IN THE SUPREME COURT SITTING IN THE HIGH COURT OF JUSTICE

H.C.J. 88/680

Before:

His Honour Judge A. Barak

His Honour Judge Y. Melitz

Her Honour Judge Sh. Wallenstein

The Appellants:

1. Meir Shnitzer
2. Aluf Ben. Journalist
3. Local Press Ltd

VERSUS

The Respondents:

1. The Chief Military Censor, Mr. Yitzhak Sheni
2. The Minister of Defence

APPEAL FOR GRANT OF DECREE NISI

Date of Hearing: 18 December 1988

For the Appellants: Sh. Liblik, Attorney-at-Law

For the Respondents: Ms N. Arad, Attorney-at-Law

JUDGMENT

JUDGE A. BARAK

What is the power of the "Military Censor", operating in accordance with the Defence Regulations (Period of Emergency), 1945, to prohibit publication of a newspaper article which is critical of the role of the Chief of the Institute for Intelligence and Special Operations ("Mossad"), noting that the matter relates to forthcoming changes in the leadership of the Mossad - this is the question at the centre of the Appeal before us.

THE APPEAL

1. In Tel Aviv there appears a weekly newspaper, "The City" (the third Appellant), of which Mr. Shnitzer (the first Appellant) is the editor. Aluf Ben (the second Appellant) is a journalist employed by this newspaper. He prepared an article dealing with anticipated changes in the leadership of the Institute for Intelligence and Special Operations (hereinafter - the Mossad). The article was submitted to the Chief Military Censor (the first Respondent) and was prohibited by him (3 August 1988). The reason given for the prohibition was that publication of the article would be prejudicial to the security of the State. A few days later (11 August 1988) the Editor submitted to the Censor an

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alternative version of the article. This new version was also prohibited, and again the reason given concerned the security of the State. The Censor approached the newspaper requesting a revised article and this was submitted to him (14 August 1988). This version was not passed for publication (15 August 1988), on the grounds that individuals were identified by name. A few days later (23 August 1988) the article was submitted to the Censor in its final form. He passed the article for publication, with the exception of thirty-two items, which were prohibited. It is against this decision that the Appeal before us is directed.

2. The items banned from publication deal with three subjects. First, a profile of the Chief of the Mossad. In the opinion of the censor these items are not to be published, because they are liable to lead to his identification and thus endanger his personal safety. Second, criticism of the activity of the Chief of the Mossad, casting aspersions on his efficiency. In the opinion of the Censor, criticism of the Chief of the Mossad is prejudicial to the operational capability of the Mossad, at all its levels. In particular it was noted that the matter would be prejudicial in the sphere of State Security, in regard to relationships both with parallel organisations in other states and with operators in the field. Third, the timing of the replacement of the Chief of the Mossad. The position of the Censor is, that reporting information

regarding the anticipated departure of the present Chief of the Mossad is forbidden, because certain interested parties are liable to focus an intolerable degree of attention on the man, his movements and his activities and make full use of this knowledge to expose the identity of the Chief of the Mossad, especially outside Israel. In the opinion of the Censor, this constitutes a real danger to the safety of the Chief of the Mossad.

3. Mr. Liblik, representing the Appellants, agrees that all items in the article dealing with a profile of the Chief of the Mosssad should be excised, and this issue in no longer in contention before us. On the other hand he considers that the two other subjects - criticism of the Chief of the Mossad and the date of his replacement - are suitable for publication and prohibition of them is not lawful. Mr. Liblik stresses the importance of freedom of expression, and the public's right to know, in a democratic society. In his opinion, only when there exists a near-certainty of prejudice to State Security, is the Censor entitled to prohibit publication of an article, and even then he must act reasonably. In the view of Mr. Liblik, publication of criticism of the Chief of the Mossad and of the date of his replacement, constitutes no near-certainty of prejudice to State Security, and prohibition is unreasonable. In his presentation to us Mr. Liblik stressed the public importance of the function of the Chief of the Mossad - especially

since the Yom Kippur War - and the vital need that the most suitable person be chosen for this post. Hence, it is the duty of the Appellants to warn and to remind those responsible for this, that the appointment of the new Chief of the Mossad should be considered in a responsible manner, and the choice should not be influenced by politics, by inter-party rivalry, or by an attempt to find a compromise which will lead to the appointment of a mediocre person. Mr. Liblik stressed the point that the Appellants mention no names in the article, and make no recommendation of candidates. They seek only to underline the obligation to appoint the most suitable people, in such a way that the derelictions of the past are not repeated. Mr. Liblik agrees that the activity of the intelligence services needs to be secret and protected from publicity, but there is no justification, in his view, for preventing publication of criticism of the Chief of the Mossad. Public criticism is in fact likely to lead to greater caution on the part of the Chief of the Mossad. Finally, Mr. Liblik noted that the report of the anticipated appointment of a new Chief of the General Security Service was passed for publication and there is no basis for distinguishing between the Chief of the Service and the Chief of the Mossad. He also drew attention to an article published in September 1987, and passed for publication by the First Respondent, which spoke of increasing unrest in the Mossad with regard to the appointment of the next Chief of the Mossad. Mr. Liblik also

notes that the Military Censor has not prohibited published criticism of the Chief of the General Security Service, of the Chief of Army Intelligence and of the Chief of the General Staff. In his opinion, there should be one law regarding public criticism applicable to the chiefs of the Security organisations.

4. In her reply, Ms. Arad, on behalf of the Respondents, stressed that the Military Censor accepts the need to respect the right of expression and freedom of expression, which are among the fundamental principles of our system. This is the guiding premise in his deliberations. Furthermore, the Military Censor accepts that the proper test for the exercise of his authority is that he is authorised to prohibit a report only when there exists a near-certainty that publication of the report will be prejudicial to State security. In her submission, publication of criticism of the Chief of the Mossad and publication of the date of his replacement do constitute a near-certainty of prejudice to security, and prevention of the publication of this information is reasonable. The reasons given by the Military Censor regarding prohibition of criticism of the Chief of the Mossad and the ban on revealing the fact of his replacement we have already noted. Ms. Arad commented that the Military Censor does not prohibit the sections which concern criticism of the Mossad and its activities in general. The prohibition applies to

criticism of the outgoing Chief of the Mossad. The reason is, as afore-mentioned, that as long as the Chief of the Mossad continues in office, close attention to his role is liable to prejudice State Security. In her submission criticism of the Chief of the Mossad is not the same as criticism of the chiefs of the other security organisations, and this in the light of the special nature of the operations of the Mossad. Thus, for example, according to existing practice, information is released on behalf of the government regarding the appointment of a new Chief of the Mossad, without revealing his name, and it is permitted to report the end of the term of office of the outgoing Chief of the Mossad. Once the new appointment has been made it is permitted, for the first time, to publish the identity of the latter. This practice does not exist with regard to the chiefs of the other security organisations. Ms. Arad added and stressed, that over the appointment of the Chief of the Mossad there already exists public scrutiny. The Chief of the Mossad is appointed by the Prime Minister. Scrutiny of the Chief of the Mossad is in the hands of the Prime Minister, the Government, the Foreign Affairs and Security Committee of the Knesset, the Knesset and the State Comptroller.

5. As the case has progressed the area of contention between the parties has narrowed. Of the thirty-two items prohibited by the Military Censor, the ban on eight of them

has been lifted. The Appellants themselves have agreed, on their own initiative, to waive six of the items prohibited by the Censor. It thus emerges that the area of disagreement relates to eighteen items, which are all concerned with criticism of the alleged misconduct of the outgoing Chief of the Mossad and with his imminent replacement. The question with which we are faced is, therefore, whether the fundamental approach of the Military Censor in these matters is lawful.

THE NORMATIVE FRAMEWORK

6. "Military Censorship" exists under the provisions of the Defence Regulations (Period of Emergency), 1945 (hereinafter - Defence Regulations). Section Eight of the Defence Regulations concerns censorship. Regulation 87(1) states:

The censor may by order prohibit generally or specially the publishing of matters the publishing of which, in his opinion, would be, or be likely to be or become, prejudicial to the defence of Palestine or to the public safety or to public order.

Thus the censor is entitled to demand presentation of material for censorship before publication (Regulation 97). The publication of prohibited material constitutes an offence against the Defence Regulations. The censor is

appointed by the High Commissioner. This authority now belongs to the Minister of Defence. The censor is a serving officer, and the exercise of censorship in accordance with Section Eight of the Defence Regulations is performed in a military framework - hence his title "Military Censor". It should be noted that, in practice, the authority of the Military Censor is not applied to those newspapers which are parties to the Agreement between the Society of Editors and the Minister of Defence (for the Agreement and its application, see Chafets, "Press and Government in Israel", Isr. Yearbook on Human Rights 134 (1984); Lahav, Press Law in Modern Democracies 265, 275 (1985)). The Appellant newspaper is not a member of the Society of Editors and not a party to the Agreement with the Minister of Defence, and therefore the legality of the conduct of the Military Censor is to be tested directly according to the Defence Regulations, without any reference to the Agreement with the Society of Editors.

7. The provisions of the Defence Regulations regarding censorship raise, in connection with the Appeal before us, four questions: First, in what circumstances of prejudice to the defence of the State, public safety or public order, is the Military Censor entitled to forbid publication in newspapers; Second, what are the restrictions imposed on the deliberation of the Military Censor; Third, what is the scope of judicial review over the decision of the Military

Censor; Fourth, does the decision of the Censor in the matter before us pass the appropriate tests, and is there a case for our intervention in his decision. These questions will be addressed in order.

THE FIRST QUESTION:

THE CIRCUMSTANCES FOR PROHIBITION OF PUBLICATION

8. The Defence Regulations were instituted by the High Commissioner, on the authority vested in him by Article 6 of the Orders in Council for Palestine (Defence) 1937. These Regulations are therefore an article of Mandatory legislation. On the other hand, under Article 11 of the Constitution of 1848, they became a part of Israeli law. This transference from Mandatory to Israeli instrument is not of a solely technical nature. It is in the nature of things that change of framework entails change of content also. Indeed, Article 11 of the Constitution states that the law which existed in the country on 14 May 1948 will remain in force "subject to the changes emanating from the establishment of the State and its rights". Initially this court took the view that these changes are of solely technical nature (H.C.J. 48/5, Levin v. Governik). Later it was determined that the "changes" are not of solely technical nature, but of substantive nature (H.C.J. 68/222 National Clubs v. Minister of Police). Judge Zilberg insisted on this point in the case of the National Clubs,

commenting on the technical approach adopted in the case of Levin v. Governik:

With the greatest of respect to the learned judges, I am not entirely convinced of the validity of the formal interpretation given to these words on that occasion. I consider that there would be capitis diminutio *(devaluation) of the prodigious historical event of the creation of the Jewish State in the Land of Israel, if we say that the judicial change we are faced with, after two thousand years of exile, with the establishment of our independent State, is of the order, for example, of the change of frontiers made in the year 1948, when it became necessary to drop the Allenby Bridge from the list of "legal" points of entry to the country, published in 1943... I admit without shame that I am incapable of grasping this concept. My heart is with those "maximalist" dreamers of national independence: deliverance, the Third Temple, the renewal of national life. And if this is the reality of independence, is it not possible, in principle, to examine the cogency of every Mandatory law and to see if it accords with the vibrant spirit of the laws of our free and independent State?* (H.C.J. 68/222 *supra*, p. 157).

Indeed, in place of a colonial administration there came national independence. In place of autocratic rule came a democratic system, which is rule of the people, based on

representative government, operating according to the view of the majority, and guaranteeing human rights. This change, by the nature of things, has brought with it a new perception of the law and the legal system. The effects of this change vary with the circumstances. Sometimes the change is solely technical (see H.C.J. 52/107 Asad v. Chief of Staff). Sometimes the change is of a more substantive nature and thus an article of Mandatory legislation does not become a part of Israeli law (see H.C.J. 68/222 *supra*).

9. One of the "changes emanating from the establishment of the State and its powers" consists in the interpretation of articles of Mandatory legislation. "The conclusion to Article 11 drew attention to the essential fact that national independence also brings in its wake changes in the domain of law and its interpretation. The more urgent the matter, the more legitimate is the basis for independent interpretation of the law and independent realisation of the theoretical change" (: Judge . Shemgar). This change in the interpretation of Mandatory legislation is twofold: First, articles of Mandatory legislation will not be interpreted according to the rules of interpretation practised in the period of the Mandate. They will be interpreted according to the rules of interpretation practised in the State of Israel; Second, an article of legislation is to be interpreted on the basis of the fundamental principles of the legal system. Articles of Mandatory legislation will not

be interpreted on the basis of the fundamental principles of the legal system as practised in the period of the Mandate. Articles of Mandatory legislation will be interpreted on the basis of the fundamental principles of the legal system practised in Israel. Judge Agranat established this point in H.C.J. 53/73 "Voice of the People" Ltd v. Minister of the Interior when he said:

The system of laws, according to which the political institutions of Israel were established and operate, testify that this is indeed a State based on democratic foundations. Similarly, the matters pronounced in the Declaration of Independence - and in particular the matter of establishing the State on principles of liberty and the guarantee of freedom of conscience - mean that Israel is a freedom-loving State. In view of the declaration that "there is here no constitutional law determining a priori *the enactment of different orders and rules or their repeal"... except insofar as it "expresses the vision and the credo of the people," we are bound to pay attention to the matters stated in it when we come to interpret and give meaning to the laws of the State, including legal provisions established in the period of the Mandate and adopted by the State after its founding, by means of Article 11 of the Constitution of 1948. Surely it is a well-known axiom, that the law of a people is to be studied in the mirror of its system of national life.*

Indeed, a legal norm - whether enacted or theoretical - is not a creature existing independently. A legal norm is "a creature living in its environment" (Judge Zusmann). It is involved in its environment, influencing it and being influenced by it. The "judicial environment" which influences every legal norm "includes not only close legal connections but also broader circles of accepted principles, fundamental aims and criteria which emerge, in the words of Judge Landau, from 'the social consciousness of the people among whom the judges live!.. These principles do not need to be reiterated in regard to every single law, but they constitute a kind of 'normative umbrella' covering all articles of legislation." Furthermore, "An act of legislation... is not a unique act divorced from general experience. The law takes on skin and sinew in the context of a given political and judicial system. It constitutes one brick of the overall structure, which is founded on the basis of the precepts of government and law which constitute the fundamental axioms of that society." Thus a normative legal principle which constituted a part of Mandatory law is accepted into our law if it does not "deviate from the fundamental principles of the legal structure of our state", and it continues to be operative in Israeli law, on the basis of the fundamental principles of Israeli law. Its form is determined by its new environment. This rule applies to any enacted norm which constituted a part of the Mandatory

judicial system. This norm is accepted into our law, and if it accords with the basic principles of our legal structure, it continues to be operative in Israeli law, on the basis on the fundamental principles of Israeli law. Hence the aspiration towards "legislative harmony" (Judge Zusmann). The various articles of legislation - those whose historical origin is Mandatory and those that are the product of our independent legislature - need to be combined to work in a comprehensive system. The nature of the fundamental principles can be learned from various sources. One of the most important of these is the Declaration of Independence, "which constitutes a legal norm expressing the revealed values of the nation" (Judge Shemgar). This point was reinforced by Judge Zusmann, who said of the Declaration of Independence:

The way of life of the citizens of the State is determined by it, and its principles should be taken by every power in the State as its guiding light (H.C.J. 62/262, Peretz v. Kfar Samria).

The Declaration of Independence is not the only source from which one may learn of the fundamental values of the State. Thus, for example, the Supreme Court sometimes has recourse to "basic principles of equality, freedom and justice, which are the property of all developed and enlightened nations" (Judge H. Cohen in H.C.J. 63/39, Street v. Chief Rabbi of

Israel) and to "basic rights which are unwritten but emanate directly from the nature of our state as a democratic and freedom-loving state" (Judge Landau in H.C.J. 62/243, Israel Film Schools Ltd. v. Gari).

10. The Defence Regulations were established by a colonial legislator. They are not the product of legislation in a democratic society. With the foundation of the State it was claimed that their continuance in force in the State of Israel is not consistent with the changes emanating from the establishment of a democratic state. This claim was rejected by the Supreme Court (H.C.J. 48/5, Levin v. Govornik; H.C.J. 64/39, El Arad Company Ltd. v. Commissioner of the Northern District). A number of parliamentary attempts were made to repeal them in their entirety, but these attempts proved fruitless (see Rubinstein, The Constitutional Law of the State of Israel, 219 (3rd. edition, 1980)). On the other hand, the Israeli legislature has seen fit to repeal parts of the Defence Regulations and to put in their place original Israeli arrangements (see, for example, The Law of Emergency Powers (Detention), 1979). No such legislative change has been applied to the authority of the Military Censor. Section Eight of the Defence Regulations, which relates to military censorship, remains in force in the State of Israel. However, the interpretion to be given to the Defence Regulations in the State of Israel is not identical to the interpretation which was appropriate in the

period of the Mandate. The Defence Regulations today are among the laws of a democratic state. They need to be interpreted on the basis of the fundamental principles of Israeli law. This has been the practice of this court in a long list of articles of Mandatory legislation, such as: the Order of Police, the Order of Cinematic Films, the Order of Public Performances (Inspection), the Order of Newspapers, the Order of Prisons (Revised Version). The same procedure should be followed in the interpretation of the Defence Regulations. Judge Elon made this point when he said:

The Mandatory Defence Regulations dating from 1945, are such that we do not always feel comfortable with them, and we accept that it is appropriate to interpret them in a restricted fashion, so long as the matter is feasible and tolerable in legal parlance, in such a way that they will accord with the democratic principles on which the administration of the State of Israel is founded. (H.C.J. 84/234, "News" Ltd. v. Minister of Defence.)

It is a fact that the Defence Regulations concern national security. This fact has an influence over the manner in which the basic principles of the system are operated. This fact has no influence over the validity of the basic principles. Indeed, every article of legislation - whether its origin is in the Mandatory period or it is of original Israeli provenance - whether it concerns national security

or does not concern national security - is interpreted according to the general principles of the system. National security and public order do not supersede or negate the validity of basic values. They are interwoven with them, influencing their form and being weighed in their framework.

11. What are the basic values which mould the interpretation of the Defence Regulations? First and foremost stand considerations of security which extend over the full range of the Defence Regulations. State security, public safety and public order are the essential purpose for which the Defence Regulations were enacted, and they need to be interpreted on the basis of this purpose (cf. Article 6 of the Orders in Council for Palestine (Defence) 1937). Alongside considerations of security there exist other values, in the light of which every article of legislation in a democratic society must be interpreted, and on which the Defence Regulations have a bearing. Thus, for example, the Defence Regulations deal with military courts. It is only natural that in this connection, the value associated with integrity of judgment should be taken into account. The Defence Regulations lay down instructions concerning offences, punishments and pre-emptive arrest. In this connection, among the values to be considered are personal freedom and the rights of the innocent. Another part of the Defence Regulations deals with "unlawful associations". In this connection it is obviously necessary to consider the

basic right of freedom of association. Another part of the Defence Regulations deals with orders restricting freedom of movement. Freedom of movement is, likewise, a value which must be taken into consideration. That part of the Defence Regulations which imposes military censorship is prejudicial, first and foremost, to freedom of expression. Censorship of printed material threatens freedom of expression, wide-ranging powers of search ("censorship of travellers") are an attack on privacy, human dignity and the inviolability of person and property. This list of basic values impaired by the Defence Regulations is neither complete nor exhaustive. It merely indicates the broad spectrum of basic values which the Defence Regulations promote (State security, public safety, public order) and those which they impair (integrity of judgment, personal freedom, freedom of association, freedom of movement, freedom of expression, privacy, human dignity, the inviolability of person and property).

12. In interpreting the Defence Regulations consideration is to be given, on the one hand, to the fundamental values which serve the practical purpose of the Regulations, and on the other, to the fundamental values of the system, which serve general purposes, and which every item of legislation in a democratic state is intended to realise ("assumptions of general incidence"). Sometimes these values lead towards the same outcome. Sometimes they are mutually opposed. Thus,

for example, values in respect of State security, public safety and public order are liable to be opposed to values in respect of freedom of movement, freedom of expression, human dignity. In all these cases, it is for the Court to decide between the conflicting values. In his comments on the need to decide between the values of security and the values of freedom of expression in regard to the authority of the Military Censor as defined by the Defence Regulations, Judge Elon stated:

The existence of the censor and prohibition of publication, are sometimes inimical - to a greater or lesser degree - to the fundamental right of freedom of expression, which is one of those fundamental rights which, although unwritten, emanate directly from the nature of our state as a democratic and freedom-loving state... and one of the greatest and most important missions of democracy is to find the correct balance between the existence of this right and its defence, and the need to preserve legitimate secrecy in order to guarantee the security of the state and the correct maintenance of public safety and order. This guarantee is also an essential condition for the very existence of democratic government (H.C.J. 84/234, "News" Ltd. v. Minister of Defence).

13. In the Appeal before us the value in respect of State security opposes the value in respect of freedom of

expression, publication, and the public right to know. The opposing values are an integral part of our judicial system. Without security there can be no state, and there cannot be the public consent on which it is based, and there can be none of the personal freedoms which the state is required to uphold. Hence the centrality of the values of security in the scheme of values of the judicial system. Without freedom of expression, it is impossible to expose the truth, impossible for the individual to realise his potential, and impossible for a democratic system, which depends on the exchange of ideas, to exist. Free exchange of information, opinions and views is a vital condition for the existence of a democratic system, based on government of the people, by the people, for the people. Without freedom of expression democracy loses its soul. Indeed, on more than one occasion this Court has commented on "the tight association that exists between the principle of freedom of expression and debate, and the correct operation of the democratic process" (Judge Agranat in H.C.J. 68/255, State of Israel v. Ben Moshe). Similarly it has been noted that "freedom of expression is a pre-condition for the existence and correct operation of democracy" (Judge Shemgar in H.C.J. 84/372, Klopfer-Naveh v. Minister of Education and Culture). Hence the special status of the social value in regard to freedom of expression. Freedom of expression guarantees the democratic system, which for its part guarantees other fundamental rights.

14. How is one to resolve the conflict between the values of security and the values regarding freedom of expression? It seems to me that if the conflict between the values is "head-on", so that one cannot exist at the same time as the other, then the value in respect to security will gain the upper hand. The reason for this is twofold: First, because the value in respect of State security is the material purpose essential to the Defence Regulations, and the interpreting judge must, first and foremost, uphold this purpose; Second, because democracy needs to exist in order to uphold itself. "Indeed, the democratic system is prepared to defend freedom of expression so long as freedom of expression defends the democracy. But when freedom of expression becomes an axe to strike at democracy, there is no requirement for democracy to lay its head on the block" (H.C.J. 85/399, Kahana v. Management Board of the Broadcasting Authority). "Law is not a recipe for suicide, and the rights of the citizen do not encompass national destruction... Democracy does not need to destroy itself in order to prove its vitality" (H.C.J. 84/2, Neuman v. Chairman of the Central Electoral Committee for the Eleventh Knesset). A man cannot enjoy freedom of expression if he does not enjoy the freedom to live in the society in which he has chosen to live. The right to live in society takes precedence over the right to express an opinion of it (see United States v. Progressive inc. F. Supp 290, 995 (1973).

15. The "formula of balance" in the conflict between State security and freedom of expression assumes, in any case, the upholding of the value in respect to State security. At the same time, because of the centrality of the fundamental value in respect of freedom of expression it seeks to limit the damage to this fundamental value as far as possible, and only if the damage to freedom of expression is vital to the existence of the value with respect to State security, will this damage be allowed. In this matter, the judgment of this court rests on two fundamental questions: First, what is the degree of damage to security which justifies damage to the freedom of expression; Second, what is the degree of probability that the damage to State security will come about if freedom of expression is not restricted. The guiding approach of the judgment is that "the question is always, whether the scale of the damage, when it is compensated by the prospect that it will not occur, justifies the denial of the rights of the citizen in order to prevent the danger" (H.C.J. 84/2, supra, p. 38). It has been determined that in a conflict between State security on the one hand and freedom of expression on the other "freedom of expression only yields where the damage to public order is serious and severe" (H.C.J. 86/14, La-Or v. Film and Theatre Inspection Council). Hence only a severe and substantial damage to public order is sufficient to justify the limitation of freedom of expression. Similarly it has been determined, that the probability which justifies

limitation of freedom of expression is that of "near-certainty". "In order that this court will forbid anyone, responsible for broadcasting and publicising on the public's behalf, to broadcast any item, there need to exist extreme circumstances, from which arises substantial and near-certain danger to the safety of the public at large" (Judge Shemgar in H.C.J. 81/1, Shiran v. Broadcasting Authority). "In the view of Judge Agranat, the important right of freedom of expression is negated by the public interest when there exists a 'near-certainty' that exploitation of this right in a certain case is likely to endanger public safety or national security" (Judge D. Levin in H.C.J. 82/243, Zikhroni v. Managing Committee of the Broadcasting Authority). This probability does not exist when it is possible to adopt other means - besides restriction of personal freedom and besides damage to freedom of expression - which are sufficient to reduce the danger. Damage to freedom of expression should not be the first means. It should be the last. "I see in censorship a means that should be used only in the most exceptional cases where there is no alternative" (Judge Vitkon in 62/243, Israel Film Schools Ltd. v. Gary p. 2425).

16. We have seen that in various statutory contexts (such as, Order of Police, Order of Newspapers, Law of Broadcasting Authority, Order of Public Performances) this court has taken the judicial-compromise approach, whereby it

is possible to limit freedom of expression in the interests of defending the security of the State and public order, only when there exists a near-certainty of substantial damage to the security of the State and to public order if freedom of expression is not limited. Is this approach also applicable to interpretation of the Defence Regulations? Both the representative of the Appellants and the representative of the Respondents answer this question in the affirmative, and my opinion concurs with theirs. My reasons for this are fourfold: First, from a semantic viewpoint, the authority of the Military Censor consists in that he considers that publication is "likely" to damage security. Second, the judicial-compromise approach aforementioned is not dependent only on the "likely" terminology of the Defence Regulations. It reflects a principled approach to the relative weight of the values in respect of state security and public order on the one hand and freedom of expression on the other, and the correct balance between them. In quoting the words of Judge Agranat in the "Voice of the People" case regarding the test of near-certainty, Judge D. Levin commented:

The decisive and instructive matters afore-mentioned have become the corner-stone of our judicial system, and the principles embodied in them are accepted by all, such that they require no further consideration. (H.C.J. 82/243, supra, p. 785.)

Third, there is nothing exceptional about the Defence Regulations and therefore there is no justification for deviating from the general concept accepted in Israel in similar cases. There is no material difference between "military" and "civilian" censorship, and in both cases there is a need to give the same consideration to State security on the one hand and to freedom of expression on the other; there is no substantial difference between "military" and "police" authority in regard to defending State security and public order on the one hand and freedom of expression on the other. The truth of the matter is, that the security dangers which the Defence Regulations are intended to prevent are likely to be - although not always - more severe than the dangers to public safety which the other regulations are intended to deal with. This expression of relativity is reflected in the fact that sometimes it is easy to demonstrate that the danger of damage to security is substantial and severe, and that the likelihood of the danger is indeed close to certain. There is no reason why this difference in the severity of the danger existing in some cases should express itself in different tests of principle. Indeed, when consideration was given to the test for deciding the information that should not be divulged in broadcasts in all matters relating to interviews with a representative of the P.L.O., this Court decided on the test of near-certainty. Judge D. Levin observed that "the important right to freedom of expression is negated by the

public interest when there exists a near-certainty that exploitation of this right is liable in a given case to endanger public safety or the security of the State" (H.C.J. 82/243, supra, p. 766). The same approach was adopted by Judge Shemgar when he observed that "no right is abrogated from the start except in relation to the existence of a near and unavoidable certainty of the commission of a crime or of damage to security or to public safety" (H.C.J. 84/2, supra, p. 266). Fourth, to the nub of the matter, it seems to me that the test of near-certainty of real damage to the security of the State is the proper test. It reflects correctly the social importance of the conflicting principles, and this according to the criterion of the "enlightened public" - the criterion that we adopt in cases of this kind. "The dividing line between the permitted and the forbidden is for the court to decide in every case according to its judgment, in accordance with the enlightened views current in contemporary society, remembering that any restriction on the freedom of expression is redolent of censorship, and in border-line cases the tendency should be to permit and not to forbid" (Judge Landau in H.C.J. 69/495, Omer v. State of Israel). On the one hand, this test protects State security and public order, as it prevents publication in which there is near-certainty of real damage to these values. On the other hand, this test protects freedom of expression in broad and comprehensive areas, and thus permits the achievement of the

objectives which freedom of expression is supposed to achieve. Any attempt to impose a more severe test on freedom of expression, is likely to have serious results for freedom of expression and for democracy. It must not be forgotten that here we are discussing censorship, which prevents publication in advance and thereby not only "cools" freedom of expression but "freezes" it (see A.M. Bickel, The Morality of Consent, 61 (1975)). Furthermore, this freezing takes place without judicial process and without judicial decision. In these circumstances it is particularly important to insist that denial of information to the public will not take place except in extraordinary and exceptional cases. The test of near-certainty expresses this approach. It is not irrelevant to note that in the United States the test for "prior restraint" is much more severe. The principle is that prior restraint is forbidden, unless there is an inevitable, direct and immediate influence on the security of the State, such as, an influence on the physical safety of participants in a military operation (New York Times Co v. United States, 403 U.S. 713 (1931); Near v. Minnesota, 283 U.S. 697 (1971). In Israel we have not adopted this test. On the other hand we note that the distinction on which it is based - between prior restraint of publication and punishment of the publisher after publication - is sufficient to justify the fact that in Israel we adopt the test of near-certainty in relation to prior restraint of publication and not a lighter test. Judge

Agranat insisted on this in the "Voice of the People" case, saying as follows:

We have expatiated on this Anglo-American concept of the use of means of a preventative nature, because it is clearly evident that - from the point of view of the objective of defending the interest of freedom of expression - this is a most severe test. If the Israeli legislator saw fit, nevertheless to maintain in force the authority defined in Article 19 (2) (A), he did so on account of the situation of emergency, in which the State has stood since its inception. On the other hand, we should not attribute to him, the Israeli legislator, an intention - in view of the drastic circumstances afore-mentioned - that the person entrusted with this authority would be entitled to demand the non-appearance of one newspaper or another, simply because the things published in it seem to him to reveal a tendency towards endangering public safety, rather than a direct incitement to such an outcome, or at least a polemic which, in the circumstances of the case, makes it more of a real possibility... Such an intention is manifestly impossible, seeing that on the one hand Israel is a state founded, as we have said, on principles of democracy and freedom, and on the other hand, the adoption of such an arbitrary and vague criterion as "harmful tendency" alone, will of necessity leave the door wide open to the intrusion of the private opinions of the person in whose hands the afore-mentioned

authority is vested - and however lofty his aspirations may be - to his personal appraisal of the anticipated danger to public safety should the said item be published.

Indeed, Israeli society today, which sees the need to defend security and public safety on the one hand and freedom of expression on the other, can find no suitable balance between them, in any test other than the test of near-certainty. Judge Shemgar reinforced this point when he observed:

If there is a near-certainty that use of a particular right will be prejudicial to public safety and public order in a specific case, the statutory power vested with this authority may restrain the practical application of this right in the circumstances stated. (H.C.J. 84/2, supra, p.265)

Indeed, in the absence of near-certainty of real danger, it is important that the free exchange of opinions and ideas be maintained. This matter is no less important in matters of security than in other matters. Precisely because of the "survival" implications of security issues, it is important that the public be made aware of the various problems, so that it may reach informed decisions regarding the fundamental problems that concern it. In the words of Flinn:

On matters affecting the national interests, the people must be provided with all the pertinent information so that they can reach intelligent responsible decisions. The first constitutional principle is that a self-governing people must have a thorough knowledge and understanding of the problems of their government in order to participate effectively in their solution... in the absence of strong and effective governmental checks and balances in the areas of national defense and international affairs, the only effective restraint on executive power lies in a well informed citizenry. Only if the government is vigorously and constantly cross-examined and exposed by the press can the public stay informed and thereby control their government. (Flinn, "The National Security Exception to the Doctrine of Prior Restraint," 13 Will Mery L. Rev, 214, 223.)

Thus, precisely because of the bearing that decisions of a security nature have on the life of the people, it is appropriate to open the door to the frank exchange of opinions on security issues. In this context, it is particularly important that the press should be free to provide a forum for the exchange of opinions and criticism in matters vital both to society and to the individual. Therefore it seems to me that the test of near-certainty is an appropriate test for gauging the powers of the Military Censor according to the Defence Regulations.

17. In conclusion: the Mandatory Defence Regulations are interpreted on the basis of the values of the State of Israel. In their interpretation there must be a balance betweem State security and public order on the one hand and freedom of expression on the other. This balance means that it is legitimate to restrain freedom of expression, as a last resort, only when there exists a near-certainty of substantial damage to State security and public order.

THE SECOND QUESTION:

THE LIMITATIONS IMPOSED ON THE DELIBERATION OF THE CENSOR

18. The deliberation of the Military Censor is subjective. He is empowered to prohibit the publication of material the publication of which "in his opinion, would be, or be likely to be or become, prejudicial to the defence of the state, public safety or public order." Does not this style of deliberation waive the need for a criterion in respect of the existence of a danger of prejudice to security? May we not say that all that is required of this deliberation is that it be exercised with sincerity? The answer to both this questions is in the negative. Subjective deliberation is not absolute deliberation. It does not bestow upon the one who deliberates the power to choose any option which appears to him, subjectively, reasonable. Subjective deliberation is limited. Like any other form of

judgment it must satisfy the following conditions. First, it must be exercised within the framework of the enabling law; Second, the subjective deliberation of the authorised person must be directed towards the realisation of the objective criteria which determine the conditions for the exercise of the authority; Third, the choice between the various legal options available to the authorised person must be exercised with sincerity, without arbitrariness, on the basis of consideration of the relevant factors alone, and reasonably; Fourth, the choice between the various possibilities must be based on reasonable assessments and on facts established on the basis of convincing and reliable findings which leave no room for doubt. I shall deal briefly with each of these requirements.

19. Subjective deliberation must be exercised within the framework of the enabling law. Judge Agranat defined this principle as follows:

The general principle is that every administrative authority must operate within the framework of the purpose for which the Law established the authority in question; and this rule also applies to the responsibility which it is entitled to discharge according to 'absolute deliberation'. (H.C.J. 60/241, Kardosh v. Social Registrar)

And this concept was repeated by Judge Zusmann in a supplementary judgment to the Kardosh case, as follows:

But the deliberation which is exercised by an administrative authority - even if it is absolute - is always bound by the obligation which the authority is required to fulfil, that is its obligation to the administrative functions for the purpose of which the authority was empowered to act according to its deliberation. Although the freedom of choice may be great, it will never be unrestricted.

"In fact, statutory deliberation may be broad or narrow, but it is always restricted. The number of possibilities available to the decision-maker may be great or small, but it is never unrestricted. It is thus that the law guarantees the freedoms of the individual... Even that which is absolute in deliberation must restrain itself to the framework of the law which breathes life into it" (H.C.J. 84/42, Kahana v. Speaker of the Knesset). Therefore, one who is entrusted with authority according to the Defence Regulations is entitled to exercise this authority for the realisation of the objectives which are at the core of the Defence Regulations, and not for the realisation of extraneous objectives (see Wade, Administrative Law, 394 (5th edition, 1982)).

20. All governmental authority is based on conditions and requirements whereby it is exercised. The legal exercise of authority requires that these be unheld in practice. The subjectivity of the authorised person must be directed towards the upholding of these conditions, and not of any other conditions. Therefore, if the correct interpretation of Article 87 of the Defence Regulations is that it is possible to prohibit publication of an item in a newspaper only if in the opinion of the censor there exists a near-certainty that publication will be substantially prejudicial to security, then the deliberation of the censor must be directed towards the establishment of this near-certainty. Therefore, if the censor prohibits publication and is not convinced that publication creates the required near-certainty, he has not acted in accordance with the law.

21. Deliberation assumes freedom of choice between legal options. Subjective deliberation assumes that the choice between options will be exercised through assessment of the nature of the options by the authorised person. This assessment must be made in accordance with the rules of administrative law. Thus the assessment must be made with sincerity, without arbitrariness or obfuscation, having consideration of all the relevant facts, and these facts only. Furthermore: assessment of the options and choice of the preferred option must be made reasonably. Indeed, subjective deliberation and the objective test of

reasonableness are not mutually opposed; they are mutually complementary. The determination of the legal option needs to be performed according to the test of reasonableness. The existence of deliberation does not empower an administrative authority to formulate an unreasonable option. Sometimes there exist a number of options, all of which are reasonable. There is created a "range of reasonableness". Deliberation permits the governmental authority to choose between the various options. Therefore it is for the Military Censor to deliberate, as to whether publication in a newspaper will be substantially prejudicial to security. This deliberation must be exercised reasonably, taking into account the requirements of security on the one hand and freedom of expression on the other, and choosing between them according to the test of near-certainty. This deliberation is sometimes liable to give rise to a number of possibilities, all of which satisfy the stated test. There is then created a "range of legal possibilities". Deliberation on the choice of the appropriate option within this range is the responsibility of the Military Censor. It is for him to choose any option that seems to him the best among the options available within the range. He may not choose an option located outside this range.

22. Article 87 of the Defence Regulations states that the censor is empowered to prohibit publication if, in his opinion, publication is likely to be prejudicial - i.e.,

there exists a near-certainty of substantial prejudice - to the security of the State. What is the meaning of the ruling that deciding on the existence of prejudice - i.e., the existence of a near-certainty of substantial prejudice - is to be exercised according to the opinion of the chief censor? The meaning of the ruling is, that the censor - he and none other - is empowered to act in this matter, and if there exist a number of legal possibilities in the matter, the choice is made by him and by nobody else. This ruling does not mean that the censor is entitled to reach his decision in any manner that seems to him appropriate. Indeed, the decision of the censor must be reasonable, in the sense that a reasonable censor would act accordingly in the circumstances of the case. In establishing the reasonableness of the Military Censor's decision account is to be taken of assessment of the facts on the one hand, and of near-certainty of substantial prejudice on the other. The question in each case is, whether a reasonable censor is entitled to reach the conclusion that, on the basis of assessment of the given facts, publication is likely to cause - i.e. there exists a near-certainty that publication will cause - severe or substantial damage to the security of the State.

23. The Military Censor's decision regarding the existence of danger to the security of the State must be based on facts and assessments. As for the facts, these are

determined by the Chief Censor on the basis of evidential material available to him. This establishing of facts must be exercised according to the criteria accepted in administrative law. The test is, whether a reasonable governmental authority would see in the material presented to it material of sufficiently decisive value. The reasonableness of the decision is a function of the values involved in the decision. Therefore, if administrative deliberation is liable to be prejudicial to human rights, convincing and reliable evidence is required, evidence that leaves no room for doubt. To quote Judge Shemgar:

The assessment of the evidence is indeed, first and foremost the responsibility of the authority... but if it is a question of existing rights, which the authority seeks to abrogate, then although the authority is not obliged to base its decision on legal precedent, there is nevertheless required convincing proof which leaves no room for reasonable doubt. (H.C.J. 76/56, Bermann v. Minister of Police)

Judge Shemgar reiterated this concept in another case, as follows:

In H.J.C. 76/56... the issue concerned the abrogation of existing rights, and it was said on that occasion, that for the purposes of the decision there must be before the

authority decisive and reliable proofs which leave no room for doubt. This criterion seems to me reasonable. Whenever the point at issue is the abrogation of existing rights or the abrogation of fundamental rights... in my opinion, the evidence required to convince a statutory authority of the need to apply an injunction, must in general be clear, unequivocal and convincing.

Therefore, the decision that if publication is not prohibited there exists a near-certainty of substantial prejudice to the security of the State, must be based on clear, unequivocal and convincing evidence. At the same time, it is not to be forgotten that the decision in regard to near-certainty of substantial prejudice to security is, by the nature of things, based not only on facts but also on assessment of future developments. Of course, this assessment must be based on clear, unequivocal and convincing evidence. However, by its very nature assessment looks to the future, and it cannot but be concerned with observing future trends and prospects. All that can be demanded in this matter is that the prognosis be reasonable. The Military Censor is not expected to assume the mantle of a prophet.

THE THIRD QUESTION:

THE SCOPE OF JUDICIAL REVIEW

24. On the founding of the State, it was determined that the scope of judicial review, over the authority of statutory agencies operating according to the Defence Regulations, is extremely limited. Judge Agranat established this, when he said:

The authority of this court, in reviewing the activity of a statutory agency, operating according to the Defence Regulations (Period of Emergency) 1945, is extremely limited. When the said Regulation empowers the statutory agency to act towards the individual in every case where it "supposes" or it "takes the view" that the known conditions required for this exist, then in general the authority vested in it is the final arbiter as to the existence of these conditions. In such cases the role of this court is only to examine whether the said agency has not deviated from the criteria of the Regulation by the terms of which it is licensed to act, if it has given due consideration to the causes established in law, and if the agency has acted in good faith. Being limited to this restricted role, the court has no powers to review the reasoning that has induced the statutory agency to promulgate the order in question (H.C.J. 50/46, Alayubi v. Minister of Defence)

This approach was based on the subjective nature of the authority, on its security element, and on the English law which was current at that time (see especially the case of Liversidge v. Anderson (1941) 3 All E.R. 375)

25. Over the years the scope of judicial review has gradually broadened. This broadening has derived from developments in regard to the substance of subjective deliberation and in regard to the substance of judicial review. There has thus been accumulated a store of judicial experience which has permitted a broadening of judicial review of administrative deliberation in the security context. Similar developments have taken place in England. Over the years it has become clear that subjective deliberation is not essentially different from any other deliberation. Judge Zusmann determined this when he observed:

I doubt if there exists any distinction in principle between "regular" and absolute or "subjective" deliberation. Even for the purposes of subjective deliberation a number of objective tests have been determined, such as lack of good faith, arbitrariness or deviation from the objective entrusted to the authority, which will lead to cancellation of the administrative act. (H.C.J. 61/16 supra, p. 1218)

Hence, even in subjective deliberation there exists an obligation on the authority to uphold the instructions of the law. Furthermore, subjective deliberation is impaired not only if the action of the governmental authority is affected by a "subjective" flaw such as lack of good faith or arbitrariness. Subjective deliberation needs to be exercised reasonably. Even the subjective element in deliberation is to be measured by objective criteria. There is, anyway, no basis for limiting judicial review to the perception of "subjective" flaws such as malice or lack of good faith. This approach is reinforced in the light of the concept of the substance of judicial review. This derives from the principle of the separation of powers, and from the need to guarantee the legality of government. There is no reason why the court should not test, by the criteria of legality, the full extent of administrative deliberation. If this were not the case, there would remain areas of deliberation immune from judicial review. This immunity would ultimately lead to illegality, for where there is no judge there is no justice. Indeed, it is appropriate to observe administrative deliberation from the viewpoint of the rules which determine the legality of deliberation. When the doctrine of administrative deliberation (substantive and legal) determines that in a certain deliberation a flaw has occurred, it is appropriate that the court be prepared to examine the legality of the exercise of administrative deliberation. There is no basis for acknowledging that

certain areas of administrative deliberation are not subject to judicial review. Hence, there is no basis for the concept that the subjectivity of administrative deliberation limits judicial review to a defined number of instances of review. The correct perception is that the doctrine of deliberation establishes the conditions for the legality of employing deliberation, and the doctrine of law establishes that the court is authorised to test the matter of the existence of these conditions. It is not the scope of review that entails the legality of administrative deliberation; it is the legality of administrative deliberation that entails the scope of review (cf. H.C.J. 86/731, Micro Daf v. Israel Electric Company Ltd). With the development of administrative law in the matter of subjective deliberation and with the expansion of the legal requirements applied to administrative deliberation, judicial review in the matter of administrative deliberation has also expanded. It is interesting to note that as early as the "Voice of the People" case, where the point at issue was the subjective deliberation of the Minister of the Interior, and it was determined that this deliberation must submit to the test of near-certainty, Judge Agranat observed:

The expression "according to the opinion of the Minister of the Interior," mentioned in Clause (A) of Section 19 (2), requires the decision that the assessment of the influence of published matter on public safety, in the light of the

certain areas of administrative deliberation are not subject to judicial review. Hence, there is no basis for the concept that the subjectivity of administrative deliberation limits judicial review to a defined number of instances of review. The correct perception is that the doctrine of deliberation establishes the conditions for the legality of employing deliberation, and the doctrine of law establishes that the court is authorised to test the matter of the existence of these conditions. It is not the scope of review that entails the legality of administrative deliberation; it is the legality of administrative deliberation that entails the scope of review (cf. H.C.J. 86/731, Micro Daf v. Israel Electric Company Ltd). With the development of administrative law in the matter of subjective deliberation and with the expansion of the legal requirements applied to administrative deliberation, judicial review in the matter of administrative deliberation has also expanded. It is interesting to note that as early as the "Voice of the People" case, where the point at issue was the subjective deliberation of the Minister of the Interior, and it was determined that this deliberation must submit to the test of near-certainty, Judge Agranat observed:

The expression "according to the opinion of the Minister of the Interior," mentioned in Clause (A) of Section 19 (2), requires the decision that the assessment of the influence of published matter on public safety, in the light of the

circumstances, will always be the exclusive responsibility of the Minister of the Interior. Inasmuch as, the High Court of Justice will not intervene in the deliberation of the Minister, unless he has deviated, in the said assessment, from the test of "near-certainty" in regard to the concept of "danger to public safety"; he has not given more than dismissive attention to the vital interest of press freedom, or has erred in his deliberation in some other way, because of his adherence to considerations which are unimportant, inconsistent or absurd (H.C.J. 53/73 supra, p. 893).

This formulation accorded well with the evolution of the rules of administrative deliberation as practised more than thirty years ago. Since then the doctrine of deliberation has been developed further. It has been determined, *inter alia*, that an unreasonable decision - even if it is not inconsistent or absurd - is not a lawful decision. In parallel the rules of judicial intervention have been developed, and it has been determined that judicial review will also be applied to the exercise of administrative deliberation. Therefore, the subjectivity of the deliberation of the Military Censor is not sufficient grounds to deny the full rigour of judicial review. This review must touch on every one of the essential factors which determine the legality of the Military Censor's deliberation. There is no place for "dead ground".

26. In the past the security aspect of administrative deliberation has been a deterrent to judicial review. It was felt that since judges are not experts in security matters, they should not intervene in security considerations. Over the years it has become clear that there is nothing exclusive about security considerations, in regard to judicial review. Judges are not members of the administration, but the principle of separation of powers obliges them to check the legality of members of the administration. In this respect, security considerations enjoy no special status. They too must be exercised according to the law, and they too need to be subject to judicial review. Since judges are competent and obliged to examine the reasonableness of professional deliberation in every area, they are competent and obliged to examine the reasonableness of security deliberation. Hence the approach that there are no special limits on the scope of judicial review as applied to administrative deliberation concerning State security. As I observed in my judgement of another case:

Great power is concentrated in the hands of military government, and in the interests of the rule of law it is reasonable to apply judicial review in accordance with the conventional tests. (H.J.C. 82/393 Jamat Asran v. Regional Military Commander of Judea and Samaria)

It should be clearly stated that the court does not claim to be an expert in security, and the security deliberation of the judge is not intended to override the security deliberation of the authorised person. The court only tests the legality of security deliberation, which includes the reasonableness of this deliberation. In this respect there is no difference between the scope of intervention in security deliberation and the scope of intervention in the deliberation of any other administrative agency. In all these cases the court does not become a seat of overriding administrative power, but merely tests the legality of governmental deliberation. In this respect there is nothing exclusive about security considerations. The scope of judicial review should be uniform for all the agencies of government. In the absence of an explicit instruction in the law, it is not acceptable that certain governmental agencies should enjoy immunity from judicial review. Thus, for example, it is not acceptable to limit judicial review of the deliberation of the Legal Adviser to the Government to instances of lack of good faith. As I have noted elsewhere, "In regard to the scope of intervention by this court there is no difference between the Legal Adviser to the Government and any other bearer of public office. Both are obliged to conduct deliberation in a logical manner, honestly and reasonably, without arbitrariness or obfuscation, on the basis of the relevant considerations alone. Both are subject to judicial review, and just as there is no special

dispensation for the Legal Adviser to the Government in respect of the authority of the court, so there is no special dispensation for the Legal Adviser to the Government in respect of the scope of the court's powers of review" (H.C.J. 81/329, Nof v. Legal Adviser to the Government; see also H.C.J. 86/292, Hatzani v. State of Israel). This rule applies to the governmental authority responsible for security. Regarding the scope of our intervention, there is one rule for all governmental authorities. They are all subject to the instructions of the law, and they are all subject to review by the court, according to the normal and accepted occasions of review which reflect the legal requirements of administrative jurisdiction. When the scope of our intervention was considered in relation to the decision of a District Commissioner, under the terms of the Defence Regulations, to withdraw permission for the publication of a newspaper on the grounds of State security, we said:

Since the Commissioner has given the reasons for his decision, then these reasons are subject to judicial review as is any other administrative deliberation (H.C.J. 83/541, Asali v. Jerusalem District Commissioner)

This same approach applies to the present case. Since the Military Censor has given reasons for his decision, these

reasons are subject to judicial review, like any other administrative deliberation.

27. It should be noted, that the limitation of scope of judicial review regarding the exercise of security deliberation in the context of the Defence Regulations, was based in the past to a large extent on the majority decision of the House of Lords in the case of Liversidge v. Anderson. In fact, the Supreme Court based itself on this precedent when it determined that "the authority of this court, when it sets out to review the activity of an authorised body, operating under the terms of the Defence Regulations (Period of Emergency), 1945, is extremely limited" (H.C.J. 50/46, Alayubi v. Minister of Defence). Since then there has been a significant development in England itself. The majority decision in the Liversidge case no longer reflects existing law. This change has been expressed in a series of judgments (see, for example, Nakkuda Ali v. Jayasatuna (1951) A.C. 66; Ridge v. Baldwin (1964) A.C. 40). Typical in respect to this matter is the statement of Lord Diplock, as follows:

For my part I think the time has come to acknowledge openly that the majority of this house in Liversidge v. Anderson were expediently and, at that time, perhaps, excusably wrong and the dissenting speech of Lord Atkin was right (R. v. Inland Revenue Commissioners, ex. p. Rossminster Ltd. (1980) A.C. 952, 1011).

And since then the English court has tended to review the activities of authorities of a security nature which operate on the basis of defence regulations or emergency legislation (see Wade, ibid, p. 394). In Israel it has been determined that the Supreme Court no longer acts in accordance with the majority decision in the Liversidge case. Judge Shemgar noted this when he said:

There is no doubt, that the afore-mentioned Regulation 110 gives far-reaching authority, which must be exercised with appropriate caution and with meticulous attention to the previous conditions which justify its exercise. For this reason the court will examine the exercise of this authority with appropriate rigour, and furthermore this court will no longer act under the limitations and self-restraint which typified the parallel English case which examined the activity of similar authorities in England (Liversidge v. Anderson), a judgment which was also rejected in the afore-mentioned H.C.J. 50/46. (H.C.J. 81/554, Beransa v. Regional Commander, North)

Indeed, it is the "far-reaching" aspect of governmental authority of a security nature, and the damage which its exercise is likely to impose on fundamental human rights, which requires - as Judge Shemgar observed - that this court examines "with appropriate rigour" the exercise of the authority.

THE FOURTH QUESTION:

EXAMINATION OF THE CENSOR'S DECISION

28. The Military Censor is empowered to prohibit publication of an article where there exists a near-certainty that its publication will cause substantial harm to the security of the State. Deliberation as to the existence of near-certainty of substantial harm to security is the responsibility of the Military Censor, who is obliged to exercise it reasonably. The question before us is, whether the decision of the Military Censor in regard to the subject of the Appeal before us stands up to these tests. To answer this question it is necessary to distinguish between the Censor's decision regarding prohibition of publication of criticism of the Chief of the Mossad, and his decision regarding publication of the date of replacement of the Chief of the Mossad. Each of these matters will be dealt with separately. It will be noted that there is no longer disagreement between the parties, that publication of details likely to expose the identity of the Chief of the Mossad is to be prohibited, since with regard to them the required conditions are met. The area of contention between the parties centres on the two remaining matters, and on them alone.

CRITICISM OF THE CHIEF OF THE MOSSAD

29. It is the Censor's position that "the casting of aspersion directed towards the Chief of the Mossad, as also the casting of aspersion on the efficiency and the results of his role, and the ratification that would be implied were publication to be permitted in Israel alone (leaving aside the question of publication abroad) - all of this is prejudicial to the operational capabilities of the Mossad at all its levels, including its relations with parallel organisations in other countries and with operators in the field." The Military censor adds that "on the other hand, it is appropriate to stress that there has been no excision of those passages where the writer of the article has expressed an opinion critical of the Mossad and its activity in general." The censor concludes his argument in this matter with the observation that "the essence of the business is not the prohibition of publication on the grounds of personal injury to the individual who is the subject of the report, but on the grounds that for as long as he continues to serve in his post, such detailed and factual attention to him, regarding his activity and its results in the field - all these things, in the assessment of the censor, constitute injury to the security of the State. And this is based on the most practical of considerations."

30. Perusal of the Military Censor's statement indicates that he is not complaining that the article involves publication of the activities of the Mossad or of the Chief of the Mossad, and that such publicity is prejudicial to State security. The Censor's statement is directed towards prejudice to the efficiency of the role of the Chief of the Mossad if the criticism of him is published. In this matter the Military Censor distinguishes between criticism of the Chief of the Mossad which is prejudicial, in his opinion, to State security and is therefore not to be published, and criticism of the Mossad itself, publication of which is not prohibited. In my opinion, this argument does not pass the test of review. In publication of criticism of the role of the Chief of the Mossad there is created no near-certainty of substantial prejudice to State security. What we have before us is a remote possibility - a "harmful tendency" to quote Judge Agranat in the "Voice of the People" case - which is not to be taken into account in our judicial system. On the contrary: it is proper to allow, in a democratic state, the expression of criticism of persons holding public office. Of course, criticism is not pleasant, and is sometimes injurious. This applies to criticism of the Chief of the Mossad or the Prime Minister or any other public functionary. But lack of pleasantness is not enough to silence criticism in a democratic society based on the exchange of ideas and public debate. It may be assumed that criticism of the Prime Minister, for example, creates a

possibility of prejudice to his role, to the public's trust in him and to his conduct of negotiations with the leaders of other states. This possibility does not establish a sufficient basis for prohibition of publication. Freedom of expression is also freedom of criticism, and the freedom to ask questions which may be uncomfortable to those in power. Sometimes the criticism is not justified. Sometimes it is malicious, sometimes it is harmful. None of these things is sufficient to justify the prohibition of publication. It is appropriate to repeat and underline the decisive statement of Judge Landau that:

'A government that takes on itself the power to decide what is good for the citizen to know, will eventually decide what is good for the citizen to think. There is no greater deviation than this from genuine democracy, which is not "directed" from above (H.C.J. 62/243 supra, p. 2416).

In similar vein, Judge Vitkon has observed:

All serious and practical criticism is entitled to protection from government interference (unless what is involved is the exposure of vital secrets) (Vitkon, Justice and Judgment, 180 (1988)).

In deciding to forbid publication of criticism of the Chief of the Mossad, the Military Censor has not given adequate

weight to the principle of freedom of expression. Admittedly, the Censor has repeatedly declared before us, that he has "no quarrel whatsoever with the obligation to respect the right of expression and the freedom of expression - in the press, in the present case - which are vital to our system. This factor has guided his deliberation." But rhetoric is not enough. A principled approach is needed when establishing a practical decision. It is not enough to say that freedom of expression is a fundamental principle of our system. The statement must be given operative meaning. As Judge Bach rightly observed, commenting on freedom of expression:

The principles, on which this court has stood in the past... must not be used merely as a kind of ideological flag to be waved at the outside world, but must also guide us in our practical day-to-day decisions (H.C.J. 82/243 supra, p. 784).

And as I have added in another case, if we do not act accordingly, "then all that has been decided at the normative level will vanish into oblivion in the practical world. It is for the court to inspect not only the theory but also the practice. Rhetoric needs a practical application" (H.C.J. 86/14 supra, p. 439).

31. A democratic system is a system of checks and balances. Checks and balances are, first and foremost, a fruit of the reciprocal relationships between the powers of government - legislature, judiciary and executive. In a democratic system there exist additional functions of check, such as the office of the State Comptroller. But this check is not exclusive to government agencies. There exist other functions of check, outside the framework of government itself. Among these, the press plays a vital role. It is the duty of the press to expose defects and warn against them. A free state cannot exist without a free press. Therefore the press must be allowed to fulfil its function, and only in extraordinary and exceptional cases, where there exists a near-certainty that substantial damage will be caused to the security of the State, are there grounds for prohibiting the publication of information in the press. In principle, it is hard to imagine a case where the publication of criticism - as opposed to the revelation of facts - is liable to provide a basis for the existence of near-certainty of substantial damage to State security. The burden in this matter must lie with the Military Censor. He has not proved equal to this burden. On the contrary: our opinion is, that the certainty of damage to State security is remote, and that the damage is not substantial. Indeed, it is difficult to accept the proposition that criticism of the Mossad itself does not create a near-certainty of real harm to the security of the State, whereas criticism of the Chief of the Mossad does

create such a danger. The distinction seems to me artificial. Just as criticism of the Mossad itself creates no near-certainty as required for the prior restraint of freedom of expression, so criticism of the Chief of the Mossad fails the test required to justify restraint of freedom of expression. In the case of New York Times Company v. United States the Supreme Court of the United States determined, quoting one of its previous judgments, that:

Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity (ibid).

This is the ruling in our case. Any prior restraint of freedom of expression bears a heavy presumption of unlawful prejudice to freedom of expression. A heavy burden rests on the one who seeks to demonstrate that prior restraint of freedom of expression is lawful. The Military Censor has not proved equal to this burden.

TIMING OF REPLACEMENT OF THE CHIEF OF THE MOSSAD

32. The Military Censor has forbidden the Appellants to publish details of the timing of the replacement of the Chief of the Mossad. The reason for this, is that "certain interested parties are liable to focus an intolerable

degree of attention on the man, his movements and his activities, and make real use of this knowledge to expose the identity of the Chief of the Mossad, especially outside Israel. This constitutes real danger to the safety of the Chief of the Mossad." In my opinion, this conclusion also fails to pass the test of review. The possibility that publication of the timing of the forthcoming replacement of the Chief of the Mossad increases the danger to the safety of the outgoing Chief of the Mossad, seems to me merely speculative. No information has been placed before us - besides the afore-mentioned assessment - which is capable of supporting this claim. And what is the claim - that hostile elements will be able to identify the Chief of the Mossad by noting an increase in the number of flights from Israeli airports? In my view this claim has no validity. But let us suppose that there is some validity in the claim. In these circumstances, is it not possible to adopt precautionary means, in order to minimise the danger? Indeed, it seems to me that in this matter too, the Censor has not given adequate weight to the value of freedom of expression. The exchange of opinions as to the qualities desired in the Chief of the Mossad is especially important in the run-up to the appointment of a successor. It sharpens the public's awareness of the vital importance of the post and the vital importance of the qualities which are appropriate in the one who occupies this post. By these means - and by means of public debate - it is likely to influence the nature of the

decision of those responsible for the said appointment. The knowledge that the matter of the appointment is a subject for public exchange of opinions and public scrutiny is likely - in itself - to influence the deliberations of the decision-makers, and to deter them from making an unsuitable appointment. This debate will be beneficial if it takes place before the appointment and not after it. It is therefore important that the public is informed of the forthcoming appointment. This is one of the clearest indications available of the importance of freedom of expression and of the public's right to know. Of course, if the matter creates a near-certainty of substantial damage to the security of the State, there is no alternative but to restrain publication regarding the forthcoming appointment. As previously stated, I am not at all convinced that such a near-certainty exists. In fact, the Censor himself allowed publication of the following article in a periodical:

Usually, when the Chief of the Mossad is nearing the end of his term of office, there is intensifying unrest regarding the appointment of his successor. A group of former Mossad officers has requested an urgent meeting with senior Ministers with a view to preventing the appointment of a candidate whom they consider unsuitable.

When the Military Censor was invited to comment on the publication of this article, he replied that the report

"deals with what 'usually' happens in the run-up to the end of a term of office. Furthermore, in this article there is no concrete reference to the timing of the end of the term, as there is in the matter before us." This explanation is not satisfactory. The wording of the article, and especially the reference to the urgent meeting sought by former Mossad officers, leaves no doubt as to the specificity and imminence of the event, and it is hard to distinguish between this article and the article which is the subject of this Appeal. The difference between the two articles is so infinitesimal that it cannot be justified, either from the perspective of State security or from the perspective of freedom of expression.

33. It will be claimed on behalf of the Respondent, that the Military Censor takes the view that there exists a near-certainty of prejudice to the security of the State if criticism of the Chief of the Mossad is to be published and the timing of his replacement is to be published. This is sufficient to justify prohibition, even if the Court takes the view that near-certainty does not exist. As we have seen, this claim is not to be accepted. The Censor's position, that there exists near-certainty of substantial prejudice, must be a reasonable position. His assessments - based on solid facts - must be reasonable. In our opinion, the position and the assessments of the Military Censor are not reasonable. In this approach of ours, we do not presume

to censor the Censor. In this approach of ours, we declare that a reasonable censor, acting in a democratic state, obliged to strike a balance between security and freedom of expression,' would not have reached the conclusion reached by the respondent.

CONCLUSION

Before I conclude, I wish to make the comment that I do not at all doubt the sincerity of the Military Censor. He is required to perform a difficult task, in difficult circumstances. However it is worth repeating and stressing that the Defence Regulations - although of Mandatory/autocratic origin - are operated in a democratic state. In these circumstances the Defence Regulations must take their shape against the background of their new democratic environment. Of course, democracy is entitled and obliged to protect itself. Without security a democratic state cannot exist. However, it must not be forgotten that security is more than a matter of weapons and armies. Democracy too is security. Our strength consists in our moral energy and in our adherence to the principles of democracy, especially when there is so much danger around us. Indeed, security is not an end in itself. Security is a means. The end is democratic government, government of the people which guarantees the liberties of the individual. Among these liberties, freedom of expression ranks highly.

Therefore, all efforts must be made to minimise the possibility whereby considerations of security become prejudicial to freedom of expression. The way to achieve this balance between security and freedom of expression, is to uphold freedom of expression, and to restrain it only where there exists a near-certainty of substantial prejudice to security, and there is no alternative means of preventing the danger which avoids prejudice to freedom of expression. It is the task of the Military Censor to take his difficult decisions on the basis of this fundamental concept.

The verdict is that we declare the Decree Nisi Absolute, meaning that there is to be no prohibition of publication of those parts of the article wherein there is criticism of the Chief of the Mossad or reference to the date of the forthcoming replacement of the Chief of the Mossad. We repeat and affirm that publication of any item likely to identify the Chief of the Mossad is forbidden. It is also assumed that those items waived by the Appellants in the course of the hearing will not be published, and those items conceded by the Respondents in the course of the hearing will be published.

The Respondents are to bear the costs of the Appellants, in a sum to be determined hereafter.

Judge A. Barak

Judge A. Melitz

I concur

Judge Sh. Wallenstein

I concur

Judgment recorded this day, 10 January 1989.

(Translated from the Hebrew by Philip Simpson M.A. (Oxon))