Translator's note: The Hebrew word Shabbat has been translated as *Shabbat* which can refer to either Saturday or the Jewish Sabbath.

HCJ 1514/01

1. Yaakov Gur Aryeh
2. Bat Shir Gur Aryeh

v.

1. Second Television and Radio Authority
2. TTV, Ltd.
3. Eyal Zayid
4. Avital Levi

The Supreme Court Sitting as the High Court of Justice

[June 18th, 2001]

Before President A. Barak, Vice President S. Levin, Justice D. Dorner

Petition to the Supreme Court sitting as the High Court of Justice for an *order nisi* and an interlocutory order.

Facts: Petitioners are the subject of a film made by or for the respondents. The film was designated for broadcast on television on Shabbat. When the petitioners discovered the film was going to be broadcast on Shabbat they approached the Second Television and Radio Authority, and asked that the film not be broadcast on Shabbat stating that broadcast of the film on Shabbat would harm their religious feelings and violate their religious freedom. The request was denied by the Second Television and Radio Authority, which was willing to add captions on the screen which would state that the film was filmed on a weekday, but was not willing to broadcast the film on a weekday. The petition was filed against this decision.

Held: In the majority opinion, written by President Barak, it was determined that broadcast of the film on Shabbat constituted a violation of the petitioners' religious feelings but not their freedom of religion. In the balance between the violation of the petitioners' religious feelings and the freedom of expression of the respondents the freedom of expression prevails. The petition was therefore denied.

In a dissenting opinion Justice Dorner was of the view that the petitioners' freedom of religion was violated, and that in balancing the competing human rights – the freedom of religion of the petitioners, on the one hand, and the freedom of expression and right to property of the respondents on the other – in this specific instance, the freedom of religion of the petitioners should prevail.

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Basic laws cited:

Basic Law: Human Dignity and Liberty

Basic Law: Freedom of Occupation, s. 4.

Legislation cited:

Second Television and Radio Authority Law 5750-1990, ss. 48, 48(a).

Israeli Supreme Court cases cited:

[1] HCJ 164/97 *Kontrem Ltd. v. Ministry of Finance* IsrSC 52(1) 289

[2] HCJ 399/85 *Kahane v. Broadcast Authority Management Board* (1987) IsrSC 41(3) 255

[3] HCJ 4804/94 *Station Film Company Ltd. v. Film and Play Review Board*, IsrSC 50(5) 661.

[4] HCJ 6218/93 *Cohen v. Bar Association* IsrSC 49(2) 529.

[5] HCJ 953/89 *Indor v. Head of Jerusalem Municipality* IsrSC 45(4) 693.

[6] HCJ 3888/97 *Novik v. Second Authority* IsrSC 51(5) 199.

[7] HCJ 287/69 *Meiron v. Minister of Labor* IsrSC 24(1) 337.

[8] HCJ 5016/96 *Horev v. Minister of Transportation* IsrSC 51(4) 1.

[9] HCJ 351/72 *Keinan v. Film and Play Review Board* IsrSC 26(2) 811.

[10] HCJ 806/88 *Universal City Studio Inc. v. Film and Play Review Board* IsrSC 43(2) 22.

[11] CrimAp 697/88 *Sutzkin v. State of Israel* IsrSC 52(3) 289.

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

[13] HCJ 243/81 *Yaki Yoshe Company Ltd. v. Film and Play Review Board* IsrSC 35(3) 421.

[14] HCJ 448/85 *Dahar v. Minister of Interior* IsrSC 40(2) 701.

[15] CrimA 126/62 *Disenchek v. Attorney General* IsrSC 17 169.

[16] CA 294/91 *Chevra Kadisha GHSHA 'Kehillat Yerushalayim' v. Kestenbaum*. IsrSC 46(2)464.

[17] HCJ 2481/93 *Dayan v. Commander of Jerusalem District* IsrSC 48(2) 456.

[18] HCJ 148/79 *Sa'ar v. Minister of Interior and Police* IsrSC 34(2) 169.

[19] HCJ 291/74 *Bilet v. Goren* IsrSC 29(1) 98.

[20] HCJ 115/50 *Yosefof v. Attorney General*, IsrSC 5 481.

[21] HCJ 866/78 *Morad v. Government of Israel*, IsrSC 34(2) 657.

[22] HCJ 650/88 *Movement for Progressive Judaism in Israel v. Minister of Religious Affairs*, IsrSC 42(3) 377.

[23] HCJ 3267/97 *Rubinstein v. Minister of Defense* IsrSC 5295) 481.

[24] HCJ 4298/93 *Jabarin v. Minister of Education*, IsrSC 48(5) 199.

[25] HCJ 3872/93 *Mitral Ltd. vs. Prime Minister* IsrSC 47(5) 485.

[26] CA 6024/97 *Shavit v. Chevra Kadisha GHSHA Rishon LeZion* [1999] IsrSC 53(3) 600.

[27] HCJ 262/62 *Peretz v. Local Council Kfar Shmaryahu*, IsrSC 16 2101.

[28] HCJ 292/83 *Ne'emanei Har Habayit, Association v. Commander of Jerusalem District*, IsrSC 38(2) 449.

[29] HCJ 6656/93 *Am K'Lavi v. Commander of Jerusalem Police* IsrSC 48(4) 793.

[30] CrimA 7528/95 *Hillel v. State of Israel* IsrSC 50(3) 89.

[31] HCJ 4541/94 *Miller v. Minister of Defense* IsrSC 49(4)94.

[32] HCJFH 4466/94 *Nuseiba v. Minister of Finance*, IsrSC 49(4) 68.

[33] CrFH 2316/95 *Ganimat v. State of Israel* IsrSC 49(4) 589.

[34] HCJ 1715/97 *Office of Investment Managers in Israel v. Minister of Finance* IsrSC 51(4) 367.
[35] HCJ 450/97 *Tnufah Manpower Services and Maintenances Ltd. v. Minister of Labor and Welfare* IsrSC 52(2) 433.

American cases cited:
[36] *United States v. Lee*, 455 U.S. 252 (1982).
[37] *Thomas v. Review Bd. Of Indiana Employment Security Div*., 450 U.S. 707 (1981).
[38] *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989).

German cases cited:
[39] *BVerfGE* 35, 36 [1973].
[40] *BVerfGE* 93, 1 [1995].

Israeli books cited:
[41] A. Barak, *Interpretation in Law*, Vol. 2, (1993).
[42] A. Rubinstein, *Constitutional Law in Israel* (5th ed., volume A, 1996.
[43] H.H. Cohen, *The Law* (1992).

Israeli articles cited:
[44] D. Statman, 'Violation of' Multi-Cultural 'Religious Feelings' in a Democratic and Jewish State' *Memorial Book for Ariel Rosen Zvi, may his memory be a blessing'* (eds. M. Mautner, A. Sagi, R. Shamir) (1998).
[45] Berinson 'Freedom of Religion and Conscience in Israel' *Iyunei Mishpat* 3, 405 at 406;
[46] Gavison, 'Religion and State – Separation and Privatization' *Misphat U'Memshal* 2 55 at 78 (1984).
[47] H. H. Cohn, 'On Freedom of Religion and Religious Wellbeing – Reviews in Legal History' *Landau Book* 813 (volume B, 1985).
[48] A. Kasher, 'Violation of Feelings for the Overall Good' *Mishpat U'Memshal* B 289 (1984).
[49] I. Zamir and M. Sobel, 'Equality before the Law', *Mishpat U'Memshal* 5 (2000) 165.
[50] Aharon Barak, 'Protected Human Rights: The Scope and the Limitations' *Mishpat U'Mimshal* A (1993) 253.

Jewish law sources cited:
[51] Mishnah, *Avot* 1, P.
[52] Avot of Rabbi Natan 22, A
[53] Rabbi David Stav, 'Filmed on a Weekday, Broadcast on Shabbat' *Nekudah* 211 (1988) 52.
[54] Rabbi Shlomo Zalman Oyerbach 'Repeat Radio Broadcast on Shabbat', *Tehumin, Religious Law Compilation on the Topics of Torah, Society, and State* 17 (1997) 13.
[55] Rabbi Dr. Nahum Eliezer Rabinovich, *Electricity in Jewish Religious Law (Part B – Shabbat and Holiday, 1981)* 270.

[56] Rabbi Dr. Nahum Eliezer Rabinovich, 'Asking in the Matter' *Hadarom Torah Collection* 15 (1962) 120.
[57] Shavuot 39, A.
[58] Mishnah, *Psahim* A, B.

For petitioners – Naftali Wersberger
For respondent no. 1 – Doron Avni; Tamar Hacker.
For respondents no. 2-4 – Efrat Avnet; Amir Ivztan

JUDGMENT

President A. Barak

The television network seeks to broadcast a film documenting the life and worldview of the petitioners, who are observant Jews. They fill an active role in the film, which includes interviews with them. The film was filmed on the weekdays. The television network would like to show the film on Shabbat. The petitioners object to this. They claim violation of religious feelings and religious freedom. Whose side is the law on – that is the question before us.

The Facts

1. The Second Television and Radio Authority (hereinafter: 'the respondent') is a statutory corporation. It was set up by power of the Second Television and Radio Authority Law 5750-1990. Most of the broadcasts are by franchisees. The Second Authority Council is authorized to 'take time slots from a broadcast unit of the franchisee, for the purpose of showing broadcasts on behalf of the authority, on topics that in its opinion 'are of special interest to the public'' (section 48(a) of the law). Against this background for four years now the program 'Documentary Word' has been broadcast on Shabbat. This is the only half hour broadcast time slot that the respondent has. The respondent decided (in 1999) to invite proposals for the production of documentary films on the topic of 'places, phenomenon, and people in Israel on the issue of the tension between Judaism and Israeliness.' Consequent to this it was decided between the respondent and respondent no. 2, a private company, that the latter would make a film about the residents of the settlement 'Mitzpeh Kramim'. The film was directed by the respondent no. 3. The investigative research and interviews were conducted, inter alia, by respondent no. 4, who was the acting producer.

2. The petitioners are residents of the settlement 'Mitzpeh Kramim'. As stated above, they are observant Jews. They were identified by respondents 2-4 as suited to take part in the film. They agreed to this. The film was made and sent to the respondent. Since it was considered suitable, it was supposed to be broadcast in the framework of the show 'Documentary Hour', which is broadcast, as stated, on Shabbat. The petitioners approached the respondent, and asked that the film not be broadcast on Shabbat. According to their claim, broadcast of the film on Shabbat violates their religious feelings and their religious freedom. The respondent denied the request. It is

willing to add captions on the screen which would state that the film was filmed on a weekday. It is not willing to broadcast the film on a weekday as it does not have a time slot for this. The petition before us was filed to counter this decision.

3. At first the petitioners argued before us that an agreement was made with them that the film would not be broadcast on Shabbat. During the course of the arguments the petitioners repeated this claim, while arguing that there was a misunderstanding. The source for this was, according to their claim, in the fact that some of the respondents were religious and from this the petitioners concluded that the film would not be broadcast on Shabbat. After reviewing the material before us, we are making the determination that there was no agreement between the petitioners (or some of them) and the respondents according to which the film would not be broadcast on Shabbat. The opposite: it was said to the petitioners that the film would be broadcast on the show 'Documentary Word'. From this the petitioners could conclude that the film would be broadcast on Shabbat. Moreover, it is routine that observant Jews are filmed on weekdays and the film is aired on Shabbat. Indeed, the petitioners should have known that the film would be aired on Shabbat, and the respondents assumed and were entitled to assume, that the petitioners agreed to this. It was the duty of the petitioners to look into this matter before they participated in the film (compare HCJ 164/97 *Kontrem Ltd. v. Ministry of Finance* [1]). Against this background the question was raised whether the petitioners have the right – which is not anchored in an agreement – that the film not be broadcast on Shabbat as, according to their claim, it violates their religious feelings and freedom of religion. In truth, the petitioners themselves are not being made to desecrate Shabbat. However, broadcast on Shabbat turns the petitioners, according to their claim, into accomplices of the desecration of Shabbat. When the petition was filed we sought to resolve the matter by amicable means. A conference was held before the President. The petitioners' Rabbi was invited to the meeting. We sought to examine various ways to settle the dispute by agreement between the parties. The respondents offered to broadcast the film with a caption that the filming took place on a weekday; it was also proposed that the caption would further state that the petitioners objected to broadcast of the film on Shabbat. It was proposed to them that they make do with the filing of the petition without insisting on a judicial determination. All proposals were rejected. There is no recourse therefore but to hand down a judicial determination.

The normative framework

4. The respondent is a statutory corporation. Its discretion is subject to principles of public law in Israel. It must weigh the relevant values and principles, and it must properly balance them. On the one hand, there is the right of the respondent to freedom of expression. That is the freedom of expression of the respondent – which serves as a spokesperson and a stage simultaneously (see HCJ 399/85 *Kahane v. Broadcast Authority Management Board* [2] at 268); it is the freedom of (artistic) expression of the other respondents (see HCJ 4804/94 *Station*

Film Company Ltd. v. Film and Play Review Board [3] at 680); it is the right of the public to know (see HCJ 6218/93 *Cohen v. Bar Association* [4] at 541).

5. **On the other hand**, there are the feelings of the petitioners. I accept that the very knowledge that the film in which the petitioners are participants will be broadcast on Shabbat – thereby turning the petitioners, in their own eyes, to parties to the desecration of Shabbat – can violate the religious feelings of the petitioners. Preventing this violation is in the public interest. Indeed a society whose values are Jewish and democratic protects the feelings of the public in general and religious feelings in particular (see HCJ 953/89 *Indor v. Head of Jerusalem Municipality* [5] at 690; HCJ 3888/97 *Novik v. Second Authority* [6] at 202; HCJ 287/69 *Meiron v. Minister of Labor* [7] at 364; hereinafter – 'the *Meiron* Case'; HCJ 5016/96 *Horev* v. Minister of Transportation [8] at 58; hereinafter – 'the *Horev* Case'; Statman, Violation of Religious Feelings, Multi-Culturalism in a Democratic and Jewish State (eds. M. Mautner, A. Sagi, R. Shamir) at 133 (1998)). Indeed the coarse violation of religious feelings gnaws at the value of tolerance, which is one of the values which binds and unifies society in Israel. The duty not to violate the religious feelings of the other 'stems directly from the duty of mutual tolerance between free citizens of different beliefs, without which a diverse democratic society such as ours is not possible.' (Justice Landau in HCJ 351/72 *Keinan v. Film and Play Review Board* [9] at 814; see also HCJ 806/88 *Universal City Studio Inc. v. Film and Play Review Board* [10] at 30; hereinafter – 'the *Universal City* Case'; CrimAp 697/88 *Sutzkin v. State of Israel* [11] at 307; hereinafter: 'the *Sutzkin* Case'.

6. What is the proper balance between the need to protect the freedom of expression of the respondents on the one hand and the need to protect the religious feelings of the petitioners on the other? This question was discussed at length in the case law of the Supreme Court. It was determined that the (vertical) 'balancing formula' is this: freedom of expression prevails, unless the violation of religious feelings is nearly certain and their violation is real and severe (see HCJ 7128/96 *Temple Mount Faithful v. Government of Israel* [12]; *Universal City* Case, p. 31; the *Sutzkin* Case, p. 308). Indeed in order to restrict freedom of expression a 'plain' violation of religious feelings is not sufficient. A real and severe violation is necessary. It is necessary that the violation go beyond the tolerable threshold of Israeli society (see HCJ 243/81 *Yaki Yoshe Company Ltd. v. Film and Play Review Board* [13] at 425). This is a violation that shakes up the 'doorposts of mutual tolerance' (the *Horev* Case, p. 47)).

7. What is the result of the proper balancing in the petition before us? In opposition to the violation of the freedom of expression of the respondents is there a near certainty of a real and severe violation of the religious feelings of the petitioners? There is no debate that the violation of the religious feelings of the petitioners is nearly certain. It has been proven to us that such violation is certain (compare the *Universal City*

Case, at p. 40). But is the condition as to the intensity of the violation met? The answer to this question is negative. 'The level of tolerability' of Israeli society, in a Jewish and democratic state, includes situations in which the image of a believing Jew is broadcast on Shabbat (whether they are a political person and whether they are not a political person; whether it is an active interview or whether it is a chance filming). This has been the situation in Israel for many years. No one disputes this. The violation of the religious feelings of the petitioners does not shake the doorposts of mutual tolerance in the State. 'In a democratic society a certain degree of violation of religious feelings is to be recognized. Only in this way will it be possible for cooperative living of those with different religious views to take place.' (*Universal City* Case, p. 39). Certainly this is so if the broadcast of the film is accompanied by a caption that the film was filmed on a weekday. A different conclusion would lead to the beginning of the end of broadcasts on Shabbat. These broadcasts began as a result of a petition to this court (see the *Meiron* Case). Consequent to this it is accepted in Israeli society that television broadcasts take place on Shabbat, in which, among others, observant Jews are seen, and in which interviews and conversations with them take place. Thus on Shabbat, the operation of the Knesset and the government are broadcast, and in the framework of these, observant members of Knesset and ministers who are interviewed on weekdays are viewed; so too, on Shabbat entertainment, political, and cultural programs, in which observant Jews take an active part, are viewed. If all of these are prohibited from being viewed, chances are great that all television will be shut down on Shabbat followed by the radio. All this is not consistent with the 'level of tolerability' of the violation of religious feelings in Israel, as it has been accepted here for many years. Indeed, the possibility of a certain violation of religious feelings is the price that every person, be his religion what it may be, is required to pay for life in democratic society, in which secular and religious and members of different religions live side by side one next to the other. This is in many instances the price one must pay and there is no escape from it. But, there are cases where a person who has a particular difficulty making peace with the violation of religious feelings can avoid that violation. The case before us is such a case. A religious person who is willing to be interviewed for television, but is not willing for the interview to be shown on Shabbat, can condition the interview on the term that the interview is to be broadcast only on a weekday. But the petitioners did not do so, not explicitly nor by implication. In this sense, as they themselves note in their notice to the court, they have only themselves to blame. The result is therefore that the claim as to unlawful violation of religious feelings is to be dismissed.

8. The petitioners did not base their arguments before us only on violation of religious feelings. They went on to argue that broadcast of the film on Shabbat violates their freedom of religion. They argue that in the (horizontal) balance between the violation of freedom of expression and the violation of religious freedom, the violation that is caused to the

petitioners in broadcasting the film on Shabbat is more severe than the violation that will be caused to the respondents if the film is broadcast on a weekday. What is the legal fate of such an argument? Indeed, a distinction is to be made between the violation of religious feelings and the violation of freedom of religion. Violation of the former (religious feelings) is a violation of the public interest. The balancing required between the violation of this interest and the violation of freedom of expression is a vertical balancing (see A. Barak, *Interpretation in Law*, Vol. 2 [41] at p.688.). The freedom has the upper hand, unless there is a probability (a likely possibility, near certainty, and the like) of severe violation (in various degrees of severity) to the public interest (see, for example, HCJ 448/85 *Dahar v. Minister of Interior* [14] at 708 (public safety versus freedom of movement); CrimA 126/62 *Disenchek v. Attorney General* [15] (judicial purity versus freedom of expression); CA 294/91 *Chevra Kadisha GHSHA 'Kehillat Yerushalayim' v. Kestenbaum* [16] at 519 (public interest in language versus human dignity). The second violation is to personal liberty. It is a matter here of the necessary balance between violation of the two liberties (or more) (see HCJ 2481/93 *Dayan v. Commander of Jerusalem District* [17] (freedom of expression versus privacy and property); HCJ 148/79 *Sa'ar v. Minister of Interior and Police* [18] (freedom of expression versus freedom of movement). The balance is horizontal. Within it limitations of time, place and shape are established which will enable every liberty to fully fulfill its principles. Is a vertical balancing necessitated in the petition before us? In order to answer this question the scope of the competing rights needs to be examined. Only if in light of this examination there is a clash between them, will there be a need for a horizontal balancing. What is the situation in the matter before us?

9. All accept that freedom of religion is a basic right in Israeli law (see A. Rubinstein, *Constitutional Law in Israel* 175 [42]. More than once it has been ruled that freedom of religion is a 'core rule in our legal system' (Justice Kister in HCJ 291/74 *Bilet v. Goren* [19] at 102), that it is 'one of the personal liberties guaranteed to him in every enlightened democratic regime' (Justice Landau in HCJ 115/50 *Yosefof v. Attorney General*, [20] at 488) and that it is to be seen as a 'basic principle of our legal regime' (Acting President Justice Landau in HCJ 866/78 *Morad v. Government of Israel*, [21] at 663).10. What is the scope of freedom of religion? This freedom encompasses the liberty of the individual to believe and his liberty to act according to his faith, while realizing its rules and customs ('freedom of worship') (See HCJ 650/88 *Movement for Progressive Judaism in Israel v. Minister of Religious Affairs*, IsrSC [22] at 381; HCJ 3267/97 *Rubinstein v. Minister of Defense* [23] 528; Berinson 'Freedom of Religion and Conscience in Israel' [45] at 406; Gavison, 'Religion and State – Separation and Privatization' [46] at 78 (1984); H. Cohn, 'On Freedom of Religion and Religious Wellbeing – Reviews in Legal History' [47]. Therefore freedom of religion includes the right of a person not to be compelled to act against their religion (see the *Horev* Case, at p. 140). Freedom of religion also includes the right of

a person to express himself with attire suited to the directives of his faith (see HCJ 4298/93 *Jabarin v. Minister of Education*, [24] at 203). It is superfluous to mention that this is not a closed list. Freedom of religion is tied to the individual and the realization of his identity. It is part of his 'I'. Just as the 'I' constitutes a complex phenomenon whose boundaries are not to be clearly demarcated, so too the boundaries of freedom of religion are not to be demarcated.

11. Does broadcast of the film on Shabbat violate the freedom of religion – as opposed to the religious feelings, of the petitioners? The answer is negative. Broadcast on Shabbat does not violate their liberty to believe and their liberty to act according to their belief. It does not prevent them from realizing the rules and customs of their faith. Examination of the arguments of the petitioners shows that their argument in fact is that the actions of others (the respondents) in opposition to the directives of the religion constitute a violation of the freedom of religion of the petitioners. An argument such as this has been dismissed in the past more than once by this Court. Thus, for example, the claim was dismissed that the existence of broadcasts on Shabbat constitutes a violation of the freedom of religion of the individual who does not watch television on Shabbat (the *Meiron* Case, at p. 363). Justice Berinson noted in that case that despite the broadcasts on Shabbat, nobody was forcing the individual to watch television on Shabbat. Only a violation that does not enable the individual to fulfill the directives of his religion and faith, or to conduct his lifestyle as a religious person, will be considered a violation of freedom of religion. In another case, the claim was dismissed that the import of non-kosher meat and the consumption of non-kosher meat by Jews, constitutes a violation of the freedom of religion of believing Jews (see HCJ 3872/93 *Mitral Ltd. vs. Prime Minister* [25] at 500). It was determined that the distinction is to be made between direct violation of the individual's lifestyle (which constitutes a violation of his freedom of religion) and a violation of the feelings of an individual, consequent to the actions of another, which is not a violation of freedom of religion. In that spirit I noted in another case that 'I am not of the opinion that driving on Shabbat on Bar-Ilan street violates the constitutional right of every one of the residents of the neighborhood to freedom of religion. The residents of the neighborhood are free to fulfill the directives of the religion. The movement of the cars on Shabbat does not deny them this right, and does not violate it.' (The *Horev* Case, p. 58). Indeed, where a person is harmed by the actions of another which are in opposition to religion the claim is not of violation of freedom of religion but rather to its feelings and consciousness. (See Kasher, 'Violation of Feelings for the Overall Good' [48]).

12. I am aware that in the petition before us the harm to the petitioners is not merely because of the actions of others, but also because of the use on Shabbat of interviews that were conducted with the petitioners on a weekday. This difference does not change the determination that at the basis of the claim of the petitioners there is the

violation of their religious feelings and not their religious freedom. Just as it cannot be imagined that the freedom of religion of an observant Jew is violated if a book that he wrote on a weekday is read on Shabbat while violating Shabbat, so too it cannot be imagined that the freedom of religion of an observant Jew is violated if an interview he gave on a weekday is broadcast on Shabbat. Indeed, unchecked expansion of freedom of religion will result in a cheapening of the freedom of religion and depleting it of content.

13. My conclusion, therefore, is that the broadcast of the film on Shabbat does not constitute a violation of the freedom of religion of the petitioners. In light of this conclusion, there is no need to examine what the proper (horizontal) balance is between the violation of freedom of religion (were it to have occurred) and the violation of freedom of expression. This examination raises a number of questions which are not simple, and which I have no need to discuss. I also do not have the need to discuss an additional claim against the petitioners. According to the claim, the respondents spent a prolonged period of time producing the film on the basis of a contract between the respondent and the production company, investing significant manpower and monetary resources. They acted in good faith, and had no basis to think that the petitioners, who cooperated with them throughout the time period, would wake up when the work was done and raise an objection to the broadcast of the film on the date that was determined in advance. In this situation there is room for the claim that the petition is lacking due to its delay, or that the petitioners are prevented from submitting the petition at this stage, or that it would not be just to grant the petitioners the requested remedy against the respondents. However, as stated above, these claims can be left without a determination.

The result is that the petition is denied. We have noted before us the declaration of the respondents that a caption will be added to the broadcast stating that the filming took place on a weekday.

Vice President Levin

I agree.

Justice D. Dorner

Unfortunately I cannot agree with the judgment of my colleague, President Aharon Barak. Indeed, I agree with the opinion of my colleague that the violation of the petitioners' feelings on its own does not justify, under the circumstances, granting the petition. However, were my opinion to be heard, we would grant the petition and rule that broadcast on Shabbat of a television film which documents the course of the lives of the petitioners, observant Jews – including interviews conducted with them (hereinafter: 'the film') – does not merely harm their feelings, but rather also unlawfully infringes on their right to freedom of religion.

The following are my reasons.

The facts

1. Production of the film which is approximately 24 minutes long, was ordered from respondents 2-4 (hereinafter collectively: 'the producers') by respondent no. 1 (hereinafter: 'the Second Authority'). This, with the intention of broadcasting it on Shabbat, in the broadcast time slot of half an hour, which is the only broadcast time slot that was available to the Second Authority for the purpose of broadcasting topics of special interest to the public. The producers knew this. However, the intention to broadcast the film on Shabbat, in the framework of the television show 'Documentary Word' dealing with the tension between Judaism and being Israeli, was not brought to the petitioners' attention. This, on the basis of a presumption based on the experience of the Second Authority with broadcasting interviews with observant Jews on Shabbat, including on the show 'Documentary Word' itself, according to which it fulfilled its obligation by accompanying the broadcast with the caption 'filmed on a weekday'.

At the same time, it never occurred to the petitioners, who are young, and lack experience and contact with the media, that the film was designated for broadcast on Shabbat. The subject was raised by the petitioners by chance on the day the filming was completed, and the producers promised to handle the matter. However, it was later made clear to the petitioners by the producers, that the film would be broadcast on Shabbat. Written requests by the petitioners to the Second Authority were to no avail. The Second Authority apologized to the petitioners for the harm to their feelings, but explained that it could not broadcast the film on a weekday. In their difficulty the petitioners turned to their Rabbi, Rabbi Shlomo Aviner, in order to find a solution in Jewish religious law that would not turn them into desecrators of Shabbat. Rabbi Aviner made a categorical and resolved determination based on Jewish religious law that broadcast of the film on Shabbat would entail a mass desecration of Shabbat with the participation of the petitioners, that showing the film with the caption 'filmed on a weekday' may be perceived as propaganda and may even amount to moral corruption, and that in his view there is no solution in Jewish religious law that would

allow the broadcast of the film on Shabbat. Rabbi Aviner repeated this position of his during the course of the discussion which took place in the framework of the petition before us for the purpose of reaching a consensual arrangement.

The questions

Against this background three questions arise. **First**, does the broadcast of the film, whose 'actors' are observant Jews, on Shabbat, violate their right to freedom of religion, meaning their right to fulfill the directives of their religion, as opposed to merely constituting harm to their feelings, as a result of the breach of the directive of their religion by other Jews. **Second**, what is the proper balance between the rights of the petitioners to freedom of religion and the rights of the respondents to freedom of expression and property? Third, how does the agreement between the petitioners and the producers as to the participation of the former group in the film, which was obtained without relating to the question of broadcast of the film on Shabbat, impact the parties' rights.

I will discuss these questions in order.

The right of the petitioners

2. The element which distinguishes freedom of religion from harm to religious feelings is that the violating action is prohibited to the believers or incumbent upon them according to the directive of their religion. The content of the religion's directive is determined by the religious guides of the Jewish religious law. H. Cohn explained this:

> ''Freedom of religion' means the freedom to do not what the religion permits, but only what the religion obligates. . . In other words: the right to freedom of religion is the right to fulfill all the directives that a person's religion imposes upon him, as long as he does not break the law. . . the question what is the 'directive' that the law obligates one to do is a religious question, not a legal one: every single religion and its own directives, and every religion determines what is the degree of obligation in the fulfilment of one directive or another' [Haim H. Cohn, *The Law*, [43] 525, emphases in the original].

We find a similar approach in comparative law. The following was written in a decision of the United States Supreme Court, handed down by Chief Justice Warren Berger:

> 'It is not within 'the judicial function and judicial competence,' ... to determine whether [the Amish] or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'
>
> [*United States v. Lee*, 455 U.S. 252, 257 (1982) [36] citing *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981)[37]]

In another decision of that court Justice Thurgood Marshall wrote:

> 'It is not within the judicial ken to question the centrality of

> particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.' [*Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989)[38]].

In Judaism which is not monolithic but decentralized, a believing person or believing public chooses their rabbi, and this rabbi is one who determines for him the obligations of his religion. As it says in our sources 'find yourself a rabbi and remove the doubt' (*Mishnah, Avot* 1, P, [51]; *Avot of Rabbi Natan* 22, A [52]). On this matter Justice Izhak Englard has written:

> 'There is no place for this court to make an assumption as to the content of a religious law which is different than the one which was determined by the Rishon Le'Tzion and by the Local Rabbi of Rishon Le'Tzion… It is a great principle in Jewish religious law that the public is obliged to follow the religious determination made by the local rabbi. . .'
>
> [CA 6024/97 *Shavit v. Chevra Kadisha GHSHA Rishon LeZion* [26]].

In the case before us Rabbi Aviner made the religious law determination that in their appearance in the film being broadcast on Shabbat the petitioners themselves will break the directive of the religion, even if the broadcast is done by others.

Indeed, there are also other approaches more lenient than the approach of Rabbi Aviner. See for example, a Jewish religious law ruling that permitted an observant film producer to sell his films to the Broadcast Authority knowing that they would be broadcast on Shabbat (Rabbi David Stav, 'Filmed on a Weekday, Broadcast on Shabbat' *Nekudah* 211 (1988) 52, [53] at 52-53). But the position of Rabbi Aviner is not esoteric, and has much support. See for example, Rabbi Shlomo Zalman Oyerbach 'Repeat Radio Broadcast on Shabbat', *Tehumin*, Religious Law Compilation on the Topics of Torah, Society, and State 17 (1997) 13 [54]; Rabbi Dr. Nahum Eliezer Rabinovich, Electricity in Jewish Religious Law (Part B – Shabbat and Holiday, 1981) 270 [55]; Rabbi Dr. Nahum Eliezer Rabinovich, 'Asking in the Matter' Hadarom Torah Collection 15 (1962) 120[56].

3. However, we need to draw a boundary between violation of freedom of religion and harm to religious feelings. Thus, constitutional protection will not be given to an extreme approach which regards every harm to religious feelings due to the breach of religious directives by Jews as a violation of the freedom of religion of the believer, in the sense of 'all of Israel are responsible for one another' (*Shavuot* 39, A [57]).Conversely, the criteria is not necessarily the identity of the one performing the prohibited act, but rather whether the prohibited act is obligatory for the observant person or whether they are being kept from fulfilling a religious obligation. The obligation need not necessarily be physical. Thus, for example, running a factory on Shabbat due to an emergency order, when the religion of the owner prohibits them from having their property involved in the desecration of Shabbat, may violate

their right to freedom of religion. Similarly, it was determined in Germany in 1973 that placing a cross on the judge's podium in court violates the freedom of religion of the Jewish attorney who appears before the court, and therefore is prohibited. See *BVerfGE* 35, 36 [39]. In a later case, from 1995, it was determined that hanging a cross in classrooms in a school violates the freedom of religion of the students who are not Christian and is therefore prohibited, and the law that instructed to do so was void. See *BVerfGE* 93,1 [40].

In our matter, broadcasting the film on Shabbat harms the petitioners not because of the action of others, nor in the name of a metaphorical mutual guaranty which binds all the people of Israel together. The petitioners are directly harmed, as they themselves are appearing on television on the day of Shabbat. They thereby become themselves partners to the desecration of Shabbat, and transgress, at the time of the broadcast, against their will, the directive of their religion.

My colleague writes, that 'their [the petitioners'] argument in fact is that the actions of others (the respondents) in opposition to the directives of the religion constitute a violation of the freedom of religion of the petitioners.' (In paragraph 11 of his judgment). In my opinion, this is not so. The petitioners have no claims against the broadcast of television on Shabbat. They have no complaint against the broadcast of the program 'Documentary Word' on Shabbat. Their petition and request is only in opposition to the broadcast on Shabbat of the specific film that was made about them and with their participation.

Such a broadcast contains a violation of the freedom of religion, which is the provision of the possibility of the individual to fulfill the directive of their religion without government intervention. Freedom of religion is 'of the basic liberties which are recognized according to our legal system and constitute a part of it' (President Meir Shamgar in HCJ 650/88 *Movement for Progressive Judaism in Israel v. Minister of Religious Affairs*, IsrSC [22] at 381) and it was guaranteed to all citizens of the state in the Declaration of Independence, whose 'principles every authority in the State must place before itself' (Justice J. Sussman in HCJ 262/62 *Peretz v. Local Council Kfar Shmaryahu*, [27] at p. 2116). Freedom of religion is counted among the liberties on which our democratic regime is based. See the words of Justice Barak in HCJ 292/83 *Temple Mount Faithful v. Head of Jerusalem Municipality* [12] at p. 454.

However, as with every right, freedom of religion too is not absolute, and it must be balanced against other rights and protected interests.

Balance between the parties' rights

4. In the case before us, against the right of the petitioners to freedom of religion stand the rights of the respondents to freedom of expression and property, which are also basic rights. On this matter case law has distinguished between values which override one another, in which case the balancing between them is 'vertical', and values of equal weight, which concede to one another, in order to enable their collective

existence, in which case the balancing is 'horizontal'. Vice President Barak explained this:

> 'In the 'vertical' balancing, one value – in colliding with another value – has the upper hand. However, this superiority is realized only if the requirements of the balancing formula are met as to the likelihood of the violation of the preferred value and its degree. Thus, for example, the public interest in public peace and public order overrides freedom of expression, as long as there is a 'near certainty' that actual damage will be caused to the public interest if the freedom of expression is not limited. . . In the 'horizontal' balancing the two conflicting values are of equal weight. The balancing formula examines the degree of mutual concession of each of the rights. Thus, for example, the right to movement and the right of assembly are of equal weight. The balancing formula will establish conditions of place, time, and scope in order to enable the collective existence of the two rights.' [HCJ 2481/93 *Dayan v. Commander of Jerusalem District* [28] at p. 474-475].

See also HCJ 6656/93 *Am K'Lavi v. Commander of Jerusalem Police* [29] at pp. 796-797; CrimA 7528/95 *Hillel v. State of Israel* [30] at p. 96; HCJ 5016/96 *Horev v. Minister of Transportation* [8] (hereinafter: 'HCJ *Horev*') at pp. 37-38.In the legal literature complications in the distinction between the two types of balancing have been pointed out. It has been noted that it is proper to strive for collective existence of values, even if these are not equal in weight. But, if it is not possible for the two values to co-exist, preferring one value over another is unavoidable, even if the two are of equal weight. See Izhak Zamir and Moshe Sobel, 'Equality before the Law' [49] at pp. 214-215.

5. In my opinion the basis of the distinction between the types of balancing is not in the result of the balancing in the sense of mutual concessions as opposed to preference of one value over another, but in its purpose, from which the criteria for balancing are derived. The vertical balancing – which is implemented in the collision between a human right and a public interest – is intended to minimize, as much as possible, the violation of the right even where the public interest overrides it. While the horizontal balancing – which is implemented in the collision amongst human rights, is intended to minimize, as much as possible, the violation of both of the rights. See and compare Aharon Barak, 'Protected Human Rights: The Scope and the Limitations' [50] at pp. 263-264.

A human right, by its nature, carries a social price. This price is expressed in the criteria for respect of human rights that were established in section 8 of the Basic Law: Human Dignity and liberty and in section 4 of the Basic Law: Freedom of Occupation (hereinafter: 'the limitations clause'). The limitations clause was also applied to violations by administrative authorities (and not only by the Knesset) of basic human rights (including rights that are not established in a basic law). See, for example, HCJ 4541/94 *Miller v. Minister of Defense* [31] at p. 138;

HCJFH 4466/94 *Nuseiba v. Minister of Finance*, [32] at pp. 86-87; HCJ *Horev* , **Ibid** at p.41-42.

However, the purpose of the limitation clause, the principle of proportionality being among its foundations, is to protect human rights by minimizing the infringement on them **when they collide with a public interest**. Thus, within the principle of proportionality, the authority is required to undertake from among the alternative means which may advance the realization of the public interest (the purpose) the means which causes the smallest harm to the right. Today, balancing formulas such as the 'near certainty' test and the 'reasonable possibility' test, which were formulated in case law even before the principle of proportionality was absorbed in our legal system, are also integrated into the principle of proportionality, and this for the purpose of establishing the legality of the decisions of the administrative authorities which violate human rights. These formulas take into account the idiosyncratic weight of the right and the public interest for the sake of which the violation of the right is sought.

The test of the lesser violation and the balancing formulas, therefore, reflect the public price that a democratic society is willing to pay in order to protect human rights. I explained this in another case which relates to the balance between a person's right to freedom from detention and protection of public safety:

> 'Where the realization of an interest has no price, there is no significance to anchoring it in a right, and all the more so in a constitutional basic right. The value in the rights of the public and victims' is generally collective and in opposition to it are the rights of the single accused. Without recognizing the rights of the accused, there is no existence to the rights of the potential victims, who may find themselves, in other circumstances, as the accused. Protection of basic human rights is not just a matter of the individual but of society as a whole, and it determines society's image.
>
> Indeed, it is possible that preventative detention of a person who has not yet committed a crime, cancellation of the presumption of innocence and replacement of the more stringent burden of proof which is customary in criminal law with the degree customary in civil trials would reduce the amount of crime and contribute significantly to the protection of public safety. But in our democratic regime, in which the liberty of the individual is recognized as a basic right, society concedes some of the possible protection of public safety.'
>
> [CrFH 2316/95 *Ganimat v. State of Israel* [33] at p. 645.]

6. The criteria in the limitations clause, and in particular the principle of proportionality, are not appropriate for the balancing of two human rights. The purpose of the horizontal balancing is to reduce the violation of both of the rights, and this, as said, through mutual

concessions which enable the realization of both simultaneously, even if not to their full extent. But if the possibility of the co-existence of the two competing rights does not exist, the prevailing right will be the one which if infringed upon will result in more severe damage to the individual. The severity will be determined, **first**, by the substance of said right. In this matter heavy-weight rights, which grow directly from the core of human dignity and the protection of human image, are to be distinguished from lighter-weight rights, which are more distanced from this core. However, one is not to merely relate to the title of the basic right, but also to the interests which stand at its foundation in the concrete instance and the specific values which are protected in the relevant context. See and compare HCJ 1715/97 *Office of Investment Managers in Israel v. Minister of Finance* [34] at pp. 422-423; HCJ 450/97 *Tnufah Manpower Services and Maintenances Ltd. v. Minister of Labor and Welfare* [35] at p. 452. **Second**, the degree of violation of the right and its scope are to be considered, and we should examine whether the realization of the competing right violates the center of the said right or its margin.

In our matter, I am of the opinion that the competing human rights – the freedom of religion of the petitioners, on the one hand, and the freedom of expression and the right to property (which is of a lesser weight) of the respondents, on the other hand – are of equal weight. However, mutual concession between them is not possible. In the existing circumstances, the right to freedom of religion has no room to retreat and its violation is substantive. And, as stated above, the petitioners have been forced – according to them and according to their rabbi – into the desecration of the Shabbat.

On the other hand, the circumstances of the case enable the respondents to concede a small portion of their rights, by broadcasting the film on a weekday instead of on Shabbat. Such a concession violates only the margin of the rights.

7. The respondents claim that 'the Authority has no other date to broadcast a program of this type', and that banning the film from being broadcast on Shabbat means banning it from being broadcast at all, which is equivalent to censorship and severe violation of the freedom of expression and the right to property.

This argument is not reasonable. Indeed, the Second Authority has a broadcast time slot on Shabbat. However, transferring the program from Shabbat to another day is not impossible. The legislator entrusted the Second Authority with the discretion to take time slots from a broadcast unit of a franchisee for the purpose of presenting programs on its behalf, as long as notice of this is given in a reasonable amount of time in advance. See section 48 of the Second Television and Radio Authority Law 5750-1990.

8. One would think that it would be possible to resolve the difficulty not only by a compulsory 'taking'. Even the Second Authority itself wrote the following in its response:

'Given that the only time slot of the Second Authority is on

> Shabbat, the realization of the suggested solution required approaching one or the other of the franchisees with a request that they agree to allot, at short notice, a date for broadcast of the program in the framework of their broadcasts. Taking into consideration the fact that broadcast schedules of franchisees are finalized several months before the date of broadcast, and the fact that documentaries such as this type of program do not draw a large viewership and therefore it is difficult to schedule commercials in them, the broadcast time that could be requested from the franchisees for this purpose is during the late night hours (around 1:00 at night).'

In the framework of the relationship between the franchisees which broadcast in the middle of the week, amongst themselves and between them and the Second Authority there have in the past been deviations from the broadcast schedule and the time slots, as a result of various circumstances. The broadcast schedule is not 'holy' and unchangeable, but rather, when necessary, it can be flexible according to needs and circumstances. Moreover, the broadcast of the film was postponed with the consent of both parties for a number of months, such that the argument as to the short notice is no longer valid.

Broadcast of the program on a weekday is not impossible, even if it entails a fair amount of effort, and possibly even the provision of financial indemnification to one of the franchisees due to considerations of viewership percentages (taking into account the addition of religious viewers who do not watch television on Shabbat). This being the case, transferring the program from Shabbat means only minimal violation of freedom of expression and the property right of the respondents.

It turns out therefore, that the requested balance which will enable 'joint living' and 'co-existence' of the rights necessitates granting the petitioners request. The petitioners have nowhere 'to retreat back' to. Their Rabbi appeared before the court and could not find a solution in Jewish religious law. Broadcast of the film on Shabbat means a forced infringement by the petitioners on the directive of their religion and the violation of their freedom of religion. The respondents on the other hand have room to maneuver. Refraining from broadcasting the film on Shabbat, while enabling its broadcast on another day, means, as said, a minimal degree of violation of freedom of expression and property of the respondents alongside protection of the freedom of religion of the petitioners.

The claim of delay

9. The respondents claim, that the petition was delayed, as for them it is routine to broadcast programs with the participation of religious people on Shabbat, with the accompanying caption 'filmed on a weekday', and that they had no basis for assuming that the petitioners would only raise objections to broadcasting the film on Shabbat after its making was completed.

The good faith of the respondents does not detract from the good faith of the petitioners, who are not accustomed to viewing television on Shabbat, and did not know about the said practice. In fact the petitioners claim that the possibility never crossed their mind that a program about them would be broadcast on Shabbat, and they were even misled into believing that this is the case. In this situation, there is no room for the claim of delay, as when the petitioners found out about the broadcast planned for Shabbat they approached the Second Authority and tried to prevent it.

However, the primary issue to me is that the Second Authority, which ordered a film about and with the participation of observant people, with the intention of broadcasting it on Shabbat – and according to its claim, even with the knowledge that there was no possibility of broadcasting it on a weekday – is not entitled to rely on the customary practice of placing the caption 'filmed on a weekday'. As, under the circumstances, it was obligated to present the petitioners with its intention to broadcast the film on Shabbat. Even if in practical life, in the face of such a practice, which is based, apparently, on more lenient approaches in Jewish religious law, the Second Authority is accustomed to refraining from obtaining prior consent in similar cases, in doing so, it thereby runs the risk that it will be forced to give up the broadcast on Shabbat if an objection arises.

As a rule, it is appropriate to impose on the Second Authority, or those who represent it who initiate the broadcast and are experienced in contracting with film subjects for the purpose of preparing programming about them, the duty of proper disclosure, when it is possible that the party who is the film's subject will be harmed.

Ramifications for the future

10. My colleague, the President, is concerned that consequent to a decision which prevents the broadcast on Shabbat 'chances are great that all television will be shut down on Shabbat followed by the radio.' I do not share these concerns.

There are certainly many people who will agree to participate in programs broadcast on Shabbat, including secular people, non-Jews, and even, as the respondents claim, religious Jews who agree to broadcasting with the accompanying caption 'filmed on a weekday'.

Moreover: the right to freedom of religion does not prevail in every case, but rather only when the injured parties are at the center of the program under discussion. When this is the situation, the technical action of the broadcasters is the also the substantive action of the subjects of the broadcast. This being so, the intensity of the belonging of the subjects of the broadcast to the program, as well as the harm to them, prevails over the right of the broadcasters to freedom of expression and their property. It cannot be inferred that this ruling extends neither to a case of subjects who were filmed by chance in a crowd, nor to public figures or authors who appear frequently on television on Shabbat. It is possible and necessary to draw analogies only to similar cases. The

words that were said in our sources in the context of the fear of an unlikely event in the case of checking for Chametz, are appropriate here:' One is not to be concerned that perhaps a rat has dragged it from home to home or from place to place, as if so, then from courtyard to courtyard and town to town and it is endless.' [*Mishnah*, *Psahim*, 1, B [58]]

Therefore, if my opinion were to be heard, we would make the *order nisi* absolute.

It was decided as per the opinion of President Barak against the dissenting opinion of Justice Dorner.

18 June 2001
27 Sivan 5761