and conclusions. That is also the case in the matter at hand.

140. Literary fiction expresses an "**unwritten contract**" between the reasonable reader and the writer. One of the terms of the contract is the lack of connection between the creative work and reality. This is not the case where legal fiction is concerned. The law, contrary to the literary-professional position expressed by the expert professors in the opinions, does not render its judgment in a binary world in which the work is categorized into one compartment and not

the other. The law examines the **degree** to which the work is fictional. At times, the work slightly resembles events that occurred in real life; at times the work is based on such events, but without a full compatibility; and at times, such events are reflected in the actual work word for word. The examination of the degree of fiction is not a theoretical matter. It will be carried out according to the extent of the reader's acquaintance with the events that appear in the work. At times, only the soul mate of the real-life character would be able to recognize the events described through the lines. However, at times, close acquaintances of the character would also be able to recognize it. And sometimes its distant acquaintances, and sometimes the nameless amorphous reasonable reader would be able to identify it. Adopting a **legal** policy that is based on the **literary** worldview of the scholars Hirschfeld and Hever is inappropriate. Such a policy would allow those who so seek to publicize things that amount to invasion of privacy and defamation under a literary-fictional guise. The reasonable reader would view the literary manifestation and would be able to ignore the real-world one. However, the acquaintances and cherishers of the real figure would easily recognize it, process the information in their consciousness, and arrive at real-life conclusions; not fictional ones. This would open the door to the nullification of the laws of privacy protection and defamation prohibition.

141. Examining the degree of fiction of the creative work before us indicates that the character of the female protagonist includes numerous and unique identifying details, which enable the recognition of the Respondent. Among these, we can enumerate the description of her physical appearance, details of her age, unique occupation, her place of studies, her workplace and her place of residence, details of her special creative work, identifying details of the Appellant, her **partner**, and events that occurred in reality in the presence of third parties. In its judgment, the District Court correctly articulated these details (*ibid*, paragraph 40):

> "**a. The female-protagonist is described in the book when meeting the male-protagonist [as being[at the age of the Plaintiff at that time, and as someone who studies in the same institution and in the same department as the Plaintiff had, and works at the same place and in the same position as the Plaintiff had. The Plaintiff resided with her partner at the time relevant to the claim in the area described in the book, her partner's also lived in the immediate area of the location described in the book. The female-protagonist has the same number of siblings as the Plaintiff and her parents are of the same ethnic origins as the Plaintiff's parents.**
>
> **b. The physical appearance of the female-protagonist as described in the book bears a great resemblance to the physical appearance of the Plaintiff, including her hair, the color of her eyes and the presence of tattoos in locations similar to the ones specified in the book. The book describes many additional details with respect to the female-protagonist's appearance, her hobbies and her past;**

however, these are less pronounced for the identification of the Plaintiff with the female-protagonist.

c. The book describes, as aforesaid, the Plaintiff's graduation project. The book includes a conceptual description of the project and describes all of the stages of preparation of the project as well as its visual appearance. It is a unique project that had been publicly presented as the Plaintiff's graduation project in the presence of her teachers and schoolmates and consequently also identifies the Plaintiff. The vast volume apportioned in the book to the work and the stages of preparation thereof also points the finger, in and of itself, at the Plaintiff.

d. The descriptions of the male-protagonist in the book in a manner which identifies him as the Defendant also contribute to the identification of the Plaintiff, as the Defendant's partner at that time, as the female-protagonist. A fact to be added thereto is that the book was written by the Plaintiff [sic; should be "Defendant"] under his own name, in the first person, and this too contributes to the identification of the Plaintiff by her immediate environment, which knew her to be the Defendant's partner.

e. The book includes events that undisputedly occurred in reality, in the presence of third parties, and which enable the identification of the Plaintiff as the literary character in the eyes of the persons who were present in the events or had heard about them from the parties".

142. These details – factual findings determined by the District Court, and there is no cause to intervene therein or change them – tip the scale and mandate the conclusion that the Respondent can be recognized as the female-protagonist of the Appellant's book. On the whole, according to the nature of the details and their accumulation, there is basis for recognition by the reasonable distant acquaintance, a colleague, a classmate and a potential student. To this we must add that it is the course for juicy details such as these to reach broader circles. A description of physical appearance in a novel is not generally etched in the mind of the reader, and it is temporary and passing. On the other hand, a description of the character's sexual habits and details of her doings in the bedroom fulfill voyeuristic urges and serve as juicy raw material, tradable currency.

143. A side note on the opinions of the experts, Prof. Hirschfeld and Prof. Hever: A light and superficial perusal of the theoretical literature that addresses fiction gives rise to distinctions which were not mentioned in the opinions at all, and mainly, the existence of midpoint intermediate definitions between fiction and documentary, such as the *Roman à clef* genre. For some reason, the experts chose not to present the court with the theoretical definitions and sub-definitions for the term "fiction", which are extensively discussed in research

literature. That is a problem with that. As a result, Prof. Hever decisively determined in his opinion that his own conclusion "**refutes any claim based on this argument**". There is no room for a conclusion such as this in an expert opinion. The expert is required to opine in the field of his expertise, not to overstep the jurisdiction of the court.

The Degree of Invasion of Privacy

144. As aforesaid, with respect to the invasion of privacy, we make a distinction between an impingement on the core of privacy and an impingement on the margins thereof. The core of the right – intimate details of a person's life – "**the inner circle of life**". The margins of the right – details that belong to the external space of a person's life – "**the external circle of life**". In this appeal, we are not required to discuss the "**twilight zone**" that lies between the margins of the right and its core. We are concerned here with a clear infringement on the core of the right. The book includes "**a detailed description of matters pertaining to the private life of the Plaintiff… a detailed description of the Plaintiff's relationship with the Defendant, including events, conversations and descriptions that are unmistakably intimate. The book includes a description of the Plaintiff's relationship with her former partner until their breakup, with the parents of her partner and with her own parents, including statements made by the Plaintiff with respect to her parents in personal conversations she had with the Defendant. The Plaintiff rightly claims that the book comprehensively, and without any camouflage, describes her most intimate relationships, exposes her thoughts, feelings, desires, secrets and sexual life. All in such a manner that the Plaintiff's life, down to the most intimate details, is spread out as an open book before the readers**" (paragraph 49 of the judgment of the District Court). Descriptions of this type constitute a severe impingement on the very core of the right to privacy.

Protection of the Trust Relations between Couples

145. "**Acquire a friend for yourself**". This sound advice, which is based on nature and human need, is given to us by Rabbi Joshua Ben Perachia (*Mishna*, *Avot*, 1, 6). "**And how will one acquire a friend? This teaches that a person should acquire a friend with whom to eat… and read … and reveal all of his secrets, the secrets of the Torah and the secrets of worldly things**". (*Avot de Rabbi Natan* 8, 3). A person needs a friend; man and woman need one another. "**Either friendship or death**" (*Bavli*, *Bava Batra* 16, 2). The relationship between a man and his friend and between a man and his wife serves as a haven for a person, a protected and safe place. The outside world, it is strange and alienated. A man's home is his castle. In the public domain, a person is constantly under a scrutinizing and inspecting eye. In private, in the privacy of his own home, together with a friend or a spouse, a person has a piece of land, physical relaxation and peace of mind. This relationship is characterized by a high level of trust between the parties. At its peak, the friends and the spouses accept each other, as they are, unreservedly. Relationships such as these encourage a person to open his heart and share his secrets with another. Unlike the scale armor that a person wears when going out into the outside alienated world, relationships like these are characterized

by removal of the outer layer and exposure of the inner world. In the course thereof, the spouse is stripped bare, physically and spiritually, before the other spouse. A worthy legal regime grants protection to such a relationship. Secrets and details revealed in the framework of interpersonal relationships, in which there is a high expectation for trust relations, are worthy of legal protection. Words such as these were stated by the English Court:

> "**There could be hardly be [sic] anything more intimate or confidential than is involved in that relationship, or than in the mutual trust and confidences which are shared between husband and wife. The confidential nature of the relationship is of its very essence and so obviously and necessarily implicit in it that there is no need for it to be expressed". (Argyll v. Argyll [1967] Ch. 302, 322).**

For additional information see also: Nigel Lowe & Gillian Douglas, Bromley's Family Law 113-118 (2007).

146. The Appellant and the Respondent had a longtime romantic relationship that lasted approximately five years. In the course of their acquaintance, the Respondent separated from her partner, and the Appellant divorced his wife. Clearly such a stable and lengthy relationship gives rise to an enhanced duty of loyalty. In exposing intimate details, which one of the parties learned about during the couple's relationship, there is severe harm to the rationale at the base of the protection of privacy and to the inclination to safeguard and protect the existence of interpersonal relationships. Naturally, the context in which the details were disclosed, and the ones for which the question of exposure is on the table, also adds to the depth and to the weight of the invasion of privacy in the case at bar.

147. **Interim Conclusion**: After examining the degree of fiction in the creative work and the degree of infringement on the right to privacy, we have learned that there is little fiction and great harm. This is a creative work, a novel, in which the reasonable distant acquaintance may recognize the Respondent. It is a grave infringement on the core of the right to privacy, the trust relationship between a couple. The inevitable result is that publishing the novel will cause a severe and intense invasion of the Respondent's privacy; the identification and the injury join together to create heavy weight on the side of privacy on the constitutional scale.

Freedom of Speech

148. The extent of the violation of freedom of speech will be examined according to its underlying rationales. We will distinguish between rationales that reflect extensive social values such as: human dignity, the exposure of truth, and the importance of freedom of speech in a democratic regime. Realizing these values through the examined expression elevates the protection of the expression to a high level and the freedom to express it. On the other hand, insofar as the expression primarily stands on the basis of personal wellbeing, the **value** will be reduced to **interest** level, simultaneously reducing the degree

of protection of the freedom to express it. This is not a binary choice. Many expressions contain several elements that stem from different rationales. The court is entrusted with the task of deciding the dose of the rationales fulfilled by the expression.

149. The novel authored by the Appellant embodies **artistic freedom**. This specific manifestation does not merit as severe a protection as its fellow **political expression** (see and compare: Barak, **Human Dignity**, above on page 731), but nor does it descend to the bottom tier, like its **commercial** counterpart. As such, it fulfills different values that underpin freedom of speech – the exposure of truth, and the importance of freedom of speech in a democratic regime – but it does not involve a full realization of these rationales, which are wholly realized in political expressions. Artistic freedom is also known for its self-serving personal aspect. The creator wishes to glorify his name and make himself renowned. The weighting of these rationales indicates that the expression before us realizes freedom of speech to a medium degree. **Ideal and interest are intermingled therein.** The violation of freedom of speech in the case at bar is also not of the severe type, as it does not originate in censorship on the part of the governing authorities, but rather in the Respondent's legal action as a person concerned with protecting her right to privacy. **The balance between a serious and severe infringement of the right to privacy against a medium violation of freedom of speech tends toward the protection of privacy.**

Concern of Literary Work being Shelved

150. According to the Appellant, denial of the appeal "**might lead to absurd results**" and to the shelving of important literary work based on "actual" events. Counsel for the Appellant quotes the CEO of the publisher, who protested against such legal policy in his testimony at the District Court: "**In fact, what will be asked of me, is not to prove that things happened, but rather to prove that things never happened … I will have to prove that the fictional protagonist did not have such a neighbor … how can you prove what did not happen … any work whatsoever is impossible if we come to that place, which I find preposterous … it is the absolute paralyzing of original creative work**" (page 110 of the court transcript). The Appellant also notes a considerable list of important literary works that would have been shelved and never published, according to the legal policy set by the District Court.

151. The Appellant claims that "**The judgment may have… destructive implications on an entire branch of literary writing. Its practical implication is that writers writing an autobiography or an autobiographic novel are prohibited from relating a relationship with another person and sharing with the public, through the work, experiences that they themselves had had in that relationship**". In conclusion, the Appellant calls upon the court to stop and ask itself "**Would I be willing to apply the exact same criteria to one of the masterpieces of Hebrew literature? Were I to ignore the identity of the Appellant and visualize Amos Oz, or David**

Grossman, or Meir Shalev before me – would I then too arrive at the same outcome?"

152. I have done as the Appellant directed. I turned to ask myself, would I indeed be willing to adopt similar criteria in other situations? But I will first say a few words. The utilitarian argument regarding the increase of the aggregate wellbeing of society as a result of the publication of literary works has great charm. It is supposedly simple: in situations where the right of one private individual collides with the right of another person, which has a high aggregate benefit, the second right should be preferred.

153. However, this argument bears a twofold flaw: firstly, the protection of human dignity also rises from utilitarianism itself, since a society that throws human dignity down the gutter significantly reduces the aggregate wellbeing. This principle was not overlooked by the father of the utilitarian doctrine, John Stuart Mill, who, in his book "**On Liberty**", determined that aggregate benefit and utility also rise from a regime that protects human rights. This utility should be taken into account when examining the aggregate wellbeing regime in situations of human rights' violation. A similar position is brought in *Midrashei Chazal* [the writings of our sages may their memory be blessed] that addressed the construction of the biblical Tower of Babel: "**Rabbi Pinchas says that there were no stones there to build the city and the tower, so what did they do? They fashioned bricks and burned them as artisans of earthenware until they built it seven miles high … and if a man fell down and died they paid him no heed and if a brick fell down they sat and wept and said when would there be another to replace it**" (*Pirkei de Rabbi Eliezer(Higger)*, Chapter 24). The preference of brick over man – this is what stands at the heart of *Chazal's* criticism of the Babylonian tower.

154. Secondly, there are situations wherein we decide that the protection of human dignity is more important than the accomplishment of other social values. This is the case, for example, in legal policy on experiments in humans. The benefit held in this type of experiment and the aggregate wellbeing expected therefrom could have a crucial effect on the future of the whole of mankind. Despite this, the law has chosen to apply a restraining legal policy that takes a firm hand against these, in order not to violate human dignity. A similar principle is reflected in the words of *Chazal* who determined that "**So great is human dignity that it overrides the negative commandments of the Torah**" (*Bavli, Berachot* 19, 2).

155. Clearly, one must not underestimate the importance of the artistic freedom in general, and the autobiographical one in particular. It should be granted an honorary place in the Israeli realm of rights. As a rule, the court will not prevent the publication of an autobiographic novel. Prior restraint is a highly rare act. However, it is possible that as a result of the legal policy outlined in the judgment of the District Court and now adopted in our ruling in this court, mankind as a whole will suffer the loss of several literary works. This argument, as aforesaid, does not deny our ruling. There are values that merit

even the loss of several "good books". **Man before book**. Books are meant to serve mankind, not the other way around, in the sense of "**a maidservant who inherits her mistress**" (Mishlei, Book of Proverbs 30, 3). It appears that the Appellant's words of "cultural ruin" and of his own work which "went up in flames" were overstated, to the point that he has forgotten which is the **cause** and which is the **effect**.

Copyright and Defamation

156. The District Court found, as mentioned, that there was no need to rule on the Respondent's arguments with respect to Appellant's infringement on her copyright to her letters – which he had used in his book – because there was anyway no justification to award additional monetary compensation beyond the compensation for invasion of privacy. The Appellant did not address this cause of action in his summations. There is therefore no need to address this issue in the framework of the appeal at bar. Likewise with respect to the Appellant's claim that the publication of his book does not constitute publication of defamation against the Respondent. According to him, the District Court erred in finding that "**The Plaintiff (the literary character) is described in the book as a woman who had an intimate relationship with a married man and did so in parallel to her relationship with her then partner. She is further described as someone who is willing to trample over anything that stands in her way to her goals, and as someone who uses people 'as if they were objects'**" (paragraph 68 of the judgment). The Respondent, on her part, claims that this ruling of the District Court should also remain unchanged. In my opinion, this matter too does not require a ruling in the framework of the appeal at bar, as it has no bearing on the remedies.

Consent of the Respondent

157. Section 1 of the Protection of Privacy Law prescribes that "**A person will not invade the privacy of another without his consent**". The Appellant claims that once the Respondent expressed her consent to the writing of the book, its publication is no longer a prohibited invasion of privacy. The District Court discussed this argument at length and its conclusion was resolute: "**It should be determined that not only did the Plaintiff not give her informed consent to the invasion of her privacy, but the Plaintiff also made clear to the Defendant before the publication that she forbids him from including in the book any details that may lead to her identification**" (paragraph 65 of the judgment). I accept the ruling of the District Court, based on the materials brought before it. It is a ruling on a matter of fact. As known, the court of appeals is not in the habit of intervening in matters of this type, and there is no good reason to deviate from the rule. I will, however, briefly address the legal aspect of consent to invasion of privacy.

158. It is inarguable that the Respondent expressed before the Appellant her objection to the publication of the book several times. According to the Appellant's claim, this objection was preceded by consent. What is the nature of this consent and can one withdraw therefrom?

159. Various scholars have expressed their position that "C**onsent may be compared to a contract, and the principles of contract law will apply to consent**" (**Protection of Privacy Law** above, on page 45); and that "T**here is no impediment to the application of the principles of contract law to consent**" (**Private Space**, page 100). Despite the noticeable similarity, scholars have pointed to the difficulty in the "blind application" of contract law: "**Although it appears that the principles of contract law apply to the element of 'consent', the protection of privacy laws give rise to dilemmas that are not always resolvable through contract law. Thus, for example, it may be that a person who gave consent will withdraw the consent he gave: the basic principle in contract law mandates enforcement of the obligation. However, in our opinion, this remedy is not necessarily suitable in the event of withdrawal of consent to relinquish the right to privacy. The personal nature of the consent to relinquish privacy and the elevation of the right to privacy to the rank of a basic right, require the interpreter to use additional tools to examine 'the consent', in addition to contract law. When a person withdraws his consent to relinquish his privacy, one should not, in our opinion, impose the ordinary law of enforcement on him and publish information that invades his privacy in reliance on previous consent. A person should be allowed, primarily in circumstances that concern intimate information, the ability to withdraw his waiver of his right to privacy against monetary compensation if the party who relied on the waiver of privacy has been damaged as a result**" (see **Protection of Privacy Law** above, 46; for similar positions see: **Private Space** above, page 100-104); **The Law of Privacy and the Media** above, on pages 537-538).

160. It appears to me that a person's consent to invasion of his privacy is not the final word. The constitutional status of the right, the hard personal nature of invasion of privacy, may place the remedies for the withdrawal of consent in a position that differs from the one under contract law. Enforcement may possibly be unjustified in circumstances of severe invasion of privacy, compared with monetary compensation that may be justifiably awarded due to the withdrawal of consent, if it caused damage. According to a "**parallelogram of force**" between the severity of the invasion of privacy and the validity of the consent, the milder the invasion the greater the chances of receiving an enforcement remedy; the more grave the invasion, the more the balance will tilt towards avoiding enforcement, while granting the possibility of a compensatory remedy. In the case at bar, as aforesaid, the District Court rightly ruled that there had been no consent. There had been the explicit objection of the Respondent to the inclusion of a detail that could bring to her identification.

Conclusion

161. The Appellant's freedom of speech "collides" with the Respondent's right to privacy. His artistic freedom, as reflected in the book he has written, harms the Respondent's good name. The **autobiographical work** has many notable virtues. However, the book in question is actually a documentary book

disguised as a work of fiction – as the District Court has ruled – and its invasion of the Respondent's privacy is grave and severe. We are concerned here with two constitutional rights – **freedom of speech** and **the right to privacy** - and, in principle, neither takes precedence over the other. In our ruling, we have examined whether the weight of the benefit that will arise from the fulfillment of one right exceeds the weight of the damage incurred by the other right. Our in-principle conclusion is that **on the constitutional scale, freedom of speech will prevail in a situation of mild and medium infringement on the right to privacy against a severe violation of freedom of speech; the right to privacy will prevail when the violation of freedom of speech is mild or medium and faced with an intense impingement on the core of privacy**. We implemented the principle, according to the circumstances of the matter and the book in question, and we have found that there is little fiction and great harm. A grave and severe invasion of the Respondent's privacy, whereas, on the other hand, there is a medium violation of the Appellant's freedom of speech. The identification of the Respondent in the Appellant's book as the female-protagonist, together with a detailed description of her inner life circle, including matters that are manifestly intimate, outweigh, in their aggregated weight, the infringement on the Appellant's freedom of speech, in which ideal and self-interest are intermingled.

162. Were the Appellant seeking to hold a photography exhibition in which he displayed the Respondent with him in the nude, it appears that an injunction would have been issued, in order for him not to do so. All the more so the book, where he portrayed the Respondent's body in her own bedroom and also exposed the depths of her soul and her innermost secrets. It is thus just that the District Court issued a permanent injunction prohibiting the publication of the book.

163. Therefore, I propose to my fellow-justices to deny the appeal and leave the judgment of the District Court standing. I further propose that the Appellant be charged with the payment of trial costs and legal fees to the Respondent in the amount of ILS 75,000.

Justice

Deputy Chief Justice M. Naor:

1. My fellow-justice, Justice **Sohlberg**, has laid out an extensive review. It appears to emerge from his review that were the case before us heard in the courts of the United States – the result would have been different. The result of disqualifying a book that has been written is a difficult result and ought to be kept for exceptional cases. I am afraid that the case at hand is such a case.

2. It appears that in his book, more than the Appellant sought to write about the female-protagonist, he actually sought to write of the male-protagonist, the experience of a man who leaves his home mentally and physically in a gradual process, first for short-lived affairs, and eventually for a relationship with the female-protagonist. The relationship with the female protagonist began when the male-protagonist was married and the relationship continued after the male-protagonist left his home. The work describes the difficulties in the relationship of the male-protagonist with his longtime wife, and with his children, difficulties that eventually also harm his relationship with the female-protagonist, for whom he cannot make room for in his world. It is not the female-protagonist who is at the center of the plot, although the female-protagonist and other women (to a lesser degree) hold an important place in the plot. The plot is centered on the man who leaves his home.

However, in his writing, at the center of which is the male-protagonist, the author has breached permitted boundaries and severely invaded the Respondent's privacy. Things could have been written differently to begin with. My fellow-justice rightly noted, following the findings of the District Court, that things were written in such a manner so that even a distant person who knows the Respondent would recognize that it was about her. The standard sentence appearing on the internal side of the book cover, that the plot of the book and the characters mentioned therein are all the product of the author's imagination and that any connection to living persons or characters is purely coincidental – does not reflect the situation as it truly is. This being the case – there was no room for various descriptions, which it would not be right to specify, that run as a common thread throughout the entire book. There was also no room to share with the reader the heroine's secret thoughts and her sex life. The Appellant wrote his book as he did while ignoring that grave invasion. We cannot illustrate the severity of the invasion with the details contained in the book, because such details would also constitute an invasion of privacy. It is sufficient for me to note that my words with respect to the serious invasion have been written after reading the book in full.

Although, as aforesaid, it could have been done differently to begin with. In the hearing we suggested allowing non-trivial changes in the book, but this was not achieved. We cannot assume the role of "chief editor" and the role of the one directing changes in a literary novel in a judgment. According to my impression, things could have been written differently to begin with, without significantly compromising artistic freedom, yet the Appellant wrote what he did in a manner that completely ignores the harm to the Respondent.

3. Despite the considerable difficulty I feel as to the need to censor a literary work – at the end of the day, I join my opinion with the opinion of my fellow-justice, Judge **Sohlberg**, and all while emphasizing that disqualifying a literary work should be done in rare cases. However, the case before us is, as aforesaid, such a case.

Deputy Chief Justice

Justice S. Joubran:

1. I concur with the thorough and comprehensive judgment of my fellow-justice, Justice **Sohlberg**. I will briefly note the reasons specified by my fellow-justice that have led me to this conclusion.

2. Firstly, the case before us gives rise to a complex question pertaining to the correct balance between the Appellant's freedom of speech and the Respondent's right to privacy in the framework of Section 18(3) of the Protection of Privacy Law, 5741-1981 (the "**Protection of Privacy Law**"). The section prescribes a balance between the right to privacy and the freedom of speech and public's right to know. In this context, I agree with the approach of my fellow-justice, whereby it is the court's role to pour substance into this basic formula, and in the case at bar – interpret it in view of constitutional principles (paragraphs 53, 68 of his opinion; L.C.A. 6902/06 **Zadik vs. Ha'aretz Newspaper Publishing**, paragraph 10 (August 13, 2008)).

3. In my opinion, in the balance between two constitutional rights of equal status, the highroad is to take a conciliating approach with the aim of allowing both rights to coexist by means of a proportionate impingement on one at the expense of the other (see and compare: H.C.J. 2481/93 **Dayan vs. Chief of the Jerusalem District**, 48(2)456, 474-475 (1994); A.P.A. 398/07 **The Movement for Freedom of Information vs. the Tax Authority**, paragraph 53 (September 23, 2008) ; A.P.A. 9341/05 **The Movement for Freedom of Information vs. the Government Companies Authority**, paragraph 31 (May 19, 2009); Ruth Gavison "**Prohibition on a Privacy-Invading Publication – the Right to Privacy and the Public's Right to Know**" Civil Rights in Israel – a Collection of Essays in Honor of Haim H. Cohn 177, 204, 219 (1982)). In this spirit, we have tried to conciliate between the parties in the hearing we held on the appeal, and to reduce the invasion of the Respondent's privacy and allow the publication of the book. However, most regrettably, this attempt was unsuccessful. Only then, in the absence of the option to reconcile the rights, the path of a binary decision should be taken and one right preferred over the other (see: H.C.J. 1435/03 **Jane Doe vs. the Disciplinary Court for State Workers Haifa**, PD 58(1)529, 537-539 (2003)).

4. Secondly, the scope of the protection of speech is determined according to the rationales it fulfills. This court has held that the three rationales underpinning freedom of speech are the exposure of truth, individual self-fulfillment and the reinforcement of democracy (H.C.J. 399/85 **Kahana vs. the Israel Broadcasting Authority**, PD 41(3)255, paragraphs 14-16 of the judgment of Justice (his former title) **A. Barak** (1987) (hereinafter: "**Re Kahana**"); Ilana Dayan-Orbach "**The Democratic Model of Freedom of Speech**" *Iyunei Mishpat* 20 377 Chapter A (1996)).

5. In my opinion, although it is undisputed that the Appellant's book is protected under free speech, most of its underlying rationales (with an emphasis on the exposure of truth, as will be specified here) do not apply to the work, certainly not fully. In this context, I will note that a considerable part of the Appellant's

claims, both before us and before the District Court, was based on the argument that this is a work of fiction, and therefore cannot in fact invade the privacy of the Respondent. In view of this, I accept the position of my fellow-justice that the rationale of "exposure of truth" does not fully apply to the book (paragraph 149 to his opinion). It is noted that it is written in the beginning of the book, black upon white:

> "**The plot of the book, the characters mentioned therein and their names are all the product of the author's imagination. Any connection between the plot of the book and events that occurred in real life, as well as between the characters mentioned herein and their names and characters or names of persons, living or dead, is purely coincidental**".

6. In this state of affairs, I find it difficult to determine that the book helps "T**o ensure freedom of speech in order to enable various and diverse ideas and views to compete with one another. From this competition – and not from a governmental dictation of a one and only 'truth' – will truth float and rise up, as, in the end, the truth will prevail in the battle of ideas**" (Re Kahana, in paragraph 14). In view of this, I believe that the scope of protection to be granted to the book is not broad whilst on the other side stands the Respondent's right to privacy in its clearest sense, and the latter should prevail.

7. On these grounds, I concur with the judgment of Justice **N. Sohlberg**.

Justice

Ruled as aforesaid in the judgment of Justice **N. Sohlberg**.

Rendered today, Nissan 24, 5774 (April 24, 2014).

Permitted for release today, Iyar 22, 5774 (May 22, 2014).

The judgment was sent in its entirety to the parties' counsels, and, at our request, they suggested light changes and omissions in order to prevent a situation where the contents of the judgment reveal details whose publication would undermine the injunction prohibiting the publication of the book. The main omissions and changes were incorporated into the language of the aforesaid judgment. We therefore allow the release of the judgment in its reduced format herein, while the prohibition on exposure of the names of the litigants and identifying details about them, as well as the judgment in its full format, still standing.

Deputy Chief Justice Justice Justice