In the Supreme Court sitting as the High Court of Justice

HCJ 5870/14

Before: The Honorable Deputy President E. Rubinstein
The Honorable Justice E. Hayut
The Honorable Justice U. Vogelman

The Petitioner:

Hashavim H.P.S. Business Information Ltd.

versus

The Respondent:

The Courts' Administration

A petition for Order Nisi

Date of session: 11 Av 5775; July 27, 2015

Adv. Ofer Larish, Adv. Sivan Neumark Zuriel
On behalf of the Petitioner

Adv. Avi Milikovski
On behalf of the Respondent

Adv. Avner Pinchuk
On behalf of the Association for Civil Rights in Israel

Adv. Assaf Pink
On behalf of the Association for Digital Rights in Israel

Judgment

Deputy President E. Rubinstein

1. This is a Petition challenging the decision by the Courts' Administration (hereinafter: the Respondent), which requires signing a "Letter of Commitment"

in order to gain access to its database of judgments and decisions. The "Letter of Commitment" includes, among others, a prohibition against indexing the information in a manner that would allow finding it on internet search engines such as Google and Bing.

Background and Prior Proceedings

2. The Petitioner is a commercial company, whose primary business is operating internet websites which provide the public with information for a fee. The relevant websites for our purposes are "Takdin" and "Takdin Light" (how nice it would be had "Light" would have been given a Hebrew term) where judgments and other decisions (hereinafter, for the sake of convenience: judgments) of various courts may be found. The two websites contain a similarly database of judgments which are "pulled" from the Respondent's judgments database, but are distinguishable by the business model upon which they rely.
Access to Takdin is conditioned upon a subscription fee of about NIS 2,000 a year, whereas Takdin Light allows the purchase of a digital copy of a single judgment for NIS 26. Even prior to the purchase and without commitment, any person may use Takdin Light in order to locate a particular judgment and read its first 2,500 characters. The different business models led the Petitioner to decide to permit the indexing of Takdin Light, as opposed to Takdin. Indexing is a process that enables finding the website, or parts of it, through web search engines. In other words, when we search through a web search engine a name of person mentioned in a judgment, we will receive as a result a hit that refers to the judgment in Takdin Light, but not a hit that refers to Takdin. It should be noted that according to the Petitioner, 94% of the visitors to Takdin Light arrive at the site through the web search engines. A person whose name appears in the judgment published on Takdin Light may approach the Petitioner and the latter would immediately remove the document from the free site. However, for several weeks later the judgment will still appear as a hit on web search engines. The Petitioner offers quick removal from the web search engines as well for a fee of NIS 50, which is intended – according to the Petitioner – to cover its costs of reaching out to the web search engines.

3. On April 28, 2008 the Petitioner signed, per the Respondent's demand, a letter of commitment whereby it obligated to post only documents that may be published subject to any law, and to not bring any civil claims against the courts' administration should it be sued by any third parties as a result of publishing the information. On January 15, 2013 the Respondent reached out the Petitioner and required, in order to continue the Petitioner's access to the judgments database run by the court's administration, the signing of an updated letter of commitment. Section 10 of the updated Letter of Commitment states that "I am aware that granting access to the information in my possession through open web search engines, such as the 'Google' web engine and others, may in itself constitute violation of privacy or constitute an unlawful publication, and thus I commit to

take all necessary steps in order to prevent indexation of decisions and judgments passed through it in these web search engines."

4. Following the letter, two meetings between the Petitioner's representative and the legal counsels of the courts' administration and the Ministry of Justice's Information and Technology Authority (hereinafter: ITA), which ended with the Petitioner being requested to submit technical information as to its activity. The information was provided by the Petitioner on May 16, 2013. On November 5, 2013 the Respondent notified the Petitioner that to the extent that it does not prevent indexation of the information it "pulls" from the Courts' Administration' judgments database, its access to the database would be blocked beginning on January 1, 2014. The Petitioner was granted a period of 14 days to submit its written objection. At the Petitioner's request, it was given an additional 21 days to submit its written response, which it submitted on December 17, 2013. On January 28, 2014 a meeting was held in the Respondent's offices, during which the Petitioner was given the opportunity to supplement its arguments orally. On June 15, 2014 the Respondent notified the Petitioner that in the absence of signing the updated Letter of Commitment, access to the Courts' Administration judgments databases would be blocked. On August 18, 2014, after several delays from the Respondents and several requests by the Petitioner to receive reasons for the decision, an email was sent from the Courts' Administration, which said that a company that fails to sign the updated Letter of Commitment by September 8, 2014 would be disconnected from the judgments database. An explanatory letter from the Respondent's legal counsel was attached to the email. It should be noted that the opinion by the ITA, which served the Respondent in making its decision, was not provided to the Petitioner, despite its request for it. On September 1, 2014 this petition was submitted against the Respondent. The Respondent's attorney has consented to delay the effect of the decision dated August 18, 2014 until our decision in this petition. In the absence of a written response by the State Attorneys Organization, for organizational steps, it was agreed during a hearing from March 4, 2015 that the hearing be postponed and that postponed hearing be conducted as if an order nisi had been granted. We shall further note, that a class action suit submitted against the Petitioner is pending in the Tel Aviv Yaffo District Court (before Deputy President I. Inbar) in Class Action 34134-01-12. The suit was filed by people who claim that their privacy was violated due to the publication of their names on the website. Under the decision of the District Court from June 16, 2015, the adjudication of that case will continue after a decision is handed down in the petition before us here.

The Petitioner's Claims

5. The Petitioner's arguments attack the decision by the Respondent on three levels – the **authority** to make the decision, the **procedure** by which it was made, and the **discretion** at its base. We shall begin with the arguments regarding the issue of **authority**. According to the Petitioner, the point of departure in this regard is section 70 of the Courts Law [Consolidated Version], 5744-1984 (hereinafter: "The Courts Law"), which sets publishing of judgments as a rule and

confidentiality as the exception. To the Petitioner, diverging from this rule requires explicit legislative authorization. The lack of the authorization is particular serious, so it was argued, because we are concerned with primary legislation that infringes both the principle of a public hearing and the rights of the Petitioner – the right to free occupation, the right to property and the principle of equality. According the Petitioner, the decision was made by the Courts' Manager, who is not authorized to do so. It was maintained that the Courts' Manager fills a managerial role that is not necessarily held by a judge, and whose responsibility is limited to executing administrative arrangements set by the Minster of Justice under section 82 of the Courts Law. Therefore, establishing substantive arrangements as to the publication of judgments – such as the decision dated August 18, 2014 – is not within the Courts' Manager's authority. It was also argued that the authority over this issue was granted explicitly to the Minister of Justice in section 83(a)(2) of the Courts Law, which stipulates that "the Minister of Justice may enact in regulations – […] publishing courts' judgments." According to the Petitioner, there are several substantive matters that the Minister of Justice explicitly delegates to the Courts' Managers, such as hearing cases during recess, but the issue at hand is not one of them. The Petitioner reminds us that the Minister of Justice appointed a committee, headed by retired Supreme Court Justice Professor I. Englard, for the examination of matters relating to publishing identifying details in courts' judgments and decisions (hereinafter: Justice Englard Committee), and this still sits in consideration. The appointment of the committee indicates, according to the Petitioner, that the Minister of Justice did not intend to delegate the authority to regulate this issue to the Courts' Manager.

6. As to the **procedure** by which the decision was made, it was argued this was made with a number of flaws. First, the Petitioner maintains that the non-disclosure of the ITA opinion, despite its request, infringes upon its right to make arguments as part of a proper administrative due process. It was additionally argued that the fact that the Respondent did not change its position as a result of the hearing process indicates that the hearing was a matter of mere formality, in a manner that does not substantively uphold the right to make arguments. Finally, that Petitioner maintains that the reasons given by the Respondent does not address the arguments raised during the hearing, and does not present the factual foundation upon which the decision relied. Therefore, it was argued that the Respondent did not meet – substantively – the duty imposed on any administrative authority to give reasons.

7. On the **discretion** level, the Petitioner has several arguments. First, it claimed that the decision was made for an unworthy purpose. This is so because the general public, as opposed to individual people, has no right to privacy. One's right to privacy is considered by the court upon the submission of a motion to make a case confidential and there is no place – according to the Petitioner – to provide additional protection to the general public, at the expense of other values such as a public hearing. It was secondly argued, that the current state of the law grants

paramount status to the principle of a public hearing, which prevails the right to privacy. To substantiate this claim, the Petitioner refers us to several sources of law, including relevant sections of the Defamation Law, 5725- 1965. Thirdly, it was maintained that the decision by the Respondent violates the principle of equality because the meaning of the decision is limiting the access to judgments only to professional jurists, rather than the general public. In the Petitioner's approach, this harms the group of unrepresented adjudicating parties who rely on themselves for legal representation. Fourth, it was argued that the decision is an infringement of the Petitioner's freedom of occupation, as the operation of Takdin Light constitutes a significant portion of its income. As noted above, the Petitioner claims that 94% of visitors of Takdin Light reach the site through web search engines. In light of all of the above, the Petitioner maintains that the Respondent must select a less restrictive mean, such as instructing the courts to reduce the publication of personal details which are not necessary for the decision.

The Respondent's Arguments

8. According to the Respondent, the principle of a public hearing does not require making court judgments accessible through web search engines, and in any event limiting their indexing requires no explicit legislative authorization. The Respondent additionally notes that certain restrictions on using the Courts' Administration judgments database were already included in the Letter of Commitment from 2008, as to which the Petitioner makes not claim of lack of authority. It was also argued that the Respondent is subject to the Privacy Protection Law, 5741-1981 by virtue of it being an "administrator of a database" as defined by section 7 of that Law.

9. As for the process of making the decision, the Respondent argues there was no flaw to it. The Petitioner was granted the right to make arguments both in writing and orally, given several extensions, and it was agreed to postpone the date the decision would come into effect. The Respondent claims that an administrative authority is under no duty to accept the arguments raised at a hearing and thus the lack in a change in its position does not reveal any flaw in the hearing process. Additionally, the Respondent's letter from August 18, 2014 includes detailed reasons that were the basis for the decision, so that the duty to give reasons was also flawless.

10. On the discretion level, the Respondent notes the harm caused to the privacy of litigating parties as a result of posting their names on web search engines – a harm that is distinguishable from the publishing of their names in "closed" legal databases such as Takdin, which are used primarily by jurists for professional needs. It was also noted that exposing the names of parties on web search engines creates a "chilling effect" that discourages people from turning to courts in a way that harms the right to access courts. The Respondent argues that this harm is primarily acute in labor courts, when employees who approach the courts fear that the publishing of their names may harm their chances of finding future job. It was

therefore argued that reversing the Respondent's decision is that which would infringe the right to access courts, not the other way around. In this context, we recall the Petitioner's response claiming that it is unclear which factual data the Respondent's arguments rely, as the number of those approaching courts increases each year. It was emphasized that preventing publication of judgments in the web search engines is not equivalent to a "gag order" because the judgments still appear in different internet websites in a manner that balances public hearing on one hand and the right to privacy on the other. It was also argued that the Respondent's decision does not violate the principle of equality and that the argument was raised for financial motivations alone. As for the violation of free occupation, the Respondent noted that not every administrative decision with implications to a businesslike body can be considered a violation of free occupation. In this regard it was argued that to the extent there is a violation of free occupation, then this is proportional in light of the alternative violation of the privacy of litigating parties. The Respondent argues that it explored taking less restrictive measures "however this exploration has, at this time, yielded no results." Finally, it was claimed that though the decision may not be optimal, this does not warrant legal intervention that is reserved only to decisions that are unreasonable.

The Positions of Those Seeking to be Joined as Amicus Curiae

11. In this case, two motions to be joined as amicus curiae were submitted. The first motion was submitted by the Association for Civil Rights (hereinafter: the Association), and the second by the Movement for Digital Rights (hereinafter: the Movement.) The two motions objected to granting the Petition, and these are their reasons: the Association's motion describes how technological development brought upon a sharp change in the level of litigating parties' exposure, though the legal rule remained as it was. This is still true while when the right to review judgments existed in the past, the infringement of privacy in times before the internet – a time when judgments were published in printed copies alone – was in effect highly limited (this is referred to as "practical obscurity"). Thus the Association argues that the new technological reality requires a shift from the binary approach of "private or public" to an approach of information accessibility. This approach considers not just the publishing of information but also the impact of publication. For example, the Association notes the report by the Committee for the Examination of Opening Israeli Courts to Electronic Communication, which mentioned the increased exposure of litigating parties as one of the considerations against direct broadcasting of court hearings. The Association also notes the "aggregation problem" whereby the accumulation of details of information – which each in itself raises no significant objection to its publishing – creates a real violation of privacy.

12. The Movement argues, that publishing judgments in "closed" databases such as Takdin fully realizes the right to review, while only somewhat infringing upon privacy right. On the other hand, publishing judgments in "open" databases such as Takdin Light – the judgments therein may be located through web search

engines – equally satisfies the right to review but severely violates the right to privacy. As to the claim regarding a lack of authority, the Movement claims that the Respondent's authority is established in regulation 5(b) of the Courts and Labor Courts Regulations (Review of Files), 5763-2003 (hereinafter: Files Review Regulations) which states that "in a general permit for review, the Courts' Manager may set any condition or arrangement necessary for the balance between the need to review and the potential harm to litigating parties or to third parties due to the review…" The Movement maintains that the Petitioner's argument regarding flaws in exercising the administrative discretion must be rejected. It claims that permitting indexation in the Takdin Light website causes severe harm to the privacy of litigating parties, and the possibility of removing the document from the website for a fee does not qualify the harm. It was additionally argued that the operation of the Takdin Light website is particularly egregious because the Petitioner takes active steps to make the website appear as one of the first hits presented by the web search engines. So, for purposes of illustration alone, searching the name "Shnikav" in Google's search engine produces reference to Takdin Light's site on the first results page, despite the fact that there is no judgment which addresses a person of that name. It was argued that the referral to the Takdin Light website is par for the course of the Petitioner's active steps which may mislead a person seeing that there are judgments for that same Shnikav, should that person fail to click the link and realize the mistake. We shall note here that the latter argument is not directly related to the petition at hand, but is raises a weighty issue which we see fit to address below.

Discussion

13. In the hearing before us, the Petitioner's attorney argued that though the Respondent does indeed have the authority to set technical limits for companies given access to the courts' judgments database, but it is not within its authority to set substantive restrictions – which is the case before us. The importance of web search engines to the general public, who uses them as a nearly exclusive source for its legal knowledge, was emphasized. It was also emphasized that we are concerned with a matter of policy that necessitates an organized legislative process. Therefore, it was argued, the recommendations of the Justice Englard Committee must be made before making significant changes to the current situation. The Respondent's attorney recognized that the demand to prevent the indexation prevents not just the ability to search litigants' names, but also the ability to search "legitimate" legal terms such as "breach of contract in good faith", but he claims that at this time it is technologically impossible to only partially prevent the process of indexation. The Respondent's attorney further emphasized to us that the conclusion of the Justice Englard Committee's work is yet unforeseeable and that it is necessary to take intermediate steps in order to prevent the harm currently caused to the privacy of litigating parties. The Association's attorney stated that the state holds many databases, such as the land registry, the public's full access to which via web search engines would cause a grave infringement to the public's privacy, this despite the fact that even now it is possible to receive information from such databases through individual requests to

the relevant bodies. The Movement's attorney emphasized that the Petitioner's conduct leads not only to over exposure of litigating parties, but also creates a misrepresentation whereby the name of a person appears in a judgment, even when reality is completely different (see paragraph 12, above). It was also argued, that the Respondent's policy does not cause a real harm to the Petitioner, because the latter may become in possession of the judgments even were its access to the Respondent's database to be blocked – this by copying the documents published on the Respondent's website or by any other means.

Decision

14. The matter before us raises complex questions as to the intersection between law and technology and serves as an important reminder to us – judges – that the judgments we write while aspiring to accomplish justice may, by virtue of their publication, cause injustice to litigating parties (see my decision in CA 438/14, *John Doe v. The Israeli Database for Car Insurance* (February 6, 2014) (hereinafter: the *Car Insurance Database* case.) This case is a testament again, as other cases in our times, that the law lags behind technological progress and the legal problems it poses, it chases them but does not catch up. This is the case in areas of the internet and the virtual, and this is the case in matter of intellectual property and others (see Michal Agmon-Gonen, *The Internet as a safe Harbor: Legal Regularization In Light of the Technological Possibilities for Circumvention and the Global Nature of the Net*, LAW, SOCIETY AND CULTURE – LEGAL NET: LAW AND INFORMATION TECHNOLOGY 433 (2011), Amal Jabarin, *The Role of Law in Regulating the Internet through the Perspective of Economics Approach to Law*, KIRYAT HAMISHPAT 7, 233 (2008)). In the introduction to the book INTELLECTUAL PROPERTY: INTERDISCIPLINARY REVIEWS (eds.: Miryam Markovitz-Bitton and Lior Zemer (in print)) I had the opportunity to say: "the chase after technology and its tentacles is not unique to the world of intellectual property. It applies to many areas in the law, in particular is the connection between the great virtual world to criminal law, defamation and many others, and the issues that arise from each of these." This case reveals a conflict between the freedom of information and the public's right to know (including corporate information) and the right to privacy, which elicits "genetic sympathy", based in values, in order to prevent as much as possible that one's past follow them indefinitely, and the computer after all does not forget.

15. In this context, recall the judgment by the European Union Court of Justice which compelled Google to remove a link to a story that included details of an offence committed by a person many years prior (C-131/12, Google v. Agencia Espanola de Proteccion de Datos). Some have termed this the "right to be forgotten" (see Yehonatan Klinger, *The Right to be forgotten? Apparently Not in Israel*, in the blog INTELLECT OR INSANITY (February 2, 2015) http://2jk.org/praxis/?p=5368)). It should be noted that the "right to be forgotten," as defined by the European decision, requires that the search engine examine individual requests to remove links, but the decision does not expand as to the considerations which must guide decisions regarding such requests. As a result, it is hard to say whether –

according to the European Court – there is a "right to be forgotten" also from official and lawfully published case law. So far it seems that American law has not adopted the "right to be forgotten" (see the U.S Court of Appeals for the Ninth Circuit in *Garcia v. Google Inc.*, 786 F.3d 733, 745-46 (2015)). This comes from a long-standing general position of the superiority of free speech (see Steven Bennet, *the "Right to be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J OF INT'L L. 161, 169 (2012)). In the Israeli context, we shall note that a certain aspect of this issue was regulated in the Criminal Registration Law, 5741-1981, which sets guidelines for running the criminal registration database – including the process of expunging (deleting registration) after 10 years have passed since the end of period of limitations on the conviction had elapsed (section 16 of the Law). The Law's explanatory notes state that "the basic principle behind the proposal is that – aside from unusual matters – one should not be remembered by their wrongdoing for their entire lives and must be instead permitted to turn over a new leaf and that full rehabilitation and fully reintegration into society must be encourages." (BILLS 1514, 216; and see Nahum Rakover, THE STATUS OF AN OFFENDER WHO HAS SERVED HIS SENTENCE (5767-2007)).

16. Back to the matter before us, the issue raised is whether indeed the step taken by the Respondent meaningfully and effectively contributes to protecting the right to privacy, and whether this contribution justifies the accompanied harm caused to the principle of a public hearing. The decision in this case will follow these steps: first, we shall explore whether the Respondent's decision was made within its authority. Then we shall explore the process of making this decision and whether it maintained rules of natural justice. Finally, we shall examine the administrative discretion at the basis of the decision and its reasonability.

Authority

17. The principle of administrative legality – which is the foundation for administrative law – instructs us that an administrative authority is limited in its action to the four walls it was granted by the legislature (HCJ 1/49, *Bejerano v. The Minister of Police*, IsrSC B 80 (1949) (hereinafter: the *Bejerano* case); HCJ 1405/14, *Professor Salwin v. The Deputy General Director of the Ministry of Health* (2014)). This is in contrast to a private citizen, who is free to do as she pleases so long that there is no law to limit her. In other words, the difference between the private and public entity is the premise as to the lawfulness of their actions. The administration requires individual permission, whereas the private citizen is free in the absence of a specific prohibition. Saying "From any tree of the garden you may eat freely; But from the tree of the knowledge of good and evil you shall not eat" (Genesis 2:16-17). The legislative authorization is not a mere technical legal requirement, but rather the administrative authority needs it in order to secure the public's trust in its activity, which is funded by public resources (see Baruch Bracha, ADMINISTRATIVE LAW, vol. 1, 35 (5747-1986)). As said by the scholar Zamir: "The principle as to administrative legality is necessarily rooted in the actual nature of democracy. Democracy grants sovereignty to the people. The people is that who grants the government and any

other administrative authority, through laws, all the authorities they hold and they hold but the authorities granted to them by law." (Itzhak Zamir THE ADMINISTRATIVE AUTHORITY vol. A 50 (5756-1996) (hereinafter: Zamir). Moreover, in plain language free of legal jargon, an administrative authority's exceeding of its authority holds totalitarian characteristics – law at one end and reality at the other. However, the administrative authority must not be paralyzed in its operation to the benefit of the many, and we shall return to this. As a general rule, that administration is granted the discretion as to whether and how to use the authorities granted to it, but there are instances where such discretion is particularly narrow, to the extent of imposing duties on the administration to exercise its authority (LCrimA 7861/03, *The State of Israel v. The Local Council of the Lower Galilee*, para. 16 of Deputy President Cheshin's judgment (2006); Daphna Barak-Erez ADMINISTRATIVE LAW vol. A 216 (5770-2010) (hereinafter: Barak-Erez.))

18. Authorization for the actions of an administrative authority need not be found explicitly in primary legislation. Rather, secondary legislation may also be recognized as a source for authorization (Zamir, 131.) However, where the administrative action infringes basic rights – authorization sourced in secondary legislation is insufficient. This was mandated by the Limitation Clause in section 8 of Basic Law: Human Dignity and Liberty: "One is not to violate the rights accordance by this Basic Law save **by means of a law**…" (emphasis added – E.R.) This provision was expanded through case law to include basic rights enshrined in other statutes (EA 92/03, *Mofaz v. Chairman of the Central Elections Committee*, IsrSC 57 (3) 793, 811, para. 17 of then Justice Matza's judgment (2003)). A similar rule applies also to "primary arrangements" which require – due to their importance – anchoring in primary rather than secondary legislation. In the words of President Barak:

> "It is a basic rule of the public law in Israel that where a government activity is based in a regulation or an administrative instruction, it is appropriate that the general policy and principal standards that guide the basis of the action be sourced in primary legislation which permits the regulation or the administrative instruction. In more 'technical' terms, this basic rule means that 'primary arrangements' that set the general policy and the guiding principles must be established by Knesset legislation, whereas the regulations or the administrative instruction must set only 'secondary arrangements.'" (HCJ 3267/97, *Rubinstein v. The Minister of Defense*, IsrSC 52(5) 481, 502, para. 19 of President Barak's judgment (1998); see also Gidon Sapir, *Primary Arrangements*, IYUNEI MISHPAT 32(1) 5 (5770-2010)).

19. One of the issues that often lands on judges' desks is the level of explicit required in an authorizing statute. That is – how specific must the statute be regarding of the administrative authority's permissible activity. Recognition of implicit authority – authority that is not written explicitly into the language of the law –

stems from common sense and life experience, which teach us that reality is infinitely more complex than the ability of a flesh and blood legislature to foresee in advance. Strict insistence over a high level of specificity may thus lead to debilitating the authorities of a public administration and to obstructing normal life. The words of scholar Margit Cohen are apt here:

> "No legislative system, not even the most comprehensive one, can provide full responses to any possible situation, particularly when in a modern state, whose needs and conditions change rapidly. A lack of regulation may exist even when the system is still in the process of creation and coming together. Further, a system may be characterized by refraining from regulation through primary legislation, which is rotted in geranial parliamentary weakness or deliberate failure from addressing matters of great political sensitivity. When it is possible that the law does not regulate particular areas, the outcome of this must be examined in terms of the executive authority. One possibility may be avoiding action. However at the same time there is force to the argument that the government must act even in the absence of legal arrangements and that its power to do so results inherently from its nature and from its role." (Margit Cohen, THE GENERAL AUTHORITIES OF THE EXECUTIVE AUTHORITY 8 (5763-2002)).

Recall here the decision by President Beinisch in HCJ 10203/03, *The National Census v. The Attorney General*, IsrSC 62(4) 715 (2008), where it was noted that the "level of specificity" must be determined according to the circumstances of the matter, including the "nature of the infringed right and the reasons behind it, the relative social importance of the right, the level of its infringement, its social consequences, the identity of the infringing authority and the context" (p. 82, see also Barak-Erez, 125). A mirror image of sorts to this holding was also established in HCJ 3933/11, *Maccabi Health Services v. The Minister of Health*, para. 35 of Justice Arbel's judgment (2014), where it was held that a "level of specificity" must be low where it is necessary in order to authorize the administration authorities to protect basic rights. I will emphasize – as in other cases – common sense. It must be examined often whether the circumstances support strictness or a flexible approach, while inferring the intent of the legislature appropriately. The authority serves the public. Thus, to the extent that it is recognized that its authorities are exercised in good faith in order to provide service, the Court does not bar its actions. If, god forbid, it is clear that irrelevant considerations, arbitrariness, or lack of good faith taint the authority's action, the approach would of course be different. The authority is not the master of the individual but rather its servant, as well as the servant of society as a whole, and balancing its authorities must carry that always, including when considering principled questions such as protecting one's privacy and minimizing the harm as much as possible within the contours of the law.

20. And from the general to the specific. The Courts' Administration is regulated constitutionally in Basic Law: the Judiciary and in the Courts Law (Consolidated Version) 5744-1984. Section 24(1) of Basic Law: The Judiciary lists "the regulations of the administration of the courts, the establishment of such regulations and the responsibility to execute them" among the matters for which "instruction shall be set by law." Section 82 of the Courts Law states that "(a) the Minister of Justice shall set the administration regulations of the courts and shall appoint, with the consent of the President of the Supreme Court, the Courts' Manager, whether a judge or not; (b) the Courts' Manager shall be responsible to the Minister as to the execution of the administration regulations"; see HCJ 4703/14, *Sharon v. The President of the Supreme Court* (November 30, 2014), paragraphs 10-11. Among others, it was said in paragraph 11 there that "the Manager… is charged with the administrative operation of the system…" and that he has additional authorities, as listed there. Do such authorities cover our matter as well?

21. As recalled, the Respondent's decision conditions continued access to its database upon barring the indexation of judgments found in the database. The practical meaning of this decision is that the Petitioner is barred from posting the pages of Takdin Light to web search engines and from attracting potential clients by doing so. The prevention of posting to web search engines may cause severe harm to the Petitioner's business, as most of the visitors to its site arrive there through a "Google" search (it claims, as mentioned, that these are 94% of the visitors to Takdin Light, whose activity is responsible for about 20% of the Petitioner's income.) It is clear that limiting the Petitioner's ability to publish its services is a violation of the freedom of occupation itself (see HCJ 4000/93, *Canval v. Israel Bar Association*, para. 9 of President Barak's judgment (1997)). The publication is an essential component in the chain of business activity, which of course includes many stages and cannot be reduced solely to the process of sale to end consumers. Harms to the chain of business activity – whether in the planning, production or marketing phases – may amount to a violation of the freedom of occupation. As a side note, I should point out that preventing commercial advertizing and publications may also constitute a violation of the freedom of speech, as said by Justice Dorner: "Commercial speech is not a step child to free expression, but it is among its organs" (HCJ 606/93, *Kidum Entrepreneurship and Publishing Inc. v. The Broadcasting Authority*, IsrSC 48(2) 1, 10 (1994)). It is true, that a violation of free commercial speech is less significant that harm to free political speech (HCJ 5118/95, *Meir Simon Inc. v. the Second Authority for Television and Radio*, IsrSC 49(5) 751 (1996); HCJ 15/96, *Thermokir Horashim v. the Second Authority for Television and Radio*, IsrSC 50(3) 397 (1996)), but this does not mean that commercial speech may be violated thoughtlessly. Therefore, before us is a not insignificant violation of the basic rights of a private body by a public body. Such violation requires authorization in primary legislation.

22. As was already previously written, the Respondent does not point to a specific source of authorization for the basis of its decision, but rather argues that as a general rule there is no need for authorization in law. This is because, arguably, the law does not mandate publishing judgments on web search engines. For our purposes here, and without setting anything in stone, I am willing to assume that indeed the Respondent is not **obligated** to publish the judgments on web search engines, and that it is possible – from the law's perspective – to be satisfied with publication through other means. However, the mere fact that the Respondent is under no duty to publish the judgments on search engines does not mean, necessarily and inherently, that it is permitted to prevent this from private bodies. The status of the Respondent's authority to publish judgments – whether it is permissible or obligatory – is irrelevant to the issue of its authority to prevent publication by private bodies. These are two distinct actions – publishing and preventing publishing – each of which seemingly requires statutory authorization. Another interpretation – whereby it is within the authority of an administrative authority to prevent activity which it is not statutorily obligated to commit on its own – does not fit common sense and means the emptying of the principle of legality, which mandates that the individual is free to do as she pleases in the absence of any other legislative provision. We thus find, that the Respondent is not exempt from presenting a statutory source to authorize its decision. As written, the Respondent's decision to limit the Petitioner's access to the judgments database violates its freedom of occupation – and this, without authorization in primary legislation, must not be permitted.

23. The Respondent argues that the Petitioner signed the letter of Commitment in 2008 demonstrates that it was within its authority to limit access to the database. Without causing offense, I believe this is an argument that is hard to accept. First, the letter of Commitment from 2008 is not similar to the current one. The first letter of Commitment is substantially limited and it primarily limits publications that are prohibited by any law. It seems that is not a meaningful limitation, as opposed to the current prohibition against indexation of judgments. In other words, it makes sense that conditioning access to the database was within the authority so long as the requirement was obeying the law, but not so when the requirement exceeds this. Second, and this is the main point, the Petitioner's consent to signing a letter of Commitment is irrelevant to the question of authority. The authority requirement is not dispositive and the administrative authority may not exempt itself from it, even with the agreement of the parties. Recall, that one of the rationales at the foundation of the authority requirement is the people's control, through its representatives, over the public administration. It is clear that the administration may not free itself from this control through the consent of one individual or another out of the general public. Appropriate here are the words of the scholar Shalev:

> "Clearly, a contract that exceeds the lawful powers and authorities of the authority, as established by the authorizing law, is an unlawful contract that is therefore void. A contract may not expand the authority's powers, or grant it authorities, or allow it to act

> outside of the bounds of its lawful authority. This is the distinction between the public administrative authority (aside from the state, whose powers and authorities are unlimited) and the individual: the authorities of the public authority and its capacity are restricted and thus her contracts as well require a statutory source." (Gabriela Shalev CONTRACTS AND TENDERS BY THE PUBLIC AUTHORITY 49 (1999); see also Barak-Erez, vol. 3 259.))

24. The Movement for Digital Rights wished to defend the Respondent, and to find the source of the authority for its decision in regulation 5(b) of the Files Review Regulations. This is the language of the section:

> "(b) The Courts' Manager may establish in a general permit for review any condition or arrangement that is necessary in order to balance the need for review and the harm that may be caused to litigating parties or a third party due to the review, including redacting of details, limiting the number of reviewers and taking steps to prevent the identification of parties or people. Additionally, the Courts' Manager may refuse to give a general permit of review or establish conditions or arrangements for its implementation considering the necessary resource allocation."

These words are well and good, but still – this is secondary legislation that cannot serve as a source of authority for violations of fundamental rights. As it was written above, administrative decisions that infringe upon basic rights – and such is the decision before us – must pass muster under the Limitations Clause, whose first element is authorization in primary legislation. Additionally, it is highly doubtful whether the Review Regulations are relevant to the matter here, because commercial companies that enter into contracts with the Courts' Administration – such as the Petitioner – do not do so as a result of a general review permit. Rather this is a completely different procedure.

25. A different possibility that was presented was recognizing the Privacy Protection Law, 5741-1981 as a source behind the authority for the Respondent's decision. According to this explanation, the Respondent is the "operator of a database" as defined by section 7 of this Law. Therefore, as revealed by the Respondent's arguments, it is obligated to comply with section 8(b) of the Law: "No person shall use the information in a database that must be registered according to this section, but for the purpose for which the database was established." This should be joined with section 17 of the Law whereby "an owner of a database, a holder of such database or the operator of a database, is each responsible for safeguarding the information in the database." This is the root, it was argued, of the authority at the basis of the Respondent's decision. I am afraid that this interpretation is not devoid of difficulties. The first difficulty is technical in its nature, and it concerns the question whether the Respondent operates a database for purposes of section 7 of the Law. If so – as the Petitioner's attorney has noted – its judgments database is not registered in the register of databases. The second

difficulty – and this is the main one – goes to the matter of the purpose of the Respondent's database. On its face, and with no party claiming otherwise, the judgments database exists for the purposes of realizing *de facto* the principle of a public hearing. The Courts' Administration collects the judgments, publishes them on its website and allows commercial websites direct access to them – all for the purposes of benefiting the public, so that "the wise may become wiser still" (Mishley, 9: 9). If so, does the indexation of judgments constitute a use that exceeds the purpose of which the database was established for? I believe that the answer is not in the affirmative. The indexation of the judgments constitutes in itself a "step up" in making legal material accessible to the general public, thus generally serving the purpose for which the database was established. Still, the "step up" in making judgments accessible creates a parallel increase in the violation of litigating parties' privacy with the human sensitivities involved, and it is certainly possible that the administrative authorities must give thought to this and seek solutions (and of course this would naturally apply to the Justice Englard Committee) – however the administration must do all this only with permit and authority. This ends our discussion in the level of the authority, and a source for authorizing the Respondent's decision – in its face, is nonexistent. Beyond the necessary scope, we shall continue our examination of the decision along the two other levels – the level of the procedure for making the decision and the level of the discretion upon which it relied.

Procedure

26. After discussing the authority requirement that derives from the principle of legality, we shall address the requirement for proper administrative due process. Strict adherence to administrative due process is essential, and there is no need to elaborate (see Barak-Erez 262-63): meeting the requirements for a due process protects the values of fairness and equality; improves the quality of the administrative decision; allows the public to influence the decision in a democratic manner; ensures public trust in governance and administration; allows effective review over the operations of the administration; and of no less importance – prevents corruption, the creation of appealing loopholes and a slippery slope in the style of countries and administrations to which we do not wish to resemble. The duty to hold an administrative due process includes, among others, holding a hearing for parties who may be affected by the decision (HCJ 598/77, *Eliyahu Deri v. The Parole Board*, IsrSC 32(3) 161 (1978); LCA 2327/11, *John Doe v. John Doe*, para. 22 of Justice Danziger's decision (2011)), giving reasons for the decision made (HCJ 142/72, *Shapira v. The Israel Bar Association*, IsrSC 25(1) 325 (1971); Yoav Dotan, *Administrative Authorities and Elected Bodies' Duty to Give Reasons*, MECHKAREI MISHPAT 19 5 (5762-2002) (hereinafter: Dotan)), and exposing internal documents that substantiated it (HCJ 5537/91, *Efrati v. Ostfeld*, IsrDC 46(3) 501, 513, para. 21 of then Judge Cheshin's opinion (1992); AAA 4014/11, *Eid v. Ministry of Interior*, para. 28 of Justice Barak-Erez's judgment (2014)).

27. In this context it seems that the Petitioner's claims as to the administrative process touch on three aspects: the hearing, the reasoning and the disclosure of internal documents. I shall already note here that I do not believe the arguments ought to be accepted. We are not concerned with night time "grab", but a serious and prolonged administrative process throughout which the Petitioner was permitted to express its opinion as to the decision, and indeed several extensions were provided for such purposes (see the email correspondence between the Respondent and the Petitioner on the dates of Nov. 18, 2013; Dec. 26, 2013 and July 1, 2014.) The hearing was provided both orally and in writing, with the Petitioner furnishing the Respondent with relevant information. Accepting the Petitioner's argument whereby the fact that the Respondent did not change its mind during the hearing indicates that the hearing was conducted for appearances' sake alone – would mean imposing a duty on administrative authorities to necessarily change their positions as a result of a hearing. This, of course, is unacceptable and it is hard to believe that the Petitioner itself holds this view.

28. As for the duty to give reasons, the Respondent noted in its letter from August 12, 2014, among others, that the rationale behind the decision was the desire "to protect the privacy of the litigating parties, private information about whom was exposed on the internet to any inquiring eyes" and that it "is permitted to put in place reasonable conditions to proportionately balance the principle of a public hearing and the interest in guarding the privacy of litigating parties before granting access to servers." On its face, this is sufficient for meeting its administrative duty to give reasons for its decisions. Indeed, in a legal sense, in order to fulfill the duty to give reasons, there is no requirement that the reasons are lawful or based in law. See for this issue, the words of the scholar Y. Dotan:

> "Even a decision whose reasons are completely wrong – is a reasoned decision. The flaw in the decision is a substantive flaw on the merits, but it is not a flaw to the procedural duty to give reasons. When the authority gave reasons – and even reasons that are completely wrong, the reasoning 'played its part' and it is now possible to subject the decision to review on the basis of the reasons given." (Dotan, 50).

These things are presented for the completeness of the legal picture, but in simple terms, god help an authority whose reasons are wrong and god help a public the reasons of whose servants are wrong, because – in other words – they may not be performing their duties adequately.

29. And now – to the Respondent's decision not to disclose the ITA opinion, upon which it relied its policy as to the indexation of judgments, to the Petitioner. As noted above, the representative of ITA refused to send to Petitioner the opinion (see the email from November 21, 2013.) Seemingly, there is no substantive reason not to disclose the legal opinion since it does not concern national security, confidential methods of action or protecting the privacy of a third party (Barak-Erez 506-508.) And still, and without setting things in stone, it should be noted

that it is not impossible that the ITA opinion constitutes "internal consultation" for the purposes of section 9(b)(4) of the Freedom of Information Law 5758-1998, which exempts the administrative authority from providing such information (AAA 9135/03, *The Council for Higher Education v. Ha'aretz Newspaper Publishing*, IsrSC 60(4) 217 (2006)). It therefore appears that the issue is whether the Respondent met its administrative duty to permit the Petitioner to review documents that informed its decision (see HCJ 7805/00, *Aloni v. The Jerusalem City Comptroller*, IsrSC 57(4) 577, para. 18 of Justice Procaccia's judgment (2003)). Let us note, that the Petitioner continued its long email correspondence with the Respondent without referencing the matter again, in a manner that may be understood as the Petitioner's abandoning its request to review the opinion. We shall further note that the Respondent did properly give reasons for its decision (see paragraph 26, above.) As known, not every flaw in an administrative decision would inherently and necessarily lead to its voidance (CA 4275/94, *The Stock Exchange v. The Torah Literature Database Management Ltd.*, IsrSC 50(5) 485, 509 para. 22 of then Justice Orr's opinion (1997); AAA 2339/12, *Shohat v. The Kfar Saba Local Committee for Planning and Construction*, para 49 of Justice Shoham's judgment (2013)). It therefore seems, without making any determinations in the matter, that it would not be appropriate to void the decision because of the Respondent's refusal to disclose the opinion.

The Discretion

30. So far we have been concerned with the source of the authority to make the decision, and the way in which it was made. We now open the "black box," and look inside at the decision itself and its content. At the outset, we shall note that this Court does not rush to intervene in the discretion of an administrative authority, and particularly not where we are concerned with decision that are within its professional expertise (HCJ 338/87, *Margaliot v. The Minister of Justice*, IsrSC 42(1) 112, 116, para. 6 of Justice Bach's judgment (1988); HCJ 7510/05, *Lotan v. the Minister of Industry, Commerce and Employment*, para. 23 of Justice Joubran's Judgment (2006)). Still, we would not be performing our duties properly were we to shut our eyes to administrative decisions that substantially and extremely exceed the range of reasonability. The requirement of reasonability it closely linked to the authority requirement, and both are founded upon the democratic rationale that was reviewed above (see para. 15.) As noted, the administrative authority is limited in its actions to the four walls defined by the legislature – as the representative of the general public. It is easy to see that those four walls do not house decisions that are extremely unreasonable, as this was not the legislature's intent. As was said by then Justice Barak:

> "The balance between the different interests was charged by the legislature to the Second Respondent, and so long as it weight appropriate considerations and attributed proper weight to them, we shall not intervene. But if the considerations of the Second Respondent are based in a lack of good faith, arbitrariness, discrimination or unreasonableness – we shall not hesitate to

intervene." (HCJ 148/79, *Sa'ar v. The Minister of Interior*, IsrSC 34(2) 169, 178, para. 8 of his judgment (1979)).

Clearly, balancing conflicting interests is no simple task, which is often likened to an acrobat's walk of a tightrope with the interested parties pulling at either end of the rope. Therefore, with the assumption of good faith, only a serious divergence from the range of reasonableness shall give rise to judicial intervention in the balancing decision made by the administrative authority. (HCJ 910/86, *Ressler v. The Minister of Interior*, IsrSC 42(2) 441, 518, para. 7 of President Shamgar's judgment (1988)). In the case before us, the necessary balance is between the right to privacy of litigating parties on one hand, and the principle of a public hearing and the Petitioner's freedom of occupation on the other. Note, that we are not required to make categorical determinations as to whether privacy must prevail or whether a public hearing and the freedom of occupation should. Were I to follow my heart, I believe I would have proposed to prefer privacy. But instead the question before us is whether the benefit to the protection of privacy, which results from the Respondent's concrete decision (which prohibits the indexation of judgments by bodies granted direct access to its judgment database), outweighs the harm caused to the principle of the public hearing and the freedom of occupation due to the decision (see and compare CA 8954/11, *John Doe v. Jane Doe*, para. 121 of Justice Sohlberg's judgment (2014)).

31. Let us open with the right to privacy, which was said to "draw the line between the individual and the general public, between 'me' and society. It creates a space where one is left alone, to develop her 'self', without another's involvement" (HCJ 2481/93, *Dayan v. the Commander of the District of Jerusalem*, IsrSC 48(2) 456, 470, para. 16 of then Deputy President Barak's judgment (1994)). Indeed, one's privacy is one's castle. This castle is exceedingly chipped away at with the progress of technology and there are those who believe privacy is a thing of the past (A. Michael Froomkin, *The Death of Privacy*, 52 STAN. L. REVIEW. 1461 (2000); see also Yair Amichai-Hamburger and Oren Paz, *Anonymity and Interactivity on the Internet: The Right to Privacy as a Multi-Dimensional Concept*, PRIVACY IN THE TIME OF CHANGE 201 (5772-2012)), and in practical reality this is not far. The ability to photograph and record on a mobile phone that is accessible to many, and in technologically advanced societies almost to everyone, has drastically reduced privacy. However, this does not mean that the value of protecting privacy is lost to the world. Indeed, the new era brings with it new tools – with both blessings and curses – but I believe this does not necessitate complete abandonment of human dignity and his good name. The words of the scholar M. Birnhak are apt here: "Technology has a complex relationship with the legal right to privacy, similarly to the relationship between the right and social norms. At times technology affects the content of the social norm and/or the legal right, and at times the law and/or social norms influence technology. At times the law cooperates with technology and at times they compete." (Michael Birnhak, PRIVATE SPACE: THE RIGHT TO PRIVACY BETWEEN LAW AND TECHNOLOGY 45 (2011); see also Michael Birnhak, *Control and Consent: The Theoretical*

Foundation of the Right to Privacy, MISHPAT U'MIMSHAL 11 9 (2008)). The proper relationship with technology is not a binary. Instead we must seek a middle ground that allows us to enjoy the fruits of technology while limiting the harm to individual rights, which often follows it. This resembles the tale in the Talmud Bavli (Hagiga, 15, 72) about Rabbi Meir who studied under Elisha Ben Abuyah, one of the Tannaim who was considered heretical and hence was referred as the "Other One" in the Talmudic language. The Talmud commends Rabbi Meir for "eating the content and discarding the shell." In other words, Rabbi Meir wisely adopted the positive sides of his teacher without taking also the other side. Jewish law considers privacy protection, among others, through the concept of "harmful watching" – an injury one causes another by looking into his domain. About the verse "What benefit is there in Jacob's walk through Israel's houses," (Arithmoi, 24, 5) Rashi says instead "What good is in the houses – for no doors are direct at each other." Bilam commends the People of Israel for their conduct to protect the right to privacy (Eliyahu Lifshitz, *The Right to Privacy in Jewish Law and in State Law*, WEEKLY PARASHA 33 (2011); see also the TALMUDIC ENCYCLOPEDIA, vol. 8 "harmful watching – Heizek Reiya"; Gidon Klogman, *On Harmful Watching*, IYUNEI MISHPAT 5 425 (1975-76); Sharon Aharoni-Goldenberg, *Privacy on the Interment in the Prism of Jewish Law*, HAPRAKLIT 52, 151 (2013)). Let us recall once more, that the matter here does not necessitate weighing the right to privacy as a whole, but only the added harm to the privacy of litigating parties, which may be caused when indexing of judgments mentioning their names is permitted to bodies with direct access to the Courts' Administration's judgments database.

32. The principle of a public hearing is an individual subset of the ideology of transparency more broadly, about which I wish to say a few words. The policy of transparence enjoyed a boost in the past years through the Freedom of Information Law, 5758-1998. This Law's primary novelty is in the message that **public information is public property** – rather than the property of the administration, who holds it in trust. The Law's explanatory notes state that: "… the seeker of the information needs not specify in the request for information, which is submitted in writing, the reason for which the information is sought… This approach is rooted in the recognition that because the information is in effect an asset among public assets, there is no significance to the question why the information is necessary to its owner." (Explanatory Notes for section 7 of the Freedom of Information Bill, 5757-1997, BILLS 2630; see also Hillel Sommer, *The Freedom of Information law: Law and Reality*, HAMISHPAT 8 437 (5763-2013)). Similar and well-known comment is found in the case law, as early as in HCJ 142/70, *Shapira v. The Jerusalem District Committee of the Lawyers' Bar*, IsrSC 25(1) 325, 331 (1971), where then Justice H. Cohen wrote:

> "The claim that in the absence of statutory duty to disclose, one may conceal rather than reveal – may be made by an individual or a private corporation… but it cannot be made by a public authority who fulfills duties under law. The private domain is not as the

> public domain, as the former does as it may will. If it wishes, it provides and if not it refuses. Whereas the latter is wholly created in order to serve the general public, and it has nothing of its own: all it has is put to it in trust, and in itself it has no rights or duties additional to those, or separate and different to, those which derive from such trust or that were granted to it or imposed upon it by virtue of statutory provisions."

Indeed, as noted in the case law and in the Law's explanatory notes, receiving public information is a "property" right which does not require special reasons, but I wish to point out to one benefit of opening government databases to the general public. Databases are an asset that may be useful to young entrepreneurs who may derive great public benefit from the information granted. Take for example, on the public level, the organization "The Workshop of Public Knowledge" which launched internet tools such as "Open T.B.A." (www.opentaba.info) - a project for mapping city construction plans in a user friendly manner, which relies on information from the Israel Land Authority; or the "Open Journalism" project (www.opa.org.il) which makes accessible a multi dimensional database of newspapers which were scanned over the years by the national library and made it searchable. Such projects and others similar to them illustrate the added value the public brings when the gateways to public information held by administrative authorities are open to it. Of course, granting public information is not a process free of challenges and concerns (see Aharon Barak, *Freedom of Information and the Court*, KIRYAT HAMISHPAT 3, 95, 105 (5763-2003), but public officials must also remember the benefits to it. And now specifically to the principle of a public hearing: the case law mentions three reasons to protecting this principle (see LCA 3614/97, *Adv. Dan Avi Yitzhak v. The Israel News Corporation Ltd.*, IsrSC 53(1) 26, 45, para. 6 of Justice Goldberg's judgment (1998) (hereinafter: the *Avi Yitzhak* case); HCJ 5917/97, *The Association for Civil Rights in Israel v. The Minister of Justice*, para. 18 of President Beinisch's judgment (2009)). First, recognizing a public hearing as an integral part of the public's right to know – a right which naturally derives from the existence of a democracy. As put by James Madison, who was among the drafters of the United States Constitution and a President of the United States: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both." (Letter by Madison to William Barry – an American statesman – dated August 4, 1822.) Second, the principle of the public hearing contributes to the improvement of the quality of legal products, as a result of exposing the proceedings to the scrutiny of the general public. Apt here are the words of Justice D. Levin (CrimA 334/81, *Haginzar v. The State of Israel*, IsrSC 36(1) 827, 832 (1982):

> "A major rule it is in the law, that the court adjudicates in public. This is a pillar of both criminal and civil procedure, and one of the most important means to ensure an impartial trial and a due process. On one hand, this principle opens the court up to exposure

> to the public and to its judgment insofar that conducting an objective trial, in judgment and discretion. On the other hand, the litigating parties, too, stand before the public, who hears everything and being aware of the facts presented to the court, may – according to the information in its possession – appropriately offer evidence to refute them. Therefore, parties may beware and be cautious to suggest to a presiding judge facts that are not reliable or have not been corroborated."

Third, the principle of the public hearing is essential to the existence of public trust in the judicial system, and this additionally to the first two reasons already mentioned, and without connection to them. The sentence appearing in THE FEDERALIST (as translated by Aharon Amir, edited by Yael Hazoni, with the introduction by Ruth Gavison and Ellen Shapira, 2001), on page 388, whereby the judicial branch is the least threatening of them all to the political rights enshrined in the United States Constitution, as it "Has no influence over either the sword or the purse," is well known. Put differently, the judiciary does not set the budget and does not head the public administration (THE FEDERALIST PAPERS, No. 78.) Another important element was added to this famous quote – and it is paramount in our matter – by Justice Felix Frankfurter of the Unites States Supreme Court, and it is that the Court indeed lacks a purse or a sword, but it does have at its disposal the public trust. (*Baker v. Carr*, 82 S. Ct 691 (1962)). The principle of the public hearing is not foreign to Jewish law (see Yaron Unger and Yuval Sinai, *Public Hearing in Jewish Law,* THE CENTER FOR THE APPLICATION OF JEWISH LAW, (5775-2014)). We shall mention here the words of scholar Haim Cohen in his book THE LAW (p. 443), that the sources of Jewish law effectively enshrine the principle of the public hearing, without explicitly naming the concept:

> "The widow who asserted exercising the commandment of impregnation by her husband's brother 'went to the elderly at the gates' (Deuteronomy 25, 7). And 'Boaz came to the gate' and purchased all that Elimelech had and took Ruth of Moav as a wife before 'all the people at the gate and the elderly' (Ruth 4, 1 and 11). The judges (and the police men) were commanded to be present at 'all of your gates' (Deuteronomy, 16, 18) and they brought the prodigal son to justice 'to the elderly of his city and the gate of his place' (there, 21, 19). Ezra called his court to convene 'on the street of the house of God,' under the sky (Ezra 10, 9), and the Sanhedrin sat in its chambers at the Temple, which it convened with all 71 members. But when it sat with 23 members to adjudicate it sat at the 'entrance to the Temple Mount' or the 'entrance to the auxiliary' (Sanhedrin 88, 2), a place that was open to all the people, as the auxiliary was 'filled with Israel' (Yoma 1, 8)."

All these sources have a similar trend – holding law at the most public location out of recognition that justice must be seen and not just made (*R v. Sussex Justices, Ex Parte McCarthy,* 1KB 256 (1924)).

33. The third value relevant to our matter is freedom of occupation. Freedom of occupation is one of the only basic rights which was enshrined in a specific basic law – Basic Law: Freedom of Occupation. Even before this Basic Law was enacted – on 11 Shvat 5709 – this Court ruled that any citizen may work in any vocation he sees fit to choose (see the *Bejerano* case). It was said of freedom of occupation that it "derives from the autonomy of private will. It expressed one's self-definition. Through freedom of occupation one may designed his personality and his status and contribute to the social fabric. This, under the values of the State of Israel as a democratic state as well as under its values of a Jewish state. Occupation makes one unique and gives expression to God's image within him (see RABBI ELIEZER'S MISHNA (Analau edition, New York, 1934), parasha 20, on p. 366)" (HCJ 1715/97, *The Israeli Investment Managers' Guild v. The Minister of Finance*, IsrSC 51(4) 367, 385, para. 15 of President Barak's judgment (1997)). Indeed, the principle of freedom of occupation is required by the State of Israel being a **Jewish** and democratic state. The sources of Jewish law recognized work as a primary and constitutive component of human life. Here are some of the words of Rabbi Nathan: "How to love work? It teaches us that a person must love work rather than hate it, **because as the Torah was given to us by covenant so has the work was given to us by covenant** (emphasis added – E. R.), as it was said 'six days you shall work and you completed all your work and the seventh day rest for the sake of your God (Exodus 20, 9)" (Noscha A, chapter 11). The value of work appears also in the words of the Rambam who stated that "it is better to remove the skin of animals than to say to the people 'I am a great scholar, I am a Cohen – you must support me.' And thus under the orders of our sages, some of whom where great scholars and some of whom chopped wood and carried the beams and fetched water for gardens and made iron and coals and who did not ask from the public and did not receive when given." (Rambam's MISHNA TORAH, Matnot Aniyim, 10, 18 Halacha.) And see also in the Q+A of MISHPATEI UZIEL (Rabbi Ben-Zion Meir Chai Uziel, Israel, The 20th Century) vol. 4, sign 44, whereby one of the commandments performed through Jewish work is that the employer "finds (for the employee – E. R.) work to strengthen him that he does not need from others and does not ask, and this was called 'and you held him.'" (Leviticus, 25, 35). However, similarly to the Israeli law (HCJ 5026/04, *Design 22 v. The Ministry of Employment and Welfare*, para. 6 of President Barak's judgment (2005)), Jewish law recognizes that freedom of occupation – despite its significance – is not an absolute right. This particularly when we are concerned with unfair competition, which is prohibited as "going into the art of his colleague" (see TALMUDIC ENCYCLOPEDIA, vol. 23 "going into the art of his colleague"). Thus, in the Q+A IGROT MOSHE (Rabbi Moshe Feinstein, the United State, 20th Century), YOREH DE'AH, part 2, sign 98, describes a case of a butcher who joined a guild of butchers with the agreement that the shall not compete with them. Eventually, the butcher left the town and opened a butchery in a nearby

town. It was decided that the butcher was prohibited, under his own commitment, from doing so, as the commitment outweighed the freedom of occupation under the circumstances.

34. As mentioned, balancing between values is not easy task at all. For such purposes the Court requires the three tests of proportionality, which make concrete the general concept of reasonability (see Barak-Erez, vol. 2, 771.) The first test is the test of the suitable means, which examines the likelihood that the administrative decision will indeed achieve its purpose. The second test is that least restrictive means test, which considers the existence of alternatives that realize the same purpose, but are less restrictive of individual rights. Finally, the third test is the test of the proportional means, which examines the weight of the benefit of reaching the purpose against the weight of the cost of harm to individual rights. A reasonable administrative decision is one that meets all the tests describes. Failing to pass one of these tests means that a decision is not reasonable. Recall, that extreme unreasonableness may lead to judicial intervention that would void the decision.

35. The proportionality principle – on its three tests – appears in Jewish law as well. Here are a few brief examples. First, the suitable means test. In the RIBASH Q+A (R. Itzhak Bar Sheshet, Spain and North Africa, 14th -15th centuries) sign 484 discusses the issue of incarceration of debtors – those who do not pay their financial debts. The RIBASH rules that such incarceration is legitimate only where the debtor hold assets and that it is likely that the incarceration would persuade him to pay his debts. On the other hand, when we are concerned with a person of no means, incarceration is ineffective and in any case should not be used (see also RAMBAM'S MISHNA TORAH, The Laws of Lender and Debtor, chapter 2, Halacha 1; Menachem Elon HUMAN DIGNITY AND LIBERTY IN ENFORCEMENT (5724-1964)). Second, the application of the least restrictive means test can be seen in the rulings of the Rambam in his writing of MISHNA TORAH, Laws of Murderer and Protection of Life, chapter 1. The Rambam finds that where one chases after another in order to kill him – and this is the source for the "sentence of the pursuer" – any person in Israel is commanded to stop the pursuer and even kill him if need be (Halacha 6.) Rambam qualifies this, by finding that the permission to kill the pursuer exists only where there is no way to achieve the goal – rescuing the pursued – through less harmful alternatives in terms of the pursuer (Halacha 7). In his words:

> "… Since the pursuer would be killed, if it is possible to save him for his limbs – such as striking him with an arrow or a rock or a sward and that his arm may be amputate or his leg may be broken or that he may be blinded this must be done, and where it is impossible to save the other but for killing the pursuer then they must kill him."

Third, the proportional means test: the constituting source for this matter is mentioned in MASECHET AVOT, chapter 2, Mishna 1 – "and the cost of a Mitzvah

must be calculated against its benefit." We must balance conflicting considerations, when each may be correct and appropriate in itself. In the words of Rabbi Shlomo HaCohen Rabinovitz (the first Admor of Rdumsk) (Poland, the 19th century) in his essay TIFERET SHLOMO "One may have a level and scales of justice in his hands must always think of the cost of a Mitzva against the benefit of it and the benefit of an offense against the cost of it. When often it seems fitting in his heart to perform a Mitzva that he may pray with greater holiness and cleanliness, in order that he may forget his offense against the laws of the Torah on the other hand. In conclusion, here are the words of Rabbi Moshe Chaim Lucato, Italy-Holland-Israel, 18th century) in his well known book MESILAT YESHARIM, chapter 3.

> "And I see a person's need to be exact and to weigh his ways everyday as the great merchants who always navigate their businesses so that they may not go bad, and he sets times and hours for it so that it is not random, but with great regularity, as it is the father of productivity. And sages may their memory be a blessing instructed us explicitly of the need for such calculations, and this is what they said (BAVLI, BABA BATRA, 78): therefore the governors may say let us calculate, and those who control their nature and impulses shall say let us calculate the calculations of the world – the cost of a mitzvah against its benefit and the benefit of an offense against its cost."

36. Let us turn to applying these tests to the case before us. As noted, we must begin with the question whether the means realizes the end. In other words, does the Respondent's decision not to permit the indexation of judgments **by the Petitioner** indeed protects the privacy of the litigating parties. **I am afraid that the answer is not in the affirmative**. The Respondent wishes to prevent the location of judgments through web search engines by using search terms, but this is not the outcome of its decision, so it seems. The Respondent's decision limits the indexation of judgments by those granted direct access to its case law database, but it does not effectively limit its indexation by third parties who may post them to its site.

37. In order to understand the issue and its significance, we must discuss two factual elements. First, the likelihood of passing on the judgments to a third party. One of the central characteristics of the information age is the speed and ease with which information passes from one person to another with the push of a button. This is true for information protected under copyrights (Niva Elkin-Koren, *Copyrights and Competition – from a Market of Copies to a Regime of Policing*, DIN U'DVARIM 485, 541 (2006); see also Niva Elkin-Koren, *The New Brokers in the Virtual 'Market Square'*, MISHPAT U'MIMSHAL 6, 381 (2003)), let alone where we are concerned with judgments which inherently are subject to no copyright limiting their dissemination (see section 6 of the Copyright Law, 5768-2007). Let us further recall that the Petitioner is a commercial corporation who profits from

disseminating judgments. That is, passing the judgments to a third party is under no doubt, but should assumed to be fact. Second, indexation by a third party: it is important to emphasize that indexation is the default and that preventing indexation is an active choice made by the owner of a website. As a result, almost any third party who may publish the judgments on its website – for instance a website of a law firm or a news site – would inherently result in their finding on web search engines. It is unnecessary to note that the privacy of a litigating party is violated as a result of the mere finding of a judgment – which includes his personal details – on a web search engine, and the identity of the website to which the search engines refers does not negate this infringement. Therefore, it is reasonable to assume that ever where the Respondent's decision to take effect – the search of a litigating party's name on a search engine would still lead to his judgment, were it to be published by anyone.

38. Having said all this, there is still room to believe that the Respondent's decision would prevent the indexation of **some** judgments, this because, one may think, not **all** the judgments published in the Petitioner's website would be copied and published on websites of third parties. Let us recall that the Petitioner's website includes most of the decisions and the judgments handed down in courts in Israel. Those judgments that are not copied are "spared" the indexation process thanks to the Respondent's decision which prevents the Petitioner from indexing the judgments on its website. Seemingly – small consolation, but there is room for doubt here as well. Naturally, the most problematic judgments in terms of the privacy of litigating parties may be those which create the greatest interest among the general public. Hence the concern that judgments containing sensitive and personal details about litigating parties will not remain on the Petitioner's website as a "stone unturned" (Bavli, AVODA ZARAH, 8, 2.) In any event, a complete "seal" or close to it is not what we are concerned with here at all.

39. We therefore learn that the Respondent's decision seemingly does not fulfill its purpose, or sadly – does so partially and insufficiently. This simply means that this point is greatly important. Let us continue to the next test – the least restrictive means test. This test as well does not shed a positive light on the Respondent's decision. As noted, the Respondent's goal – which is positive in its essence, on a human and value level – is the prevention of infringement to the privacy of litigating parties, which is caused by locating their judgments on web search engines. By doing so, the Respondent draws a "line in the sand" and states that posting on the internet (for instance on the Respondent's website) in and of itself is proportionate, but this is not the case for locating the judgments in web search engines. We addressed above the practical aspect of the distinction between the internet and web search engines and later we shall also address the aspect of the legal norm. We shall now consider the issue of alternatives.

40. I myself believe, that there are several alternative means that realize the purpose in a similar manner (and perhaps even more so) without harming the Petitioner's

freedom of occupation or the principle of a public hearing. Apt for this issue the words of then Justice Orr (the *Avi Itzhak* case 82, para 46 of his judgment):

> "Another aspect which the Court must consider when deciding whether to prohibit a publication or to temporarily suspend it, goes to the existence of other authorities granted to the Court, which may satisfy the 'need' to protect one's good reputation. The principle is that the use of the means of publication prohibition must be 'a last resort'. This is a drastic means, whose harm to the public hearing is difficult and egregious. Using this means may prevent, to a great extent, the effective publicness of hearings. Therefore, the Court may seriously consider the matter of whether alternative means that are less restrictive and which may realize the purpose of preventing unnecessary harm to the good reputation of a plaintiff, exist."

Indeed, it seems the proper way to prevent publication of sensitive information in web search engines does not include the prohibition of some indexation or another, but it must simply be ensured that sensitive information is not found in a judgment, even before it is published to the general public – and this may be done in several ways. The Respondent may conduct refresher trainings to the administrative and legal staff on issues of privacy in writing judgments; it is possible publish the judgment to the litigating parties alone, several days before publishing on the internet, while providing the parties with opportunity to seek the redaction of irrelevant personal details (this is the path of American law. See Fed. R. Civ. P. 5.2(e); fed. R. Crim. P. 49.1(e); Fed. R. Bankr. P. 9037(e); see also Conley, Datta & Sharma, *Cyberlaw: Sustaining Privacy and Open Justice*, 71 MD. L. REV. 772, 781-82; see and compare Australian law Rule 2.29 of the Federal Court Rules 2011, made under the Federal Court of Australia Act 1976; it is not unnecessary to mention that it is possible to find American judgments through the web engine "Google Scholar".) In this context, I shall note that in the United States there are courts which use an algorithm that scans the judgment – before its publication – and searches for sensitive information that may be contained in it such as ID numbers (see, for example, in the State of Florida "Online Electronic Records Access Application" 27, 2014, which appears on the Florida courts' website – www.flcourts.org.) Additionally it is possible to write judgments and pleading papers in formats that do not leave a possibility for leaking personal details that are not necessary, and this is not a pie in the sky (see Yehonatan Klinger, *Protection of Privacy in Writing Judgments: The Defect is in the Design*, on the blog INTELLECT OR INSANITY, https://2jk.org/praxis/?p=5387 (March 29, 2015)). And in the *Vehicle Insurance Database* case, I had to opportunity to say the following:

> "I recall from my days as a judge in the District Court a long time ago, that I wondered why the names of parties are published in family cases. Indeed that was close to two decades ago, and there were yet to be the developed databases there currently are or the computerization, and judgments therefore were not in the public

> domain to the same extent. Today, when by easy typing and minimal effort it is possible to access all of case law, the potential harm to those whose health details may be exposed is greater."

Indeed there are things that today are thoughts of the heart and tomorrow are reality. All the steps mentioned above – which are not mutually exclusive of each other – may reduce the infringement upon the privacy of litigating parties without harming the Petitioner's freedom of occupation or the principle of a public hearing.

In conjunction to the steps mentioned, there are additional steps that may be promoted on a legislative level. Thus, it is possible to initiate a proposal that would establish that the names of litigating parties be published by initials alone, as it is done to some extent in other countries (see, for example, in France: Commission Nationale de I'informatique et des libertes (CNIL), Deliberation N. 01-057 of 29 November 2001, and in Belgium – Commission de modernisation de l'ordre judicaire, "Rapport consacre a la question de la publication des decisions judiciaries: La plume, le Pelikan et le nuage," 30 Juin 2014.) It shall be noted that a similar proposal was indeed raised in Israel, but it did not successfully make its way through the legislative process (The Courts Bill (Amendment – Non-Mention of Names in Judgments), 5768-2007; see also Tomer Moskovitz, *Protection of Privacy in Courts' Publications – Is it Proper to Publish Names in Judgments?*, MISHPATIM 18 431 (1989). Let us recall here that the legislative branch is aware of the harm done to the privacy of litigating parties as a result of publishing judgments, and operates in order to balance between this harm and the principle of a public hearing. This, section 10(4)(b) to the Family Courts Law, 5755-1995 states that most family cases be adjudicated confidentially and in closed hearings, and as a result their publication (and see section 70(a) of the Law) is in the absence of parties' names but as "Anonymous v. Anonymous" (and see on the other hand the Courts Bill (Amendment – Requiring Publication of Judgments and Decisions of Family Courts), 5771-2010; see also Rina Bogush, Ruth Halperin-Kedari and Eyal Katvan, *The 'Hidden Judgments': The Impact of Computerized Databases on the Creation of the Legal Knowledge Body in Israeli Family Law*, IYUNEI MISHPAT 34 603 (5771-2011)). A Similar provision, in regards to juveniles' cases, is found in section 54(2) of the Juvenile Law (Adjudication, Penalty and Manners of Treatment) (Amendment n. 14), 5768-2008 (see also the Court's Bill (Amendment – Prohibition of Publication of Minors' Names in Civil Proceedings), 5769-2009). Another examples is amendment n. 77 of the Courts' Law which states that "No one shall publish the name or identification number of a litigating party who claims recovery for bodily injuries…" From the collection of all this it appears that this is not a legislative vacuum in which the Respondent operates but in regards to an issue to which the legislature's eye is open "from the beginning of the year and until the end of it" (Deuteronomy 11, 12) and it is possible that there may be more to come.

41. And now to the third stage in the proportionality test, where narrow proportionality is examined. Does the benefit of the decision outweigh its cost? Does the protection extended to the privacy of litigating parties as a result of the Respondent's decision is worthy of the harm to public hearings and to freedom of occupation? Is the "narrow equal the harm" (Book of ESTHER, 7, 4). This test is on its face redundant in light of our prior holdings whereby no source of a lawful authority was found for the decision (para. 25), it seems not to have realized its purpose (paras. 37-38) and it was selected despite the availability of less restrictive alternatives (para. 40.) However, I shall briefly address this test.

42. Section 68 of the Courts Law mandates that as a rule, "a court shall adjudicate in public", at the same time the Law includes various circumstances where publishing in regard to a judicial proceeding may be prohibited (see LCrimA 1201/12, *Kti'i v. The State of Israel*, para. 18 of Justice Hendel's judgment (2014), which reasons the principle of a public hearing the while giving a narrow interpretation for exceptions.) Indeed publishing judgments, inherently, causes conflict between the right to privacy and the principle of a public hearing. The Law authorizes the judge to determine **on a case by case basis** according to the circumstances of the matter at hand (see my opinion in LCA 8019/06, *Yediot Aharonot Ltd., v. Meirav Levin*, para. 5 (Oct. 13, 2009)). As my collogue, President Naor often says – the law derives from the facts. The Respondent's decision, on the other hand, summarily privileges the right to privacy, without giving space to the significant difference between different judgments – criminal or civil, judgments and interim decisions, different trials and others. Furthermore, the "immunity from indexation" which the Respondent's decision provides – and as noted, there is doubt whether judgments are not to find their way to web search engines anyway (paras. 37-38 above) – is not limited to the personal details of litigating parties, but applies to the entire judgment as a whole. It is here that we should mention that the Israeli legal system belongs, in many of its principles, to the tradition of the common law, where judgments constitute a significant part of the law itself (see section 20 of Basic Law: The Judiciary). I would not be overstating to say that in the absence of access to judgments – there is no updated possibility of knowing what the law is in Israel in its entire scope. In other words, The Respondent's decision may limit intrusive searches into the lives of litigating parties and therein lies its benefit, but this may also prevent a renter of an apartment from knowing what a lack of good faith in performing a contract means in the updated interpretation of this Court.

43. We shall also note in this context that the Petitioner's website includes the ability to search for judgments using parties' names, and the Respondent's decision does not prohibit this. This means that anyone could – for a handsome fee – enter the legal database such as the one appearing on the Petitioner's site and search for their acquaintances' names. In other words, to the extent that the Respondent's decision may indeed "rescue" a certain number of sensitive judgments from indexation, the gains in terms of litigating parties' privacy will be limited to the fact that in order to find them it would be necessary to enter – with a click of a

button – a legal database and to pay a certain fee. I do not, of course, take this lightly, but I believe it is difficult to accept the argument whereby this state of affairs – where a judgment that is accessible and searchable on an internet legal database – provides practical obscurity, in contrast to the current state where a judgment may be found through web search engines. A similar matter was discussed in the opinion by the Israeli Institute for Democracy as to the Privacy Protection Bill (Amendment – The Right to Be Forgotten), 5775-2015. In that opinion, Dr. Schwartz-Altschuler writes that: "The Bill before us actually exacerbates the technological difficulty because it addresses only the removal of hits from search engines, without having removed the original pages containing the information. Would anyone think of removing a book from a library catalogue without first removing the book itself from the shelf first? At the end of the day, a possible outcome of the Bill would be deepening the gaps between those who know how to access information that does not appear on web search engines and those who do not and who are dependent upon them" (p. 4 of the opinion.) Therefore, it is revealed before us that the gains for privacy – if any – are small, whereas the costs to public hearing and primarily to the freedom of occupation are great. It is hard to accept that a decision which brings us to this should stand, regardless of its worthy motives.

In Conclusion

44. Should my opinion be heard, the Respondent's decision would be voided, so that the Petitioner may continue to have access to the judgments databases without committing to close its website to web search engines. There is no doubt in my mind that the Respondent operated out of positive motives and out of desire to take initiative in light of the significant changes that the internet age brings upon us. However, I am afraid that such decisions require the legislature's say about proper regulation of the matter. The recommendations of the Justice Englard Committee, upon their submission, may be assist in this task. In the meantime there may be new technological developments that would allow the matter to be refined further. This decision does not mean that the Respondent must sit idly by and observe the changes in times – indeed, there are many steps open to the Respondent, and some were mentioned explicitly above (para. 40).

45. It should be noted that this decision is not at all endorsement of any of the Petitioner's activities. The pending class action suit against it shall be determined according to the discretion of the presiding court. Additionally, during the adjudication of the case weighty arguments have been raised in regard to actions taken by the Petitioner in order that the search for one's name on a web search engine may lead to the website it owns, in a manner that misleads to believe that such person appears in the judgment, even if reality is completely different (see para. 12 above.) These claims were raised incidentally and have no direct connection to the petition at the center of this judgment. Naturally, no in depth discussion was held regarding them and of course no evidentiary proceedings. Without setting anything in stone, and without making factual findings that the petitioner acts in some manner or another, I will briefly note that this is a

problematic practice that is not consistent with the language of the law, certainly not with its spirit or purpose. This judgments considered the violation of privacy caused to a person, a search of whose name leads to a judgment where **his name is mentioned**, this cannot be equated to the violation of privacy caused to a person a search of whose name on a web search engine leads to a judgment **which appears** misleadingly to be connected to him. The harm in the second case is egregious particularly in light of its allegedly deliberate character. Of its face, a violation of privacy caused incidentally is less severe compeered to a harm causes deliberately and by motivation of profiting a commercial company (see and compare HCJ 2605/05, *The Academic Center for Law and Business, The Human Rights Department v. The Minister of Finances*, para. 33 of President Beinisch's decision (2009)). The Respondent is assumed to have explored the matter in depth, and to the extent there is truth to the claim – will work to eliminate the phenomenon, as it was said "banish evil from your midst" (Deuteronomy 17, 7.)

46. I shall therefore propose to my colleagues that we issue an absolute order whereby the Respondent's decision is voided. I shall propose under the circumstances not to make any order as to cost.

Deputy President

Justice E. Hayut:

I join the position of my colleague the Deputy President E. Rubinstein whereby the order nisi must be made absolute and the Respondent's decision be made void. For purposes of this conclusion, it is sufficient that the Respondent's decision from August 18, 2014 was made in the absence of explicit lawful authorization, which is required in light of the gravity of the relevant rights – freedom of occupation, the principle of public hearing, and freedom of expression on the one hand and protection of privacy on the other (as to the relationship between the scope of an authorizing provision and the strength of the relevant protected right see also HCJ 4491/13, *The Academic Center for Law and Business v. The Government of Israel* (July 2, 2014)).

Balancing between the values and the basic rights noted is no simple task at all and my colleague the Deputy President discussed this in his illuminating opinion. This balance ought to be designed and regulated by the legislature or according to his explicit authorization. In the absence of such authorization, I join the position of my colleague that the decision subject the Petition, made by the Respondent on August 18, 2014, was made without authority.

Justice

Justice U. Vogelman:

I join the outcome reached by my colleague, Deputy President E. Rubinstein, in his comprehensive opinion whereby the order nisi must be made absolute and that the Respondent's decision in question must be voided, as well as my colleague's main reasons as detailed above.

We are in the midst of an information revolution that was brought by the internet age. Information that was once accessible only to experts in their field is now accessible to anyone who seeks in, quickly and easily. The law lags behind, as it usually does, these developments which regularly require new interpretations to old legislation – in the spirit of the times and the technological advances – and the different balances that may alter established decisions (see, for instance, my opinion in AAA 3782/12, *Tel Aviv-Yafo District Police Commander v. The Israeli Internet Association* (March 24, 2013.)) The judiciary authority is not exception, and it too must rethink certain issues. Such is the issue before us today, which was raised in light of the Respondent's demand that the Petitioner (and other legal databases) sign a "Document of Guarantee" whereby it commits to take all necessary steps in order to prevent the indexation of decisions and judgments given to it. The decision to require the Petitioner's signature on this Document of Guarantee was made – according to the Respondent in its papers – in light of the scope and severity of privacy violations suffered by litigating parties, a violation which the Respondent believe may be reduced by way of preventing the indexation of judgments on search engines. This, because the principle of a public hearing does not require, in the Respondent's approach, making the information in the judgments accessible to the public specifically through web search engines.

The Respondent's considerations are indeed worthy. But what is their outcome? Reuven, who is a lawyer, searches for Shimon's name in a legal database – Takdin, for example – to which he has access through his occupation. The search leads him to a judgment where Shimon's name is mentioned – as someone who was a party to a legal proceeding, served as a witness in the proceeding, or any other relevant part of it. Levi, who is not a lawyer, searches for Shimon's name on Google. Through Takdin Light, his search leads Levi to that same judgment that Reuven found as well. The Respondent's decision wishes to prevent Levi the ability to locate the judgment through the web search engine in order to reduce the infringement upon Shimon's privacy. This is what it means: lawyers, jurists, and those with access to legal databases will be able to find what they are looking for; but not the general public. The ability to locate judgments is not eliminated then, rather only those with access to the various legal databases – access which requires significant funds, as well as research skills that are not necessarily acquired by the general public – may locate them. In my opinion – in light of the nature of the rights at stake and in light of the high significance and the broad consequences such a decision – which requires a delicate balance between a variety of relevant considerations which may pull in opposite directions – necessitates a legislative anchor, which is not present in our matter.

This on the authority level. As to the discretion level – indeed it is possible that, as my colleague put it, the Respondent's decision would save several judgments from indexation, but this is insufficient. First, as noted, it is doubtful whether indeed the

privacy of litigating parties (as well as others mentioned in different judgments, to their benefit or not) is ensured through the Respondent's decision, given the option third parties hold to publish different judgments through their sites. Second, and more importantly, this harm can be reduced through alternatives, a few of which my colleagues presented in his opinion, including, for example, advance delivery of judgments to parties in order that they may move for redaction of private and irrelevant details; computerized scanning of judgments designed to locate sensitive information; and various legislative steps (see para. 40 of my colleague's opinion). All of these are available without minimizing at all the duty to make sure in advance that sensitive information – certainly that which is not material to determining a dispute – is not included in a judgment even in advance of its publication to the general public, a duty imposed primarily upon judges. Noting all this, the Respondent's decision, whose good intentions are clear, is flawed in my view on the discretion level as well, as clarified by my colleague.

As said, I join the decision of my colleague according to which the Respondent's decision must be voided.

Justice

It was decided as said in the opinion of Deputy President E. Rubinstein.

Handed down today, 30 Heshvan 5776, (November 12, 2015)

Deputy President Justice Justice