CFH 9/77

The Israel Electric Corporation, Ltd., and Another
v.
"Ha'aretz" Daily Newspaper Ltd., and Others

The Supreme Court Sitting as a Court of Appeals
[August 27, 1978]
Before Landau D.P., Etzioni J, Kahan J, Ben-Porat J and Shamgar J.

Editor's synopsis -

This is a petition for rehearing of the civil action for defamation reported immediately above. A majority of the panel of five Justices of the Supreme Court reinstated the District Court's judgment in favor of the Plaintiffs. The majority of the Court held -

1. The constitutional right to free speech does not enjoy a status that is superior to the citizen's right to the protection of his good name, rejecting the contrary position taken by the United States Supreme Court in New York Times v. Sullivan. The task is to find the proper accomodation between these interests, when they conflict with each other, rather than to subordinate the one to the other.

2. The correct balance between these conflicting interests is governed in Israeli law by the detailed provisions of the Law Forbidding Defamation, 5725-1965, which should be interpreted according to the plain meaning of its words in their ordinary sense, without any particular tendency to narrow or expand the scope of one interest or the other.

3. For the publisher of defamatory material to enjoy the defense of section 15(4) of the said Law, his publication must distinguish clearly between facts and opinions, so that the ordinary reader can tell what

are the facts on which the author bases his opinion and can then judge for himself whether the author's opinion is well taken. If the author mixes facts and opinion in his article, he loses the special protection given by the Law to the expression of opinion on matters of public concern. The Defendants in this case did not separate fact from opinion as required.

Justice Shamgar's dissent acknowledged that the United States Supreme Court decision in New York Times v. Sullivan could not, of course, be binding precedent in Israel. But, he asserted, that decision expresses certain values which can be incorporated into Israeli law in general, even if not in the details of their application. The issue is whether the Law should be interpreted strictly, to give limited scope to the value of free speech that criticizes public officials, or broadly and liberally, to encourage the public to publish its complaints about improper official conduct, which often is the only way that such conduct can be corrected. Justice Shamgar would classify the statements made in the publication as fact or opinion based on a fair reading of the article in its entirety.

Supreme Court Cases Cited:

[1] H.C. 73/53, 87/53 *Kol Ha'Am Co. v. The Minister of the Interior*, 7 P.D. 871; 13 P.E. 422.

[2] H.C. 75/76 *"Hilron" Agricultural Products Export-Import Company, Ltd. v. The Fruit Production and Marketing Board,* 30 (3) P.D. 645.

[3] F.H. 27/76 *"Hilron" Agricultural Products Export-Import Company, Ltd. v. The Fruit Production and Marketing Board,* 31 (3) P.D.18.

[4] C.A. 90/49 *Bentov v. Kutik,* 5 P.D. 593, 4 P.E. 190.

[5] Cr.A. 24/50 *Gorali v. The Attorney General, 5* P.D. 1145; 6 P.E. 3.

[6] E.A. 1/65 *Yardor v. The Chairman of the Central Election Committee for the Sixth Knesset,* 19(3) P.D. 365.

[7] H.C. 112/77 *Fogel v. The Broadcasting Authority,* 31(3) P.D. 657.

[8] H.C. 253/64 *Jeris v. The Supervisor of the Haifa District,* 18(4) P.D. 673.

[9] C.A. 34/71 *Friedman v. Chen,* 26(1) P.D. 524.

[10] C.A. 30/72 *Friedman v. Seigel,* 27(2) P.D. 225.

[11] C.A. 213/69 *The Israel Electric Corporation, Ltd. v. "Ha'aretz" Daily Newspaper, Ltd.,* 23(2) P.D. 87.

[12] C.A. 552/73 *Rosenbloom v. Katz,* 30(1) P.D. 589.

[13] Cr.A. 364/73 *Zeidman v. The State of Israel,* 28(2) P.D. 620.

[14] H.C. 206/61 *The Israel Communist Party v. The Mayor of Jerusalem,* 15 P.D. 1723.

English Cases Cited:

[15] *Slim v. Daily Telegraph, Ltd.* (1968) 1 All E.R. 497; (1968) 2 W.L.R. 599; 112 S.J. 97 (C.A.).

[16] *London Artists v. Littler* (1969) 2 All E.R. 193; (1969) 2 Q.B. 375; (1969) 2 W.L.R. 409 (C.A.).

Australian Cases Cited:

[17] *Christie v. Robertson* (1889) 19 N.S.W.L.R. 161.

American Cases Cited:

[18] *New York Times v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964).

[19] *Pauling v. News Syndicate Co.,* 335 F.2d 657 (1964).

[20] *Rosenbloom v. Metromedia,* 91 S. Ct. 1811.

[21] *Gertz v. Welch Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L,. Ed.2d 789 (1974).

[22] *The Village of Skokie v. The National Socialist Party,* 373 N.E.2d 21.

Jewish Law Source Cited:

[A] Maimonides, Code of Jewish Law, Laws Concerning Beliefs, chapter 7.

JUDGMENT

Deputy President Landau: In this Further Hearing we are required to reexamine the rulings that emerge from the opinions of my esteemed colleagues, Shamgar J and Berinson J, in this Court's C.A. 723/94. In that case, by a majority decision over the dissenting opinion of my esteemed colleague Ben-Porat J, the court accepted the appeal of the Respondents before us, Ha'aretz Newspaper Ltd. and others, against the Petititioners, The Israel Electric Corporation, Ltd. and Yaacov Peled, and rejected the Petititioners' claim for the payment of damages for defamation. (The District Court's judgment was published in District Court Judgments 1975, at page 671, and the judgment in the appeal was published in 31(2) P.D. 281.) Of the two majority Opinions in this case, my esteemed colleague Shamgar J ranged extensively across the issues and rendered novel holdings concerning the law of defamation that have far reaching consequences, while Berinson J based his decision on narrower grounds, limited to the application of the provisions of the Law Forbidding Defamation, 5725-1965, to the facts of the case, without expressing any opinion concerning the questions of principle dealt with in my esteemed colleague's judgment. Therefore, my esteemed colleague's judgment concerning those questions expressed his views only. Nevertheless, it is clear that even as such, because of its extensive intellectual apparatus, this judgment might become accepted in the future as binding and give guidance to many concerning their conduct and their claims, unless we come to different conclusions in this Further Hearing.

After much consideration, I have concluded that I must disagree with my esteemed colleague on the following three issues: First, as concerns the preferred status he attaches to the principle of free speech in our legal system over a person's right to his good reputation. Second, with regard to the manner in which he interprets the Law Forbidding Defamation, 5725-1965 (hereinafter - the Law), especially paragraph 15(4), which provides the defendant a defense for expressing an opinion in good faith. And third - and Berinson J joined my esteemed colleague in this matter - as to the manner in which they construed the article which was the subject of the claim and applied the Law to it. I will set forth my position on these issues in that order.

My esteemed colleague writes as follows at page 240:

> "The relationship between defamation and freedom of speech has been defined in various ways and approaches. The difference between these approaches is expressed principally in fixing the status of the two subjects in relation to each other, that is, whether they are treated as two separate fields with equal status, or whether they are regarded as values, one of which deserves preferential treatment and whose importance therefore outweighs the other, either in general or in particular circumstances."

Immediately thereafter, he refers to the American cases, starting with those earlier decisions in which the judges "regarded the laws of defamation as an exception to the right of freedom of expression and defined them as prohibitions which impinge on this right and

limit its absoluteness", and later, on page 241, the decision of the Federal Supreme Court in *New York Times v. Sullivan* [18], according to which -

> "with regard to defamatory matter concerning holders of official or public office, the view that designates the laws forbidding defamation as an exception to free speech and no more, has been abandoned in the United States ... for some considerable time in favor of the principle that gives higher standing to the right of expression of opinion on matters of public interest concerning the holders of official or public office."

That American case held that publishing untrue facts concerning a public office holder is protected, unless it be proved that the defendant knew that the statements were false or was indifferent to the question whether they were true or not. My esteemed colleague adopted this view, and after noting the importance of the principle of the right to free speech, in the spirit of the judgment in *Kol Ha'am* [1], he said further, on page 243:

> "The previously described character of freedom of expression as one of the fundamental constitutional rights gives it superior legal status.... Any limitation of the boundaries of this right and of its extent, which arises from legislation, will be narrowly construed so as to give the aforesaid right maximum scope and not to restrict it in the slightest beyond what is clearly and expressly required by the legislature's words.... Freedom of expression and a provision of law that limits it do not have equal and identical standing, but, rather, to the extent consistent with the written

> law, one should always prefer the maintenance of the right over a provision of law that tends to limit it."

I asked myself, from what source did my esteemed colleague draw support for such forceful comments on a matter of greatest constitutional importance, other than the American law in *New York Times v. Sullivan* [18]. He also mentions the *Hilron* case [2], which dealt with the proper relationship between a legislative enactment and the principle of freedom of gainful employment. But the views expressed at the particular place referred to in that judgment, page 653, are those of my esteemed colleague which are the minority view. My own opinion, that of the majority, stated on page 650, was that "the labor of interpreting legislation must be done without any particular widening or narrowing tendency...." And in the Further Hearing in that case, (F.H. 27/76 [3]) the majority again agreed with my view and my esteemed colleague Kahan J said, at page 22:

> "I do not in any way minimize the importance of the basic right to freedom of employment. However, it is well known that the legislator has restricted this right in various enactments and in various ways, based on the view that the public good requires the imposition of these restrictions.... When the legislator has expressed his view in clear terms in a particular law, the court must interpret that law according to its plain import and the legislator's intent...."

And, closer to our matter, concerning what has been said in our judgments hitherto on the relationship between freedom of speech and defamation, I quote the words of Olshan J, in C.A. 90/49 [4], at page 597:

"... So long as a law exists that recognizes a person's right that his good repute not be impugned, it is in the public's interest that this right be honored and not be injured. If someone wishes to enjoy the right to freedom of speech and abuses such freedom, intentionally or otherwise, and in so doing injures another person's right, it is not unjust that he should be responsible toward the person so injured, and there is no ground for complaint that this entails some restriction on the citizen's right of free expression.

But each flower has a thorn. Since every publication involves some risk that it might contain something that could injure another person, this is likely to restrain all initiative for criticism or to disseminate information, even when the public good or that of the state require that such criticism be heard and that such information be disseminated.

Therefore, the law distinguishes between ordinary cases in which defamatory material is published and exceptional cases, in which the public good is preferred over the individual's right, even if this causes a certain amount of injustice to the individual."

Agranat J said in Cr. A. 24/50 [5], at page 1160:

"Our point of departure is the general assumption of the common law - which also applies in this country as well - that each person has the right

> to freedom of speech and freedom of expression. The objective of the local criminal law that establishes the offenses of distribution of defamatory material orally and publication of written libel, is to restrict this basic right when a person abuses it.... However, the law recognizes that, in certain conditions, the general good demands - so that the said basic right not be emptied of its content - that a person not be punished for publishing slanderous matters, since the harm which would be caused to the public by excessive restriction of freedom of speech and freedom of writing is preferred in the eyes of the law to the causing of any private injury."

My esteemed colleague brought the final sentence of this quotation, on page 296, as being on all fours with the *New York Times* decision [18]. I do not agree: in my opinion, they are on all fours with the previous American precedents that my esteemed colleague summed up in the following words on page 240:

> "There were those who regarded the laws of defamation as an exception to the right of freedom of expression and defined them as prohibitions which impinge on this right and limit its absoluteness."

In the *Kol Ha'am* case itself [l], at page 880, Agranat J explained the relationship between freedom of speech and the necessity to preserve public security in the following words:

> "The principal cause for this complexity is the competition between two types of interests, each of which is of considerable social and political importance."

And earlier, at page 879, he said:

> "The right of free speech is not absolute and unlimited, but a relative right, which can be restricted and controlled to preserve other important social and political interests which, in certain circumstances, are considered paramount to the interests which are secured by the exercise of the principle of freedom of speech. The fixing of the boundaries of the exercise of the right of freedom of speech and the press is therefore a process of balancing various competing values and choosing among them."

While he thereafter describes the right of free speech as "a supreme right ... that is the condition precedent for the exercise of practically all the other basic freedoms", at page 878, he immediately adds: "One must distinguish between freedom and anarchy" and he recalls at that point his words in the *Gorali* case [5], and Lord Kenyon's dictum: "Freedom of the press is dear to England but anarchy of the press is an abomination in England".

In my opinion, these arguments remain strong, even after the provisions in the Criminal Law Ordinance and the Civil Wrongs Ordinance concerning defamation have been replaced by the Law Forbidding Defamation, 5725-1965. Accordingly, freedom of speech does not enjoy a superior status as opposed to other basic rights, but in Agranat J's words, it is

"a process of balancing various competing values and choosing among them".

This is not the "vertical" grading of a "superior right" against an ordinary right but the horizontal fixing of the boundaries of rights that have equal status, without any tendency to prefer one particular right as defined by legislation at the expense of its fellow right. From this it follows that one must interpret the statutory right according to its plain meaning in accordance with the legislature's intention, and not place some unwritten right above it.

So far as I am aware, the idea of a superior right that stands above the written law has appeared thus far only once in our decisions, in the separate opinion of Sussman J (as his title was then) in E.A. 1/65 [6], at page 389. Sussman J's inspiration for this was the opinion of the Supreme Court of West Germany, which placed basic constitutional norms above even the written constitution. This view has been subjected to considerable academic criticism (Guberman, Israel's Supra-Constitution (1967) 2 Israel Law Review 445). Agranat P.J. did not follow this path. He interpreted the Knesset Election Laws in the light of the constitutional principles laid down in the Declaration of Independence. In this regard he followed the path he himself had laid down in the *Kol Ha'am* decision [1], without any tendency to limit the written law by way of interpretation.

To be more precise, what is at stake here is the citizen's freedom as opposed to his right, that is to say, **his freedom** to say what he wishes and to hear what others wish to say, as opposed to **his right** not to have his honor and good name impugned. If there is indeed any place for grading the two vis-a-vis each other, I would place the right above the freedom. (On

the definition of a right as opposed to a freedom, see H.C. 112/77 [7], at p. 662.) It appears that this is how the draftsmen of the proposed bill, Basic Law: The Rights of Man and the Citizen (Proposed Bills 5733-1972, p. 448), to which my honorable colleague referred, presented the issue. Compare the right to express one's opinion, which appears there as a relative right, which may be restricted, according to section 11(b) "by legislation intended to ensure the existence of the democratic regime ... **to protect the rights of others**...", with section 3 to the effect that "each person is entitled to the lawful protection of his life, his body, his mind, his honor and his good repute," which apparently cannot be restricted, according to the draftsmen's intent, by any legislation. Placing the right to good repute on the same level as the right to life calls to mind our sages' statement: "Whoever insults his fellow man in the presence of others is considered as if he sheds blood". Today we call this "character assassination". (Concerning the rulings of Jewish law that stress the importance of the dignity of man among the legal values deserving of protection, see the study by Dr. N. Rakover, "The Protection of the Dignity of Man", volume 54 in the series of researches and articles on Jewish Law published by the Ministry of Justice.) Accordingly, if the right of free speech is a "superior right", how should we denominate man's right to the protection of his honor and good name? As for me, this illustrates the problematic aspect of any written declaration of rights. See the example given in Chafee, Free Speech in the United States, p. 31, of a man who was brought before a judge because he had thrown his arms about and struck someone in the nose. He asked the judge if he did not have a right to throw his arms about as he wishes in a free country, to which the judge replied: "Your right to throw your arms about ends precisely at the point at which your fellow man's nose begins".

I propose that we not be so captivated by the precedent in the *New York Times* case [18], which so strongly influenced my esteemed colleague's opinion. As said, it was there

decided that one who publishes criticism of a public official concerning a public matter is not liable for slander, even if his statements are false, so long as the publication was made in good faith. Justices Black, Douglas and Goldberg went so far as to say that this also is the case even when the publication was malicious - all this to preserve the principle of freedom of speech and the press contained in the First Amendment to the Constitution, which has become, in the fundamentalist view of Justice Black and his followers, an iron cast rule that cannot be limited in any way. I am certain that had the Bill of Rights in America contained a provision similar to that in section 3 of the proposed Basic Law in this country - and I do not know why one's right to his good repute was not recognized as one of the citizen's rights - the American Supreme Court would not have established such a far reaching rule. Under that ruling one may impugn a public servant with no factual basis, for example, by saying that he accepted a bribe, unless (according to the majority view) the person defamed can prove that the slanderer acted with malice. Another American judge, Judge Friendly, has already commented on this in the Federal Court of Appeals in *Pauling v. News Syndicate Co.* [19]. He asks: if it is permitted to defame a public official for accepting a bribe, what is the difference between that and defaming a person for giving a bribe to the public official? And what about a person who is not a public official, but he takes part in debate on a matter of public importance during the course of which he defames another person? Is he the next in line to receive immunity for his statements? Indeed, in *Rosenbloom v. Metromedia* [20], the majority of the Federal Supreme Court expanded the *New York - Times* rule [18], so that it also includes a private person, provided that the slander relates to a matter of public interest. The truth is that the opinions given there are so varying that it is difficult to discover any clear line. *Gertz v. Welch Inc.* [21], which my colleague referred to at page 241, constitutes a retreat from that

extreme majority view, but the decisions still contain a great deal of inconsistency and confusion.

In the American legal literature, one hears criticism of and disagreement with the *New York Times* precedent. In an article, "Access to the Press - A New First Amendment Right" (1967) Harvard Law Review 1641, Professor Jerome A. Barron disputes the Supreme Court's decision and sees in its attitude to the First Amendment as assuring "a marketplace of ideas", a "romantic" notion that is totally unrealistic. (See pages 1642 and 1656 et seq.). The press and other mass media, which in our day and age are the main providers of information and opinion to the public, are not a free market, but are in the hands of a small group of monopolists. A realistic view of the First Amendment compels the conclusion that freedom of expression is somewhat slender if it can be exercised only by the grace of those who operate the mass communications media (*id*., at p. 1648). He therefore proposes to secure by law to any person who is attacked by a newspaper the right of access to the newspaper so that he may bring his position to the notice of the same readers before whom he was defamed (and not just by means of a letter to the editor, which the editor may publish or not as he wishes). If no such right will be recognized, there will be considerable inequality between the owners of a newspaper and the ordinary citizen.

The ruling of the *New York Times* case [18], was not accepted in other countries where the common law applies. Fleming says on this subject in his "The Law of Torts", 4th edition, at p. 512:

> "...Our law does not esteem freedom of speech and of the press even in matters of public concern sufficiently high to clothe false statements of

> fact with qualified privilege, let alone elevate it to a constitutional guarantee as in the United States."

Gatley on Libel and Slander, 7th edition, p. 223, dismisses the *New York Times* case [18], with the following comment:

> "It is submitted that so wide an extension of the privilege would do the public more harm than good. It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility and leave them open to others who have no respect for their reputation."

In his detailed written summations Dr. Goldenberg, counsel for the Petitioners, sets out the laws of other common law countries throughout the world. Not one of these countries has adopted the American ruling. Mr. Lieblich, on behalf of the Respondents, did not deal with this particular matter. He restricted himself in his brief to a discussion of the legal questions that arise in Israeli and English law.

In E.A. 1/65 [6], which was referred to above, Agranat J quoted with approval Witkon J's words in H.C. 253/64 [8], at p. 679:

> "It is not an isolated phenomenon in the history of states having a well-functioning democratic regime that various fascist and totalitarian movements rose against them and used those very same rights of the freedom of speech, of the press and of association which the state accords them, to conduct their destructive activities under their

> protection. Those who saw this during the days of the Weimar Republic will not forget the lesson".

It is worth recalling that one of the most effective means used by Hitler and his cronies to bring down the democratic Weimar regime in Germany was by the uncontrolled defamation of the heads of the state, by spreading lies about their conduct, while the courts did not respond approriately in the libel cases that were filed (on this matter see the article by David Riesman, "Democracy and Defamation: Fair Game and Fair Comment", (1942) Columbia Law Review 1085).

This author's opinion is (*id*., at p. 1090):

> "Whereas in Germany libel law was one of the cumulative factors in the Nazi triumph, in England there is evidence that the severity and impartiality with which the law of libel is enforced has measurably served to check the rise of demagogic fascism."

These words contain a warning to those who are prepared to give excessive free reign and ignore the dissemination of libellous material against public persons, for fear that the protection of the right of free speech as an absolute value might be harmed. But one must be concerned that history might repeat itself. I have before me a copy of the judgment of the Supreme Court of Illinois, of January 17, 1978, in the matter of *The Village of Skokie v. The National Socialist Party*, [22]. The court there allowed a march by the National Socialists bearing swastikas in a Chicago suburb with a large Jewish population. The judges felt

themselves forced to decide as they did by the First Amendment to the Constitution. This should cause us to ponder the matter.

Thus, one must find the correct point of balance between this principle and the protection of the honor of a public servant who is attacked. I do not propose, heaven forbid, to belittle the importance of the role of a free press to criticize governmental acts and to uncover undesirable public matters and bring them to the public attention. But I deny the assumption that a responsible press cannot carry out these functions unless it is given the freedom to defame persons under the cloak of "fair criticism".

I have propounded these matters concerning the *New York Times* decision as if the subject before us was tabula rasa, without a solution in statutory law. But, in fact, that is not the case, because we have section 15(4) of the Law which contains a full answer concerning the defense of fair criticism for a publication that expresses an opinion concerning the conduct of a person who acts in a public function or in connection with a public matter. We must interpret this provision, enacted by the legislature, as it is written and in its spirit. Precedents from other countries may assist us in our deliberations, but we should not attribute to them undue weight. My esteemed colleague has interpreted our law narrowly, and in that regard I disagree. In my opinion, we should interpret this section just as any other provision of a statute, first and foremost according to the ordinary meaning of its words. Because of our differing approaches, our resulting interpretations differ, too. My esteemed colleague concludes his opinion by saying (at p. 268) that -

> "It is our task to maintain this defense [for expressing an opinion in good faith], in practice and according to the letter of the Law and its intention **and the tendencies that lie at its base."** (Emphasis added.)

And there is no doubt that the tendency to preserve the "superior standing" of freedom of expression strongly influenced his restrictive interpretation of the protection given to an impugned person against defamatory matters published against him.

I will now turn to the second part of my discussion and will begin by copying the language of section 15(4):

> "15. In a criminal or civil action for defamation, it shall be a good defence if the accused or defendant made the publication in good faith under any of the following circumstances:
>
> …
>
> (4) the publication was an expression of opinion on the conduct of the injured party in a judicial, official or public capacity, in a public service or in connection with a public matter, or on his character, past actions or opinions, as revealed by such conduct".

I believe that this section together with the matters set out in section 15 give us a proper solution to the problem of balancing the conflicting values of freedom of expression and the protection of a person's honor and good name.

The language of the section teaches us that it provides a "good defense" for two types of expression of opinion.

(a) the expression of an opinion concerning the injured party's conduct in a judicial, official or public function, in a public service or in connection with a public matter.

(b) the expression of an opinion concerning the injured party's character, past actions or opinions, as revealed by such conduct.

Grammatically, the concluding words "as revealed by such conduct" apply to the second situation only and not to the first. It is clear, however, that the two components are present in the first situation as well: the injured party's conduct (in a judicial. official or public capacity, in a public service or in connection with a public matter) on the one hand, and the expression of an opinion by the defendant, on the other hand. And it is essential that the defendant's opinion relate to the injured party's conduct. From the opening portion of section 15 it is clear that the publication of the expression of opinion must be made in good faith, but it need not be the truth, that is to say, factually accurate. If this were not the case, there would generally be no need for the special defense accorded by section 15(4) and all the other sub-clauses in section 15. Section 14 gives a full defense, in any event, for publication of a truthful opinion, if the publication is a matter of public interest. Only if there is no public interest in the publication does the publisher need the defense provided in section 15, if it is a true opinion.

From the language of section 15(4), therefore, one learns that publications falling within its purview must contain the following true elements:

(a) reference to the injured person's conduct in a judicial, official or public capacity, or in connection with a public matter (or to his character, past actions or opinions, as revealed by such conduct) ;

(b) the expression of the accused or the defendant's opinion concerning one of the matters mentioned in (a).

There is a basic difference between these true elements, in that element (a) must refer to correct facts, whereas with regard to (b), in certain situations the publisher has a defense against criminal and civil liabilty even if the expression of opinion was not the truth.

As said, with regard to the description of the conduct, the publication must relate to true facts. On this matter there is already established precedent in this court interpreting the provisions of the 1965 law: C.A. 34/71 [9], at p. 528; C.A. 30/72 [l0], at p. 236. I am prepared to restrict this requirement as set forth by my esteemed colleague, Ben-Porat J, in her Opinion in the appeal which is the subject of this Further Hearing (at p. 284), that one must read into section 15 of the Law that portion of section 14 concerning the defense of truth: that the defense should not fail for the sole reason that the defendant was unable to prove the truth of an incidental detail that does not contain substantial injury. I also agree with my esteemed colleague (at p. 278) that the publisher must set forth at least the main facts on which his opinion is based. I would add that the publisher does not have to particularize facts which are in any event publicly known and which, therefore, need not be repeated in the publication which was made. However, I do not agree with my esteemed colleague's statement at p. 256:

> "The question may be asked, what is the law when a factual assertion is intermingled with the expression of an opinion in respect of which the defense of good faith contained in section 15(4) is sought. The answer is that the circumstances set out in the various sections of section 15 classify the publication according to its dominant character. In other words, the type and category of the publication as establishing a fact or expressing an opinion will be determined by its essential nature that is divined from its general import in the eyes of a reasonable reader, and it will not lose its character as a publication expressing an opinion merely because some fact was included, if that does not change its essential feature as described."

I do not find support for this in the language of sections 15 or 16, to which my colleague referred later on in his Opinion. At page 257, he relies upon the words of Justice Brennan in the *New York Times* case [18]. I have dealt extensively with that judgment. I will now add that in my opinion it is clearly contrary to the correct interpretation (which is not a restrictive construction) of the provisions in our law. I will add also that the *New York Times* case itself does not speak of the publication's dominant character, but permits the publication of inaccurate facts concerning a public figure without regard to the dominant nature of the publication.

My colleague referred at this point in his Opinion to an inaccurate fact which has been intermingled with the expression of an opinion. I cannot accept this intermingling theory, in principle, because in my opinion any publication seeking the protection of section 15(4) must

make a clear separation between the description of the facts and the expression of an opinion concerning those facts. The very mixing of these two elements might make the writing unclear and allow the insertion of libellous and untrue facts into the opinion. The writer must indicate on which facts he is relying, and these facts must be accurate (except for incidental facts that are not substantially harmful), and having set forth the facts, he may then draw his conclusions from them by way of expressing an opinion, provided he clarifies and distinguishes between a fact and an opinion. On this matter, I am prepared, together with my esteemed colleague, to adopt that part of Odger's book which she brings at page 277. If the setting forth of the facts is separated from the expression of opinion by way of conclusion drawn from those facts, it is as if the publisher says to the public that read or hear him: "These are the facts concerning this person's conduct and this is my opinion about that conduct. And now you, the reader, judge if you accept my opinion based on those facts". Such a presentation of matters is not forbidden by section 15(4), and if the opinion is expressed concerning one who fulfills a judicial, official or public function, or a person in the public service or in connection with a public matter, the injured person will have to accept the situation, even a wrong conclusion that the publisher has drawn from those facts, if the expression of opinion by way of drawing conclusions complies with the remaining requirements of the law. The remarks of an Australian judge on this topic, brought by Gatley at page 298, hit the mark:

> "To state accurately what a man has done, and then to say that (in your opinion) such conduct is dishonourable or disgraceful, is a comment which may do no harm, as everyone can judge for himself, whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to the one conclusion detrimental to the

> person whose conduct is misdescribed, and leaves the reader no opportunity for judging for himself the character of the conduct condemned, nothing but a false picture being presented for judgment." Per Windeyer J. in *Christie v. Robertson* (1889) 19 N.S.W.L.R. at p. 161 [17].

From what I have just said in relation to the "dominance" theory, it is clear that I disagree not only with my esteemed colleague but also with Berinson J, who said (at p. 269):

> "Finally, I agree that from a legal point of view the author would have done better to have separated facts from opinions, to have commenced with facts and ended with an opinion; and he did not do that. In one part of the article he also mixed and joined together facts and opinions. To my mind this is not significant. What is important is whether the article established an adequate factual foundation the conclusions expressed and the criticism contained in it.... I agree with Justice Shamgar's analysis of the facts and his finding that basically they are correct, and that any inaccuracies are of secondary importance."

I understand from these remarks that Berinson J supports the idea of "dominance" in the publication. I will deal later on with the question whether these inaccuracies, which were intermingled with the opinion and the criticism, were indeed secondary in their importance.

With regard to the defense under section 15(4), the Law does not recognize any distinction between the owner of the newspaper and its editor or any other person who makes

a publication. The claim that the owner of a newspaper and its editor have superior standing was rejected in earlier stages of these proceedings, C.A. 213/69 [11], in which this Court struck out the claim of a defense under section 15(2), and held, based on the ruling in C.A. 90/49 [4], that the law applicable to newspapers is the same as that applicable to any other person, with regard to the duty of publication, that is to say, he may not rely on the defense under section 15(2) when such a defense is not available to another person. So, too, C.A. 552/73 [12]. And if a newspaper does not have superior standing with respect to section 15(2), then the same is true with regard to the defense for expression of opinion in good faith under section 15(4).

With regard to the scope of the right to expression of opinion in good faith (as opposed to the presentation of the facts), I am prepared to accept Justice Brennan's remarks in the *New York Times* case [18], which my colleague cites (at pp. 244-245), that the debate concerning disputed public matters may be "uninhibited, robust and wide open". This is necessary so as not to stifle the free clarification of political and other disputes in which the public has an interest. Here, freedom of expression overrides the policy of protecting the individual's good name. But our law sets limits to this freedom. (a) The opinion must be expressed in good faith (the opening part of section 15) and (b) the publication must not exceed that which is reasonable in the circumstances set forth in section 15(4). And while requirement (b) appears in section 16, which deals with presumptions concerning good faith, one may derive from this a substantive requirement that the opinion expressed must also be reasonable. On this point I agree with the broad language that my esteemed colleague brought from the English cases:

> "In this regard, it is sufficient that a reasonable man could have reached the defamatory conclusion from the facts set out in the publication, and that the facts upon which he relied were brought in the body of the publication".

But once again, the facts on which the expression of opinion or criticism is based must be correct, and it is not sufficient that the weight of the accurate facts is dominant with regard to the inaccurate facts, in the total picture.

My esteemed colleague said (at p. 262):

> "As explained above, the purpose [of sections 15 and 16 of the Law] is to open the door to criticisms and to protect them against defamation actions, even if it transpires that the opinions expressed are not founded on truth and even if the thinking expressed therein is not consistent with what the court considers logical."

Dr. Goldenberg attacked this statement, but it seems that his criticism was based on a misunderstanding. My esteemed colleague spoke here (and he will certainly correct me if I have misunderstood him) only of the **expression of an opinion** "that is not grounded in the truth", and he did not intend to say that the facts upon which the opinion or the criticism was based need not be truthful. With that I too agree, provided that the expression of the opinion was honest and reasonable, (but I did not agree, as aforesaid, that it is sufficient if the dominant character of the factual basis for the criticism be truthful).

I have now reached the last part of my Opinion, in which I will examine the publication which is the subject of the Petitioners' claim. The article was brought in its entirety at pages 230-23l and I will not set it out again. No one disputes any longer that the Respondents did not establish the truth of the statement in the article that "actually, the Electric Corporation is not really interested to get rid of the car. It hopes that after some time, when the public will have forgotten the incident, the car will be returned to serve the retiring Director General...." On the other hand, the Petitioners did not prove that the Respondents published the article's contents in bad faith. In this context it should be remembered especially that the fourth Respondent turned to the first Petitioner's spokesman before the publication occurred and asked for his reaction, but the latter refused to give any reaction (as a result whereof the Petitioner was awarded nominal damages in the amount of one pound only).

Before I examine the contents of the article, I will dispose of Mr. Lieblich's claim that, since the majority judges in the appeal concluded that the article in its entirety was primarily a good faith expression of opinion, this is a finding of fact, and this court's practice is not to intervene in such findings in a Further Hearing, because Further Hearings are not intended to serve such a purpose, while on the other hand, it was proper for the majority judges to contradict the District Court's findings, because the question of classifying the article's contents is a question of law. Mr. Lieblich's claim is self-contradictory. It is correct that the question concerns the application of the law to the facts, and if the law was not interpreted correctly, then its application to the facts may contain a legal defect which can be corrected in an appeal and also in a Further Hearing. In my opinion, this is what happened in this case, because the majority opinion in the appeal contains novel holdings which ought not to be supported and they influenced the majority's interpretation of the provisions of the Law and, as a result thereof, also the way in which the Law was applied to the facts.

I agree with my esteemed colleague that the question here is that of classification of the article's contents. The article charged that the Petitioners intended to mislead the public - to calm down the criticism of the purchase of an expensive car for the second Petitioner during a period of financial cutbacks by means of the fraudulent assertion that the car would be sold, whereas in fact this was merely a subterfuge, because their true intention was that the vehicle would be returned for the second Petitioner's use when the hue and cry will have died down. Was the attribution of this intention to the Petitioners a factual claim - and a false fact - or was it only the expression of an opinion? My esteemed colleague concluded that based on the dominant character of the article, this was only an expression of opinion and Berinson J thought that the Respondents mixed fact and opinion together, but he did not consider that of any import.

Dr. Goldenberg suggested a standard for distinguishing between determining facts and expressing an opinion (in paragraph 18 of his summations):

> "'A fact' is not only a primary fact but also a factual conclusion, presented to the reader as a factual datum. 'The expression of an opinion,' by contrast, is the rendering of an **expression of value,** ('good', 'bad', 'appropriate', 'inappropriate', 'proper', 'improper', and the like), that is to say: the making of a normative value judgment on the facts in their widest sense (including factual conclusions)".

This standard seems to me too narrow, because the attribution of this or that intent to the injured party, too, such as fraudulent intent, can be an expression of opinion by way of

drawing a conclusion from the detailed facts, even if it is not a normative judgment. But, as I set out above, in order for the attribution of a particular intention to be the expression of opinion, the publisher must first set forth all the facts upon which he attributes that intent to the injured party. In this way, the expression of an opinion can also be correct or incorrect, true or false, whereas Dr. Goldenberg's standard of making a normative judgment does not state "correct or incorrect", but "appropriate or inappropriate" and the like.

I will illustrate my words by reference to the contents of the article in issue: the attribution of fraudulent intent appears in true places, in the first part of the article and in its second part. The second part states, based on the facts previously brought out:

> "From this, the Goldberg agency's clerks concluded that the Electric Corporation was not interested in selling the car and was only interested in gaining time until the public furor would die down ...."

In other words, the Goldberg agency clerks drew their conclusions from the facts which were set out and the fourth Respondent agrees with this conclusion. If that were all, I would have said that this is expression of an opinion concerning the corporation's intent, which does not necessarily have to be true for the Respondents to enjoy the protection of section 15(4), and all that remains to be done is to see whether the conclusion which was drawn is not unreasonable based on the facts set out. However - and this is the important point - there is also the first part of the article in which the writer states categorically that: "actually, the Electric Corporation is not really interested to get rid of the car". This is a clear finding of fact, that is the article's sting, without any factual foundation having been laid for it in what was said earlier. This part of the article gives the ordinary reader the impression that the

writer has information on the basis of which he establishes it as a fact that the Corporation does not intend to sell the car. That is to say, he does not invite the reader to judge, based on facts which he has set out, whether it is reasonable to draw this conclusion, but the writer has already judged for himself, as it were on the basis of evidence which he does not disclose, and he encourages the reader to accept his judgment without exercising his own criticism. Such a presentation of fact is done at the writer's risk and if he is not able to establish its truth, he must bear the consequences. It is true that there also is the second part of the article in which the matters are presented as the conclusion drawn by the clerks at the Goldberg agency, with which the writer agrees, and that one should generally read the article in its entirey in order to discern its nature. But one must also remember that the ordinary reader of the newspaper does not analyze the material presented to him in great detail, but the general impression is what counts, and this impression is very much influenced by the order in which the matters are set forth. If a certain impression is created at the beginning of the article, it will not easily be erased by other matters which appear later. At the very least it may be said that this article mixed factual statements and the expression of opinion in a way that the reader cannot separate them - and this is sufficient ground on which to hold the respondents liable.

On the basis of the above, I would set aside the judgment of the majority in the appeal and I would hold the Respondents liable, as did the District Court in its judgment.

After writing this Opinion, I received a copy of Sir Zelman Cowen's book "Individual liberty and the Law" published by Eastern Law House, Calcutta & Oceana Publications Inc., Dobbs Ferry, New York. This is a collection containing the Tagori Lectures that the author presented at the University of Calcutta. The learned author (who is now the Governor

General of Australia) discusses in these lectures the fundamental problem of preserving the individual's right to his good name and privacy as against the freedom of the press. I have no doubt that this book will become a leading book on this subject. I note with some satisfaction that much of what I have said here accords with this authority's opinion. (And as chance would have it, the title for the first part of the book is "The Right to Wave My Arm"). The perusal of the chapters in the book that cite extensive authorities that were not before me has broadened my understanding and deepened my thinking concerning the matters we have dealt with in this Further Hearing. There is no room here to describe even its principal contents. The reader will find there a complete analysis of the American decisions, beginning with *New York Times v. Sullivan* [18], in a very critical light. The author's conclusion is that the publication of that opinion was no occasion for "dancing in the streets", as one American professor suggested (see pp. 47, 63). After studying this important book, I am reinforced in my view that we stand in this matter at a parting of the ways between the permissive American approach, which is liable to lead us astray, and the healthier approach that prevails in all other common law countries and that is in accord with our laws.

Kahan J: I agree.

Etzioni J: I respectfully concur fully with my esteemed colleague, the Deputy President's judgment, in its entirety. However, in light of the very wide ranging arguments which my esteemed colleagues Shamgar and Ben-Porat JJ have set forth, and of the new and far reaching precedents which were established in C.A. 723/74, as the Deputy President notes, I find it proper to add a few remarks of my own, particularly with regard to the question whether the principle of freedom of expression is superior to the right of a person to

his good name, in the hope that I will not detract thereby from the Deputy President's comprehensive remarks.

In C.A. 30/72 [l0], which the Deputy President has referred to, I discussed the strict rules of Jewish law concerning a man's right to the protection of his good repute, as expressed in the well known sentence from the book of Ecclesiastes: "Better a good name than good profits". I also quoted there from Maimonides, Laws Concerning Beliefs, chapter 9, that a person who disparages his friend, even when saying the truth, nevertheless commits an act of speaking with an evil tongue. Still, I set out there that a public person is subject to public criticism and exposure. And in Cr.A. 364/73 [13], I expressed my opinion that the judiciary, too, is not immune from this criticism. In that judgment, which concerned a person who was charged with criminal contempt of a judge, I said:

> "There is often a clash between two principles in this matter. One is the principle of respecting the judicial system while the other is freedom of expression and criticism, including criticism of the judicial system and the judges".

And I added:

> "It is not always easy to tell which principle to prefer in each case. And if from time to time it turns out that a judge suffers unfair criticism, well this is the unavoidable price of the democracy in which we live. Only in totalitarian countries does the citizen not dare to criticize the regime and the courts."

And, further on, I said:

> "Such criticism must be fair, restrained and based on the issues. Nevertheless, it should not be silenced when from time to time it crosses the bounds of good taste".

I have quoted the above matter so as to show that I am not lightly disposed to limit the citizen's and the press' right of criticism regarding the acts of public figures, including judges themselves, as long as such criticism is within accepted bounds of fairness. As for me, I see no conflict between these two principles of freedom of expression and criticism and the protection of a person's good name.

I expanded on this matter in another case, C.A. 552/73 [12], where the question arose whether the award of high sums of damages for defamation might repress freedom of the press. I allow myself to repeat what I said on that occasion:

> "I am far from denigrating the importance of the existence of a free press in Israel. However, when is that the case - when this freedom is not abused. When we speak of the freedom of the press, we mean principally the freedom to publish a clear and true account of events that occur in the country and the ability to criticize them freely, without fear of official censureship on political or other grounds. However, this freedom is not a license to issue defamatory material without any factual basis".

And I also added there:

> "If the newspaper crosses the boundary of reasonableness, it can no longer enjoy any privilege by claiming that the imposition of heavy damages could harm freedom of the press."

It is clear, therefore, that there is no ground to prefer the principle of freedom of expression over that of a person's right to his good name.

And if there be any need to cite additional authority beyond that which my esteemed colleague has brought, I find such in the rules of professional ethics that were adopted by the Press Council and were set out in the Annual Book of Journalism, 5738-1978, in an article by Advocate Rotenstreich, "Guarding Freedom of the Press." I quote three of those rules, numbers 1, 3 and 6:

> "1. Freedom of the press and expression are man's basic rights, a cornerstone of his freedom and his rights in a democratic society. This right achieves its fullest and most comprehensive expression **to the extent that journalists remember and take care to preserve their moral duty to truth and accuracy in the collection of information and its distribution -** and by considering the acts, the thoughts and the sensibilities of the public."

"3. The journalist's and the newspaper's calling is to furnish to the public **reliable information and interpretation which accords with the facts."**

"6. Ridicule, inciting against a person and unfounded accusations - for example, on the basis of personal, national, ethnic, religious or racial background - are serious offenses for journalists. **The journalist and the newspaper must respect every person's good name and private and family life.**

If the publication has injured someone's honor and good name, he should be given the opportunity to publish a reply. **The journalist and the newspaper must be particular concerning accuracy and to prevent the reader from drawing wrong conclusions."** (Emphasis added - M.E.)

From these provisions we see that even those who are particularly concerned to protect freedom of the press do not adhere to the principle that this freedom has superior status, but take particular care that a journalist who publishes his words to the public will exercise his legitimate and desired right of public criticism without belittling his other duty, to be exacting in preserving the facts that are the basis of such criticism.

As my esteemed colleague the Deputy President has already pointed out, the Respondents in this case did not comply with this duty, and I therefore agree with his opinion, with all due respect.

Ben-Porat J: There remains for me only to concur in the opinion of my esteemed colleague the Deputy President. His remarks complete what I omitted in my own remarks in the original hearing.

I also concur in the remarks made by my esteemed colleague Etzioni J.

Shamgar J: 1. I have read with interest the remarks of my esteemed colleague, the Deputy President, which represent the majority view in this Further Hearing, and out of respect to the position taken by my esteemed colleagues, I have also reexamined my own judgment in C.A. 73/74 (hereinafter - the previous hearing). My conclusion is that I disagree with the views expressed by my esteemed colleagues in this Further Hearing and I do not see my way clear to change the views I expressed in the previous hearing.

2. The text of the article and the facts of the event will not be set out here once again, although their study is, of course, an essential condition for the evaluation of the substance of the publication that is the subject of this case, its connection to the proven facts, the classification of its parts - whether as facts or as the expression of opinion to which section 15(4) of the law applies - and the drawing of conclusions concerning proof of the existence of any of the circumstances specified in section 16(b) of the Law which deal with presumptions of lack of good faith.

It is unnecessary to add that I also will not repeat here in detail my conclusions and my thoughts which were set out extensively in the judgment in the previous hearing, and for the reasons therefore, I refer the reader to what I said in the previous hearing.

Since the inquiry in this Further Hearing has been very widespread, and in order to fix correct bounds, it will not be superfluous, I think, to state that we deal here with a defined segment of the law forbidding defamation, that is - a publication that relates to a matter of **public** interest and deals with the conduct of an **official** or **public** functionary.

3. My esteemed colleague, the Deputy President, disagrees with my stand, as he says, in these three respects:

(a) The preferred status granted by our law, in my opinion, to the right of freedom of expression.

(b) The meaning of the provisions of the Law Forbidding Defamation, 5725-1965 (hereinafter - the Law) in general and of section 15(4), especially and primarily the manner in which those provisions should be interpreted.

(c) The application of the defense set forth in section 15(4) of the Law to the article which is the subject of this litigation.

4.As I have said, the majority of my esteemed colleagues disagree with my basic position, which I set forth in the previous judgment and according to which -

"the previously described character of freedom of expression as one of the fundamental constitutional rights gives it superior legal status. The obligation to maintain this right serves as a guideline to fashion and

> shape laws and to test the legality of acts of the authorities. This also has consequences for the legal interpretation of every written law. Any limitation on the boundaries of this right and of its extent, which arises from legislation, will be narrowly construed so as to give the aforesaid right maximum scope and not to restrict it in the slightest beyond what is clearly and expressly required by the legislature's words.... Freedom of expression and a provision of law that limits it do not have equal and identical standing, but rather, to the extent consistent with the written law, one should always prefer the maintenance of the right over a provision of law that tends to limit it. In sum, the standard of judgment that establishes the protection of freedom of expression as the primary consideration when it clashes with another right should be given full expression, not only when the legislature enacts the law's provisions, but also **in the interpretation of the law and the application of its provisions to circumstances in which its actual essence and performance are tested in practice"** (Emphasis added - M.S.).

It follows that acceptance of this legal point of departure, that recognition of the basic freedoms is an essential part of the law in Israel. entails the conclusion that the basic freedoms are part of the law. **as per their name and their purpose,** that is to say, as basic rules that guide and give structure to forms of thought and legal interpretation and influence them by their spirit and direction. The result is, among other things, that to the extent that the matter can be reconciled with the written law, one should always prefer the existence of freedom of expression as opposed to its limitation and restraint. It goes without saying that I agree that when a court is called upon to interpret the provisions of a law that has

implications for freedom of speech, the court may not declare that the law is void if it contains express and unequivocal provisions that forbid the exercise of that right or establish a specific limitation on it, in particular circumstances. But whenever the legislature's words leave room for interpreting the law one way or another, that is whenever the modes of interpretation allow a choice between a strict interpretation that tips the scales in favor of curtailing freedom of expression and an alternative liberal method, then the second method should be adopted, which will protect and establish freedom of expression to the extent possible.

My esteemed colleague, the Deputy President, is not ready to lend his hand to this approach, and as he hinted, his attitude derives, to a certain extent, from the difficulties inherent, in his opinion, in any written declaration of rights, that is to say, from his doubts concerning the necessity of giving constitutional standing to the basic rights.

In this context, freedom of expression has been called "an unwritten right", but this does not reduce its legal standing in any way. Our Israeli common law has not yet been transformed into written law, and despite legislative efforts to convert unwritten principles into written rules, it should be assumed that there will remain legal precedents that do not find expression in any particular legislative enactment. As is well known, this does not in any way detract from their standing in our system of law.

In taking exception to the standard for interpretation which I set forth in my Opinion, the Deputy President refers, among other things, to the remarks of my esteemed colleague, Kahan J, in F.H. 27/76 [3]:

> "When the legislator has expressed his view in clear terms in a particular law, the court must interpret that law according to its plain import and the legislator's intent".

With all due respect, this is not at all the question before us in this case: so long as this court has no power of constitutional review, it is obvious that a clear and unequivocal statutory provision must be interpreted according to its plain import and meaning, even if that law curtails a basic freedom. The standard or the guideline to which I referred above becomes important, as I explained, when the matters are not clear and unequivocal, when the text of the law allows room for judicial discretion and when the question arises in this connection, what is that intention that should be read into the legislature's words.

More particularly, the legislature did not lay down unequivocally that any person who transmits a fact inaccurately, whether slight or serious, important or marginal, substantive or irrelevant, will always be liable for having committed a tortious act, without more. Were that the case, there would be no place for the thesis I have set forth. But that is not the way in which the legislature works. It defined defamation but also set up frameworks to clarify and to classify published matter, it established the importance of good faith and created defenses and mitigations which would apply to different publications, even though they are defamatory. Among other things, the legislature defined those circumstances which will raise a presumption that the publication was not done in good faith and opened the door thereby, that the opposite conclusion will be drawn on certain facts. These special defenses are a clear sign that, **in certain circumstances,** the legislature chose to prefer freedom of expression even though the publication injures someone's honor.

This reflects a basic approach which, in my opinion, should be extended and applied whenever the court concerns itself with the interpretation of the Law or the meaning of a publication, as for example, when writings that criticize a public authority can be understood both as expressing an opinion and as stating a fact. To sum up my view, I can best refer once again to part of those quotations which were brought by my esteemed colleague in his Opinion from Olshan J (as was his title then) in C.A. 90/49 [4], which include the following selection:

> "Therefore, the law distinguishes between ordinary cases in which defamatory material is published and exceptional cases, in which the public good is preferred over the individual's right, even if this causes a certain amount of injustice to the individual."

So, too, Agranat J's view (as was his title then) in Cr. A. 24/50 [5], at p. 1160:

> "The law recognizes that, in certain particular circumstances, the public good requires that a person not be punished for distributing defamatory material, so that the above-mentioned basic right [freedom of expression - M.S.] not be emptied of all content, because the danger of harm that would be caused to the public by over-restriction of freedom of speech and writing is given preferred consideration over the injury to one individual."

And in H.C. 73/53 [1], Agranat J called freedom of expression a superior freedom that is a condition precedent to the exercise of almost all the other freedoms.

I do not disagree with my esteemed colleague that one must distinguish between freedom and anarchy and that certain freedoms must be qualified, in given circumstances and conditions, for the public good. However, the question always is where to draw the line and what is the proper guideline for marking the limits. It may not be inferred from my esteemed colleague's remarks, which appear to set up a person's right to his honor and his good name as paramount to the right of freedom of expression, that he believes that it is always forbidden to publish a libel, regardless of the circumstances. For that would render the provisions in the Law that establish defenses when the published words are defamatory empty of all content. So, too, one should not infer from the protected and preferred status given to freedom of expression that it may never be qualified in the slightest.

To sum up, when the law provides defenses whereby, in specified circumstances, things said or written will not be regarded an offense or a tort even though their content is defamatory, the basic approach takes on great importance: whether it is severe, restrictive and guided by a narrowing yardstick, that seeks to impose the fear of the law on marginal cases, such as those which we will deal with shortly, in which insignificant and unimportant inaccuracies have been intermingled in the writing that is essentially the expression of opinion concerning the improper conduct of a public functionary. Or, perhaps we should interpret the writing - to the extent possible - liberally, and perceive the defenses defined in the written law as an expression of a desire not to harm or impede the free expression of criticism concerning public matters, beyond the necessary minimum.

5. The majority Opinion expresses the view that, instead of giving interpretive superior status to the principle of freedom of expression, one should undertake "a process of

balancing the competing values on the scales and choosing among them". This does not provide an answer to the question how one should interpret the provisions of a given law. The process of balancing competing values describes the starting line of interpretation, but it does not provide criteria or value weights with which to do the work of interpretation. Furthermore, I fear that the result of comparing values without setting forth criteria for evaluating their respective weights will be that, in each case, the court will apply whatever criterion appears appropriate in the circumstances, according to the best understanding of the particular panel that happens to be sitting. In other words, the decisional framework which contains a guideline of value, namely, the object of maintaining a fundamental freedom, will be exchanged and replaced by an unpredictable paternalistic and arbitrary framework. With all due respect, this is most unsatisfactory, and I am certain that it also will not bring about clear and consistent decisions.

6. For the purpose of emphasis and clarification, my esteemed colleague referred to the German experience, that is to say, the theory that the weakness of the German law of defamation during the period of the democratic Weimar regime that preceded Hitler was used by the enemies of democracy as a very effective weapon to undermine democratic regime. For support, he referred to the article by David Rieisman which was published in the Columbia Law Review in 1942. It seems to me that the long period that has passed since then has given us a wider historical perspective for the understanding of the many and varied factors that led to the rise of the Nazi regime in Germany and I am certain that a broader analysis, today, would disclose that the relative importance of the German libel laws in this context, as opposed to other factors and elements, was not great. However, the principal matter is that one must be cautious when it comes to imposing restraints on freedoms merely because a totalitarian movement of one type or another managed to take advantage of such

restraints for its nefarious purposes. Such an approach, itself, can lead to dangerous and far reaching conclusions. It is better to avoid analogies whose relationship and similarity to our political and social realities and our system of law are flimsy and slight, particularly when this very month two foreign journalists were put on trial in Moscow for defaming officials of the Soviet broadcasting authority.

I only repeat what is well known, from the statement of one of the great men of the generation, when I conclude my discussion of this point by saying that the democratic system of government has many weaknesses, one of which undoubtedly is that the freedoms it allows can be used by persons of evil intent. But, at the same time, we accept the fact that we have yet to find any better system of government, be it for the individual, for society as a whole, or for the proper balancing of the needs and the rights of both.

7. I will now proceed to the second question, namely, what is the correct interpretation of the Law. At the beginning of his discussion of this topic, my esteemed colleague refers to the defenses which the Law provides. But it should be emphasized here that we are not talking about defenses for the protection of the **injured party,** as might be understood from his discussion and his conclusions, since he considers my interpretation to be **narrowing.** By calling chapter 3 of the Law "Permitted Publications, Defenses and Mitigations", the legislator intended to refer to publications permitted to the publisher and defenses and mitigations for the defendant and not for the plaintiff.

However, the conflict between us does not rest on the question of whether my interpretation is narrowing or widening. All that I sought to express in my Opinion in the previous hearing was that the text of our Law, including section 15(4), is consistent with the

basic precepts which I put forward and does not conflict with them, and that it can be interpreted so as to preserve its fundamental purpose, namely, to forbid the publication of defamation while providing proper protection for those publications that are essential to the existence of a free society .

The judgment in the *Sullivan* case [18], as any other foreign precedent, could not have been cited by myself as a **binding** precedent and the description of its holdings was a presentation of the views and basic tendencies accepted in this field in the United States, which I proposed be adopted because they are consistent with our own written law. In other words, our legal criterion in this matter is exhausted by sections 15 and 16 of the Law, but it is up to us to decide what content to give to this legislation and what meaning to attribute to it.

My esteemed colleague said, among other things that -

> "we stand in this matter at a parting of the ways between the permissive American approach, which is liable to lead us astray, and the healthier approach that prevails in all other common law countries and that is in accord with our laws".

With all due respect, I disagree with the assertion that there is a unitary accepted approach to this matter in the common law countries other than the United States. And precisely Sir Zelman Cowen's book, to which the esteemed Deputy President referred, cites the varied tendencies and views, that often contradict each other. (Compare, for example, the conflicting proposals concerning the status of newspapers with regard to the law of libel and

the conclusions of the New South Wales Law Reform Commission, 1968, with those of the Shawcross Committee (The Law and the Press, 1965).) But furthermore, I would not incline to give approbation to the English libel laws, which only recently it was stressed require correction (see the report of 1975) and as to which Lord Diplock previously said:

"...the law of defamation... has passed beyond redemption by the courts."

8. With regard to the interpretation of section 15(4) of the Law, in my opinion, the dispute turns primarily on one issue, namely, the significance of the incorporation of secondary factual allegations within a publication that is primarily (dominantly) the expression of an opinion. Still, I conclude that my esteemed colleague did not see fit to adopt the rest of the lower court's conclusions in this matter, with which I disagreed, viz.:

(a) that the concepts good faith and truth are always linked together with regard to the protection against libel, which, in my opinion, contradicts the provisions of section 16(b) of the Law, and

(b) it appears from the District Court's analysis of the issues that every expression of opinion must meet the test of reasonableness in the eyes of the court that sits in judgment, that is to say, it is not the departure from the bounds of reasonableness in expressing the opinion **in the circumstances of the case** that determines, but the general reasonableness of the opinion in the eyes of the court.

My esteemed colleague correctly states with regard to (a) above, that the expression of an opinion need not necessarily be the truth - that is to say, factually correct - else generally there would be no need for the special defense provided by section 15(4) of the Law.

We will not deal with his remarks concerning item (b) above.

On the other hand, he disagrees with the following matters said in the previous judgment at p. 256:

> "The question may be asked, what is the law when a factual assertion is intermingled with the expression of an opinion in respect of which the defense of good faith contained in section 15(4) is sought? The answer is that the circumstances set out in the various sections of section 15 classify the publication according to its dominant character. In other words, the type and category of the publication as establishing a fact or expressing an opinion will be determined by its essential nature that is divined from its general import in the eyes of a reasonable reader, and it will not lose its character as a publication expressing an opinion merely because some fact was included, if that does not change its essential feature as described."

In this context, my esteemed colleague says:

> "I do not find support for this in the language of sections 15 or 16, to which my colleague referred later on in his Opinion."

According to my scheme, it is not necessity to seek support for this particular point in the words of sections 15 or 16. The yardsticks set forth in section 15 of the Law should be interpreted according to their substance and their clear direction, and in a manner so as not to draw from the text unnecessary strictness. Moreover, the presumptions created by the legislature in section 16 and the imposition of the burden of proof which derives therefrom support the opinion that the legislature intended to relax the publisher's burdens, if he acts without malice. Therefore, the mingling of a factual detail in a publication which is by its dominant nature an expression of opinion need not be interpreted in a limiting fashion, and it would appear from further on in his Opinion that my esteemed colleague treated an ancillary fact in the publication in the same manner, without relying on a specific provision in the written law.

Incidentally, one can find expression of a similar approach in the current opinion in England and, I referred in this context, for the purposes of comparison, to section 6 of the Defamation Act, 1952, and also, to no little extent, to the remarks of Denning J in *Slim v. The Daily Telegraph* [15], to which I will refer again later on.

I am also pleased that my esteemed colleague agrees that the defense under section 15 is not lost merely because the defendant does not prove the truth of an **ancillary fact** that is not seriously harmful, even though that section of the Law does not contain an express provision to this effect. Were the Law to be interpreted strictly, on the basis of its express provisions alone, one would have to conclude from the inclusion of such a provision in section 14, on the one hand, and its exclusion from section 15 which concerns us here, that such an **ancillary fact** would in fact undermine the defense.

It is unnecessary to add that this interpretive difficulty does not arise according to my method.

I incline to conclude that the difference between my esteemed colleague's approach on this particular point and mine is not a conflict of principle but stems from the difference between establishing the principle and applying it.

Essentially, one's basic approach bears on the evaluation of the significance of the intermingling of a factual detail in the expression of an opinion. publications concerning public matters are not always written in the same manner as one would prepare a legal opinion or legislation, and the application to them of a picayune yardstick that demands strict compartmentalization of fact and opinion and judges every slight deviation harshly could impose a heavy burden on freedom of expression. I agree that this strict view was stated expressly in the 1911 edition of Odgers, but I believe that since then we have seen the first signs of a more liberal approach. perhaps it would be correct if I quote once again Denning L.J.'s words in *Slim v. Daily Telegraph Ltd.* [15], at p. 503:

> "...These comments are capable of various meanings.... One person may read into them imputations of dishonesty, insincerity and hypocrisy .... Another person may only read into them imputations of inconsistency and want of candour .... In considering a plea of fair comment, it is not correct to canvass all the various imputations which different readers may put on the words. The important thing is to determine whether or not the writer was actuated by malice. If he was

> an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it .... I stress this because the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to 'write to the newspaper': and the newspapers should be free to publish his letter. It is often the only way to get things put right."

And at page 198 of the judgment in *London Artists* [16], which I also referred to in my previous judgment, Denning J categorized a particular letter as a combination of facts or as opinion on the basis of -

> "... a fair reading of the whole letter ...",

a yardstick which I would adopt in the matter before us.

9. I now come to the third topic, the interpretation of the article itself:

With regard to the factual inaccuracies in the article, I can do no more than repeat my previous remarks at page 263 of the original judgment, as follows:

> "Even if these ancillary facts contain inaccuracies, these are so secondary in their meaning and their importance that there is nothing in them to change the writer's conclusion: similarly, I fail to grasp the importance of the claim that since the car was returned to the Goldberg agency on 29.11.1966 (not immediately after the Respondent's public statement of 8.11.1966) it was in the agency's custody only for three and a half months instead of 'more than four months', as said in the article; so, too, it is of no importance that it was not 'the agency's clerks' who drew the conclusion described in the article, but only one clerk, since this particular clerk was the one directly responsible for carrying out the assignment to sell the car, who dealt with the matter directly until he concluded what he concluded and reported that his assignment was finished. Who was more familiar with the matter than he and more competent to communicate his impressions of the matter? The court concluded that his statements were not merely some malicious irrational personal speculation when it learned that many of the Electric Corporation's employees also thought that the offer to sell the car was a bluff. The factual description of the offers for sale which preceded the publication of the article is well founded and the lower court made no finding rejecting Mr. Sapir's testimony on this point. Moreover, Mr. Goldberg's letter of 15.3.1967, on which the Respondents relied, shows that there were offers from car dealers, 'who thought they could get the

car at this price,' and the price set forth in the letter is 24,000-25,000 Israeli pounds."

Given the light weight of these inaccuracies, the defense of good faith set forth in section 16 of the Law applies to this article, as I said at pages 264-266 of my judgment:

"With regard to section 16(b)(1): in the light of Mr. Amir's testimony, there is no basis to attribute to the fourth Appellant the lack of faith in the publication's truthfulness. On the contrary, Mr. Amir apparently believed sincerely in the truth of his impression and conclusions and conveyed them to the fourth Appellant.

The lower court was of the opinion that this did not add an aura of veracity to the author's conclusion, but that is not so. The circumstances as a whole gave Mr. Amir's story the image of truth and reason, since the corporation had shown no initiative and outstanding passivity in everything related to the sale: no offers of sale were published in the press and no notice of tenders was announced, no price was fixed for the car by the Respondents, the offers made received no attention and no attempt was made to negotiate with the bidders in order to persuade them to raise their offers. Instead of cleaning the car, which was covered by dust, to impress potential purchasers, it was confined, to the Respondents' knowledge, in a warehouse in which it disappeared completely from view and the passing time reduced the prospects of selling it. In this last connection, it was immaterial whether the

beginning of the 1968 model year had already arrived, or whether it was a few months off, as, in any event, the natural passage of time, if not halted, brought the former event closer every day, and the aging process of the car, which was a 1966 model, continued to progress. All of these facts, which were mentioned in part in the article, gave Mr. Amir's words the appearance of authenticity, and this had direct implications concerning the conclusion as to the author's good faith.

Nor can one charge the fourth Appellant with failing to take reasonable measures to discover whether the publication was true, since he approached the first Respondent whose spokesman refused to speak to him. The lower court was of the opinion that since the fourth Appellant was well aware of the reasons for this refusal, he should have sought alternative sources of information in order to fulfil the obligation set forth in section 16(b) (2). I do not see any basis for this opinion. The corporation's refusal, whatever its real reason may have been, could only have added to the suspicions in the circumstances, and that is a considered risk which anyone who refuses to react must take. Whoever approaches a public authority with a request to react is not obliged to interpret silence on the part of the authority to its advantage, but is entitled to suspect that there is something behind it. In any event, anyone who refuses to react cannot complain afterwards that the publisher did not find an alternative source of information to circumvent the barrier he himself created by his refusal.

> The court is not one of the contesting parties but must examine whether the presumption of good faith arises or whether the Plaintiff has succeeded to rebut it, and to this end it has at its disposal the criteria laid down by Law. From the wording of section 16(b)(2) it follows, inter alia, that the plaintiff may try to prove the absence of good faith by producing evidence that the publisher 'had not, prior to publishing it [the matter published] taken reasonable steps ascertain whether it was true or not'. But this provision of the Law does not merely provide a way to rebut the presumption. It also provides ground to infer that if the Defendant took steps in advance to ascertain whether the matter published was true or not, that is a sign that he has passed one of the good faith tests, and the defense remains valid as long as it is not rebutted in one of the other ways laid down in section 16(b)."

With regard to section 16(b)(2), my esteemed colleague commented on the fact that the fourth Respondent sought to speak with the first Petitioner's spokesman, but he refused to react and he noted that, as a result thereof, the first Petitioner was awarded damages in the amount of one pound only.

But the proofs in the lower court also indicated that the second Petitioner is the person who gave the order not to reply to the Respondent's approach, but for some reason the lower court did not draw any conclusion in connection with that.

10. The majority Opinion and I disagree whether to categorize a certain sentence in the article as fact or opinion ("actually, the Electric Corporation is not really interested to get rid

of the car") and over the significance of mixing finding facts with the expression of opinions. I viewed this sentence as the expression of an opinion, that arises as a conclusion from the facts given in the earlier part of the publication, whereas my esteemed colleagues regard it as a factual claim. As to my view of the matter, I can do no better than to refer once again to what I said at page 264 of my previous decision and to the selection quoted above from the judgment in *Slim* [15], according to which, the substance of the publication should be judged, among other things, after a fair reading of the whole.

11. To sum up the matter, the stricter standards which my esteemed colleagues have adopted as the test for examining factual inaccuracies and the interpretation with regard to classification of some of the matters set forth above, causes the majority to find fault with the publication at issue.

I regret this for two reasons:

First, I fear that this may be interpreted as a restraint and limitation on the principles concerning freedom of expression which have been crystallized in our legal system ever since the establishment of the State and particularly since the decision in the *Kol Ha'am* case [1]. Second, the failings which are uncovered from time to time in our public service are not rarities and not infrequently the citizen faces obstinacy, bureaucratic arrogance, indifference, and an unwillingness to practice fiscal economy and even worse. Efficient and free criticism of the conduct of public authorities, including the government companies that provide public services, is an essential means for correcting these improper practices. If the citizen fears that the every factual inaccuracy, no matter how trivial or slight, might involve him in legal proceedings, and that every doubt that arises from his text will be interpreted strictly, he will

be in fear of those who control unlimited funds in the public purse to conduct their litigation, he will not dare to protest and the criticism will be stifled before it has been uttered. The yardsticks for the limits of permitted criticism of those holding official or public office which have been adopted in the United States and whose underlying approach - as distinguished from its detailed application - can be adopted in my opinion within the framework of our written law, were not created in a vacuum. They are not the fundamentalistic views of judges of the school of Justices Black and Douglas, because it was not their opinion that prevailed in the *Sullilvan* case [18]. This conclusion arises from the need to create efficient checks and proper balances in a free society against the development, and even victory, of those who would take wrongful advantage of the powers and authority of public office, because the private citizen dares not to open his mouth. It is unnecessary to add that the public does not only feed on abstract declarations concerning the existence and importance of basic freedoms, but it is also awake to their actual application in practice. The Supreme Court of the United States was aware, therefore, of the risk that arises from the blocking of criticism beyond the extent required by the law, however pure the motives may be. In the words of Sussman J (as his title was then) in H.C. 206/61 [14], at p. 1728:

> "True democracy will be measured especially by the standard whether criticism will be published and heard, for without that, the regime of parliamentary democracy will fall into an abyss".

What I have said here concerning the essential role of criticism applies, of course, to the bureaucratic system in general, and the fact is that in this case before us, too, the Petitioners altered their original decisions only as a result of the criticism that was expressed in the press. It matters not one iota that they were unwilling to admit at any stage that they had in

fact erred. Restraint of criticism based on picayune demands concerning ancillary factual matters may create serious dangers far in excess of those which could result from the mixing of inaccurate ancillary facts into an article whose dominant character is legitimate criticism of the conduct of a public official in the performance of his duties, and which did not exceed the bounds of fair comment in those circumstances.

Accordingly I would dismiss the Petition.

Decided, by majority opinion, to void the judgment of the majority in the Appeal and to hold the Respondents liable as did the District Court. The Respondents are to pay, jointly, to the Petitioners, costs in the sum of IL30,000, in the Appeal and the Further Hearing together.

Judgment given on 24 Av 5738 (August 27, 1978).