HCJ 844/06

Haifa University

v.

1. Prof. Avraham Oz

2. Tali Yitzchaki

3. Amit Gazit

4. The National Labour Court

The Supreme Court sitting as the High Court of Justice

[14 May 2008]

Before Justices D. Beinisch, M. Naor, E. Hayut

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

Facts: The petitioner employed respondents 1-3 (hereinafter – the respondents) as lecturers in the Theatre Department. Against the background of complaints concerning the management of the department, an Investigative Committee was established, which decided not to renew the employment of respondents 2-3 and to transfer respondent 1 to another department. The Regional Labour Court rejected the respondent's request to order the petitioner to provide them with all of the material relied upon by the Committee, including protocols and testimony, ruling that the material they had received sufficed to allow for an adequate response on the respondents' part to the claims. This decision was appealed to the National Labour Court, which accepted the appeal and ordered the petitioners to transfer all of the materials to the responses, while deleting the names of the witnesses and other identifying details, basing its decision on the fact that as a hybrid body the University was governed by the rules binding an administrative authority vis-à-vis anyone who may be harmed by its decisions. This included the obligation to disclose relevant documents and to allow their examination. The relevance of the documents was based on the Investigative Committee's statement that its conclusions were based on the

testimony heard before it and protocols of the meetings in which the testimony was given. The National Labour Court's decision was appealed to the Supreme Court.

The petitioners claimed that its functions as a public body do not suffice to subject it to the entirety of obligations of administrative law including the obligation to allow individuals to examine its documents, especially where the imposition of these duties is not accompanied by the correlative authorities and powers conferred on an administrative authority. Furthermore, the petitioner claimed that in view of the Committee's explicit promise to the witnesses not to disclose the documents to the respondent, they should be given a privileged status. The petitioner argued that a breach of this promise violates the witnesses' right to privacy, a right which is protected on three normative levels: constitutional, statutory, and case-law. Compelling it to disclose additional material would decrease the future readiness of students and lecturers to cooperate with voluntary investigation committees at the University. Furthermore, the balance of interests weighs against issuing an order to disclose the documents. The reason for this is that the potential infringement of the witnesses' privacy and the damage to its ability to establish investigation committees in the future far outweighs the damage caused to the respondents by the failure to disclose additional documents.

The respondents claimed that receiving the material was essential for proving their claim that the Investigation Committee's Report was replete with inaccuracies that raised doubts about the authenticity of the testimony and the documents submitted to it. Furthermore, the documentation would enable them to confront the allegations against them on a personal level and prove that the Investigation Committee was established and its proceedings conducted with the express purpose of removing them from the Department. Furthermore, the petitioner's hybrid status and its intensified obligation of good faith as their employer precluded it from refusing to disclose the documents, and this obligation was applicable to the petitioner even were it not classified as a hybrid body. They claimed that no basis had been laid for the establishment of a privilege, the promise made to the witnesses contradicted public policy, and the testimony and complains before the committee did not fall within the rubric of private affairs within the meaning of section 2 (8) of the Protection of Privacy law. At all events, they argued, their right to a fair and just trial overrides the right of the witnesses to privacy.

The Supreme Court dismissed the petition and ordered the petitioners to provide respondents with the protocols while deleting the names of witnesses and other identifying particulars.

Held: As a proceeding being adjudicated by a statutory judicial tribunal, the starting point for disclosure and examination must be that of maximum disclosure and the broadest possible examination of the information relevant to the dispute.

The doing of justice is based on the disclosure of the truth, thereby serving the interest of the individual litigant and the public interest in ensuring the "proper functioning" of the entire social structure, which requires a fair hearing that accommodates the presentation of the entire factual evidentiary foundation, thus affording the party the opportunity to properly contend with the claims of the opposing party. While the overall aim of the rules of procedure is the discovery of truth, as is the rules of evidence, the principle is not an absolute one, and may be qualified by other competing rights and values which are of importance to the individual and to society and worthy of protection, even if they are in conflict with the principles of broad disclosure.

In order for a litigant in a judicial proceeding to be exempted from the obligation to disclose relevant evidence at his disposal, he must prove a privilege recognized by law or by accepted case law that allows him to withhold it. Having proved the existence of that privilege, and to the extent that the privilege is a relative one, the litigant must then show that the interest in the suppression of the evidence outweighs the need to disclose it for the purposes of doing justice.

The normative sources referred to by the petitioner, namely the constitutional and legal right of witnesses and complainants to privacy, and the public interest in a privilege of information given to voluntary examination committees in academic institutions, have not, to date, yielded any statutory or case-law privilege in Israeli law with respect to testimony or documents submitted to an investigation committee of an academic institution. In the establishment of a new case-law privilege it must be remembered that privilege is the exception and the rule is disclosure of most of the relevant evidence, and as such a party claiming privilege must prove both the existence of a legally recognized privilege and a more important consideration of public interest that justifies its application in cases in which the court has discretion.

Given that the issue concerns a voluntary investigation committee intended to examine internal university matters it would seem that the public interest in ensuring the effective operation of this kind of committee does not, per se, warrant the establishment of a high-level legal norm of privilege in relation to the testimony and evidence presented to it. Regarding the “chilling effect” of duty of disclosure upon the

willingness of potential witnesses to give testimony, thus impairing the functioning of university investigation committees, this consideration is outweighed by the need to enable the employees harmed by the committees' conclusions to defend themselves against allegations leveled at them, and this is certainly the case when the procedure is conducted before a judicial forum adjudicating the question of the legal validity of a change in the employment conditions of respondent 1 and the termination of its employment of respondents 2 and 3.

Notwithstanding the constitutional status of the right to privacy, the provisions protecting it do not encompass all violations of the right to privacy, and indeed there is nothing to prevent the creation of additional protections of this kind in settled case law, which draw their justification from the right to privacy, even if the protection has not been explicitly regulated by statute. Nonetheless, the alleged infringement of the privacy of the complainants and the witnesses does not justify the creation of a high-level defense of privilege against the disclosure of the information. The gravity of the alleged infringement of privacy, to the extent that there was such, is relatively low, and at all events does not match the harm liable to be caused to the respondent's right to a fair proceeding if the protocols and complaints are not disclosed.

Neither does the promise of confidentiality given by the Committee to the complainants and the witnesses, constitute a basis for privilege, and the violation of the privacy of the witnesses and complainants involved in the breach of that promise does not establish a public interest that justifies vesting the information with a privileged status in the circumstances of this case in view of the weight of the opposing considerations.

Justice Naor: The question whether or not the names and identifying details of the complainants and witnesses should have been omitted from the copies of the minutes relayed to respondents should be left for future decision, as there is no petition of respondents before us, and as that is not the issue in this case. Insofar as the voices of the complainants and the witnesses were not heard in the proceedings before us, nor can it be said that the promise given to the witnesses should be seen as including an unwritten reservation to the effect that the promise is subject to any lawful requirement to give testimony or submit a document. The basis for compelling disclosure in this case should rather be that promise of confidentiality cannot override provisions of law requiring the giving of testimony or disclosure of documents. There is an uneasy feeling regarding the fact that the promise was not kept and the interests of complainants and witnesses were not safeguarded, nonetheless, in the current circumstances, the interest of safeguarding the respondents' workplace and honor

overrides the interest of the complainants and witnesses. Note well: if their testimony is accepted they have nothing to fear. Nevertheless, if they provided incorrect information, on the basis of the secrecy promise, there is no reason to protect them. A proper judicial proceeding reveals the truth, whatever it may be. Not having examined the disputed documents and related testimony, the court cannot make any definite finding on the question of whether there was an infringement of privacy of the complainants and witnesses. However, even under the assumption of a certain infringement of the right to privacy to the extent that it extends to court proceedings, when balanced against the harm to the respondents due to non-disclosure of the documents, the respondents would have the upper hand. The interest in preventing harm to the good names, careers and dignity of the respondents, and the public interest in revealing the truth and the propriety of the judicial process, outweigh the interest in preventing a chilling effect on witnesses and submitters of evidence to investigative committees. In view of the above, the petitioner should be left with a choice either to disclose the information in the framework of the litigation, or to cancel the dismissal. This is similar to the choice of a criminal prosecutor when it is held that he must reveal classified evidence: he can choose to reveal the evidence or to withdraw the charges. The question whether the petitioner should reveal the information due to its status as a hybrid private-public body should be left to future decision, as there was not a sufficient factual basis laid before us. There may also be differences on this issue between a committee of investigation and an appointments committee.

President Beinisch. The respondents' consent to disclosure of the documents and protocols subject to the deletion of the witnesses' names and other identifying details detracts from the force of the petitioners' claims concerning the severity of the infringement of the witnesses privacy and the alleged "chilling effect".

Without ruling on the matter it seems that in exceptional cases, the public interest might justify recognition of a case-law based privilege which would prevent the divulging of sources who testified before voluntary investigation committees, for example - committees charged with the investigation of matters in which there is a major public interest in receiving information. Such circumstances do not exist in the case of a voluntary Investigation Committee set up to examine difficulties that arose in the management of the Theatre Department from both the academic and administrative perspectives. Notwithstanding the importance of this kind of committee for enhancing the quality of instruction and streamlining of the support systems in academic institutions, they do not serve a critical public interest that supersedes the broad principle of disclosure, the reasons for which lie in the public welfare and the

aspiration to expose the truth and do justice in the judicial process, and in the respondents' personal interest in properly defending themselves against the damage to their occupation and their dignity.

The absence of a privilege however does not mean that the Investigation Committee was not permitted to make any promise regarding the disclosure of the testimonies given before it, although the nature and extent of such a promise would be dependent on the statutory conditions applicable to the matter. Under the circumstances the promise given by the Investigation Committee was not, in essence, violated, in view of the decision that the material would be given to the respondents without revealing the witnesses' names.

Petition denied.

Legislation Cited

Basic Law: Human Dignity and Liberty

Council for Higher Education Law, 5718-1958.

Commissions of Inquiry Law, 5729-1968.

Courts Law [Consolidated Version], 5744-1984.

Evidence Ordinance [New Version] 5731-1971.

Freedom of Information Law, 5758-1998.

Internal Audit Law. 5752-1992.

Labour Court Law, 5729-1969, s. 33.

Military Justice Law, 5755-1955.

Patient's Rights Law, 5756-1996.ss. 3 (a), 3 (b) .5, 21

Protection of Privacy Law, 5741-1981.

State Comptroller Law, 5718-1958 [Consolidated Version], s. 30.

Israeli Supreme Court Cases Cited

[1] LabA 1185/04 *Bar Ilan University v. Kesar* (not reported)

[2] LCA 4999/95 *Alberici International Foreign Partnership registered in Israel v. State of Israel* [1996] IsrSC 50(1) 39

[3] LabA 482/05 *Mashiah v. Israel Leumi Bank Ltd.*(2005) (not yet reported).

[4] 298/86 *Zitrin v. Disciplinary Tribunal of Bar Association, Tel-Aviv District* [1987] IsrSC 41 (2) 337.

[5] LCA 1412/94 *Hadassah Ein Karem Medical Association v. Gilead* [1995] IsrSC 49(2) 516.

[6] LCA 6546/94 *Bank Iggud LeYisrael v. Azulai* [1995] IsrSC 49(4) 54.

[7] LCA 4708/03 *Hen v. State of Israel - Ministry of Health* (2006) (not yet reported)

[8] LCA 2235/04 *Israel Discount Bank Ltd v. Shiri* (2006) (not yet reported).

[9] LCA 5806/06 *Estate of Michael Nemirovsky (dec.) v. Shimko* (2007) (not yet reported).

[10] LCA 2498/07 *Mekorot Water Company Ltd. v. Bar* (2007) (not yet reported).

[11] LCA 4234/05 *United Bank Mizrahi Ltd. v. Peletz* (2005) (unreported).

[12] LCA 4249/98 *Suissa v. Hachsharat HaYishuv Insurance Company Ltd*. [1999] IsrSC 55(1) 515.

[13] LCA 291/99 *D.N.D. Jerusalem Stone Supply v. V.A.T. Director* (2004) IsrSC 58(4) 221.

[14] CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* (2006) (not yet reported).**[2006] (1) IsrLR 320**

[15] LCA 7731/04 *State of Israel-Ministry of Health v. Estate of Avital Halperin (dec.)*)2007(

[16] LCA 7114/05 *State of Israel v. Hizi* (2007) (not yet reported).

[17] AAA 6013/04 *State of Israel-Transport Ministry v. Israeli News Co. Ltd.* (2006) (not yet reported).

[18] LabA 114/05 *Mekorot Water Company Ltd v. Levi* (2005) (unreported).

[19] LCA 1917/92 *Skoler v. Gerbi* [1993] IsrSC 47(5) 764.

[20] MApp 838/84 *Livni v. State of Israel* [1984] IsrSC 38(3) 729.

[21] CrimApp 1924/93 *Greenberg v. State of Israel* [1993] IsrSC 47(4) 766.

[22] CrimA 889/96 *Mazrib v. State of Israel* [1997] IsrSC 51(1) 433.

[23] CA 327/68 *Zinger v. Beinon* (1968) IsrSC 22(2) 602.

[24] CA 407/73 *Goanshere v. Israel Electric Company Ltd.* (1974) IsrSC 29(1) 169.

[25] LCA 2534/02 *Shimshon v. Bank HaPoalim Ltd.* (2002) IsrSC 56(5) 193.

[26] LCA 6649/07 *Shlomi Local Council v. Shechtman and Co. Building and Development Company* (2007) (unreported).

[27] LA 740/05 *Pas v. General Health Services* (2005) (unreported).

[28] 494/06 *State of Israel v. Evenchik* (2007) (not yet reported).
[29] LCA 637/00 *Israel Discount Bank Ltd. v. Evrat Insurance Agency Ltd*. [2001] IsrSc 55(3) 661.
[30] HCJ 5743/99 *Duek v. Mayor of Kiryat Bialik* (2000) IsrSC 54(3) 410.
[31] HCJ 7805/00 *Aloni v. Jerusalem Municipality Auditor* (2003) IsrSC 57(4) 577.
[32] CrA 2910/94 *Yefet v. State of Israel* (1996) IsrSC 50(2) 221.
[33] CA 2906/01 *Haifa Municipality v. Menorah Insurance Company Ltd.* (2006) (not yet reported).
[34] LCA 9728/04 *Atzmon v. Haifa Chemicals* (2005) IsrSC 59(3) 760.
[35] Mot 121/58 *Keren Kayemet LeYisrael v. Katz*, IsrSC 12 1472.
[36] AAA 7151/04 *Technion – Israel Institute of Technology v. Datz* (2005) IsrSC 59(6) 433.
[37] CA 467/04 *Yatah v. Mifal HaPayis* (2005) (not yet reported).
[38] CA (BS) 1038/00 *Pener v. Ben Gurion University of the Negev* (2001) IsrDC 5761(1) 310.
[39] OM (Haifa) 283/04 *Douhan v. Haifa University* (2005) (unreported).
[40] OM (Haifa) 217/05 *Namana v. Haifa University* (2006) (not yet reported).
[41] LCA 7568/00 *State of Israel Civil Aviation Authority v. Aharoni* (2001) IsrSC 55(5) 561.
[42] CrA 5026/97 *Gal'am v. State of Israel* (1999) (unreported).
[43] HCJ 6650/04 *A. v. Netanya Regional Rabbinical Court* (2006) (not yet reported).
[44] CrA 1302/92 *State of Israel v. Nahmias* [1995] IsrSc 49(3) 309.
[45] CA 8825/03 *General Health Services v. Ministry of Defence* (2007) (not yet reported).
[46] MiscApp 82/83 *State of Israel v. Alia* (1983) IsrSC 37(2) 738.
[47] HCJ 355/79 *Katalan v. Prisons Authority* (1980) IsrSC 34(3) 294.
[48] HCJ 259/84 *M.Y.L.N. Israel Institute for Best Product and Business Ltd. v. Broadcasting Authority* (1984) IsrSC 38(2) 673.
[49] HCJ 1435/03 *A. v. Disciplinary Court for State Workers Haifa* [2003] IsrSC 58(1) 529.
[50] CA 4963/07 *Yediot Aharonot Ltd. v. Adv. A.* (2008) (not yet reported).
[51] CA 439/88 *Registrar of Data Bases v. Ventura* (1994) IsrSC 48(3) 808.
[52] CA 2629/98 *Minister of Internal Security v. Walfa* (2001) IsrSC 56(1) 786.
[53] HCJ 64/91 *Hilef v. Israel Police* (1993) IsrSC 47(5) 653.
[54] HCJ 10271/02 *Fried v. Israel Police- Jerusalem Region* (2006) (not yet reported).
[55] CrA 1335/91 *Abu Fadd v. State of Israel* (1992) IsrSC 46(2) 120.

[56] CA 391/89 *Lesserson v. Shikun Ovdim Ltd*. (1984) IsrSC 38(2) 237.

[57] CA7664/00 *Abraham Rubinstein and Co. Contracting Company Ltd. v. Holon Municipality* (2002) IsrSC 56(4) 117.

[58] HCJ1435/03 *A. v. State Employees Disciplinary Court* (2003) IsrSC 58(1) 529.

[59] CA 444/94 *Orot Artists Representation v. Atari* (1997) IsrSC 51(5) 241.

[60] AP 3542/04 *Salas v. Salas* (2005) (not yet reported).

For the petitioner - Haim Berinson

For respondents 1 – 3 - Orna Lin

JUDGMENT

Justice E. Hayut

1. Haifa University (hereinafter: "the petitioner") is a "recognized institution" as defined in the Council for Higher Education Law, 5718-1958 (hereinafter: "the Council for Higher Education Law"). It employed respondents 1 – 3 (hereinafter: "the respondents") as lecturers in the Theatre Department (hereinafter: "the Department" or "the Theatre Department") in the Faculty of Humanities. Respondent 1 is a tenured academic faculty member of Haifa University, at the rank of associate professor. He also headed the Theatre Department between 1995 – 2000, and headed the theoretical stream until 2004. The petitioner employed respondents 2 and 3 in the Theatre Department at the rank of senior lecturers (artists) for a number of years. Respondent 2 is the wife of respondent 1. She served as the coordinator of the Design stream in the Department, and respondent 3 served as the coordinator of the Stage Management and Acting stream. The employment of respondents 2 and 3 was periodically renewed by virtue of letters of appointment. The last of these related to the period from 1 October 2001 to 30 September 2004.

2. Following complaints regarding problems with the administration of the Theatre Department, the Teaching Committee of the Faculty of Humanities decided on 14 July 2003 to establish an Investigation and

Evaluation Committee (hereinafter: "the Committee" or "the Investigation Committee"). The Committee comprised three lecturers from the petitioning University, and an additional lecturer from the Theatre Department at Tel-Aviv University. Its mandate was to "investigate all aspects of the Department in the areas of teaching, research and production, and submit its conclusions and recommendations with a view to the advancement and the development of the Department." The Committee held twelve meetings and had recourse to written materials from various sources as well as interviews that it conducted. Thirteen teachers from the Theatre Department appeared before the Committee, in addition to the Dean of the Faculty of Humanities, the Head of the Theatre Department at the time, the Departmental secretary and one student. The respondents, too, appeared before the Committee, and they also filed additional written pleadings. On 22 March 2004 the Committee submitted a detailed report, listing a series of problems pertaining to the management of the Department, from both an academic and an administrative perspective. *Inter alia,* the Report related to the functioning of the teaching staff, noting the Committee's impression of the tense relations between the respondents, who called the shots in the Department, and all its other members. The testimony presented a picture of the respondents' "total control over the Department" in setting the curriculum, in controlling the employment and dismissal of teachers, and in relation to the students." The respondents were described as having imposed a "reign of terror" over the Department. The Committee concluded that "there is a clear connection between the 'academic shortcomings and the personal composition' of the Department" and that "[ ]the academic and administrative flaws of the Department cannot be rectified unless there are significant personnel changes." The Committee therefore recommended, *inter alia*, the non-renewal of the employment contract with four of the teachers in the Department, including respondents 2 and 3. Regarding respondent 1, who had tenure, the recommendation was "to examine the accepted means of dealing with these kinds of cases in the University, in order to prevent a repetition of the situation in which the person who founded and headed the Department continues to function as a source of opposition to the incumbent Department head, charged with the rehabilitation of the Department." The Report included quotations, albeit anonymous, from testimony and documents submitted to the Committee; the Committee stated at the outset that the anonymity was mandated by "its promise to preserve full confidentiality regarding the particulars of the testimony and those who testified, to enable the interviewees to speak frankly, freely and fearlessly."

3. With the submission of the Report and in view of its implications for the respondents' continued employment, the petitioner initiated a hearing

process, before deciding on the matter. The Head of the Theatre Department at that time, Prof. Menachem Mor, presided over the first stage of the hearing, prior to which the Committee's Report was submitted to the respondents. Their attorney, Adv. Lin, also asked to receive all of the documents submitted to the Committee, as well as the protocols of its deliberations. In the wake of this request the petitioner permitted the respondents to examine various documents, including correspondence, summaries of the Teaching Committee's meetings, and letters of complaint. It also gave them copies of the protocols from the meetings of the Investigation Committee in which the respondents had participated. On the other hand, the petitioner refused to provide the respondents with the other protocols of the Committee's sessions, as well as other documents submitted to it, noting that the large number of documents that the respondents had already received, along with the contents of the Committee's Report itself, were sufficient for them to properly present their case. The respondents submitted their pleadings orally and in writing to Prof. Mor based on the material they had received. On 6 May 2004 Prof. Mor notified the respondents that his recommendation to the Dean of the Faculty was that the Investigation Committee's recommendations should be implemented as far it concerned them. Regarding respondent 1 the recommendation was to find a "suitable employment alternative in the framework of the University in another department." Regarding respondents 2 and 3 his recommendation was not to renew their appointments for the 5765 [2004-5] academic year. The respondents submitted their objections to these recommendations to the head of the Humanities Department at the time, Prof. Yossi ben Artzi, complaining that they had not received all of the relevant documents that served the Investigation Committee in its work. In his response of 20 May 2004, the petitioner's attorney submitted a complete list of documents that the petitioner had refused to disclose, briefly describing their contents and the reason for their non-disclosure. Following is the list of the documents and the reasons given, as stated:

1. Five protocols of the meetings of the Investigation Committee in which the respondents did not testify. The petitioner claims that these protocols cannot be disclosed for fear of the revealing the identity of those who gave information in those meetings.

2. Decisions of the Council for Higher Education regarding the Departmental curriculum – "not relevant".

3. Two letters to the Dean from teachers in the Department, and the Dean's response to one of them, and a letter to the Committee from a Department teacher. The petitioner claimed that they could not be disclosed so as not to reveal the identity of their writers.

4. Four letters of complaint against the teachers of the Department, including respondents 2 and 3. The petitioner contended that they could not be disclosed so as not to reveal the identity of the students who complained.

5. A teacher's letter concerning a student who had complained. The petitioner contended that they could not be disclosed so as not to reveal the teacher's identity.

6. A report submitted to the Committee by a Department teacher. The petitioner contended that it could not be disclosed so as not to reveal the identity of the person who gave the information.

At the end of the hearing process, the Dean of the Faculty of Humanities announced his decision to endorse the conclusions of the Head of the Theatre Department. Regarding the demand for disclosure of documents, the Dean stated in his decision, delivered to each of the respondents, that "the majority of the documents submitted to the Committee were handed over to you at your request and there were substantive and justified reasons for withholding the particular documents that you did not receive. These reasons were explained to Adv. Lin, and there was no intention of turning them into 'mystery files' for you. At all events, I believe that the claims included in these documents were presented to you and that you were given a fair opportunity of responding to them." An additional and final proceeding pertaining to the hearing was held in the presence of the Rector of the University, Prof. Aharon ben Zeev. He too rejected the respondents' claims and endorsed the decisions of the Department Head and the Dean (see his letter to the respondents, dated 13 June 2004).

The proceedings in the Labour Court

4. Upon receiving the Rector's decision, the respondents petitioned the Regional Labour Court requesting temporary measures. Their main request was for an injunction against the removal of respondent 1 from his position and against the dismissal of respondents 2 and 3 (two other lecturers affected by the Report joined these proceedings, but subsequently decided not to pursue them). In that framework they also requested an Order instructing the petitioner to provide them with all the material relied upon by the Investigation Committee in its Report and its conclusions, including protocols of the Committee's deliberations, testimonies that were brought before it, and any other document relied upon. The petitioner objected to the application, but agreed to transfer all the requested documents in a sealed envelope for the inspection of the Regional Labour Court, and this was done. In its decision of 14 July 2004 the Regional Labour Court (Judge M. Spitzer, employees' representative Mr. Y. Baadni and employers' representative Ms. H. Blumel) rejected the respondent's petition for temporary measures, ruling, *inter alia*,

that the Report of the Committee had quoted statements made by the witnesses who appeared before it, and by doing so had struck an appropriate balance between the interests of the parties. At all events, the Regional Labour Court ruled that the subject of how much information should have been given to the respondents during the Committee's deliberations and at the hearing stage would be adjudicated in the principal proceedings, as the material before them sufficed for purposes of the current proceeding. The Court further ruled that the petitioner had provided them with extensive and substantive material and that "the substance and spirit of the matter had been brought to their attention". Accordingly, the Labour Court further determined that it would appear that the documents to which the respondents did not have access did not prejudice their right to state their case in the hearing process. In its decision, the Labour Court further stressed that the respondents "had received the right to a hearing on *three occasions*, two of which were appeal tribunals." The application for leave to appeal filed by the respondents in the National Labour Court was rejected on 29 July 2004, and two months later, on 30 September 2004, the petitioner terminated the employment of respondents 2 and 3 upon the expiry of their letters of appointment. As for respondent 1, his employment in the Theatre Department was discontinued and he began teaching in the Department of General Studies at the University.

Despite the rejection of their application for temporary measures, the respondents filed suit in the Haifa Regional Labour Court against the petitioner for having terminated their employment in the Theatre Department, requesting, *inter alia*, to be reinstated in their positions in the Department (LF 2521/04). In the course of the preliminary proceedings, the respondents again applied for the disclosure of all of the material submitted to the Investigation Committee, as well as the protocols of its meetings. In its decision of 29 March 2005 the Haifa Regional Labour Court (Judge M. Spitzer) dismissed the application. It ruled that numerous documents were given to the respondents before filing suit and numerous citations from the witnesses' testimony had been cited in the Committee's Report, and that all of these sufficed to allow for an adequate response on the part of the respondents to the claims against them. The court further noted that in the judgment of the National Labour Court in LabA 1185/04 *Bar Ilan University v. Kesar* [1], the Court had ordered Bar Ilan University to disclose the protocols of the Appointments Committee in the framework of a legal proceeding initiated by two faculty members against the decision of the University not to promote them. The court distinguished between the two cases, pointing out that *Bar Ilan University v. Kesar* involved the Appointments Committee, whereas the case at hand involved an Investigation Committee that was competent only to

make recommendations. To complete the picture, it is noteworthy that the *Kesar* case is also being adjudicated before this Court (HCJ 7793/05), in a petition filed by Bar Ilan University as well as other academic institutions that joined the *Kesar* proceeding in the National Labour Court.

5. Having been granted leave to appeal, the respondents appealed this interlocutory decision in the National Labour Court, and the appeal was allowed. In its judgment of 19 December 2005 (LabA 371/05, Judges S. Adler, E. Rabinovitz, N. Arad, the workers' representative Mr. S. Guberman and the employers' representative, Mr. Tz. Amit), the National Labour Court ordered the petitioner to submit all the protocols from the meetings of the Investigation Committee for the respondents' examination. It did, however, permit the petitioner to delete the witnesses' names and any other identifying particulars. As for the additional material submitted to the Investigation Committee, and not submitted for the respondents' examination (the letter from three Department teachers and one of the Dean's responses, four letters of complaint against the Department teachers, a letter of a Department teacher regarding a student's letter of complaint, and a report submitted by the Department teacher), the National Labour Court ruled that these documents might contain information concerning third parties, or that the disclosure of which might infringe the right of privacy of others, and that they should therefore be submitted for examination by the Regional Court, which would then rule on the "deletion of details that might be harmful to parties not connected to the proceedings, and on the possibility of allowing the disclosure of the documents [to the respondents] without such disclosure harming the interests of a third party." The National Labour Court based these rulings on its judgment in *Bar Ilan University v. Kesar* [1], stressing that insofar as the petitioner's actions in its employer capacity were concerned, the petitioner was in fact a hybrid body, and in that sense it was governed by the rules binding an administrative authority *vis-à-vis* anyone who may be harmed by its decisions. This included the obligation to disclose relevant documents and to allow their examination. In view of the fact that the Report of the Committee mentioned that its conclusions were based on the testimony heard before it, the court further affirmed the relevancy of the material requested by the respondents, including protocols of the meetings in which the testimony was given. The National Labour Court rejected the petitioner's claim that the documents not presented for the respondents' examination were privileged by virtue of the Committee's promise of confidentiality to the witnesses, and it also dismissed the contention that violation of this promise constitutes a violation of the obligation of confidentiality within the meaning of s. 8(2) of the Protection of Privacy Law, 5741-1981 (hereinafter: "Protection of Privacy Law"). In this

context the National Labour Court held that "the Investigation Committee had voluntarily spread a cloak of secrecy over its deliberations," and that there was no normative source mandating such secrecy. It further ruled that a promise of this kind contradicts public policy "and is even tainted by illegality in view of the infringement of [the respondents'] privacy, and the impairment of their ability to refute the accusations leveled against them in the Committee's hearings, and to contest the Committee's conclusions in a legal proceeding. Under the circumstances of this case the promise of confidentiality given to the witnesses may be seen as a violation of the obligation of good faith owed by the University to its workers, who were the direct victims of the Committee's recommendations…."

Nevertheless, and despite its conclusion that the petitioner had not succeeded in identifying a normative source for the privileged status of the documents, the National Labour Court felt that there were grounds for striking a balance between the competing interests, in reliance on its judgment in *Bar Ilan University v. Kesar* [1]. The respondents' personal and direct interest in the disclosure of the documents had to be balanced against the damage likely to be caused to the witnesses who appeared before the Committee, as well as the damage to the public interest in the event of witnesses refraining from giving information to investigation committees for fear that promises of confidentiality would not be honored. In view of these balances the National Labour Court attached the aforementioned conditions to the transfer of protocols and additional materials.

Hence the petition before us.

The pleadings of the parties

6. The petitioner claims that the judgment of the National Labour Court is of broad and fundamental significance, and that it contains substantive legal mistakes which must be rectified in the interests of justice. While agreeing that as an institution for higher education it fulfills public roles, the petitioner argues that this is not sufficient to render it subject to obligations in the area of administrative law, including the obligation to allow individuals to examine its documents, especially where the imposition of these duties is not accompanied by the correlative authorities and powers conferred on an administrative authority. The petitioner's central claim is that the documents not disclosed to the respondents should be granted privileged status, by virtue of the Committee's explicit promise to the witnesses, as specified in the Committee's Report. The petitioner claims that a breach of this promise violates the witnesses' right to privacy, a right which is protected on three normative levels: constitutional, statutory, and case-law. The normative constitutional

source is s. 7 of Basic Law: Human Dignity and Liberty; the normative statutory source is ss. 2(8) and 2(9) of the Protection of Privacy Law; the normative case-law source is based on an analogy from this Court's rulings that established the privileged status of information and sources of information in cases of special relations of trust or for purposes of protecting the privacy of third parties who are not direct parties to the litigation. In this context the petitioner claims that its obligation of confidentiality derives not only from the promise of confidentiality given by the Investigation Committee to the witnesses, but also from its obligation as an educational institution to maintain the confidentiality of the private affairs of the students, and from its obligation as an employer to maintain the confidentiality of the private affairs of its lecturers, whose testimony and complaints are included in the remaining documents that were not given to the respondents. The petitioner further argued that the National Labour Court erred in holding that the Committee's promise of confidentiality contradicts public policy, for in fact, such a promise is consistent with the fundamental principles of Israeli law and the protection it affords to individual privacy. The petitioner further stresses that compelling it to disclose additional material would decrease the future readiness of students and lecturers to cooperate with voluntary investigation committees at the University. The petitioner claims that the establishment and efficient functioning of such committees are a clear public interest and to that end it is necessary to ensure the confidentiality of the information submitted to them, to the extent that the committees deem necessary.

The petitioner further claims that the balance of interests, too, weighs against issuing an order to disclose the documents. According to the petitioner, disclosure of material potentially prejudicial to a third party should be permitted in rare cases only, after the material has been examined and the third party heard. Even then, its disclosure is justified only when the information is essential, with no evidentiary substitute, and its disclosure does not disproportionately infringe the third party's privacy. The petitioner contends that in the present case, the proper balance dictates the conclusion that the potential infringement of the witnesses' privacy and the damage to its ability to establish investigation committees in the future far outweighs the damage caused to the respondents by the failure to disclose additional documents. It further emphasizes that the respondents received numerous documents and that the multiple citations from the witnesses' testimony in the Report likewise provide a suitable alternative to full disclosure of the contents of the testimony. In this context the petitioner also points out that the protection of confidentiality is particularly important in the case at hand due to the Committees' findings regarding the "reign of terror" imposed in the

Department by the respondents. What is more, the respondents' suit to be restored to their places of work is currently pending in the Regional Court, and many of the witnesses are dependent upon the respondents for their livelihood, even outside the University precincts. The petitioner claims that "all of the undisclosed witnesses from among the teaching and the administrative staff continue to work in the Department and are genuinely frightened by the prospect of a return of the 'reign of terror, fear and intimidation'." The petitioner further argues that that the National Court had not heard the position of the witnesses and the complainants and that unlike the Regional Court, the National Court had not examined the documents. For all these reasons, the petitioner argues that the judgment of the National Court should be set aside, or alternatively, that an order should be given to submit the documents for the examination of an expert, who would give his opinion on the adequacy of the material handed over to the respondents for the purposes of conducting their suit. As a further alternative, the petitioner requests that the judgment of the National Labour Court be set aside and the file returned to it for renewed deliberation after it examines the documents and notifies all the potential victims of their right to object to the submission of information. The petitioner also stated that it was prepared for this Court to examine the documents that had been submitted for the examination of the Regional Court.

7. The respondents claim that the petition should be rejected *in limine* due to the petitioner's lack of clean hands for having omitted certain details from its petition, for the delay in filing, and for its failure to comply with the decisions of the Regional Labour Court. On a substantive level, the respondents claim that the National Labour Court's decision was consistent with principles of labour law and that there were no grounds for intervention. The respondents claim that the protocols and documents they seek are essential for proving their claim that the Investigation Committee's Report was replete with inaccuracies that raised doubts about the authenticity of the testimony and the documents submitted to it. Furthermore, the documentation would enable them to confront the allegations against them on a personal level and prove that the Investigation Committee was established and its proceedings conducted with the express purpose of removing them from the Department. They further claim that the petitioner's hybrid status and its intensified obligation of good faith as their employer precluded it from refusing to disclose the documents, and that this obligation was applicable to the petitioner even were it not classified as a hybrid body. The respondents further contended that the petitioner had not shown any basis for the alleged privilege, and that at all events the promise to the witnesses, which had not been proved, did not extend beyond an obligation of confidentiality that did

not reach the level of privilege. They claim that the National Court rightly ruled that the promise made to the witnesses contradicted public policy and that testimony and complaints before the Committee did not fall within the rubric of "the private affairs" of the witnesses and the complainants within the meaning of s. 2(8) of the Protection of Privacy Law. Alternatively they contend that since the petitioner had violated the respondents' right to privacy by the actual disclosure of the Committee's Report, it had no right to claim the protection of privacy of others. Either way, the respondents maintain that their right to a fair and just trial overrides the right of the witnesses to privacy, and they stress that the National Court was under no obligation to examine the documents before deciding the question of its disclosure. Moreover, the respondents argue that a distinction must be made between the protocols and the other documents submitted to the Committee, for no promise of confidentiality could have been given regarding these documents unless they had been intentionally "ordered", and to the extent that such a promise was given, its basis was illegitimate. Regarding the petitioner's claim that the disclosure of the documents would compromise its ability to establish voluntary committees in the future, the respondents argue that no legitimate interest in privilege can be recognized with respect to an investigation committee that was illegally established without the requisite authority and the conclusions of which had been determined in advance. At all events, they emphasize that in balancing the interests in this context, their right to a fair trial should prevail. Furthermore, there is no basis for the petitioner's reliance on s. 2(9) of the Protection of Privacy Law as a source for privilege, and this claim was first raised by the petitioner in a supplementary pleading filed in the current petition.

The proceedings in this court

8. In the course of the hearing in this court on 24 April 2006 the parties agreed that the privileged material would be handed over to the respondents' attorney, Adv. Lin, who would examine the material without transferring it to the respondents and would then inform the court whether the documents could benefit the respondents, or whether the Committee's Report provided an adequate reflection of the testimony, and that it would suffice. Having examined the material, Adv. Lin gave notice that the documents were required for the respondent's conduct of their suit in the Labour Court and that for that purpose the contents of the Report would not suffice. Subsequently, in an additional hearing on the petition on 12 September 2006, the petitioner gave notice that it would allow the respondents to examine four protocols of the Investigation Committee, which recorded the testimonies of four witnesses. The respondents were not satisfied, however, and we therefore ordered the

parties to complete their written pleadings to the extent that they pertained to the other protocols and the additional documents that had yet to be submitted for their examination. The petition was heard as though an order *nisi* had been issued, and with the parties' consent an interim order was issued, staying the execution of the National Court's judgment until judgment was given on the petition.

Deliberation

General – privileges and the importance of the right to disclosure and examination of documents

9. The weighty subject raised by this petition is not necessarily limited to the area of labour relations, and we have therefore decided to adjudicate the case on its merits. Having examined the case in all the various aspects raised by the parties, we have reached a result that is fundamentally similar to the result reached by National Labour Court. Our reasoning however differs somewhat from the reasoning that served in the Labour Court's judgment.

In this case, the arena in which the question of privileged documents, including the protocols of the Investigation Committee, arises is the arena of a legal proceeding. As noted, the proceeding is being conducted in the Haifa Regional Labour Court, which is currently hearing the respondents' suit against the petitioner. In that framework the respondents are challenging the endorsement of the Investigation Committee's conclusions and the subsequent decision not to renew the employment of respondents 2 and 3, and to transfer respondent 1 from the Theatre Department to the Department for General Studies. It is important to emphasize at the outset that to the extent that our concern is with a proceeding being conducted in this arena, i.e. a proceeding being adjudicated by a statutory judicial tribunal, the starting point for disclosure and examination must be that of maximum disclosure and the broadest possible examination of the information relevant to the dispute (see: LCA 4999/95 *Alberici International Foreign Partnership registered in Israel v. State of Israel* [2], at p. 44; Uri Goren, *Issues in Civil Procedure* 194 (9th ed. 2007); LabA 482/05 *Mashiah v. Israel Leumi Bank Ltd*. [3], atpara. 4; see also Adrian Zuckerman *Zuckerman on Civil Procedure*, para. 2.189-2.193 (2nd Ed., 2006) (hereinafter: Zuckerman)). This point of departure stems from the basic principles upon which the law is founded, and from the central goal of doing justice, which is the goal of the judicial process. The doing of justice is based on the disclosure of the truth, thereby serving the interest of the individual litigant and the public interest in ensuring the "proper functioning of the entire social structure…" (MP 298/86 *Zitrin v. Disciplinary Tribunal of Bar Association, Tel-Aviv District* [4], at p. 358; see also LCA

1412/94 *Hadassah Ein Karem Medical Association v. Gilead* [5], at p. 522; LCA 6546/94 *Bank Iggud LeYisrael v. Azulai* [6], at p. 61; LCA 4708/03 *Hen v. State of Israel- Ministry of Health* [7], at para. 17; LCA 2235/04 *Israel Discount Bank Ltd. v. Shiri* [8], at para. 10; LCA 5806/06 *Estate of Michael Nemirovsky (dec.) v. Shimko* [9], at para. 6.) The disclosure of the truth is dependent upon a fair hearing that accommodates the presentation of the entire factual evidentiary foundation, which affords the party the opportunity to properly contend with the claims of the opposing party. The rules of procedure in civil law (including labour law) governing disclosure and examination of documents are intended to serve the overall aim of discovery of the truth; this is also true of the rules of evidence which *inter alia* establish the right to summon any person to testify or to submit evidence, and that the person so summoned is obliged to comply with the summons as long as he has not shown a legal justification for a refusal to do so (see E. Harnon, *The Law of Evidence,* pt. 2, at p. 67 (1985); *Hadassah Ein Karem Medical Association v. Gilead* [5], at p. 522; *Bank Iggud LeYisrael v. Azulai* [6], at p. 61; *Israel Discount Bank Ltd. v. Shiri* [8], at para. 10; LCA 2498/07 *Mekorot Water Company Ltd v. Bar* [10], at para. 9.) The procedural rules requiring the litigant to disclose and accommodate the examination of documents in his control, also promote the efficiency of the proceeding and enable its conduct "with open cards, so that each party has advance knowledge of the other party's documents" (LCA 4234/05 *United Bank Mizrahi Ltd. v. Peletz* [11], at para 6; see also LCA 4249/98 *Suissa v. Hachsharat HaYishuv Insurance Company Ltd.* [12], at p. 520; LCA 291/99 *D.N.D. Jerusalem Stone Supply v. V.A.T. Director* [13], at p. 237.)

10. Nevertheless, the Israeli legal system does not advocate a total principle of revealing the truth and doing justice at any price, in the sense of *fiat justicia et pereat mundus* ("Let justice be done, though the world perish") (see *Hadassah Ein Karem Medical Association v. Gilead* [5], at p. 522, and *Bank Iggud LeYisrael v. Azulai* [6], at p. 61). It acknowledges the existence of other competing rights and values which are of importance to the individual and to society and worthy of protection, even if they are in conflict with the principles of broad disclosure forming the basis of our system (see CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* [14], at para. 44; LCA 7731/04 *State of Israel-Ministry of Health v. Estate of Avital Halperin (dec.)* [15], at para.18; LCA 7114/05 *State of Israel v. Hizi* [16], at para.5; Menahem Elon, "Law, Truth, Peace and Compromise: the Foundations of Law and Society (Hebrew), *Bar-Ilan Studies in Law* 14, 269, at 275 (1998)). The protections afforded to individual rights and public interests, when they are liable to be harmed as a result of unlimited disclosure in the course of a trial,

assume various forms and their intensity is not uniform. In this context a distinction must be made between privilege and inadmissibility, both of which constitute a relative and occasionally absolute barrier to the submission of evidence in a judicial proceeding, though differing in terms of their essence and the scope of protection they provide. Privilege prevents the submission of evidence and its examination by the other party. Inadmissible evidence on the other hand, may be submitted and even examined by the other party, but cannot be relied upon for purposes of a finding in a trial (on the distinction between them see *Bank Iggud LeYisrael v. Azulai* [6], at p. 64*; Alberici International Foreign Partnership registered in Israel v. State of Israel* [2], at p. 47; *Israel Discount Bank Ltd. v. Shiri* [8], at paras. 16-17; AAA 6013/04 *State of Israel-Transport Ministry v. Israeli News Co. Ltd* [17], at para. 19; LabA 114/05 *Mekorot Water Company Ltd. v. Levi* [18]; regarding the provisions establishing admissibility as distinct from privilege see e.g. s. 30, State Comptroller Law, 5718-1958 [Consolidated Version] (hereinafter: "State Comptroller Law"); s. 10, Internal Audit Law, 5752-1992 (hereinafter: "Internal Audit Law"); ss. 14 and 22, Commissions of Inquiry Law, 5729-1968 (hereinafter: "Commissions of Inquiry Law"); s. 79 C(d), Courts Law [Consolidated Version], 5744-1984 (hereinafter: "Courts Law"); s. 538(a), Military Justice Law, 5755-1955 (hereinafter: "Military Justice Law")). In this context it is also important to note the distinction between privilege and inadmissibility on the one hand, and the obligation of confidentiality on the other hand. As distinct from privilege and inadmissibility, the obligation of confidentiality does not as such prevent the submission of evidence in a judicial proceeding, unless, as explained below, it is an obligation (contractual or statutory), the purpose of which justifies endowing it with a privileged status (see *Bank Iggud LeYisrael v. Azulai* [6], at p. 66; LCA 1917/92 *Skoler v. Gerbi* [19], at pp. 771-772).

11. Statute-based privileges appear in the Evidence Ordinance [New Version] 5731-1971 (hereinafter: "Evidence Ordinance"). S. 44 of the Evidence Ordinance establishes a privilege for the state in evidence the disclosure of which is liable to harm the security of the state or the foreign relations of the state. S. 45 establishes a privilege for the benefit of the public in relation to evidence the disclosure of which is liable to harm an important public interest. Ss. 48 – 51 of the Evidence Ordinance establish other privileges based on special relations of trust between those summoned to testify and disclose evidence and those to whom the testimony or evidence relates, such as the relations between an attorney and his client, a minister of religion and a person who confessed in his presence, and between a doctor, psychologist and social worker and those requiring their services. Regarding

privileged evidence of the type mentioned in ss. 44 and 45, the Evidence Ordinance establishes a mechanism for examination and review and also establishes a balancing formula in accordance with which the court is authorized to suspend the privilege and order the disclosure of the evidence in cases in which it is persuaded that "the necessity to disclose it in the interests of doing justice outweighs the interest in its non-disclosure". In other words, these privileges are relative and in certain cases may be overridden by the interest of doing justice (see e.g. MApp 838/84 *Livni v. State of Israel* [20]; CrimApp 1924/93 *Greenberg v. State of Israel* [21]; CrimA 889/96 *Mazrib v. State of Israel* [22]). The same applies to the privileges under ss. 49 – 50A of the Evidence Ordinance. On the other hand, privilege against disclosure deriving from attorney-client relations (s. 48 of the Evidence Ordinance) and the disclosure of evidence by a minister of religion (s. 51 of the Evidence Ordinance) is absolute, and its application is not subject to any balancing formula, nor does the court have any authority to order its removal (see *Estate of Michael Nemirovsky (dec.) v. Shimko* [9], at paras. 6-7). Another example of statutory privilege appears in the Patient's Rights Law, 5756-1996 (hereinafter: "Patient's Rights Law") relating to a report of a control and quality committee.

Alongside the statutory privileges enabling the non-submission and non-disclosure of evidence, Israeli law also recognizes a number of privileges that originate in case law. The courts have conferred privileged status on documents prepared in anticipation of a trial (see CA 407/68 *Zinger v. Beinon* [23]; CA 407/73 *Goanshere v. Israel Electric Company Ltd.* [24]; *Hadassah Ein Karem Medical Association v. Gilead* [5], at pp. 522-523), and likewise regarding documents intended for use in an alternative dispute resolution mechanism outside court (see *Israel Discount Bank Ltd. v. Shiri*). The Supreme Court has also recognized a relative privilege against the disclosure of a reporter's sources, in cases in which the public interest in protecting the sources of information overrides the interest in receiving the evidence for purposes of disclosing the truth (see *Zitrin v. Disciplinary Tribunal of Bar Association, Tel-Aviv District* [4]). Case law also recognized another relative privilege against the disclosure of evidence with respect to the requirement of a bank to disclose documents pertaining to a client's account (see *Skoler v. Gerbi* [19]). In this context the court derived the privilege from the bank's obligation of confidentiality towards its customers, and it recognized that without such privilege, the obligation of confidentiality might be devoid of any content. In the words of the Court:

> 'To say that the banking system, whose maintenance is in the interest of both the banks and the customers, is based on the

> bank's obligation of confidentiality towards its customers, would be meaningless if it does not necessarily imply the existence of privileged relations between the bank and its customers, which means exempting the bank from the obligation (binding every witness) to disclose to the court all of the information relevant to the hearing. This is the case even though the Evidence Ordinance does not have a provision regarding privilege of that nature (*Skoler v. Gerbi* [19], at p. 772).'

By way of an interim summary, it may be said that in order for a litigant in a judicial proceeding to be exempted from the obligation to disclose relevant evidence at his disposal, he must prove a privilege recognized by law or by accepted case law that allows him to withhold it (see Joel Sussmann, *Civil Procedure*, 7th ed., 1995, at pp. 440-441). Regarding the burden of proof on the litigant claiming the privilege see: *Hadassah Ein Karem Medical Association v. Gilead* [5], at p. 524; Harnon, *The Law of Evidence*, 67; Yaakov Kedmi, *On Evidence*, Pt.2, 869 (2004)). Having proved the existence of that privilege, and to the extent that the privilege is a relative one, the litigant must then show that the interest in the suppression of the evidence outweighs the need to disclose it for the purposes of doing justice.

From the general to the specific

12. The petitioner in the present case refuses to disclose to the respondents some of the protocols recording the deliberations of the Investigation Committee and additional documents that were submitted to the Committee. It claims that the documents warrant privilege and that, in reliance on the decision of the Regional Court, in view of the extensive material placed at the respondents' disposal, including the Report of the Investigation Committee itself, the evidence requested is not such as would assist the respondents in the conduct of their suit; for that reason, too, there is no obligation to disclose it. The respondents on the other hand claim that the evidence is relevant and essential to the litigation between themselves and the petitioner and does not warrant any privilege; they persist in this claim even after their attorney was permitted to examine those pieces of evidence during the course of this proceeding, pursuant to the agreement reached by the parties.

Before addressing the question of privilege, we should first examine the petitioner's claim that the respondents are making much ado about nothing, and that the evidence in dispute actually adds nothing to what has already been disclosed to the respondents. In this context the petitioner argues that the National Labour Court reached its conclusion regarding the relevance and importance of the requested documents without having examined them,

emphasizing that the Regional Labour Court had examined the documents and decided that "even without disclosure of the additional requested material, there was an appropriate balance between the parties' conflicting interests". The petitioner further adds and stresses the rule that the trial forum has discretion regarding the disclosure of documents and the scope of disclosure, and the appeal forum will interfere in the decision only in exceptional cases (see LCA 2534/02 *Shimshon v. Bank HaPoalim Ltd.* [25], at p. 196; *Shlomi Local Council v. Shechtman and Co. Building and Development Company* [26]; see also LA 740/05 *Pas v. General Health Services* [27]; *per* President S. Adler, LabApp 494/06 *State of Israel v. Evenchik* [28], at para.2; Yitzchak Lobotzky, *Procedure in Labor Law*, ch. 11, at pp. 13-14 (2004)). The provision of reg. 46(a) of the Labour Court Regulations (Procedure), 5752-1991 (hereinafter: Labour Court Regulations) regulate the disclosure and examination of documents for proceedings being conducted in the Labour Court, and it authorizes the court or the registrar "to grant an order for the submission of additional details, and upon a litigant's application, for the disclosure and examination thereof, if it deems it necessary for the purpose of efficient litigation or to save costs." Based on the basic principles of the system we discussed above, and in order to realize the goal of the judicial proceeding, which strives to reveal the truth, the National Labour Court has ruled on a number of occasions that in granting an order for disclosure or examination under reg. 46 of the Labour Court Regulations, it must ensure that there be "as broad a disclosure as possible of the information relevant to the dispute" (*Mashiah v. Israel Leumi Bank Ltd.* [3], at para. 4; see also in *Evantchik* [28], para. 10). This approach is consistent with the fiduciary relations underlying the worker-employer connection, which are also a source for the obligation of disclosure (see *Estate of Michael Nemirovsky (dec.) v. Shimko* [9], para. 16). This same approach found expression in regs. 112-122 of the Civil Procedure Regulations, 5744-1984, as interpreted in the judgments of the civil courts, to the effect that the litigant must "disclose all documents that may reasonably be presumed to include information that would allow a party, directly or indirectly, to promote his interest in the dispute" (*Bank Iggud LeYisrael v. Azulai* [6], at p. 60; see also Goren, *Issues in Civil Procedure*, at p. 196; Dudi Schwartz, *Civil Procedure – Innovations, Processes and Trends*, 2007, at p. 321). In my view, insofar as the protocols of the Investigation Committee that include direct testimony about the respondents' conduct in the course of their work in the Theatre Department, as well as letters of complaint in that regard that were sent by the teachers and students are concerned, there can be no doubt that they constitute extremely relevant evidence, for they go to the very heart of the dispute being litigated between the respondents and the petitioner in the Regional Labour

Court. This being the case, I think that the Regional Labour Court erred in its ruling - which is relied upon by the petitioner - to the effect that the material already submitted was sufficient for the respondents, and in determining that the Investigation Committee's Report, upon which the petitioner's decisions concerning the respondents was based, includes a fair number of citations from the material that was not submitted, and that their ability to relate to the claims against them was therefore not prejudiced. The Regional Labour Court's approach to this matter is totally unacceptable to me, and I see no reason why a litigant should have to make do with a processed version of the relevant evidentiary material (the Report). In this context it should be recalled that this evidence was the basis of the conclusions included in the Report against the respondents. For example, the Report stated that "the various oral and written testimonies indicated two conflicting approaches" in the Theatre Department and the Committee had to decide between these approaches "in accordance with the overall picture emerging from the direct and indirect testimony" (pp. 3-4 of the Report). The Committee further noted that it had at its disposal "conclusive testimony in written documentation" and that its decisions relied on "the weighing up the range of testimony in each area, as well as on the written material" (pp. 3 and 6 of the Report). Bearing this in mind, as well as the respondents' claim that in the first place, the Committee was established for the purpose of reaching precisely those conclusions and thereby orchestrate their removal from the Theatre Department, one can hardly overstate the importance that they attributed to receiving the actual testimony. Therefore, the National Labour Court was correct in ruling that these were relevant testimonies.

13. Another claim made by the petitioner relating to the "outer frame" of the matter of privilege from a procedural perspective is that the National Labour Court erred in its failure to examine the evidence before ordering its disclosure (subject to the limitations it set), whereas the Regional Labour Court had examined this evidence, and only thereafter did it conclude that there were no grounds for its disclosure. This claim is of no avail to the petitioner in the present circumstances either. Reg. 119 of the Civil Procedure Regulations (which has no parallel in the Labour Court Regulations but which may possibly be applied in these proceedings by virtue of s. 33 of the Labor Courts Law) provides that when a claim of privilege is raised in the framework of an application to grant an order for the submission of a questionnaire or examination of documents, the court is entitled to "examine the document in order to decide whether the claim has substance." In the present case, the Regional Labour Court did actually examine the documents that the petitioner had refused to place at the respondents' disposal, but as will

be noted, this did not place it in any better position than the National Labour Court. The reason for this is that even after that examination, the Regional Court did not rule on the question of privilege. In dismissing the respondents' application for disclosure and examination it ruled only that "even without disclosure of the additional material, an appropriate balance is maintained between the parties' conflicting interests'." It did not, however, elaborate on the nature of the balance upon which it relied. The National Labour Court, on the other hand, considered the question of privilege, even though for the purposes of its decision it did not deem it necessary to examine the documents in dispute. It examined the question of the existence of a normative source for the privilege of the documents, given the fact that what was involved were the protocols of the Investigation Committee and the letters of complaint that it had received, and it concluded that the petitioner had not succeeded in showing any normative source for conferring privileged status on these documents. It therefore deemed that the Regional Court should have applied the normal rules and ordered the disclosure and the examination of the documents, subject to the qualifications that it stipulated. The National Court did not find it necessary to examine the documents in dispute, but this does not impair the decision and justify our intervention. In this sense the case at hand differs from that of *Estate of Michael Nemirovsky (dec.) v. Shimko* [9]. The question there was whether the privilege recognized by case-law applied to documents prepared in anticipation of a judicial process. Addressing the provisions of reg. 119 of the Civil Procedure Regulations, this court ruled that the lower court erred in accepting the claim of privilege and in its classification of the disputed documents as documents prepared in anticipation of a judicial process, without having actually examined them in order to determine their specific nature.

14. As we have said, the documents that the petitioner claims are privileged are letters of complaint against the respondents as well as protocols of the Investigation Committee's deliberations recording the testimony of the petitioner's teachers and students (with the exception of four protocols recording four testimonies which, after additional examination, the petitioner consented to submit to the respondents in the course of these proceedings). For the normative source of this privilege, the petitioner relies upon the legal and constitutional right to privacy of witnesses and complainants, and the public interest in the confidentiality of information submitted to voluntary investigation committees established by academic institutions. The constitutional source relied upon by the petitioner in this context is s. 7 of Basic Law: Human Dignity and Liberty, which entrenches the right to privacy

as a basic constitutional right, and the statutory source upon which the petitioner relies is the Protection of Privacy Law.

In defining the parameters of our discussion of privilege, it should be emphasized that the normative sources referred to by the petitioner have not, to date, yielded any statutory or case-law privilege in Israeli law with respect to testimony or documents submitted to an investigation committee of an academic institution. We are therefore dealing with an assertion of privilege by the petitioner, even though it cannot refer to any existing privilege recognized in the Israeli laws of privilege. The petitioner is actually attempting to create a new judge-made privilege which, it claims, derives its validity and its justification from the force of the constitutional right to privacy granted to complainants and witnesses appearing before investigation committees, and from the public interest in the operation of effective investigation committees of this kind in academic institutions. Furthermore, the petitioner argues that the promise of confidentiality, which it claims was given by the Investigation Committee to the witnesses and complainants, was intended to promote the aforementioned public interest and to protect the right to privacy of the witnesses and complainants. As such, this promise should be regarded as an additional source in support of privilege.

15. Insofar as we are dealing with the establishment of a new case-law privilege, it must again be stressed that privilege is the exception; the rule is the requirement for the disclosure and transfer of most of the relevant evidence, with the aim of discovering the truth and doing justice in the judicial process. In keeping with this principle, the case-law has stated that its "treatment of privilege would be cautious" and that privilege would only be recognized in the special and exceptional cases, since it is regarded as a "barrier to the clarification of the truth and an obstacle to the doing of justice" (Shoshana Netanyahu "On Developments in the Matter of Professional Privileges" *Sussman Volume,* 297, 298 (1984) (hereinafter: Netanyahu); *Hadassah Ein Karem Medical Association v. Gilead* [5], at p. 522; see also *Zitrin v. Disciplinary Tribunal of Bar Association, Tel-Aviv District* [4], at p. 359; LCA 637/00 *Israel Discount Bank Ltd. v. Evrat Insurance Agency Ltd.* [29], at p. 664; *Israel Discount Bank Ltd. v. Shiri* [8], at para. 11; *Mekorot Water Company Ltd. v. Bar* [10], at para. 9); Aharon Barak "Law, Adjudication and the Truth" *Mishpatim* 27 (1996), at pp. 11, 15); Harnon, *Evidence,* 67). A party claiming privilege must therefore prove not only the existence of a legally-recognized privilege, but also the existence of a "more important and significant consideration pertaining to public interest" that justifies the application of the privilege in cases in which the court has discretion as to its application (see Netanyahu, p. 298; *Bank Iggud LeYisrael*

v. Azulai [6], at p. 62; *Israel Discount Bank Ltd. v. Shiri* [8], at para.11). It was further ruled that the court must exercise caution when asked to create new privileges or develop existing privileges by way of case-law (see and compare: *Hadassah Ein Karem Medical Association v. Gilead* [5], at p. 525; *Israel Discount Bank Ltd. v. Shiri* [8], at para.11; Harnon, *Evidence* p. 67). It must evaluate the degree of harm that the disclosure may cause to certain social values and to the respective rights of the public and the individual, as against the importance of revealing the truth and doing justice (see *Israel Discount Bank Ltd. v. Shiri* [8], at para.11). The point of balance between the conflicting interests is determined as a function of their relative social importance (*Estate of Michael Nemirovsky (dec.) v. Shimko* [9], at para. 6) and in the words of the court in this context in *Hadassah Ein Karem Medical Association v. Gilead*:

> 'In exercising our discretion, with respect to the recognition of a new case-law privilege, we must seek a balance between the conflicting interests. On the one hand, there is the interest of the individual and the public in the clarification of the truth. On the other hand, there is the interest of the individual and the public in the protection of privacy, freedom of expression, relations of confidentiality, and other considerations pertaining to the public welfare (see *Skoler v. Gerbi* [19]; HCA 64/91 *Hilef v. Israel Police* [15]). In the framework of this balancing, *inter alia* the relative importance of the opposing considerations, the indispensability of the document for the revelation of the truth and the existence of alternative evidence for the evidence requested must be taken into account. The degree to which the disclosure affects public interests that the privilege seeks to protect must also be considered. All these factors will influence not only the actual decision to recognize a privilege, but also its scope. A broader scope than required cannot be allowed' ([5], at p. 525).

The petitioner's request that a new case-law privilege be established in the present case must be examined in the spirit of these principles.

The importance of investigation committees as the basis for establishing a privilege

16. This Court has not infrequently discussed the importance of supervision and inspection of the activities of public bodies and institutions and their contribution to the promotion and inculcation of appropriate norms and values such as proper administration, honesty, efficiency, professionalism,

thrift etc. (see e.g. HCJ 5743/99 *Duek v. Mayor of Kiryat Bialik, Mr. Danny Zak*, [31], at pp. 415-416; HCJ 7805/00 *Aloni v. Jerusalem Municipality Auditor* [31], at pp. 588-589; *State of Israel-Transport Ministry v. Israeli News Co. Ltd*. [17], at para. 14; see and compare: *Estate of Michael Nemirovsky (dec.) v. Shimko* [9], at para. 13). In order to ensure that the supervisory and oversight bodies enjoy cooperation in their work and that they are able to gather information and evidence without the supplier of information or evidence having to fear that they will serve as evidence in a judicial proceeding, the legislator established restrictions on the use of information and evidence submitted to these bodies in a judicial proceeding (on the purpose of these restrictions see *Bank Iggud LeYisrael v. Azulai* [6], at p. 64*;* CrA 2910 *Yefet v. State of Israel* [32], at p. 301*;* CA 2906/01 *Haifa Municipality v. Menorah Insurance Company Ltd.* [33], at para. 14; LCA 9728/04 *Atzmon v. Haifa Chemicals* [34], at p. 765-766). S. 30 of the State Comptroller Law provides as follows:

> ‘(a) No reports, opinions or other documents issued or prepared by the Comptroller in the discharge of his functions shall serve as evidence in any legal or disciplinary proceeding.
>
> (b) A statement received in the course of the discharge of the Comptroller's functions shall not serve as evidence in a legal or disciplinary proceeding, other than a criminal proceeding in respect of testimony under oath or affirmation obtained by virtue of the powers referred to in s. 26.’

In a similar vein, s. 10 of the Internal Audit Law provides as follows:

> '(a) Reports, opinions, or other documents issued or prepared by the internal auditor in the discharge of his functions shall not serve as evidence in any legal proceeding, but shall be valid as evidence in a disciplinary proceeding.
>
> (b) A statement received in the course of the discharge of the internal auditor’s functions shall not serve as evidence in any legal proceeding, but shall be valid as evidence in a disciplinary proceeding.'

S. 22 of the Commissions of Inquiry Law, too, provides:

> 'The report of a commission of inquiry shall not be evidence in any legal proceeding.'

S. 14 of the Commissions of Inquiry Law further provides:

> 'Testimony given before a commission of inquiry or before a person entrusted with the collection of material under s. 13 shall

> not be evidence in any legal proceeding other than a criminal action in respect of the giving of that testimony.'

Similar to ss. 22 and 14 of the Commissions of Inquiry Law, s. 538(a) of the Military Justice Law provides that –

> 'Nothing uttered in the course of an investigation of a commission of inquiry, whether by a witness or otherwise, and no report of a commission of inquiry, shall be admitted as evidence in court, except where a person is on trial for giving false testimony before that commission of inquiry.'

It thus emerges that the protection afforded by the legislator to information and evidence submitted to the State Comptroller, to internal auditors and to governmental and military commissions of inquiries constitutes protection under the rubric of inadmissibility. This protection blocks the presentation of a report drawn up by these bodies in a legal proceeding, and of the testimony or evidence presented therein. As such, the findings in such a proceeding cannot be based on those reports, testimony or evidence. On the other hand, as distinct from privilege, this inadmissibility does not prevent the disclosure of the evidence and the information that was presented to those bodies in the framework of the said legal proceeding. In our comments in para. 11 above we addressed the distinction between inadmissibility and privilege, and President Barak had the following to say on this point in *Bank Iggud LeYisrael v. Azulai*:

> 'S. 10 of the Internal Audit Law establishes the inadmissibility ("shall not serve as evidence") of the internal audit report. This provision does not, *per se*, establish a privilege preventing disclosure of the report to a party to the litigation. Indeed, inadmissibility and privilege are two separate matters. The inadmissibility of a document is not a bar to its disclosure (see App. 121/58 *Keren Kayemet LeYisrael v. Katz* [35]). Inadmissibility is intended to prevent the court from basing a finding on that piece of evidence. Non-disclosure due to privilege is intended to prevent examination of the document by the other party. Examining a document may sometimes be of tremendous value to a party even though it may not be submitted due to its inadmissibility. The accepted approach is therefore that a document's inadmissibility *per se* does not protect it from disclosure' (see 13 Halsbury, *The Laws of England* (London, 4th ed., by Lord Hailsham 1975) 34-35; P. Matthews and H. Malek, *Discovery* (London, 1992) 94), at p. 64. See also *Alberici*

International Foreign Partnership registered in Israel v. State of Israel [2], at p. 47; *Yefet v. State of Israel* [32], at pp. 305-306; *State of Israel-Transport Ministry v. Israeli News Co. Ltd.* [17], para. 19; *Israel Discount Bank Ltd v. Shiri* [8], paras. 16-17).

17. Internal audit in recognized institutions of higher education in Israel has received special statutory regulation, distinct from the arrangement for public bodies under the Internal Audit Law. A "public body" as defined in s. 1 of the Internal Audit Law explicitly excludes "an institution of higher education recognized under s. 9 of the Council for Higher Education Law, 5718-1958," and s. 15 of the Council for Higher Education Law explains the reason for this as being the desire to preserve the academic and administrative independence of these institutions. Parenthetically, it bears mention that s. 15A of the Council for Higher Education Law applies certain provisions taken from the Internal Audit Law to an internal auditor of an institution of higher education, *mutatis mutandis*. The National Labour Court based some of its reasoning with respect to the disclosure of documents on its classification of the petitioner as a hybrid body with classically public features to the extent that it operated in the capacity of an employer. In this matter it relied on the judgment in *Bar Ilan University v. Kesar* [1], adding that it was therefore necessary to subject it to the rules from the realm of administrative law that obligate the authority to disclose documents and allow them to be examined by any person who may be adversely affected by its decisions (para. 11 of the judgment). This approach finds partial support in the decision of this court in AAA 7151/04 *Technion – Israel Institute of Technology v. Datz* [36]. In that case the court held that even though the Technion (as well as the petitioner) was not a "body discharging a public function by law", and neither was it a "public authority" for purposes of the Freedom of Information Law (but see the notice regarding the definition of public authorities under the Freedom of Information Law, O.G. 5766, p. 1050), a competent court may apply the norms of administrative law to these bodies should it transpire that they bear the characteristics of public bodies. At the same time, in *Technion – Israel Institute of Technology v. Datz* [36], the court held that the application of public law to the Technion required a factual foundation that had not been presented in that particular case. In its absence, and in the absence of a thorough examination of the relevant information, the Court deemed it impossible to determine whether the Technion was a hybrid body for the relevant aspects of the case, nor could it identify the particular obligations of public law that should be applied to the Technion, or their scope. Indeed, the legal classification of recognized institutions of higher education as hybrid bodies and their subjection to obligations from the arena of public law is a

weighty question. As President Barak noted in *Technion – Israel Institute of Technology v. Datz* [36], a decision on this question requires the establishment of a broad factual and normative basis (on the complexity of this matter see CA 467/04 *Yatah v. Mifal HaPayis* [37], at para. 19.) It seems that this question was not the focus of the present case, and by extension no factual foundation was presented to us. As such, here too we should refrain from iron-clad determinations if they are not required for ruling on the petition (on this subject see also CA (BS) 1038/00 *Pener v. Ben Gurion University of the Negev* [38]; OM (Haifa) 283/04 *Douhan v. Haifa University* [39]; OM (Haifa) 217/05 *Namana v. Haifa University* [40] – appeal on the judgment currently pending – CA 8695/06).

To be precise: the present case does not concern an investigation committee established by virtue of law, but a voluntary investigation committee established by an academic institution to investigate matters related to teaching and administration in the Theatre Department. The subjects submitted for its examination related primarily to "academic and administrative matters" in respect of which the legislator prescribed that recognized institutions enjoy freedom of action, and in the words of s. 15 of the Council for Higher Education Law, "A recognized institution shall be at liberty to conduct its academic and administrative affairs, within the framework of its budget, as it sees fit." For purposes of this section, "academic and administrative affairs" are defined as including "the determination of a program of research and teaching, the appointment of the authorities of the institution, the appointment and promotion of teachers, the determination of a method of teaching and study, and any other scientific, pedagogic or economic activity." As such, even if in certain aspects an institution such as the petitioner may be viewed as a hybrid body bound by the norms of public law, it would nonetheless seem, *prima facie* and without ruling on the matter, that matters of the kind that the Investigation Committee was charged with examining, are not characterized by that public aspect.

18. As we have seen, the legislator determined that the findings and conclusions of various statutory investigation committees considering matters of outstanding public importance, as well as the evidence and testimonies heard therein, will enjoy protection under the rubric of admissibility and not of privilege (apart from a protocol of an investigation committee under s. 21 of the Patient's Rights Law, which establishes a relative privilege; see *Hen v. State of Israel - Ministry of Health* [7]; but see also *State of Israel-Ministry of Health v. Estate of Avital Halperin (dec.)* [15], regarding the findings and conclusions of such a committee). In view of this fact and of the fact that our concern is with a voluntary investigation committee intended to

examine internal university matters relating to difficulties that arose in the areas of teaching and administration in one of the University departments, it would seem that the public interest in ensuring the effective operation of this kind of committee does not, *per se*, warrant the establishment of a high-level legal norm of privilege in relation to the testimony and evidence presented to it. This conclusion holds despite the undisputed ability of these committees to enhance the quality of teaching and the administrative efficiency of the support systems of academic institutions. Conceivably, awareness of the possibility of having to disclose their testimony and evidence may have a "chilling effect" on the willingness of witnesses and those submitting evidence (regarding the different approaches to the possible existence of this effect and its significance in the totality of considerations that the court must take into account, see *Hadassah Ein Karem Medical Association v. Gilead* [5], at pp. 526-527; *Bank Iggud LeYisrael v. Azulai* [6], at p. 64; *State of Israel-Transport Ministry v. Israeli News Co. Ltd.* [17], at paras. 23-25; *Hen v. State of Israel - Ministry of Health* [7], at para. 24; *Estate of Michael Nemirovsky (dec.) v. Shimko* [9], at para. 15; *Mekorot Water Company Ltd. v. Levi* [18], at para. 13; *State of Israel-Ministry of Health v. Estate of Avital Halperin (dec.)* [15], at para. 20). However, in view of the nature of the Committee concerned and particularly, of the fact that we are dealing with the testimony and evidence that constituted the basis for the Committee's conclusions - which were adopted by the University and which led to the termination of the respondents' employment in the Department - the possibility of a "chilling effect" should not be assigned decisive weight to the extent of establishing a new privilege in the present context. In other words, to the extent that there is concern for the impairment of the functioning of university investigation committees, it is outweighed by the need to enable the employees harmed by the committees' conclusions to defend themselves against allegations leveled at them and to prove their contentions that the decision in their matter was unlawfully adopted (see and compare: LCA 7568/00 *State of Israel Civil Aviation Authority v. Aharoni* [41], at p. 565).

The rationale underlying this approach is that weighty social considerations favor enabling employees to fully realize their rights. Against this background, the interest in the efficient functioning of investigation committees of the type under discussion, however important, cannot *per se* justify awarding a privileged status to the material. This is certainly true in a case such as ours, in which a judicial forum is to rule on the legal validity of the petitioner's decisions concerning a change in the employment status of respondent 1, and the termination of its employment of respondents 2 and 3. In this context, the interest in the efficient functioning of investigation committees is secondary to

the respondents' right to due legal process in which they are given the opportunity to examine all the relevant material in support of their claims against the termination of their employment in the Theatre Department.

The right to privacy as the basis for establishing privilege

19. The right to privacy, upon which the petitioner seeks to rely as an additional basis for the claim of privilege, has indeed been recognized by Israeli law as a constitutional human right**.** S. 7 of Basic Law: Human Dignity and Liberty, entitled "Privacy" provides as follows:

> ‘(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.’

Even prior to this explicit provision in the Basic Law, in 1981 the Israeli legislator established a broad, though incomplete, statutory arrangement for the protection of privacy in the Protection of Privacy Law (see the extension of the protections in Amendment No. 4 of the Law, 5765-1996, to privacy in data bases), in prescribing that an "an infringement of privacy" as defined in s. 2 of the Law is a civil tort governed by the provisions of the Civil Wrongs Ordinance [New Version] (s. 4 of the Protection of Privacy Law) as well as a criminal offense in cases in which the violation, as defined in some of the subsections of s. 2, was intentional (s. 5 of the Protection of Privacy Law). In CrA 5026/97 *Gal'am v. State of Israel* [42] (at para. 9), this court extolled the virtues of the right to privacy as "one of the rights that establishes the democratic character of the Israeli regime and as one of the supreme rights that establish the independent status of the right to dignity and liberty to which every person is entitled." In HCJ 6650/04 *A. v. Netanya Regional Rabbinical Court* [43] (at para. 8), President Barak lauded the right to privacy as "one of the most important human rights in Israel" (see also CrA 1302/92 *State of Israel v. Nahmias* [44], at p. 353; CA 8825/03 *General Health Services v. Ministry of Defence* [45], at paras. 21, 22). Indeed, privacy is a constitutionally protected right, the specific provisions of which are laid down in the Protection of Privacy Law and in Basic Law: Human Dignity and Liberty (ss. 7(b) – (d)). These provisions do not, however, encompass all the occurrences of the right to privacy, its violation and the protections applying to it. Various statutes (for example: Patient's Rights Law, Courts Law, Evidence Ordinance) contain additional protections, of varying degrees, of this

right (whether standing alone or combined with other protected values). Indeed, as noted by President Barak in *A. v. Netanya Regional Rabbinical Court* [43], nothing prevents the continued development of the right to privacy and the various protections applying to it in the framework of Israeli common law, in which the right to privacy was in fact recognized for the first time as a human right (*ibid*, para. 8, and see also MiscApp 82/83 *State of Israel v. Alia* [46], at p. 741; HCJ 355/79 *Katalan v. Prisons Authority* [47]; HCJ 259/84 *M.Y.L.N Israel Institute for Best Product and Business Ltd. v. Broadcasting Authority* [48], at p. 684.) In other words, regarding the protection of privilege as in the case before us, there is nothing to prevent the creation of additional protections of this kind in settled case law, which draw their justification from the right to privacy, even if the protection has not been explicitly regulated by statute (see *Skoler v. Gerbi* [19]), and even if the damage whose prevention is being sought by means of the privilege is not actually mentioned in ss. 7(b)–(d) of the Basic Law or s. 2 of the Protection of Privacy Law.

20. Before discussing the appropriate scope of protection of the right of privacy in the current contexts, we should examine whether the material for which the petitioner seeks privilege does indeed pertain to the private matters or personal intimacy of any person, and whether norms in the area of protection of privacy are applicable to it. In HCJ 1435/03 *A. v. Disciplinary Court for State Workers Haifa* [49], President Barak noted that the right to privacy comprises a number of aspects and broad areas of application, and in another case he said that "the right of privacy is a complex one, whose precise parameters are difficult to determine" (at p. 539; see also CA 4963/07 *Yediot Aharonot Ltd. v. Adv. A.* [50]; Eli Helm *Laws of Protection of Privacy* 1-4 (2003)). In his enlightening article, "Control and Consent: The Analytical Basis for the Right to Privacy" (*Law and Government* 11 (2007), 9), Dr. Michael Birnhack attempts to clarify the nature of the right to privacy and the justifications for its existence as a social and legal norm, and concludes by saying that "this right is naturally amorphous, because it is socially and technologically contingent" (*ibid*, p. 72). This accurate determination reflects the difficulty of establishing defined and pre-determined frameworks for the right to privacy. At the most basic level it could be argued that the right to privacy relates to information or data that clearly pertains to a particular individual and to him alone (such information would include his medical condition, his income level, age, weight, sexual inclination etc.), and it might relate to information or data concerning his contacts with others (information or data of this kind would include the contents of a conversation or correspondence with another person, an inter-personal relationship conducted

with another person, a traumatic event involving another person, etc.). A more expansive approach might consider almost any information relating exclusively to a particular individual as a manifestation of the right to privacy (see CA 439/88 *Registrar of Data Bases v. Ventura* [51], at pp. 821 – 822). By the same token it could be claimed that information or data pertaining to a private person's contacts with others at any particular level might also be regarded as his private affairs, especially if we accept the concept of the right to privacy as meaning control of the disclosure of such information or data. Nevertheless, insofar as we are dealing with a legal norm, I find no justification for such a broad definition of the right to privacy, at least in a case in which other people are the focus of the information or data for which the protection is required, and the role of the individual seeking protection for them is marginal, not exceeding that of an observer or bystander (unless the actual disclosure of his participation in the event could, under the circumstances, violate his right to privacy). Let us be precise: the right to privacy as it applies to actual information must be distinguished from the right to privacy as it applies to disclosing information that a person absorbed through his senses. In this context of disclosing information we may refer to a persons' right to privacy in the classical sense of being "left alone" and not being compelled to reveal any matter that he does not wish to reveal. This right, however, extends only to the point at which there is a legal obligation to testify on the matter, such as in an investigation or legal proceeding. These nuances regarding the right to privacy and its protection can be demonstrated in the following example: a bell-boy sees a well-known public figure going up to a room in the hotel where he works, accompanied by a woman who is not his wife. The bell-boy would not be able to claim a right to privacy that could prevent that detail being revealed by any other person. On the other hand, if a gossip columnist from a local paper were to request his verification of that information the next day, the bellboy would be entitled to withhold it by invoking his right "to be left alone" and not to give information if he had no desire to do so. However, if the same bell-boy were summoned to testify in divorce proceedings in a family court between the very same well-known person and his wife, he would be obliged to testify regarding what he had seen and heard on that night. Under those circumstances, he would not enjoy the right "to be left alone".

21. The case before us involves information given by teachers and students of the Theatre Department concerning the respondents' conduct in the course of their work as teachers in the Department. The information was given by those students and teachers in complaints filed with the petitioner's competent authorities, and in their interviews with the Investigation Committee. The

Committee's Report and the petitioner's claims indicate that the misconduct ascribed to the respondents by the complainants and other witnesses originated in the respondents' generally problematic conduct as departmental teachers, which allegedly impaired the proper functioning of the Department at both the academic and administrative levels. In other words, the information given by the complainants and the witnesses focused on the respondents' conduct, which is not necessarily connected to the "private affairs" of the complainants and the witnesses. Indeed, the petitioner's principal claim regarding the need to protect the evidence was not based on the fear of disclosing any private matter concerning the complainants and the witnesses. Rather, it derived from the concern that if the respondents were to succeed in their legal suit and return to their place of work in the Department, they were liable to settle accounts with them as those who had complained and testified against them. In this context, the petitioner sought to draw an analogy from privilege recognized by Israeli law regarding the identity of police informants and the information given by them, but these two issues are not alike. The justification for the privileged status of police informants is not based on the right to privacy; its rationale was explained by the court in CA 2629/98 *Minister of Internal Security v. Walfa* [52], stating that "the logic of the interest in concealing the identity of informants lies in the following two factors: *first*, the protection of the informant's welfare and safety; *second*, the encouragement of submission of information to the investigating authorities, which would not have been submitted had the informant's identity not remained concealed (at p. 795; see also: HCJ 64/91 *Hilef v. Israel Police* [53], at p. 656; HCJ 10271/02 *Fried v. Israel Police- Jerusalem Region* [54]). The current case does not involve danger to the lives of the complainants and witnesses, Heaven forbid. Nor does it relate to any high-level public interest, such as providing assistance to the police in the performance of its duties. Moreover, where a person claims privilege relating to sources of information, he must produce an appropriate certificate of privilege (ss. 44 and 45 of the Evidence Ordinance referred to above), which is then judicially examined from the perspective of the necessary balances (see CrA 1335/91 *Abu Fadd v. State of Israel* [55], at p. 129). In this context, the petitioner referred us to the ruling in *Aloni v. Jerusalem Municipality Auditor* [31], in which the court allowed the internal auditor of the Jerusalem Municipality to withhold from the person being audited the names of the complainants and the informants during the course of the audit. This court's holdings in *Aloni v. Jerusalem Municipality Auditor* [31] are of no avail to the petitioner, if only because in that particular matter the court ordered the disclosure of all the relevant material to the person being audited, in order to enable her to exercise her vested right to state her case. Moreover, the provision regarding the omission

from this material of the names of the complainants and of those who testified is not substantively different from the restriction imposed by the National Labour Court in the case before us, and I will return to this point below.

If we attempt to place the dispute in the present case within the parameters of the right to privacy, it may be said that the complainants and the witnesses voluntarily gave information to the competent authorities of the petitioner, as well as to the Investigation Committee, for the purpose for which the Committee was established. Indeed, in this context, the right to privacy means the ability of the individual – in this case, the complainants and the witnesses – to control the information in his possession in a way that will restrict its disclosure to one specific purpose and not another. *Prima facie*, from this perspective (and perhaps from other perspectives arising from an examination of the material), a disclosure of the information in a proceeding between the petitioner and the respondents in the Regional Labour Court infringes the privacy of the complainants and the witnesses to the extent that they received a promise of confidentiality restricting the scope of disclosure of information (on the meaning and scope of this promise – see below). However, even if this kind of infringement of the privacy of the complainants and the witnesses occurred, and even if, as the petitioner claims, it falls within the ambit of s. 2(8) of the Protection of Privacy Law, i.e. the "infringement of an obligation of secrecy laid down by express or implicit agreement in respect of a person's private affairs," it would not necessarily establish the privilege-based defense sought by the petitioner. To be precise: at the very most, the Protection of Privacy Law could entitle the petitioner to the relative defence of inadmissibility under s. 32 of the Law, whereby "material obtained by the commission of an infringement of privacy shall not be used as evidence in court without the consent of the injured party, unless the court, for reasons which shall be recorded, permits it to be so used or if the infringer, who is a party to the proceeding, has a defense or enjoys exemption under this Law". The inadmissibility of certain material for submission as evidence – without determining if this is the case before us – does not prevent its disclosure at the preliminary stage of the trial, nor the right of the other side to examine it (see *Bank Iggud LeYisrael v. Azulai* [6], at p. 64), as aforesaid.

In sum, in the case at hand, the alleged infringement of the privacy of the complainants and the witnesses does not justify the creation of a high-level defense of privilege against the disclosure of the information. The gravity of the alleged infringement of privacy, to the extent that there was such, is relatively low, and at all events does not match the harm liable to be caused to the respondent's right to a fair proceeding if the protocols and complaints are not disclosed (see and compare Zuckerman, para. 14. 106).

The promise of confidentiality as a basis for privilege

22. It remains for us to discuss the petitioner's claim that as in *Skoler v. Gerbi* [19], in this case, too, there should be recognition of a privilege that draws its force and justification from the undertaking of confidentiality given by the Investigation Committee to the complainants and the witnesses. In this section we will again address the considerations pertaining to the importance of the Investigation Committee's activities and to the infringement of the privacy of the complainants and the witnesses, but our focus will be on the promise of confidentiality made by Committee. This promise was explicitly recorded in the Committee's report, which states on p. 3 that -

> 'The Committee gave an undertaking regarding the full confidentiality of the details of the testimonies and those giving them, in order to enable those interviewed to speak frankly, freely and without fear;'

On page 6 of the Report it states that –

> 'The quotations cited in the Report are anonymous, in order not to reveal the identity of the witnesses, pursuant to the promise of privilege that was given.'

The promise of confidentiality cited here relates, literally, to the witnesses who testified before the Committee. On the other hand, as the respondents themselves noted, *prima facie* it is problematic to apply this promise to the letters of complaint that the petitioner refused to disclose, since these letters (apart from one which bore no date), bear a date that precedes the date of the Committee's establishment (see itemization of letters in appendix 19 of the appendices volume filed by the petitioner and the Committee's letter of appointment from 9 November 2003, appendix 6, *ibid*). The petitioner had no answer to this difficulty, but for purposes of this discussion I am prepared to assume in the petitioner's favor that there was an overlap between those who wrote the letters of complaint prior to the Committee's establishment and those who testified before the Committee upon its establishment. Accordingly, once the Committee gave its undertaking of confidentiality, it extended both to matters transmitted orally to the Committee and to the letters of complaint submitted to it as part of the material that was relevant for its conclusions. The problem is that this kind of promise of confidentiality does not, *per se*, establish a privilege that negates the litigant's right in a judicial proceeding to examine the documents referred to in that promise, to the extent that they are relevant to the proceeding. Any other conclusion would divest the right of disclosure and examination of its content and mortally prejudice one of the basic conditions for the conduct of a fair procedure. This indeed is the basis

for a past ruling determining that a distinction must be made between confidentiality and privilege and that "the confidentiality of information does not automatically entail privilege against its disclosure." Confidentiality must be distinguished from privilege (see *Bank Iggud LeYisrael v. Azulai* [6], at p. 66; see also Harnon, *Law of Evidence*, p. 126). We see therefore that in our legal system, there is no automatic equation of the obligation of confidentiality with privilege, although there may be cases in which the obligation of confidentiality will be construed as an obligation that also establishes privilege. In the present context a distinction should be drawn between the obligation of confidentiality by force of a statutory provision and the obligation of confidentiality on the contractual level, deriving from a voluntary promise of a party or parties to a contract. As a rule, we would appear to be less inclined to infer a privilege from a contractual obligation of secrecy than from the purposive interpretation of a statutory provision containing an obligation of confidentiality, as was the case in *Bank Iggud LeYisrael v. Azulai* [6], at pp. 66-67). All the same, it is clear that not all contracts are cast in the same mold, and in deciding on whether privilege stems from a contractual obligation of confidentiality, consideration must be given to the nature of the contract, the identity of the contracting parties, and the broad societal and other repercussions of maintaining the obligation of confidentiality specified therein. For example, in *Skoler v. Gerbi* [19], the Court was prepared to derive a relative privilege with respect to the bank documents in reliance on the contractual obligation of confidentiality entrenched in the contractual relations between the bank and its clients. It did however emphasize that its readiness to do so reflected the public interest in maintaining the confidentiality of bank-customer relations, which is one of the bedrocks of the entire banking system. In the Court's own words:

> 'All are agreed that the bank is bound by an obligation of confidentiality in matters pertaining to its customer. The obligation of confidentiality flows from the essential nature of the bank-customer contract and from the nature of their relationship. The customer desires to ensure the confidentiality of his financial transactions and his financial position and trusts the bank not to allow their publication. The banking system is founded on the relations of trust and obligation of confidentiality (see E.P. Ellinger, *Modern Banking Law* (Oxford, 1987) 96-97. Without these it cannot survive, and in the national-economic interest in the existence of this system would also be harmed. It is this public interest that distinguishes the bank's obligation of

> confidentiality from a contractual obligation of confidentiality, in which the public has no interest' (*ibid*, p. 771).

In other words, before the court will accede to the creation of a case-law privilege stemming from a contractual promise of confidentiality, it must be persuaded that the promise is accompanied by additional, weighty considerations rooted in the public interest, which would justify such a step (see also *Zitrin v. Disciplinary Tribunal of Bar Association, Tel-Aviv District* [4], at pp. 358-359). English law adopted a similar approach whereby in principle, neither a contractual promise of confidentiality, nor even the fact that information was transferred in the framework of relations of trust that dictated secrecy, sufficed to prevent the disclosure of the relevant material and its submission for the opposing party's inspection in the course of a legal proceeding (with the exception of information transmitted in the framework of attorney-client relations). Nonetheless, a promise or obligation of this kind still constitutes a factor warranting judicial consideration in this context (see: Peter Murphy *Murphy on Evidence*, para. 13.10 (10th ed., 2007); Zuckerman, paras. 14.52-14.60; *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners* (No. 2) [1974] A.C. 405, 429, 433-434; *D. v. National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, 218, 242, 245; *Science Research Council v. Nasse* [1980] A.C. 1028, 1065, 1067, 1074; *South Tyneside MBC v. Wickes Building Supplies Ltd* [2004] N.P.C. 164, para. 23(iv)).

23. The promise of confidentiality in the case before us is a promise made to the complainants and the witnesses by an authorized body on the petitioner's behalf (the Investigation Committee). As such, this is an obligation that was created between the petitioner and the complainants and witnesses on the contractual level. One must bear in mind that this kind of obligation encourages cooperation between suppliers of information and voluntary investigation committees such as the Committee in the present case, and therefore, from the perspective of the public interest, it is fairly important in the establishment and the effective functioning of these committees as aforesaid. The violation of the privacy of the witnesses and complainants that will occur if the promise of confidentiality is not upheld is also a serious consideration in this context, in view of the constitutionality of the right to privacy. However, as clarified above, neither this infringement of privacy nor the importance of investigation committees establishes a public interest that justifies vesting the information with a privileged status in the circumstances of this case, in view of the weight of the opposing considerations. In my view, this conclusion would not differ even if our considerations were to be supplemented by the cumulative importance of the actual promise of

confidentiality. After all, it was in reliance *inter alia*, and perhaps primarily, upon those particular complaints and testimony, that the Investigation Committee issued its far-reaching recommendations regarding these respondents - recommendations that were adopted by the petitioner, who decided to remove the respondents from the Theatre Department. This caused the respondents very significant harm, for their dismissal from their positions in this manner inevitably damaged their income, their reputation, their professional future and their status in the academic world. As such, the respondents are entitled to have the legal status of the measures adopted against them examined by an appropriate judicial tribunal. To that end they should be equipped with the full range of tools provided by the law to enable them to confront the allegations against them in the Committee's Report and in the petitioner's decision, and so that the court will be able to clarify the truth having received a clear and accurate evidentiary picture of the case. This is how things should be done unless there is an important public interest that overrides the respondents' interest in receiving all of the relevant material. No such interest exists in the current case. Accordingly, there are no grounds for establishing a case-law privilege anchored in the promise of confidentiality given by the Committee to the complainants and the witnesses, on the basis of which the petitioner would be permitted not to disclose all of the disputed material to the respondents, i.e. the protocols of the Committee documenting the testimony of the witnesses to whom the promise of confidentiality was made, and additional documents submitted to the Committee which the petitioner attempted to conceal - primarily the complaints of the teachers and students in the Department.

24. This being the case, neither can the promise of confidentiality serve as an anchor for the petitioner's refusal to disclose these documents to the respondents. Does this mean that in terms of its relations with the witnesses and the complainants, the petitioner should be regarded as having breached its promise? I do not think so. I think it appropriate to read an unwritten caveat into the promises, to the effect that the petitioner is bound by any lawful demand to provide testimony or to submit a document. Any other reading of this promise, namely as a promise that purports to override a statutory requirement, might brand it as an illegal promise, leading to its nullification under s. 30 of the Contracts (General Part) Law, 5733-1973 (hereinafter: "Contracts Law") (on the rule of interpretation whereby a construction that retains the contract's validity is preferable to a construction that renders it invalid by reason of illegality, see s. 25(b) of the Contracts Law, and CA 391/80 *Lesserson v. Shikun Ovdim Ltd.* [56], at p. 255; CA 7664/00 *Abraham Rubinstein and Co. Contracting Company Ltd. v. Holon Municipality* [57], at

pp. 133-134). Consequently, and from the petitioner's perspective, a judicial order addressed to it [the petitioner] and ordering it to allow disclosure and examination of the documents and protocols in respect of which it gave a promise of confidentiality would not expose it to claims on the part of the complainants and the witnesses for having breached that promise (on this issue, see also the defence in s. 18(2)(b) of the Protection of Privacy Law and the article of Alex Stein "Bank-Customer Privilege in the Laws of Evidence" *Mishpatim* 25 (1995) pp. 45, 69-70; and cf. R.G. Toulson, C.M. Phipps *Confidentiality*, para. 3-168-3-169(2nd ed., 2006)). On the other hand, from the perspective of the complainants and the witnesses, the conclusion whereby the obligation of confidentiality is not a barrier to the respondents' right to receive the relevant material is of greater significance, especially in view of the fact that the complainants and the witnesses are not parties to the litigation between the petitioner and the respondents, and as such have not had the opportunity of stating their case in relation to the disclosure of the material. Moreover, the agreement to the unwritten caveat that must be read into the promise of confidentiality is constructively imputed to the complainants and the witnesses in order to retain the legality of the promise, whereas in practice, it is definitely possible that they understood and relied upon the promise as being a bar to any exposure of the material, even in a legal proceeding. Under these circumstances the National Labor Court rightly attached significance to the interests of the complainants and the witnesses as third parties in the proceeding, ruling that the names of the speakers and any other identifying particulars were to be deleted from the protocols of the Investigation Committee that had not yet been relayed to the respondents, and, regarding the other documents, in ruling that these were to be submitted for the examination of the Regional Labour Court, "which would rule on the deletion of details that might be prejudicial to parties not connected to the proceedings, and on whether it is possible to allow the disclosure of the documents [to the respondents] without such disclosure harming the interests of a third party." In this way the National Labour Court balanced between the respondents' right to receive the material and the interest of the complainants and witnesses, as third parties, that at the very least, the extent of the disclosure would not be in excess of what was required by the respondents for purposes of the fair conduct of their suit.

25. In view of all the reasons above I would suggest to my colleagues to deny the petition and to obligate the petitioner to pay the respondents' legal fees in the sum of NIS 20,000.

Justice M. Naor

I concur with the comprehensive judgment of my colleague, Justice Hayut. I do, however, wish to make a number of brief comments.

1. My colleague states (in para. 24 of the judgment) that "the National Court rightly attached significance to the interests of the complainants and the witnesses as third parties in the proceeding, ruling that the names of the speakers and any other identifying particulars were to be deleted from the protocols of the Investigation Committee that had not yet been relayed to the respondents. " I would like to leave the question of whether there are grounds for this deletion for future decision. The petitioner in this case is the University, and the *respondents* did not file any petition regarding the Labour Court's instructions regarding the deletions. Consequently, our decision on this matter is not required, and I therefore wish to refrain from ruling on the matter.

2. Similarly, and since, as my colleague noted, we did not hear the complainants and the witnesses, I see no basis for determining that in the relations between the petitioner and the complainants, the promise made to the complainants and the witnesses should be seen as including an unwritten reservation to the effect that the promise is subject to any lawful requirement to give testimony or submit a document. I would prefer to rule that a promise of confidentiality cannot override statutory provisions requiring the giving of testimony or disclosure of documents.

3. It is somewhat perturbing that the interests of the complainants and the witnesses, who are not parties to the current litigation, have not been safeguarded, and the promise that was made to them has not been honored. Nonetheless, in the circumstances of the case before us I believe that the respondents' interest in maintaining their dignity and their jobs outweighs the interest of the complainants and the witnesses. That is so, whatever the result may be: if at the end of a proper process in which the rights of the respondents are safeguarded, the Labour Court rules that the measures adopted against the respondents were justified, then the complainants and the witnesses have no one to fear. If, on the other hand, it turns out in the legal proceeding that the witnesses and complainants or any one of them, under the protection of a promise of confidentiality, gave information that was incorrect, then there is no justification for such protection. A proper judicial procedure will bring out the truth, either way.

4. As for the infringement of the privacy of the complainants and the witnesses: my colleague, Justice Hayut, rejected the claim that the privacy of the witnesses and the complainants was infringed, in ruling that the status of the complainants and the witnesses is a marginal one of "an observer or bystander" (para. 20 of her judgment). In my view, without examining the complaint documents and testimony, it is difficult to determine categorically that there was no infringement of privacy. As my colleague explained, the National Labour Court did not see the documents in dispute. Regarding the privilege claim and its classification our intervention is not required in this decision. However, examination of the Committee's Report points to an accumulation of testimony regarding "public humiliation ceremonies" of both the teachers and the students. One of the teachers testified to a "feeling of public humiliation" that *he experienced personally*, in addition to the public humiliation ceremonies experienced by others. Another teacher testified that these ceremonies brought the students to tears, and it is unclear whether these students actually testified regarding what they themselves had experienced. Since these testimonies are not before us, I am prepared to *assume*, for argument's sake, that there was an infringement of privacy with respect to some of the complaints or testimony. The right to privacy also extends to "privacy with respect to the proceedings in court" (*per* President Barak, HCJ 1435/03 *A. v. State Employees Disciplinary Court* [58], at p. 539) and it is "intended to enable a 'zone' for the individual in which he determines his path of action" (HCJ 6650/04 *A. v. Regional Rabbinical Court of Netanya* [43]. See also the definition of "infringment" of the right of privacy in s. 2 of the Protection of Privacy Law, 5741-1981). Even assuming that there was a certain infringement of privacy, when balanced against the harm to the respondents, the respondents would seem to have the upper hand.

5. Amongst other things, my colleague discussed the arguments concerning the public interest in ensuring the effective and fair functioning of investigation committees, as well as the concern regarding the "chilling effect" upon witnesses in and submitters of evidence to investigation committees. This argument should certainly not be taken lightly, regardless of whether it is speculative (see *Hadassah Medical Association Ein Karem v. Gilead* [5], at pp. 525-526) or not (LCA 2498/07 *Mekorot Water Company Ltd. v. Bar* [10], *per* Justice E. Rubinstein at para. 13; *State of Israel-Ministry of Health v. Estate of Avital Halperin (dec.)* [15], *per* Justice A. Grunis at para. 20).

Nevertheless, under the present circumstances, this argument cannot outweigh the real damage to the name, occupation and dignity of the respondents, which is further buttressed by the public interest in the revelation of the truth and the propriety of the judicial process.

6. The petitioner ought to have considered that the question of the dismissal might well end up in judicial forums beyond the walls of the University, and that it would be required to make a full disclosure of all the information that served as the basis for the decision and for the personal recommendations that were adopted. In my view our judgment leaves the petitioner with a *choice:* to disclose the information in the framework of the litigation or to cancel the dismissal. This would be analogous to a criminal proceeding in which it is customary to present the prosecution with the following choice when obligating it to disclose evidence despite a certificate of privilege: if it wishes to, it discloses the evidence, and if it wishes to, it withdraws the indictment, thus avoiding the disclosure (see e.g, *Mazarib v. State of Israel* [22], at p. 462e). I believe that this position is applicable to our case, with the necessary adaptations for civil law: if the petitioner deems that the interest of the complainants and the witnesses, or the interest in upholding the promise of confidentiality, outweighs the importance of the decision of the Dean of the Faculty of Humanities, it can avoid disclosing the information by accepting the suit in the Labour Court.

7. As to the legal standing of the petitioner: the National Labour Court based some of its reasoning regarding the disclosure of documents on the petitioner's status as a hybrid body with public characteristics. I agree with my colleague that the required factual foundation regarding that question was not laid. Accordingly, I would leave undecided the question of whether with respect to certain aspects an institution such as the petitioner should be regarded as a hybrid body bound by the norms of public law (see the recent book by Dr. Assaf Harel, *Hybrid Bodies – Private Bodies in Administrative Law* (2008)). I further clarify that we are dealing here with an investigation committee; the considerations I referred to would not necessarily be applicable to an appointments committee.

8. Subject to these comments I concur, as stated, with the judgment of my colleague.

President D. Beinisch

I concur with the judgment of my colleague, Justice E. Hayut, and would like to briefly add my own comments in support of the conclusions elucidated in her opinion.

1. First, it should be mentioned that in the initial stages of these judicial proceedings, the respondents were not opposed to handing over the protocols of the Investigation Committee and additional documents submitted to the Committee, without revealing the names of the witnesses or other identifying details (see e.g. the letter of Adv. Lin of 25 May 2004 to the University's attorneys, at the beginning of which she suggested the non-disclosure of the witnesses' names, as opposed to the contents of their testimony or their letters – Appendix 16 of Rs/1 of the respondents' response to the application for an interim order; see further, para. 17 of the Regional Labour Court's judgment and para. 9 of the National Labour Court's judgment, from which it emerges that the respondents proposed deleting the names of witnesses from the material requested in order "to prevent prejudice to the interests of the parties"). In their response to the petition in this Court, the attorneys for the respondents similarly "agreed to the deletion of the names in the interest of striking a balance as is customary in this kind of case", despite their observation that the identity of the witnesses might be relevant in assessing the reasonability of the conclusions reached by the Investigation Committee (response to petition, paras. 303-304). At all events, it is undisputed that the respondents did not appeal against the National Labour Court's ruling that the names of the speakers and any other identifying detail were to be deleted from any protocols that had not yet been submitted for examination, and that the other documents would be submitted to the Regional Labour Court, which would decide on the deletion of details "liable to be prejudicial to persons who had no interest in the proceedings". Under these circumstances the question for us to decide is whether the University was entitled to refuse to disclose the contents of the protocols that had yet to be submitted for the respondents' inspection and the contents of the additional documents that were presented to the Investigation Committee, subject to the deletion of the witnesses' names and other identifying details.

In this context it should also be mentioned that the University is not a "public authority" for purposes of the Freedom of Information Law, 5758-1998, and as such the provisions of that Law are not directly applicable to it, other than with respect to its financial management (see O.G 5766, 1050; also cf. *per* President Barak in *Technion – Israeli Technological Institute v. Datz* [36], p. 433, para. 15). Under these circumstances I concur with the finding of Justice Hayut, which was also accepted by Justice Naor, to the effect that we were not presented with a suitable factual-legal background for the purpose of determining whether the University is a hybrid body with the characteristics of a public body. Bearing this in mind, the guiding assumption exclusively for purposes of this litigation, and without ruling on the matter, must be that the voluntary Investigation Committee established by the University does not have public characteristics for purposes of the respondents' application for the disclosure of documents, and therefore, the norms of public law should not be applied (see para. 17 of the judgment of Justice Hayut and para. 7 of Justice Naor's judgment).

2 For the reasons set out at length in the judgment of my colleague, Justice Hayut, I too am of the view that the protocols and other documents under discussion are relevant to the dispute between the parties in the Regional Labour Court, and that the University has not demonstrated any privilege that could prevent the disclosure of the material requested.

There is no real disagreement between the parties that no actual statutory privilege exists that is applicable under the circumstances of this case. The University's central argument was that a new case-law privilege should be recognized in order to protect the constitutional right to privacy of the witnesses who appeared before the Investigation Committee, and in view of

the public interest in protecting the proper functioning of voluntary investigation committees in academic institutions. On this matter, we have already held in previous cases that "[i]n civil litigation the rule is that the disclosure of any material relevant to the dispute being adjudicated by the court should be as broad as possible", and [therefore], "…only in special and exceptional cases will a privilege be recognized" (*per* Justice D. Dorner, *Shimshon v. HaPoalim Bank Ltd.* [25], at p. 193; *per* President A. Barak in *Hadassah Medical Association v. Gilead* [5], at para. 5). In the current circumstances, I share the view of my colleagues, Justice Hayut and Justice Naor, that the gravity of the damage to the occupation and dignity of the respondents, and the need to ensure a fair proceeding which enables them to effectively defend themselves from the allegations, mandates the disclosure of the contents of the protocols and other documents that were before the Investigation Committee. This conclusion stands even under the assumption that the disclosure may cause damage – the extent of which is unclear - to the privacy of the witnesses and to the activities of voluntary, internal university investigation committees.

Here it should be noted that we have not examined the requested documents, and we therefore agree that one cannot categorically rule out the possibility of the witnesses' privacy having been infringed as a result of the disclosure. Justice Hayut stated that *"Prima facie…* any disclosure of the information in a proceeding between the petitioner and the respondents in the Regional Labour Court infringes the privacy of the complainants and the witnesses to the extent that they received a promise of confidentiality restricting the scope of disclosure of information…". According to Justice Hayut, however, the extent of the damage is relatively limited, and it is not equivalent to the respondents' right to a due process, a right which would be impaired without the disclosure of the protocols and the other requested documents (para. 21 of her judgment). Justice Naor too noted that "since these testimonies are not before us, I am prepared to *assume*, for argument's sake, that there was an infringement of privacy with respect to some of the complaints or testimony… Even assuming that there was a certain infringement of privacy, when balanced against the harm to the respondents, the respondents would seem to have the upper hand" (para. 4 of her judgment; emphasis at source – D.B). In support of the above we would emphasize that in the current case the respondents do not oppose receiving material from which the names of witnesses and other identifying details have been deleted. This detracts from the force of the University's claims concerning the infringement of the witnesses' privacy resulting from the submission of the material, and its subsequent "chilling effect" on the activities of voluntary investigation committees. As such, in my view, even without having examined the material that the respondents wish to see, it may be said that the severity of the infringement to the witnesses' privacy is mild, even if only because of the agreement not to reveal the witnesses' names and other identifying details. Considering all the above, I too am of the opinion that the circumstances of this case do not warrant the non-disclosure of the requested material.

Further to the above, and without ruling on the matter, I would note that in my view one cannot rule out the possibility that in exceptional cases, the public interest might justify recognition of a case-law based privilege which would prevent the divulging of sources who testified before voluntary investigation committees, for example - committees charged with the investigation of matters in which there is a major public interest in receiving information, the non-disclosure of which is a condition for its submission, or the revealing of which may jeopardize the possibility of its continued receipt (see and compare to the arrangement prescribed in s. 9 (b)(7) of the Freedom of Information Law, 5758-1998). Exceptional circumstances of this kind do not exist in the case before us. The University set up a voluntary Investigation Committee in order to examine difficulties that arose in the management of the Theatre Department from both the academic and administrative perspectives. Without

detracting from the importance of this kind of committee as a tool for enhancing the quality of teaching and the streamlining of the support systems in academic institutions, it cannot be said that there is a critical public interest that supersedes the broad principle of disclosure, the reasons for which lie in the public welfare and the aspiration to expose the truth and do justice in the judicial process, and in the respondents' personal interest in properly defending themselves against the damage to their occupation and their dignity.

3. As to the contractual promise of confidentiality – the differences between Justice Hayut and Justice Naor in this respect do not appear to be substantive. The assumption is that the Investigation Committee ought to have anticipated the possibility of its conclusions serving as the basis for measures taken against the respondents, and even that legal action may ensue. Bearing that in mind, both of my colleagues agree that the Investigation Committee was unauthorized to give the witnesses any absolute promise regarding the confidentiality of their testimonies which in the nature and scope would contradict the law governing the disclosure of documents; this is also the case in the absence of a critical, weighty public interest which could justify the recognition of a privilege by force of the very existence of a contractual promise of confidentiality,

As noted in para. 21 of Justice Hayut's judgment, the University's central argument against the disclosure of the requested material is based on the concern that the respondents would settle accounts with those who had testified against them. Without expressing a view as to whether this concern is substantiated and justified on its own merits, it appears that from the University's perspective the solution lies in the non-disclosure of the names and other identifying details of the witnesses, as distinct from the disclosure of the details of the testimony itself. My view is that in the absence of any recognized privilege, as explained above, the most that the Investigation Committee could have promised the witnesses and complainants would have been to *attempt* to avoid disclosure of their names or of any other identifying details – as distinct from the contents of their testimony. This could be regarded as a promise of sorts to *endeavor* not to divulge the identities of the witnesses in the event of a legal proceeding, so as to encourage the cooperation of those giving information with the Committee, in accordance with the applicable statutory provisions (on the "obligation to make an effort" see and compare: CA 444/94 *Orot Artists Representation v. Atari* [59], at para. 7).

In the circumstances of this case, the effort not to disclose the identity of the witnesses who appeared before the Committee bore fruit, because as stated, it was agreed, or at least the respondents were not opposed, that the material requested be examined without disclosure of the witnesses' names. Absent that consent, the promise to "make the effort" may have been translated into an argument on the University's part that it was initially necessary to ascertain whether the disclosure of the witnesses' identity was *essential* to the respondents' defense, in view of the infringement of the privacy of witnesses who were not party to the proceeding, and whose position on the disclosure of the material had not been heard (see and compare, in another context, AP 3542/04 *Salas v. Salas* [60], *per* Justice Proccaccia at para. 14, hearing an application for the disclosure of private material in the possession of a third party who was not a litigant in the proceeding). Either way, the University would have been left with the option of deciding whether to refrain from disclosing the witnesses' identity by agreeing to accept the suit in the Labour Court (on this matter, see para. 6 of Justice Naor's judgment).

Thus, as opposed to the ruling of the National Labour Court, my view is that the absence of privilege does not mean that the Investigation Committee was not permitted to make any promise regarding the disclosure of the testimonies given before it. At the same time, the nature and extent of such a promise must derive from the statutory conditions applicable to

the matter. On the face of it, I think that in these specific circumstances the promise given by the Investigation Committee was not, in essence, violated, in view of the decision that the material would be given to the respondents without revealing the witnesses' names. However, the contractual relationship between the Investigation Committee and the witnesses who appeared before it is not the subject of this case, and I therefore see no reason to decide on the matter.

I therefore concur in the judgment of Justice Hayut. I would add that any disputes arising between the parties relating to the practicalities of the deletion of witnesses names and other identifying details from the protocols before their submission to the respondents - should be resolved before the Regional Labour Court.

Petition denied.

9 Iyyar 5768.

14 May 2008.