LCrimA 761/12

1. State of Israel

v.

1. Makor Rishon Hameuhad (Hatzofe) Ltd.
2. Miriam Tzachi
3. Israel Press Council, *Amicus Curiae*

The Supreme Court sitting as the Court of Criminal Appeals
Application for Leave to Appeal the Decision of the Jerusalem District Court (Judge M.Y. Hacohen), dated 3 January 2012, in MApp 035991-12-11
[2 April 2012]
Before Justice E. Rubinstein, U. Vogelman, I. Amit

Facts: A violent demonstration took place at the Ephraim District Brigade Headquarters on the night of 12/13 December 2011. A photographer, who had been invited by one of the participants, was present taking photographs. The police sought an order, pursuant to section 43 of the Criminal Procedure Ordinance, requiring the photographer and her newspaper to produce the photographs. The photographer and newspaper refused, arguing that the photographs would provide information that could identify the photographer's source, and were thus protected by the journalist's privilege. The magistrate court applied the *Citrin* test and rejected the privilege claim. The district court distinguished between two groups of photographs that had been taken: one series consisted of pictures of the actual attack on the district headquarters and conformed to the Deputy Regional Commander's statement made as part of the investigation, while the pictures in the other series portrayed events that occurred at a distance away from the base. The district court ordered the respondents to hand over the first series of photographs to the police, but that the privilege could not be removed with respect to the second group of photographs. However, it also found that the police could request a court order pursuant to section 43 to have this second group of photographs handed over as well, the extent that an investigation had been initiated regarding the events that they documented and that the photographs could be relevant to that investigation.

Held: (Justice Rubinstein) Information which can lead to the identification of a journalist's source and which was provided with the expectation that it will be kept confidential will be covered by the journalist's privilege. However, the journalist's privilege can be removed if the three-part *Citrin* test is met. In previous decisions, the Court has concluded, based on the *Citrin* rule, that the journalist's privilege applies, narrowly, only to the direct questioning of a source by a journalist. The reason for the *Citrin* test is to balance the value of a free press against the interest in investigating criminal activity and the pursuit of the truth. The privilege can be removed pursuant to the *Citrin* test if the information that is sought is shown to be both relevant and significant, and if it is proven that the authorities have no available alternative through which the information can be obtained. Another relevant matter will be the issue of whether the source shared the information with the journalist with an expectation that it will be kept secret. A promise of confidentiality is not determinative, but it is a relevant factor.

Applying the *Citrin* rule specifically to this case, the photographs satisfy the relevancy and substantiality requirements established in that case. However, the third requirement – a showing that the authorities have made sufficient effort to obtain the requested information through other means – has not been satisfied, although the police may submit such proof in a further request to the magistrate's court for an order pursuant to section 43 of the Criminal Procedure Ordinance.

Appeal is granted in part.

Legislation cited:

Criminal Procedure Ordinance (Search and Arrest) [New Version] 5729-1969, s. 43

Evidence Ordinance [New Version] 5731-1971, ss. 49, 50, 50a, 51

Penal Code, 5737-1977, s. 117

Prohibition of Defamation Law, 5725-1965

Protection of Privacy Law, 5741-1981

Israeli Supreme Court cases cited:

[1] MP 298/86 *Citrin v. Israel Bar Association Disciplinary Court, Tel Aviv* [1987] IsrSC 41 (2) 337.

[2] CrimApp 9305/88 *A. v. Al Mamuniya Girls School* (2008) (unreported).

[3] CA 1761/04 *Sharon v. State of Israel* [2004] IsrSC 58(4) 9.

[4] LCrimA 5852/10 *State of Israel v. Shemesh* [4] (2012) (unreported).

[5] HCJ 73/53 *Kol Ha'am v. Minister of the Interior* [1953] IsrSC 7 871.

[6] HCJ 243/62 *Israel Film Studios Ltd. v. Levy* [1962] IsrSC 16 2407.

[7] HCJ 14/86 *Leor v. Film and Play Review Council* [1987] IsrSC 41(1) 421.

[8] HCJ 680/88 *Schnitzer v. Military Censor* [1989] IsrSC 42(4) 617.
[9] LCrimA 7383/08 *Ungerfeld v. State of Israel* (2011) (unreported).
[10] CA 723/74 *Ha'aretz Newspaper Publisher Ltd. v. Israel Electric Corp.* [1977] IsrSC 31(2) 281.
[11] HCJ 372/84 *Klopfer-Naveh v. Minister of Education and Culture* [1984] IsrSC 38(3) 233.
[12] HCJ 1736/10 *Lieberman v. Director of the Internal Police Investigations Department* (2011) (unreported).
[13] HCJ 2759/12 *Weiner v. State Comptroller* (2012) (unreported).
[14] HCJ 172/88 *Time, Inc. v. Minister of Defense* (1988), IsrSC 42(3) 139.
[15] LCA 6546/94 *Bank Igud Le'Israel Ltd. v. Azulai* [1995], IsrSC 49(4) 54.
[16] LCA 637/00 *Israel Discount Bank Ltd. v. Evrat Insurance Agency* [2000] IsrSC 55(3) 661.
[17] LCA 2235/04 *Israel Discount Bank Ltd. v. Shiri* (2006) (unreported).
[18] CrimApp 4857/05 *Fahima v. State of Israel* (2005) (unreported).
[19] LCA 1412/94 *Hadassah Medical Federation Ein Kerem v. Gilad* [1995] IsrSC 49(2) 516.
[20] CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* [2006] IsrSC 61(1) 461.
[21] CA 2967/95 *Magen veKeshet Ltd. v. Tempo Beer Industries Ltd.* [1997], IsrSC 51(2) 312.
[22] CA 6926/93 *Israel Shipyards Ltd. v. Israel Electric Corp.* [1994] IsrSC 48(3) 749.
[23] HCJ 337/66 *Estate of Kalman Fital v. Holon Municipality Assessment Commission* [1966] IsrSC 21(1) 69.
[24] LCA 2498/07 *Mekorot Water Company Ltd. v. Bar* (2007) (unreported).
[25] CA 5653/98 *Peles v. Halutz* [2001] IsrSC 55(5) 865.
[26] HCJ 844/06 *University of Haifa v. Oz* [2008] IsrSC 62(4) 167.
[27] LCA 8943/06 *Yochanan v. Cellcom Israel Ltd.* (2009) (unreported).
[28] CrimA 8947/07 *Honchian v. State of Israel* (2010) (unreported).
[29] CA 44/61 *Rubinstein v. Nazareth Textile Industries Ltd.* [1961] IsrSC 15(2) 1599.
[30] BAA 5160/04 *Ashed v. the Jerusalem Regional Committee of the Israel Bar Association* [2005] IsrSC 59(6) 223.

Israeli District Court cases cited:

[31] CC (Jerusalem) 455/94 *Hachsharat Hayishuv v. Reshet Schocken Ltd.* (1996).
[32] CC (TA) 721/95 *Kazarshvili v. Bank Mercantile Discount* [1995] 5756 District Cases (2) 402.
[33] MP (TA) 90742/09 *Channel 10 News v. Moshe Katzav* (2009).
[34] CC (TA) 1121/07 *Glatt-Berkowitz v. Kra* (2011).
[35] MP (Jerusalem) 2014/03 *Kra v. State of Israel* (2003).

United States cases cited:
[36] *Branzburg v. Hayes*, 408 U.S. 665 (1972).
[37] *Gonzales v. Nat'l Broadcasting Co., Inc.*, 194 F.3d 29 (2nd Cir. 1999).
[38] *In re Grand Jury Subpoena, Judith Miller*, 438 F. 3d 1141 (D.C. Cir. 2006).
[39] *Heathman v. United States District Court*, 503 F.2d 1032 (9th Cir. 1974).
[40] *Baker v. F & F Investment* 470 F.2d 778 (2nd Cir. 1972).
[41] *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975).
[42] *In re Miller*, 397 F.3d 964 (D.C. Cir. Ct. 2005).

Canadian cases cited:
[43] *R. v. National Post*, [2010] 1 S.C.R. 477.
[44] *Moysa v. Alberta* (Labour Relations Board), [1989] 1 S.C.R. 1572 (S.C.C.).
[45] *O'Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389 (Ont. S.C.J.).
[46] *Globe and Mail v. Canada* (Attorney General) [2010] 2 S.C.R. 592.

For the petitioner − N. Granot
For respondents − H. Olman
For the *amicus curiae* − Y. Grossman, O. Lin, N. Shapira

JUDGMENT

Justice E. Rubinstein

1. This is an application for leave to appeal a decision of the Jerusalem District Court (Judge M.Y. Hacohen) in MiscApp 35991-12-11, issued on 3 January 2012. In that decision, the district court granted the appeal of the respondents against the decision of the Jerusalem magistrate's court (Judge Rand) Misc. Order 27190-12-11, issued on 15 December 2011. The issue raised in this case is the application of a journalist's privilege.

2. The case involves photographs taken by respondent 2 in the framework of violent demonstrations. After the events took place, the police asked respondent 2 (by way of issuing an order) to deliver to the police the pictures she had taken during the events. In response to the order, respondent 2 argued that the pictures were subject to the journalist's privilege regarding the identification of her sources because their disclosure would lead to such identification. The main issue under dispute here is the scope of that privilege.

3. On the night of 12 December 2011 - 13 December 2011, Jewish demonstrators carried out violent disturbances at the Ephraim District Brigade Headquarters, and infiltrated the headquarters base and injured the

Deputy Commander of the brigade. Following these events, on 14 December 2011, a request was made to the magistrate's court for an order to produce documents pursuant to s. 43 of the Criminal Procedure Ordinance (Search and Arrest) [New Version] 5729-1969 (the Criminal Procedure Ordinance), in which the court was asked to order the respondents to deliver to the Israel Police photographs that documented the events.

4. The request was supported by the Deputy Brigade Commander's statement (marked as P/1), in which the event was described as a mass infiltration of the District headquarters base, during the course of which one of the demonstrators hit the deputy commander's head with an object, and lamps filled with paint were thrown at his vehicle. The deputy commander also stated that after the demonstrators were repelled, three tires were set on fire on the road leading to the district headquarters base, and that respondent 2 (hereinafter: "the photographer") was found among the demonstrators, while she was photographing the events. She informed him that she worked for the Makor Rishon newspaper (which is operated by respondent 1).

5. The magistrate's court ordered the production of the requested material and ruled that if a claim of privilege were raised, the material could be placed in a closed envelope and a hearing could be held in the presence of both parties; this is what actually occurred. During the hearing the petitioners argued that the photographer had not photographed the infiltration of the base and the attack on the deputy commander, but had instead taken pictures at a different event, which took place several hundred meters away from the base, in which no military commander had been attacked. It was also argued, and this is the main point, that the photographer had been invited to photograph the demonstration on condition that her sources not be disclosed in any manner.

6. In a decision dated 15 December 2011, the magistrate's court emphasized that according to the rule developed in MP 298/86 *Citrin v. Israel Bar Association Disciplinary Court, Tel Aviv* [1], *per* President Shamgar (a case which was decided by a single judge panel but the rule of which has since been accepted as a deep-rooted principle), the journalist's privilege is a qualified privilege that applies to the *sources* of the information; but this rule was expanded in the case law of the district courts, and has also been applied to the journalist's *information*, when such information can lead to the disclosure of the identity of the *source*. It was nevertheless held that in this case the requested material is the information

and not the source, and that there is no proof that the disclosure of the information will disclose the identity of the source.

7. The court therefore decided to remove the privilege. The court emphasized that the requested information was relevant to the investigation; that the alleged crimes were serious and that there was a public interest in exhausting all avenues of investigation as quickly as possible. The petitioners claim that the production of the photographs would lead to the disclosure of the identity of their source. The court emphasized that there had been no need for any source's cooperation in the creation of the information being sought, since the information was "caught in the journalist's net" and it could not be presumed that the removal of the privilege would have a substantial impact on the ability to gather such information in the future. The court therefore ordered that the material be produced. The petitioners appealed this decision to the district court.

The district court

8. There were three main issues in this appeal. The first was the applicability of an order to seize pursuant to s. 43 of the Criminal Procedure Ordinance in this case; the second was the magistrate court's holding that a privilege that protects the sources of information does not apply to the photographs; and third, the manner in which the "three-part test" for the removal of the privilege was applied in accordance with the *Citrin* rule. We begin by noting that this test examines three points – the relevance of the material to an investigation, the nature of the information and the ability to obtain it from other sources.

9. The district court also ruled that application request for the seizure of journalists' material pursuant to s. 43 of the Criminal Procedure Ordinance should not be used on a routine basis, since the police can use alternative means to access the material that they need. Nevertheless, the court held that the request was justified under the circumstances, because serious crimes had apparently been committed – crimes which require that they be investigated quickly – and because there were no other means with which the events were documented other than the photographer's pictures. However, it has been noted that the magistrate's court did not examine the matter of which investigative activities were carried out before the request was submitted, as required in the context of application request for an order pursuant to s. 43.

10. The court also noted that when a privilege claim is raised against an order pursuant to s. 43 of the Criminal Procedure Ordinance, the court must – as a preliminary step – review the material for the purpose of determining if

it can potentially disclose the identity of a source. And thus, after the review, the district court found that a distinction could be made between two groups of pictures: those which conformed to the testimony of the deputy commander (on the basis of which the order was requested) and those which are not "direct documentation of the events described specifically in P/1" (which is the testimony of the deputy commander). The court noted that with respect to the pictures that conform to exhibit P/1, there was one series of pictures that documented three tires burning on the road, as well as pictures of IDF soldiers arriving at the site, and of an IDF officer speaking with an additional person. The court noted that there was no documentation of the person who had set fire to the tires or of the fact that they had been put on fire. Regarding the group of pictures that are not relevant to exhibit P/1, the court noted that these were part of a different series of pictures, which documented an event that could have had a serious criminal aspect to it, and that event did not appear to have taken place close to the army base, near it or in the presence of military personnel. It was also noted that a number of individuals appear at that event, some of whom can be identified; that there are no dates on these pictures, and they do not identify direct damage to persons or to property. This distinction – between the two groups of pictures – served as a basis for the court's discussion of the question of the privilege and whether the tests set out in *Citrin* [1] for the removal of that privilege have been met. Before dealing with the question of the removal of the privilege, the court must deal with the scope of the privilege – which is the core of the dispute in this case.

11. The district court ruled that the journalist's privilege extends not only to the sources of the information, but also to the journalist's information itself, including photographs. The reason for this is to encourage sources to cooperate with journalists, as held in CC (Jerusalem) 455/94 *Hachsharat Hayishuv v. Reshet Schocken Ltd.* [31], *per* (then) Judge Adiel). It was noted that this approach has been the norm in the case law of the district courts, but has not yet been decided by the Supreme Court.

12. The district court did not adopt the test presented by the magistrate's court for examining the application of the privilege. The magistrate's court reasoned that the "fact that this was an event involving a large group and the fact that this was a documentation of something that happened 'in the open', and which was caught in the journalist's net, is enough to undo the privilege claim". The district court believed that the magistrate's court erred in presuming that the pictures conformed to the event described in exhibit P/1; and that this error occurred because the magistrate's court it did not review

the pictures. The district court also found that, since the sources of the information had invited the photographer to memorialize the events, the magistrate's court erred in finding that cooperation between the photographer and the source was not needed to create or obtain the information,.

13. It was stressed that according to the holding in CC (TA) 1121/07 *Glatt-Berkowitz v. Kra* [34] , *per* Judge Zamir, a contract arises between a journalist and a source who does not want to have his identity disclosed, and the exposure of the identity of that source would amount to a breach of contract; that the journalist and the source have a legal relationship of "neighbors", and the journalist therefore owed a duty of care toward the source, and the disclosure of his identity could be considered to be the commission of a tortuous wrong; and that the special relationship between the source and the journalist is not only a private interest of their own, but is also an important interest for the entire public. It was held that under the circumstances, there is a public interest in honoring the agreement between the photographer and the source, so as not to deter informants from cooperating with journalists.

14. Regarding the application of the privilege in this case, the district court held that even though some of the pictures were photographed in public, the *information* is indeed covered by the journalist's privilege in light of the photographer's undertaking not to pass them on without the source's consent. In order to examine the issue of whether it is necessary to remove the privilege, the court held that it must determine whether the tests developed in *Citrin* [1] have been satisfied. Regarding the first test (the issue of whether the photographs are relevant to the investigation) it was held, as stated, that the two series of pictures – the "burning tires" and the "remaining pictures" – should be treated differently. With regard to the "burning tires" group, it was noted, that in light of the respondents' agreement to provide the police with any "direct documentation" of the events described in exhibit P/1, they must be delivered to the petitioner; and in any event, the court held, this was relevant documentation. As to the remaining photographs, which include pictures that appear to document an event that was potentially criminal, the court held that it does not conform to the description of the events in exhibit P/1, and the degree of its relevancy is therefore reduced.

15. With respect to the second test, the court held that the issue regarding which the order was sought was an important one in which the public had a very significant interest. Regarding the third test – the existence of an alternative method for obtaining the requested evidence – the court held that

not enough had been done to obtain it. The court noted that in the hearing held on 22 December 2011, the respondents stated that they would not object to delivering the pictures, to the extent that they were direct documentation of the infiltration into the regional headquarters base and of the attack on the deputy regional commander.

16. In the course of its discussion of the scope of the privilege and before ordering that it should be removed, the district court distinguished between a public event to which a journalist or photographer is invited by sources, with a commitment being made to the source not to publicize information without the source's consent, and a public event at which other photographers and filming crews are present – who were not invited by the participants. It was held that the privilege issue should be given extra weight in cases of the first type, in light of the importance of maintaining the trust that sources and journalists have in each other, and to prevent the "chilling effect" that could be created by a fear that information will not be kept confidential. However, it was also said that if a journalist has taken photographs at an event with an apparent criminal aspect, in a public space, and the photographer argues that a promise was made to the source not to publicize it, the court must question the journalist with regard to the sincerity of his claim before granting the petition for an order pursuant to s. 43 of the Criminal Procedure Ordinance. On the other hand, when a journalist is at the site of an incident, either as a matter of coincidence or having arrived there without the source having stipulated that material should be published only with his consent, it is doubtful that the privilege applies, and the material must be provided to the police.

17. In conclusion, as stated, the court held that a distinction should be made between the two groups of photographs. The series showing the burning tires were ordered to be handed over to the police. With regard to the remaining photographs, including those providing apparent documentation of a criminal event – the court held that insofar as an investigation has begun and the petitioner believes that this information is required, the petitioner can ask the court for an order pursuant to s. 43 of the Criminal Procedure Ordinance. Note that the court rejected a "supplementary argument" that the petitioner submitted, finding that it was an attempt to broaden the factual and legal picture with respect to exhibit P/1 and to add further facts, claims and descriptions that were not included in exhibit P/1, for the purpose of removing the privilege with respect to the second group of pictures as well.

The petitioner's argument

18. The petitioner's main argument is that the district court expanded the *Citrin* rule to reach the information itself and not just the sources of the information, and that other district courts have also expanded the rule in the same way – and that this expansion is inappropriate so long as the legislature had not seen fit to anchor the journalist's privilege in any statute. The petitioner argues that the rationale underlying the journalist's privilege – the public interest in having information flow from the sources to the journalists – is sufficiently protected by the granting of privilege to the *sources* of the information only, and that its expansion to cover the journalists' *information* will lead to the flow of selective information, as dictated by the interests of the sources.

19. It is further argued that in this case the district court expanded the *Citrin* rule to reach not only the information that had been provided to the journalist and which can endanger the source, but also information that has not been provided to the journalist but of which the journalist became aware in the context of objective documentation, while he was present at a specific incident; and that the district court extended the privilege in this way because a promise had been given to a source not to publish the latter information without approval. It is argued that the application of the privilege only because of the existence of a promise given by the journalist to the source can also lead to the flow of selective information, as dictated by the interests of the sources.

20. Regarding the information itself – the pictures – the petitioner argues that the district court erred in distinguishing between the two series of photographs, in the sense that it did not view them as pictures of a single event related to the infiltration of the Efraim Regional Headquarters. The petitioner argues that the order pursuant to s. 43 turns on material that documents the "events on 12 December 2011- 13 December 2011 adjacent to the Efraim Regional Brigade Headquarters". It was argued that the Deputy Regional Commander's statement was provided to create the foundation for the request for an order, not in order to define and restrict the entire investigation to the narrow sector in which the events described in the statement occurred. It is also argued that the district court should have accepted the supplementary argument regarding the scope of the investigation – a matter which the state sought to appeal.

The respondents' arguments

21. The respondents' main position is that the disclosure of the pictures will expose the identity of the source and that the pictures are therefore covered by the journalist's privilege. With regard to the scope of the privilege, the respondents' argument is that according to various draft laws submitted over the years regarding the journalist's privilege, the privilege should apply not only with respect to the *identity of the source*, but also to the journalists' *information*. Regarding the application of *Hachsharat Hayishuv* [31], the respondents argue that since it had been held in this case – as a factual matter – that the disclosure of the pictures would lead to the disclosure of the source's identity, there is no need to decide the issue of whether the journalist's privilege will also apply to information in general, separately from its significance for the source or for the maintenance of confidentiality regarding his identity.

22. It is also argued that a contract is entered into between a journalist and the source regarding the non-disclosure of the source's identity of the information other than with the consent of that source; that pursuant to the Rules of Professional Ethics of Journalism, a journalist may not disclose information (in accordance with the ruling of the district court, at p. 8, lines 13-15); and that the journalist owes a duty of care to the source because of the relationship between them, as the court held in *Glatt-Berkowitz* [34].

23. Regarding the public nature of the event that was documented, the respondents base their argument on the district court's decision, and reject the petitioner's sweeping claim that the privilege does not apply whenever the documentation is of an event that occurred in a public place.

24. The respondents' rely on the district court's ruling with respect to the application of the *Citrin* test as well, and argue that the pictures do not satisfy the relevancy requirement, because the district court held that as a matter of law, the pictures (other than the series depicting the burning tires) do not document the event described in exhibit P/1. The respondents also argue that the police did not exhaust all possibilities for obtaining the information from other sources before the appeal was made to the magistrate's court for the issuance of the order. It should be noted that the respondents do not dispute that the second test– the existence of a significant issue – had been satisfied.

Position of the Press Council

25. The main position taken by the Press Council – which joined the case as an *amicus curiae* – is that the journalist's privilege should also apply to the content of the information and not only to the identity of the source.

According to the Council, in the years since the establishment of the rule of *Citrin* [1] (a case decided in 1986) a clear position has developed, indicating that information is protected by the privilege – a position which should be established in the case law of this Court as well. According to the Council, the privilege should apply to all information that the source provides to the journalist even if it was not provided directly to the journalist by the source, and to all information that reaches the journalist even if he obtained it solely through his own personal and professional activity without any source whatsoever having provided it to him. The Council reasons that the privilege should also apply to any analysis of such information that the journalist has carried out.

26. The Council argues that under the current circumstances, the authorities can bypass the privilege with respect to sources in various ways (such as a search of the newspaper's offices or of the journalist's own computer) and that the source can thus be identified and the entire objective of the privilege can thus be frustrated. It is therefore necessary to have the privilege apply to information as well, in order to ensure protection of the source. Another reason that the privilege should cover information is that the source often needs to give the journalist "background information" in order to establish his own reliability – but this information is not given for the purpose of having it made public.

27. It is also argued that the journalist's privilege that appears in section 22 of the Rules of Professional Ethics of Journalism (approved by the Press Council on 16 May 1996) also applies to information given to a journalist "on condition that it remain undisclosed"; and that even though the violation of an ethical duty does not create legal liability, the court can determine the applicable behavioral standard by examining, *inter alia*, the ethical rules of the journalism profession.

28. It is also argued that the privilege should apply to information for contractual reasons, in light of the trust relationship that exists between the parties. If a party is likely to have his identity disclosed by a journalist, he will hesitate to provide information in which the public has an interest, such as corruption. The Council also argues that it is necessary for the journalist's privilege to apply to information as well, in order to maintain journalistic independence and to prevent the profession from becoming a "governmental arm" of the investigative authorities – because at present, information is not protected by privilege, and the government can reach the source through the information, as stated, even if the privilege does apply to the source itself.

The main points of the discussion in the hearing before us

29. Attorney Granot argued for the petitioner that the district court expanded the scope of the privilege beyond what is necessary under the circumstances of the case, and applied it to information that does not serve to disclose the identity of the source. It is argued that this expansive view of the privilege was also applied in other district court decisions, and that this expansion harms the objective of uncovering the truth, which is the objective of the privilege itself. Attorney Ulman argued for the respondents that in the current case, the photographer was invited by her sources, and that the lower court had made a factual finding that the disclosure of the pictures would lead to the disclosure of the source's identity. The respondents' counsel also argues that the pictures have limited relevance (other than those that document the burning tires), and that the police did not carry out an exhaustive investigation before they applied for an order – meaning that the *Citrin* rules had not been satisfied. Regarding the scope of the privilege, it is argued that because the privilege is qualified and not absolute, it is proper that it should apply to a wide range of cases. Attorney Lin argued for the Press Council, noting that the protection of the source's identity must be expanded to cover information that can lead to the disclosure of his identity as well.

Decision

30. We have decided to grant leave to appeal, and to deliberate the case as if an appeal had been filed in accordance with the leave that has been granted. And we have also decided to grant the appeal in part. We have three concrete issues that are presented in this matter.

The first is the request pursuant to s. 43 of the Criminal Procedure Ordinance to obtain the pictures.

The second is the issue of the application and scope of the journalist's privilege to the pictures.

The third is the question of the removal of the privilege.

Nevertheless, it is obvious that our decision will have a broader significance with respect to the issue of the journalist's privilege in general.

Section 43 of the Criminal Procedure Ordinance (and the argument regarding privilege in the context thereof)

31. Section 43 of the Criminal Procedure Ordinance provides as follows:

> "If a judge finds that a particular item is necessary or desirable for the purpose of the investigation or the trial, the

> judge may summon any person in whose possession or property it is presumed the item may be found, to present himself and present the item, or to produce the item at the time and place indicated in the summons."

In general, a request for an order pursuant to s. 43 may not be submitted if there is an alternative method which would have a lesser impact on the autonomy of the party to which the order is issued. Requests pursuant to s. 43 are intended for cases in which a regular search and seizure proceeding is not sufficiently effective, such as when it can be presumed that the party holding the item will refuse to deliver it. The section is usually used at the police investigation stage of a criminal proceeding, and its main purpose is to move the investigation along (see CrimApp 9305/88 *A. v. Al Mamuniya Girls School* [2] , *per* Justice Arbel, at para. 8).

32. The section has two threshold requirements, which must both be satisfied – the need for the item for the purpose of the investigation, and the possibility that it is in the possession of the party to whom the order is issued. The fulfillment of these two requirements are met does not mean that an order must be issued, but it does mean that the court will consider whether it should be issued (CA 1761/04 *Sharon v. State of Israel* [3] , at p. 14). In the context of this consideration, "the court must take into consideration the substantive connection between the material being requested and the needs of the investigation, and the degree to which this information is relevant" (LCrimA 5852/10 *State of Israel v. Shemesh* [4] , *per* President Beinisch, at para.11). And the most important requirement for the purposes of this case: there is generally no justification for using the section if the investigating authority has other means of obtaining the documents that it needs (*Sharon v. State of Israel* [3], at p. 15).

33. A request pursuant to s. 43 of the Criminal Procedure Ordinance is generally made, at the first stage, in the presence of the applicant. If the party possessing the item objects to a request to deliver it before he has been allowed to present his arguments against its delivery, an additional hearing is held, and the court hears the party's objections (compare, Y. Kedmi, *On Criminal Procedure*, Part 1, B, 755 (updated 2008); CC (TA) 721/95 *Kazarshvili v. Bank Mercantile Discount* [32]). The power to issue an order pursuant to this section includes the power to exercise judicial review for the purpose of examining the fulfillment of the section's purpose; thus, even after the order has been issued and an argument has been made against the order – such as an argument based on the journalist's privilege – the court

has the discretion to decide whether or not to cancel it (*Sharon v. State of Israel* [3], at pp. 19-20). To sum up, when the court is faced with a request pursuant to s. 43, it can decide whether or not to grant the it on the basis of considerations that arise within the context of s. 43; it can also reject the request if it finds that the journalist's privilege claim should be granted and that there are no grounds for removing that privilege.

34. After reviewing the photographs, the district court found that the police had not carried out enough investigative work, as required in the context of a request for an order pursuant to s. 43 (at p. 6, line 26-28; and at p. 11, at para. 22). Nevertheless, the district court did not cancel the order for this reason, because the respondents agreed to produce any material that contained direct documentation of the event described in exhibit P/1. Therefore, we now face the issue of determining what is covered by the journalist's privilege and what the grounds for its removal are. I will therefore add, for the sake of emphasis, that it is appropriate, in my view, for a court facing a claim of privilege to see the material in question and to review it, so that it will not be feeling its way in the dark. In my view, this is a self-understood test, and would be the way to respond to any claim of privilege or confidential material, etc.

35. I believe that the district court's determination that the police had not carried out sufficient investigative work was sufficient ground for cancelling the order (at p. 6, para. 13 of the district court's judgment). The court chose not to cancel the order, because the respondents had agreed to deliver the material that was direct documentation of what had been described in exhibit P/1. I find the reliance on this reason to be problematic, for two main reasons.

36. First, it appears that we cannot say that the respondents' counsel "agreed" to provide the pictures as stated; rather, he clarified that if there was direct documentation of the events described in exhibit P/1, it could be presumed that the court would remove the privilege. He noted that "as to the court's question, I respond . . . that if the pictures show one of the demonstrators hitting the Deputy Brigade Commander, then according to the required considerations, I would have certainly have expected the court's decision to be that the pictures should be disclosed" (District Court transcript for 22 December 2011, at p. 6, lines 17-19), and later on "all that is needed to determine is whether the pictures document the attack. And if they do, there is reason for disclosing them because of the seriousness of the event, and the balancing that has been prescribed in the case law" (at p. 7, lines 30-32). These remarks should be seen in light of the fact that the respondents'

counsel knew at that stage that the pictures do not directly document the attack on the Deputy Brigade Commander. The counsel made this argument several times (for example, at p. 4, lines 30-32); however, the main principle within the respondents' argument, throughout the entire trial was – and remains – that all the pictures are subject to the privilege and that they should not be disclosed.

37. Second, and this is the main point: even if the respondents' counsel had in fact, with these remarks, agreed to hand over the pictures that included direct documentation of what is described in exhibit P/1, to the extent that he believed that the privilege applied to such pictures – it appears that it was not in his power to give such consent. The journalist's privilege is a qualified privilege, and only the court has the authority to remove it. The power to waive the privilege is given to the source and only to the source. (Y. Kedmi, *On Evidence* Part 3, (2009) (Hebrew), at p. 1147). The litigants participating in the trial cannot consent to remove the privilege from the material, which does not belong to them, other than with the consent of the source (*ibid*., at p. 1017). Throughout the proceedings, the respondents' claim was and remained that the disclosure of the information will lead to the disclosure of the source; and that the source had been promised that the information would not be disclosed. All of this indicates that the cited remarks made by the respondents' counsel cannot be relied upon as the basis for a waiver of the privilege. This is also indicated by the fact that in practice, before the court directed that the "agreed upon" pictures should be handed over, the court discussed the question of whether the *Citrin* tests regarding the need to remove the privilege have been satisfied.

38. In summation – an order to produce items pursuant to s. 43 of the Criminal Procedure Ordinance and an argument based on privilege are two different matters. When, on the face of the matter, it appears that the conditions of s. 43 have not been satisfied, the court need not deal with the privilege claim. However, where a privilege claim has been raised, it will be discussed and the claim will be heard; nevertheless, for the purpose of issuing an order, the s. 43 conditions must be met as well as the conditions for removing the privilege. Once the court found that the police had not carried out sufficient investigative work, as the rules regarding s. 43 issues require, this was sufficient – as stated – to lead to the cancellation of the order on the basis of this approach.

39. Since the court had instructed that some of the pictures should be handed over, on the basis of the tests for the removal of the privilege as

established in *Citrin* [1] – and because it established, as a starting point for this purpose, that the privilege applies to the photographs – I will discuss these two stages.

Scope of the journalist's privilege

40. In *Citrin* [1] the court established a common law privilege that allows the journalist not to disclose the *sources* of his information (*ibid.*, [1], at pp. 360-361), subject to the possibility that the privilege should be removed – as stated – in if the subject is relevant and substantive and is required for an investigation, in the absence of other evidence. In the instant case, the photographer was not asked to disclose her sources, but rather to hand over photographs that had been taken at the scene of the Ephraim District Brigade Headquarters base events. The respondents objected on the basis of a journalist's privilege claim. The district court held that under the circumstances, the privilege applied to the photographs (i.e., the *information*), because the delivery of the pictures could lead to the disclosure of the identity of the *source*. This holding raised the question of the scope of the journalist's privilege – which is the main point of the dispute that is to be decided here.

41. Chapter C of the Evidence Ordinance establishes a number of privileges, among them privileges for various professionals such as attorneys, physicians and psychologists. The journalist's privilege was not included in this list of statutory privileges; rather, it was created in the framework of case law. This was discussed at length in *Citrin* [1]. The legislature's silence on this matter despite various attempts that were made to enact legislation regulating this issue was not interpreted as a negative arrangement, and it was held that the creation of an evidentiary rule that recognizes the journalist's privilege reflects the recognition of freedom of expression and of the freedom of the press that flows from it. It was held that a privilege that allows a journalist not to disclose the sources of his information should be recognized (*Citrin* [1], at paras. 9-11, 15).

42. We will first survey the attempts to enact a statutory privilege following the court's adoption of the *Citrin* rule. This survey will document the dispute regarding the scope of the journalist's privilege. Next, I will briefly discuss the status of the privilege in the laws of other countries. Following that, I will present the reasons for recognizing a privilege for information, and the difficulties that such a privilege entails. Against this background, I will present the scope of the journalist's privilege and discuss

the consequences of that scope. Finally, I will relate to the determinations made in the district court's judgment.

Attempts to legislate and the Maoz Committee

43. After the decision in *Citrin* [1], a number of attempts were made to pass legislation on the issue – but none ripened into an enacted statute. In 1993, a Committee to Examine the Journalist's Privilege (hereinafter: "the Maoz Committee") was established; its chair was Professor Asher Maoz, from Tel Aviv University Law School. The majority opinion presented in the Committee's 1994 report recommended that the Evidence Ordinance be amended to include a journalist's privilege, in the following language:

> 'A person who has received items and documents due to his work as a journalist (hereinafter: "the information") will not be required to disclose them, if the disclosure of the items or documents is likely to disclose the *identity* of the person who provided the information or *if the information was given to such a person on the condition that it would not be disclosed*, unless the court finds that it must be disclosed or if the informant has agreed to the disclosure' (Emphases added – E.R.)

44. This text anchors the privilege first with respect to the identity of the source, and second, with respect to the *information* that was given with a promise that it would not be disclosed, subject to a court ruling requiring its disclosure.

45. The committee's recommendations have not yet been realized over the course of the 18 years that have passed since the publication of its report. Over the course of those years, a number of draft laws, with various texts, have been proposed. Among others, a draft law was proposed in 2003 in the form of a private bill, by MK Avshalom Vilan (Pr./189), according to which "a journalist is not obligated to hand over evidence or information which can serve to identify the parties who were the sources of the information . . ." The explanatory material indicated that the purpose of this proposal was to anchor only a "privilege for sources", which would also include *information* that leads to the disclosure of the *source*. In 2003, another private draft law was submitted by MK Zehava Galon (Pr./664), with the following language: "A journalist is not required to provide evidence concerning *information or an item* that he obtained through his work, if such information or item is of the kind that is generally given to journalists with the belief that the journalist will maintain confidentiality with regard to them, or evidence regarding the identity of the person who provided the item or the information . . ."

(emphasis added – E.R.). The explanatory material accompanying that draft indicated that this referred to a "privilege for sources and information" which would apply not only to the source but also to the information that the source provided. An identically worded proposal was submitted in 2006 as well (Pr./17/220). The Knesset did not enact any of these draft laws as statutes.

46. Additional draft laws were submitted in 2011 (Pr. 18/2840 and Pr. 18/2870), and these were similar in their essence to the earlier proposals. The language of the first of these was as follows:

> 'A journalist is not required to provide evidence concerning *information or an item* which he obtained through his work, if such information or item is of the kind that is generally given to journalists with the belief that the journalist will maintain confidentiality with regard to them, or evidence regarding the identity of the person who provided the item or the information, unless the person has waived confidentiality, or a court has found that the evidence must be disclosed.' (Emphasis added – E.R.)

The main output of the Maoz Committee

47. We need to briefly note the products of the Maoz Committee's work. The committee's deliberations focused on four subjects: an examination of the situation regarding the journalist's privilege, in practice; the need for the existence of the privilege and the dangers resulting from it; the desired scope of the privilege; and the need to anchor the privilege in a statute. (Maoz Committee Report, at p. 3). Various parties – including judges, police personnel, officials from various government authorities, and journalists – testified before the Committee regarding the implications of the privilege for their respective fields of work. The laws of other countries were also examined.

48. Regarding the question of the *scope* of the journalist's privilege, the Committee decided unanimously that it must apply to all the *information* that could lead to the disclosure of the identity of the source. However, a dispute arose between the majority and the minority views regarding the application of the privilege to different types of information.

49. The majority's opinion was that the privilege should apply both to information that was likely to lead to the identification of the source, and to information regarding which the journalist had agreed with the source that it would not be disclosed, such as "background information" the purpose of which is to boost the reliability of the source and his story – meaning that the privilege would be for *sources and information*. The minority group within

the Committee proposed that the privilege should apply to the identity of the source and to any item that is likely to disclose the source's identity – meaning, the privilege should be a *privilege for sources* (at pp. 15, 25 and 46). To complete the picture, I note that the minority position – unlike that of the majority – understood that the privilege should be *absolute* – (except if the case involves a serious crime), such as the respondents are seeking to have applied, in this case, in one way or another.

50. This survey leads to the following conclusion: first, the common denominator among all the draft laws and the Maoz Committee minority view was that the privilege should apply to the identity of the source and to information that would lead to the identification of the source. Second, both the draft laws from the years 2006-2011 and the proposal offered by the Maoz Committee majority opinion sought to anchor a privilege for both sources and information, but they were divided regarding the nature of the information to be protected by the privilege. The majority referred to a privilege for "items and documents . . . (hereinafter: "the information") . . . if the information was given to such a person on the condition that it would not be disclosed", while the draft laws referred to "information or an item – which is of the kind that is generally given to journalists with the belief that the journalist will maintain confidentiality with regard to them." Thus, the privilege proposed by the Maoz Committee was one that was conditioned on an agreement between the parties, while the privilege in the draft laws was conditioned on the manner in which the court interpreted the nature of the information.

The case law of the district courts

51. The issue arose in the district courts in *Hachsharat Hayishuv* [31], mentioned above; in MP (TA) 90742/09 *Channel 10 News v. Moshe Katzav* [33] and the already noted *Glatt-Berkowitz* [34], (para. 25). In *Hachsharat Hayishuv* Judge Adiel noted (in para. 25) "that the privilege must apply in principle to the information as well and not only to the source's identity", if the source had conditioned the provision of the information on the preservation of confidentiality. In *Channel 10 News* [33], (the then) Judge Mudrik wrote that "I personally believe that the existing privilege also includes protection of the content of the journalists' information which the journalist promised to keep confidential, and not only narrow protection for the identity of the source"; see also *Glatt- Berkowitz* [34].

Comparative Law

52. The two parties found support in the laws of other countries. And this is as it should be: the subject, by its nature, has been dealt with by the institutions of every country in the free world. The respondents described a picture in which the scope of the privilege in a number of Western countries provides protection for both a journalist's sources and for his or her information. The petitioner, on the other hand, presented a different picture, according to which in the common law countries, the status of the journalist's privilege and its scope, are – at the very least – unclear. The purpose of this survey is not to identify the scope of the optimal privilege. As will be described below, the matter depends on, *inter alia*, the legal system of each country, the structure of each country's legal system, and the interface between the privilege and the country's other laws. In any event, there are no exact matches between the character of the privilege in different countries. However, this survey can shed light on the search for the various balances that can be reached between the need to expose the truth and to maintain a privilege for sources, and the rationale at the basis thereof.

U.S. law

53. The United States Supreme Court dealt with the issue of the journalist's privilege forty years ago in *Branzburg v. Hayes* [36]. Branzburg was a journalist who wrote an article about drug use in Kentucky. For the purpose of understanding the issue, he consulted with a number of drug users. Following the article's publication, Branzburg was subpoenaed to testify before a grand jury (a proceeding leading up to an indictment) about his sources. Branzburg argued that he was protected by the journalist's privilege, which he sought to derive from the American Constitution's First Amendment – the Amendment that established, *inter alia*, the freedom of the press. The majority opinion in the case was written by Justice White. The question to be decided was whether a journalist who had been subpoenaed to testify before a grand jury and to respond to relevant questions regarding the crime being investigated could be protected by a journalist's privilege rooted in the First Amendment. As Justice White wrote: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of a crime" (*ibid.* at p. 682). The Justice believed that a journalist is no different from any other person who was called to appear before a grand jury in the framework of a criminal investigation, and rejected the claim that the journalist's privilege was anchored in the First Amendment to the American Constitution. The minority opinion was written by Justice Stewart, who supported the recognition of the privilege within the context of

the Constitution (*ibid.* at pp. 725-726). As he wrote: "The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press" (*ibid.* at pp. 725-726). According to him, the free flow of information is a cornerstone of a free society; and the provision of broad and varied information to the citizen not only allows the citizen to learn about different opinions, but also allows for the monitoring of government authorities. Justice Steward found that the ability of the press to gather information depended on the protection of the sources of the information – protection that was based on the Constitution (*ibid.* at pp. 728-729):

> '[T]he duty to testify before the grand jury 'presupposes a very real interest to be protected.' Such an interest must surely be the First Amendment protection of a confidential relationship …. [T]his protection does not exist for the purely private interests of the newsman or his informant, nor even, at bottom, for the First Amendment interests of either partner in the newsgathering relationship. Rather, it functions to insure nothing less than democratic decision-making through the free flow of information to the public, and it serves, thereby, to honor the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' […]. In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that, because of their 'delicate and vulnerable' nature […], and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards' (*ibid*. at pp. 737-738).

54. The majority opinion should be understood against the background of the structure of the American legal system. The *Branzburg* [36] decision referred to the issue of a journalist's privilege arising in the framework of the First Amendment to the American Constitution, and – as noted – rejected the defense argument based on such a privilege, based on the argument that no such protection applied in a proceeding before a federal grand jury. However, this holding did not rule out the possibility of state-enacted statutes that recognize a journalist's privilege. Indeed, following *Branzburg* [36], forty-nine states (all the states but one) and the District of Columbia (in which the country's capitol city, Washington, is located) enacted state laws that anchored a journalist's privilege – with different states establishing different

ranges of protection. Some of these statutory privileges cover sources only; others provide protection both for sources and for information. Keith Werhan, *Rethinking Freedom of the Press after 9/11*, 82 TUL. L. REV. 1561, 1589 (2008)). Thus, for example, California established a privilege for sources and for information which applies both to information obtained through the gathering of materials that are meant to be published, and to information the publication of which is not intended (Cal. Constitution art. 1 § 2). The District of Columbia established an absolute privilege regarding the identity of the source (D.C. Code § 16-4702 (2001), and a privilege for information which can be removed if various tests that are prescribed in the statute are satisfied. (D.C. Code § 16-4703 (2001). Florida established a qualified privilege for sources and for information (Fla. Stat. Ann. § 90.5015 (West 2004), as was established in Connecticut (Conn. Gen. Stat. Ann. § 52-146t (West)) and in Colorado (Colo. Rev. Stat. Ann. § 13-90-119 (West 2004)).

55. Following the *Branzburg* [36] decision, various federal courts also recognized a journalist's privilege for sources and for information. Thus, for example in *Gonzales v. Nat'l Broadcasting Co., Inc.* [37],), the Second Circuit recognized a journalist's privilege and held that it applied to both sources and information.

56. Nevertheless, the trend toward anchoring a privilege in state statutes and in state judicial decisions came to a stop, to a certain degree, after the events of September 11, 2001 (see D. Ronen, *The Law of Censure: Media, Freedom of Expression and National Security* (2011) (Hebrew), at pp. 145-147). Thus, for example, in *In re Grand Jury Subpoena, Judith Miller* [38], a senior government official, Lewis Libby, the chief of staff of Vice President Dick Cheney, was suspected of having committed perjury. Various journalists were called to testify, including Judith Miller, who refused to testify about her sources and was sent to prison for contempt of court because of her refusal. The three judges on the panel of the DC Circuit Court of Appeals returned to the rule of *Branzburg* [36], according to which there is no federal constitutional protection for a journalist's confidentiality. The Court did address the alternative argument regarding a privilege based on federal common law, and rejected that argument. Judge Tatel, in his concurring opinion, wrote that in principle, a federal common law privilege should be recognized:

> 'In sum, "reason and experience," as evidenced by the laws of forty-nine states and the District of Columbia, as well as federal courts and the federal government, support recognition of a privilege for reporters' confidential sources. To disregard this

> modern consensus in favor of decades-old views, as the special counsel urges, would not only imperil vital newsgathering, but also shirk the common law function assigned by Rule 501 and "freeze the law of privilege" contrary to Congress's wishes' (*ibid.* at p. 1172).

57. This Appeals Court decision creates some doubt concerning the relevence herein of the state legislation and case law. It should be recalled that the case was heard in the federal district court for the District of Columbia, which, as has been noted, confers a wide-reaching journalist's privilege. However, the existence of a state statute is not binding when a case arises at the federal level, although federal courts have found that such legislation should be reviewed. In one such federal decision, the Court of Appeals for the Ninth Circuit wrote as follows:

> 'In determining the federal law of privilege in a federal question case, absent a controlling statute, a federal court may consider state privilege law. *Heathman v. United States District Court* [39], , at 1034 (9th Cir. 1974); *Baker v. F & F Investment* [40], ;, at 781-82. But the rule ultimately adopted, whatever its substance, is not state law but federal common law' (*Lewis v. United States* [41], , at p. 237).

In addition, Rule 501 of the Federal Rules of Evidence provides as follows:

> 'The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.'

58. This survey shows that the existence of a state statutory privilege or one that has been established in the case law of the state courts – even if such privilege enjoys a broad scope – does not guarantee protection for a journalist in a federal court. The impact of the existence of state protections, even when they apply to both the source and the journalist's information, is limited – due to the structure of the American legal system. While state privileges grant wide protection the net of relations between a journalist and his sources, and to journalists in general, the lack of a parallel provision at the federal level, as well as the holding in *Branzburg* [36], point in a different direction, toward a limitation of the privilege

Canada

59. Canada has no arrangement that anchors a journalist's privilege in a statute. Section 2 of the Canadian Charter of Rights and Freedoms lists a number of fundamental freedoms. Sub-section (b) provides as follows: "[Everyone has the] freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". In 2010, the Canadian Supreme Court heard an appeal brought by a newspaper, challenging an order instructing the newspaper to hand over a document that could have led to the identification of its source. (*R. v. National Post* [43]). The document was required for the purpose of exposing a forgery. The appellants argued that a journalist's privilege had been established in s. 2(b) of the Charter of Rights and Freedoms. The Supreme Court rejected this argument and held that the value protected in the Charter is the right to freedom of the press only. The Supreme Court emphasized that:

> 'The law needs to provide solid protection against the compelled disclosure of secret source identities in appropriate situations but the history of journalism in this country shows that the purpose of s. 2(b) can be fulfilled without the necessity of implying a constitutional immunity. Accordingly, a judicial order to compel disclosure of a secret source would not in general violate s. 2(b)' (*ibid.* [43], at para. 38).

60. The Court went on to reject, as well, the argument that the privilege is established in the common law, and noted that:

> 'Journalistic-confidential source privilege has not previously been recognized as a class privilege by our Court (*Moysa v. Alberta* (Labour Relations Board) [44],), and has been rejected by courts in other common law jurisdictions with whom we have strong affinities' (*ibid.* [44], at para. 41).

61. Finally, the Court did recognize a case-by-case privilege, and held that the party claiming the privilege bears the burden of persuasion regarding the fulfillment of the conditions for the application of that privilege. The Court did not provide any clear outlines for the scope of the privilege, stating that:

> 'When applied to journalistic secret sources, the case-by-case privilege, if established on the facts, will not necessarily be restricted to testimony, i.e. available only at the time that testimony is sought from a journalist in court or before an administrative tribunal. The protection offered may go beyond a mere rule of

> evidence. *Its scope is* shaped *by the public interest that calls the privilege into existence in the first place*. It is capable, in a proper case, of being asserted against the issuance or execution of a search warrant, as in *O'Neill v. Canada (Attorney General)* [45], . The scope of the case-by-case privilege will depend, as does its very existence, on a case-by-case analysis, and may be total or partial' (*ibid.* [45], at para. 52) (Emphasis added – E.R.)

62. It appears that Canadian law resembles the United States law, beyondthe degree of the protection provided by the law – meaning the scope of the protection provided through the privilege; in neither system is it entirely clear that the privilege actually exists in a particular case. The Canadian Supreme Court noted in this context that:

> 'The bottom line is that no journalist can give a source a total assurance of confidentiality. All such arrangements necessarily carry an element of risk that the source's identity will eventually be revealed. In the end, the extent of the risk will only become apparent when all the circumstances in existence at the time the claim for privilege is asserted are known and can be weighed up in the balance. What this means, amongst other things, is that a source who uses anonymity to put information into the public domain maliciously may not in the end avoid a measure of accountability. This much is illustrated by recent events in the United States involving New York Times' reporter Judith Miller and the subsequent prosecution of her secret source, vice-presidential aide Lewis "Scooter" Libby, arising out of proceedings subsequent to his "outing" of CIA agent Valerie Plame: *In re Miller*, 397 F.3d 964 (D.C. Cir. Ct. 2005) [42], at pp. 968 -72. The simplistic proposition that it is always in the public interest to maintain the confidentiality of secret sources is belied by such events in recent journalistic history' (*R. v. National Post* [43], at para. 69).

63. Later, in a different case (*Globe and Mail v. Canada* (Attorney General) [46], para. 19-25), the Canadian Supreme Court again heard the claim that the journalist's privilege could be derived from s. 2(b) of the Charter. The Court rejected the argument unanimously, on the basis of the reasons expressed in the holding in *R. v. National Post.* Nevertheless, the Court repeated its earlier determination that the privilege could be found to apply on a case-by-case basis.

France

64. Section 1 of the French Law of Freedom of Expression, enacted in 1881 (Loi sur la liberte de la press du 29 juillet 1881 (amended 4 July 2010), provides that "Le secret des sources des journalistes est protégé dans l'exercice de leur mission d'information du public." ("The secrecy of a journalist's sources is protected in the exercise of their mission to provide information to the public.") The section protects the sources of the information and does not refer to the protection of a journalist's information. This section has been amended several times, most recently in 2010. Sub-section (3) refers to the possibility of restricting the privilege with respect to the *sources* of information, either directly or indirectly, and conditions such a restriction on an essential public interest in the disclosure and on the use of methods for disclosure that are very necessary and proportionate to a legitimate purpose, but it does not obligate the journalist to disclose his sources. Sub-section (4) continues sub-section (3), and provides that an attempt to locate a source by asking a third party – meaning a party who is not a journalist or the source himself – will be deemed to be, in the language of sub-section (3), an "indirect restriction". Sub-section (5) establishes the tests to be applied in determining whether the privilege should be removed, and these include the severity of the crime, the importance of the information for the purposes of the prevention or punishment of the crime, and the degree to which this measure is needed in order to uncover the truth.

65. In 2010, s. 5-100 was added to the Criminal Procedural Code, in the following language:

> 'A peine de nullité, ne peuvent être transcrites les correspondances avec un journaliste permettant d'identifier une source en violation de l'article 2 de la loi du 29 juillet 1881 sur la liberté de la presse.'
>
> And, translated into English:
>
> 'On penalty of nullity, no transcription may be made of any correspondence with a journalist to identify a source in violation of Article 2 of the law of the 29th of July 1881 on the freedom of press.'

This section supplements the 1881 statute, and prohibits the copying of correspondence held by a journalist which identifies the journalist's source. In addition, s. 109 of the French Criminal Procedure Code provides as follows (translated into English): "Any journalist heard as a witness in respect of information collected in the course of his activities is free not to disclose its origins." According to the section as well, the privilege applies only so as to protect the identity of the journalist's sources.

66. An additional method for preventing circumvention of the 1881 statute is derived from the provisions of the criminal procedure code relating to a search. The beginning of s. 56 of the Code contains provisions relating to the conduct of a search for evidence that was used in the commission of a crime or which relates to a crime that has been committed. Section 56-1 limits the ability to search an attorney. Similarly, s. 56-2, dealing with the conduct of a search of a journalist's property, and permits such a search only after an order has been obtained from a judge or a prosecutor – an order which ensures that the search does not violate the journalist's "freedom of exercise" and does not obstruct or delay the collection and creation of information in a manner that is not justified:

> 'A search of the premises of a press or audio-visual communications business may only be made by a judge or prosecutor who ensures that such investigations do not violate the freedom of exercise of the profession of journalist and do not unjustifiably obstruct or delay the distribution of information.'

67. Similarly, s. 77-1-1 provides that under certain circumstances, any person, institution or public or private organization can be ordered to provide documents (including computerized data). The section qualifies its application to the various professionals mentioned in sections 56-1-56-3 (a journalist is one of these), and requires that any production of documents must be with their consent. In 2011, a French High Court (Criminal and Civil) decision dealt with a request from the police to be allowed to obtain, from the phone company, a printout of a certain journalist's mobile phone calls. The court saw this request as an attempt to bypass s. 77-1-1 and held that the privilege applied under the circumstances. The court emphasized that s. 77-1-1 should be interpreted in light of the 2010 amendment of s. 2 of the 1881 Freedom of the Press Law (Cass. Crim., Dec. 6, 2011, no. 11-83.970).

68. The above shows that French law provides comprehensive protection for the identities of the sources of information, and this includes the protection of any information that leads to the exposure of a source's identity; however, this protection does not extend to the entire relationship between the journalist and the source, and does not apply to *information that does not lead to the exposure of the source's identity.* Such protection, referred to as professional confidentiality, is established in section 226-13 of the French Criminal Code. In English translation: "The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is

punished by one year's imprisonment and a fine of €15,000." The courts have interpreted this section as applying to attorneys, doctors, and priests, but in connection with journalists – the interpretation has been that it applies only with respect to the identification of the sources of information. (Muriel Giacopelli, "Obligation de deposer", Repertoire de droit penal et de procedure penal, Editions Dalloz, 2012).

Other countries

In England, s. 10 of the Contempt of Court Act, 1981 ("Sources of Information") establishes a qualified privilege regarding the identity of the sources of information:

> 'No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.'

We see that a privilege with respect to sources is recognized, subject to the "interests of justice or national security or . . . the prevention of disorders or crime."

69. In Germany, s. 53 of the German Procedure Law (captioned "Right to Refuse Testimony on Professional Grounds") protects both the sources of the information and the journalist's information. As translated into English:

> 'The persons named in number 5 of the first sentence may refuse to testify concerning the author or contributor of comments and documents, or concerning any other informant or the information communicated to them in their professional capacity including its content, as well as concerning the content of materials which they have produced themselves and matters which have received their professional attention. This shall apply only insofar as this concerns contributions, documentation, information and materials for the editorial element of their activity, or information and communication services which have been editorially reviewed.'

70. The non-exhaustive picture outlined above indicates that the law in other countries is not uniform with regard to the status or the scope of the journalist's privilege. Nevertheless, where the privilege is recognized – either by statute or by local case law – the privilege is generally understood to provide protection for information that will lead to the disclosure of the identity of the source; it is less commonly understood that the protection

reaches information in general. When the privilege is not recognized at all, the reason for such non-recognition is the concern that the assertion of the privilege will do unnecessary harm to the principle of the need to uncover the truth. We will now, taking all this into account, return to our discussion of the situation in Israel.

Interim summation

71. In Israel, the need for a limited privilege for sources is undisputed. The difficulty arises when a journalist claims the privilege with respect to the journalists' information itself. In *Channel 10 News* [33], Vice President Mudrik wrote as follows:

> 'The claim of a privilege for the sources of journalists' information presents considerable difficulty. The difficulty is caused by the fact that the privilege, which is the product of judicial decisions, is self-delineated by its purpose of protecting the identity of the sources and not of providing protection for the information provided by those sources. Look throughout the decision in *Citrin* [1]– which is the keystone of this privilege as it has been adopted in our legal system – or any of the considerable foreign decisions discussed therein – and you will find no mention of any protection for the content of information provided to a journalist.'

We are therefore faced with two questions: should we recognize a privilege for journalists' information; and if the answer to that question is affirmative, what is the scope of the privilege that we should recognize? We will first present the reasons for recognizing a privilege for information, followed by the difficulties involved in such recognition. We will then propose, against this background, the desirable scope of the journalist's privilege.

The reasons for recognizing a privilege for information

Background

72. The factors that support a privilege for information must first be examined in light of the contribution that the press makes to a democratic system. The constitutional starting point for this review is the right to freedom of expression. It is well known that this right enjoys a sublime supra-statutorystatus, and has been in this position for many years – dating back to at least this Court's groundbreaking decision in HCJ 73/53 *Kol Ha'am v. Minister of the Interior* [5] (*per* (then) Justice Agranat) – "The principle of freedom of expression is closely bound up with the democratic process." Today, we would certainly refer to it as a constitutional right; see

also, HCJ 243/62 *Israel Film Studios Ltd. v. Levy* [6], at p. 2415. In his opinion in that case, (then) Justice Landau wrote as follows: "In order for the citizen to enjoy his freedom to exchange opinions, he needs the freedom to exchange information . . . only in this way can he create for himself an opinion which is as independent as possible regarding those questions that are of the greatest importance for the world, the society and the state"; HCJ 14/86 *Leor v. Film and Play Review Council* [7] , *per* (then) Justice Barak;HCJ 680/88 *Schnitzer v. Military Censor* [8]; and see also, regarding the complexity of the issue, LCrimA 7383/08 *Ungerfeld v. State of Israel* [9], my opinion. These principles have already become entrenched and they hold an honored position – there is, therefore, no need to say much more regarding this point.

73. Freedom of the press is derived from the right to freedom of expression (CA 723/74 *Ha'aretz Newspaper Publisher Ltd. v. Israel Electric Corp.*[10],*per* (then) Justice Shamgar, at p. 298). A proper democratic regime requires the existence of frameworks that can present to the public those matters that require discussion (*Kol Ha'am* [5], at p. 877). The press is meant to function as the long arm of the public, and is charged with gathering and publicizing information; the free exchange of opinions is a fundamental condition for a democratic society (HCJ 372/84 *Klopfer-Naveh v. Minister of Education and Culture* [11], *per* (then) Justice S. Levin, at p. 238. A democracy that wishes to enjoy ongoing public debate and discussion of national issues cannot be satisfied with freedom of expression that exists only in theory; the state authorities, including those involved in the criminal and administrative fields, must limit the exercise of their powers, in order to enable the practical exercise of the constitutional right (*Ha'aretz v. Israel Electric Corp.* [10], at p. 296). Freedom of the press also applies to aggressive journalism, but this does not mean that the freedom is unlimited; the restrictions are listed in *Citrin* [1]. The principle at the basis of freedom of the press is journalistic responsibility. A person's reputation is not to be left unprotected, and it is guarded by, *inter alia*, the protections established in the Prohibition of Defamation Law, 5725-1965; see also the Protection of Privacy Law, 5741-1981; regarding the approach to this matter taken by Jewish law, see M. Vigoda "Individual Privacy and Freedom of Expression" *Portion of the Week: Bamidbar* 208 (A. Hachohen & M. Vigoda, eds., 5772).

74. The realization of freedom of the press is conditioned on the free and continuous flow of information to the public. The relationship between a journalist and his sources is the "nerve center" of this process; the need for an effective information-gathering system justifies the protection of the sources

that provide information, subject to the restrictions established in *Citrin* [1]. The absence of proper protection creates a risk that the sources of such information will dry up. The scope of the journalist's privilege can of course impact on a journalist's ability to do his job. The privilege gives the journalist the freedom to obtain sources and to verify them, to be present at events and to investigate them, and to work toward finding the information. The reason underlying this protection is not the newspaper's or the journalist's own particular interest – it is the interest of the public in such protection (*ibid.* [1], at para. 14?, at pp. 358-359). The protection of the sources of information is thus closely intertwined with the freedom of the press.

The reasons supporting the protection of the information

75. The privilege established in *Citrin* [1] was interpreted as applying whenever a journalist is asked to give a direct answer regarding the identity of his sources, but it does not release the journalist from his obligations to respond to other questions, through which the privilege can be circumvented. Thus, when information that was developed in the context of the relationship between the source and the journalist is not protected, the obligation to deliver such material to the police, in the framework of an investigation, can – in certain situations – lead to the disclosure of the source's identity. The protection provided by the privilege with respect to the identification of sources can be reduced, for example, through the seizure of items or documents that have the potential to lead to the disclosure of a source's identity – items such as a telephone book, appointments diary, or personal computer. The same holds true with respect to a printout of a journalist's telephone calls (see MP (Jerusalem) 2014/03 *Kra v. State of Israel* [35] , *per* President A. Cohen, at para. 9; and see M. Negbi, *The Journalist's Freedom and Freedom of the Press in Israel* (2011) (Hebrew), at pp. 150-151). The argument is thus made that in order to protect a journalist's sources, it is necessary to have the privilege apply to information that leads to the identification of those sources. As an ethical matter, I will not discuss the case of *Kra* [35] itself because I was the Attorney General who decided to investigate that leak of information regarding the questioning of Prime Minister Sharon, even though no particular person was suspected at the time of being responsible for the leak; the investigation was ordered because of a suspicion that sensitive details of the judicial inquiry had been leaked by a source within the investigative authorities or within the prosecution. Regarding the investigation of leaks, see also HCJ 1736/10 *Lieberman v.*

Director of the Internal Police Investigations Department [12] my opinion, at para. 25, and *per* Justice Hayut); see also HCJ 2759/12 *Weiner v. State Comptroller* [13], my opinion, at para. 3.

76. There may be reasons for the privilege beyond protection of the sources of information. An example would be a demand addressed to a journalist that he hand over material that he surveyed at an event at which he was present (see, for example, HCJ 172/88 *Time, Inc. v. Minister of Defense* [14], at p. 141); there, this Court held (*per* Justice Barak), that "freedom of expression and freedom of the press do not protect journalists' information against its use as investigative material by the competent investigative authorities, when there is a reasonable basis for the assumption that the journalists' information contains information that could provide significant assistance in disclosing disturbing facts"). Of course, cases like this have various possible implications. First, the absence of protection for such information can limit the willingness of the sources of information to invite journalists to such events; this situation can also lead those participating in such events to use various means to prevent journalists from being present at these events and reporting on them. Thus, in the absence of a privilege, a journalist may refrain from participating in such events – either because he may be asked (as part of a police investigation) to hand over the content of his journalistic output or deliver a photograph that he took – or because he could be required to testify in court (see Maoz Committee Report, solo opinion of Mr. Moshe Ronen, at pp. 46-50).

77. Another possible situation in which a *privilege for sources* is insufficient is when the matter being investigated is the exposure of corruption. Occasionally, the "minor partner" in a corruption scheme will be willing to provide details regarding the corruption, on condition that his identity is not disclosed, since the disclosure of his participation can very well incriminate him. The journalist, for his part, wants information on the "senior partner" in the corruption scheme. Nevertheless, the journalist must still examine the part played by the source (the minor partner) in order to understand the overall picture and to assess the reliability of that source – even though this is not the main point of the information that the source has provided. In order to obtain the information, the journalist must give assurances that these minor details which could incriminate the source will not be provided to the authorities (see also, Maoz Committee Report, sole opinion of Mr. Moshe Ronen, at pp. 46-50). The question is – what approach should be taken in such a situation?

The difficulties presented when a privilege for information is recognized

78. Of course, the recognition of a full privilege for information involves substantial disadvantages as well. First, the rules of evidence are directed at serving the purpose of uncovering the truth, and the recognition of a privilege is an exception to that rule (LCA 6546/94 *Bank Igud Le'Israel Ltd. v. Azulai* [15], at p. 61; LCA 637/00 *Israel Discount Bank Ltd. v. Evrat Insurance Agency* [16], at p., 664; LCA 2235/04 *Israel Discount Bank Ltd. v. Shiri* [17] *per* Justice Procaccia, at para. 10; CrimApp 4857/05 *Fahima v. State of Israel* [18] *per* Justice Procaccia, at para. 5). The principle of uncovering the truth presumes that justice will best be accomplished through a comprehensive presentation of the evidence. Only in special and exceptional circumstances should recognition of a privilege be considered, in principle, when the privilege promotes values that are of greater weight than the harm done to the principle of disclosure. (See LCA 1412/94 *Hadassah Medical Federation Ein Kerem v. Gilad* [19] , 522 and the references cited there; Shoshanna Netanyahu "Developments Regarding the Issue of Professional Privileges", *Zusman Volume* 297, 298 (1984); see Emily Ann Berman, "In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals", 80 N.Y.U.L. REV. 241, 255-256: "Most evidentiary rules are created to improve the accuracy of fact-finding. The common understanding is that justice is best served when all relevant evidence is placed before the fact-finder in any particular case. Privileges, on the other hand, have the opposite effect. They reduce the amount of relevant evidence that may be placed before the fact-finder in light of policy considerations that outweigh the interest in optimal fact-finding. Because evidentiary privileges have the effect of potentially leading to less-than-perfect results, they generally are disfavored and construed narrowly. The utilitarian theory of privilege posits that privileges should be recognized in circumstances where such recognition will advance policies that outweigh the resulting risk of injustice.") The protection of a journalist's sources and informations restricts the ability to carry out a thorough investigation, and the recognition of such protection is an exception to the rule that a witness is generally obligated to testify. The journalist's privilege can therefore constitute an impairment of the processes of law and order and of judicial proceedings, in which the public has a strong interest. President Shamgar noted this point in *Citrin* [1], when he wrote that "the right to have a person's testimony be heard, as stated, does not belong only to the litigant – but to the entire public; the propriety of the actions carried out by the entire social system is dependent on, *inter alia*, the existence of legal proceedings

that carry out and achieve their purposes. And if testifying is an essential part of the proceedings without which the proceedings cannot be established or conducted properly, then such testimony should be seen as something in which the public has an interest, that goes beyond the narrow interest of the litigants" (*Citrin* [1], at p. 358).

79. Second, a privilege that protects information can open the door to improper abuse of the use of information by the source or by the journalist, and the selective and tendentious flow of that information. Thus, for example, a source could invite a journalist to an event such as a demonstration, and demand a tendentious form of disclosure for pictures that were taken at the demonstration – such that reality is distorted and the reliability of the information as well as its objectivity is affected. Third, at a fundamental level, as distinguished from the relationships underlying the attorney-client privilege (s. 48 of the Evidence Ordinance), the doctor-patient privilege (s. 49), or the psychologist-patient privilege (s. 50), the main purpose of the relationship between the journalist and his sources – a relationship for which the privilege is sought – is the publication of information, and not its concealment. Fourth, as distinguished from the examples of above-mentioned professionals, the Journalism Ordinance does not define who is a journalist and what the conditions are for entry into the profession. The absence of obstacles to entry and the absence of express statutory supervision (as distinguished from the profession's own Rules of Ethics) create a difficulty with respect to recognition of a privilege. Fifth, a privilege will be recognized, as stated, when the public interest in concealing the information is greater than the interest in its disclosure. Because the basis of the journalist's privilege is the encouragement of freedom of expression, the exchange of views and the exposure of the truth – the greater the scope of the privilege, the greater the harm to its main objective. The core of the journalist's privilege is the need to prevent the sources from being concerned about providing information to journalists. When the demand is for the disclosure of information that does not lead to the desired identification of the source, the public interest in its protection is lessened. The question of the identity and scope of the public interest is not easily answered, of course, but we must remember – this is a matter of balancing, and the same public that rightfully desires that the authorities take care not to sweep under the rug those matters that should be publicly known (it would appear that currently, the chance of such matters being concealed is less than it was in the past, because of increased transparency and virtual media) – is the same public that desires that criminals be prosecuted. In theory, these two interests do not

contradict each other, but as a practical matter, it is possible that they will, and the function of the court begins at that point.

The proper scope of the privilege

80. Until now, we have discussed the important reasons protecting journalists' information, on the one hand, and – on the other hand – for requiring its disclosure for the purpose of achieving justice when conducting investigative and legal proceedings. As stated, because the journalist's privilege, like all privileges, is an exception to the rule concerning the need to pursue and disclose the truth, its scope will change when the area in which it is being applied justifies the withdrawal of the principle supporting disclosure. We do not examine the importance of the relationship between a journalist and his sources with respect to its absolute value, but rather as a value to be balanced against the public's interest in the disclosure of the material. In order for a determination to be made that a certain evidentiary component, which is a product of this relationship, is worthy of protection, it is necessary that its unique value – as a product of the weighing of various public interests – supersedes the need for its disclosure.

If, as the courts have sometimes understood the *Citrin* rule to mean, the journalist's privilege is limited to situations in which a journalist is asked a direct question about his source, the effect may be that the original purpose for the establishment of the privilege will be frustrated. It appears that the privilege should apply when the disclosure of the information can lead to the disclosure of a source's identity. It is hard to find a real reason for making a distinction between information that was received directly from a source and pictures that were photographed as a consequence of the photographer having been invited by the source – photographs which can potentially identify the source. The journalist's privilege should apply to both kinds of information. From a common sense perspective as well, the basis for the protection in which the public has an interest is the relationship between the source and the journalist; its basis is not a closed list of situations, such as those in which direct questions are asked of a journalist during an investigation; this principle would still be subject to the *Citrin* rules relating to the removal of the privilege.

81. This is the situation with respect to information that may lead to the identification of the source. Nevertheless, I do not believe that the journalist's privilege should be expanded to reach all information held by a journalist, as was suggested in the Maoz Committee's proposal. Prior to the decision in *Citrin* [1] and afterward, a number of attempts were made to regulate the

journalist's privilege – none of which were enacted as law. Additional issues concerning the privilege – other than its scope – are also the subject of dispute, such as the question of whether it should be a qualified or an absolute privilege, and the definitional matter of which individuals will be considered to be journalists (*Maoz Committee* Report, at p. 24). The question of the scope of the privilege is one with potentially far-reaching consequences, and its expansion through judicial legislation beyond what is required under the circumstances of a particular case is not a desired result (compare Aharon Barak "Judicial Legislation", 13 *Mishpatim* 25 (1983) at p. 47; *State of Israel v. Shemesh* [4], *per* Justice Danziger, at para. 3, and the references cited there). In light of the consequences of the journalist's privilege, its scope and its other significant aspects, should be developed one step at a time, in accordance with the concrete needs presented by the ruling (see *ibid.* [4], *per* President Beinisch, at para. 9); CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* [20] , at p. 540; CA 2967/95 *Magen veKeshet Ltd. v. Tempo Beer Industries Ltd.* [21] , at p. 322). I believe that for our purposes, the application of the journalist's privilege to information that is likely to lead to the identification of a source is the proper development of the *Citrin* rule, but it should not be applied as an expansion that reaches all information, as appears to be suggested by the judgments in *Hachsharat Hayishuv* [31] and *Channel 10 News* [33]. The late Professor Ze'ev Segal wrote of the need for legislation "that expressly recognizes a broad or almost absolute journalist's privilege, that protects the identification of a journalist's sources and the disclosure of details that contain such information" (in *The Public's Right to Know: Freedom of Information* (2000), at p. 196). In my view, his remarks go further than is necessary, and what should be privileged, as stated, are the details that include the information *that is likely to expose the source*. After I wrote this remark, I was made aware of the comprehensive doctoral dissertation written by Yisgav Nakdimon, *Blocking Expression in Order to Enable Expression – A Proposal for the Design of the Outline of the Scope and Degree of the Understanding of a Journalist's Privilege in the Constitutional Age* (2012) (Hebrew), and see pp. 152-158, regarding his support for the protection of a source's identity, whether or not the source has asked for an assurance that his identity will not be disclosed, unless it was clarified that the source's identity as the source might be disclosed (see also his introduction at p. 1X). The author does propose a privilege for information itself, under certain conditions (at pp. 160-165).

Consequences of a privilege for information

82. The above completes the discussion of the scope of the privilege. But we cannot ignore the issue of its consequences. A privilege for information that leads to the identification of the source is the equivalent, for better and for worse, of a privilege for information, including all the advantages and disadvantages of such a privilege. I will briefly discuss the primary consequences of such a privilege.

Burden of proof

As was explained above, there is a concern that a privilege for information will be exploited in a cynical manner. However, in any event, an assertion of a privilege requires proof, the burden of which is imposed on the party asserting the privilege (*Sharon v. State of Israel* [3], at p. 524; CA 6926/93 *Israel Shipyards Ltd. v. Israel Electric Corp.* [22], at p. 797; HCJ 337/66 *Estate of Kalman Fital v. Holon Municipality Assessment Commission* [23], at p., 71; see also Kedmi, *On Evidence*, Part 3, at p. 1014). When there is a dispute regarding whether a document is subject to the privilege, it is clear, as noted above, that the court must review the material for the purpose of deciding whether the assertion of the privilege is warranted (LCA 2498/07 *Mekorot Water Company Ltd. v. Bar* [24], at para. 10). When the assertion of a privilege relates to information which could lead to the identification of a source, the party asserting the privilege bears the burden of persuasion. In this way, the concern regarding an ungrounded assertion of privilege can be mitigated.

Search warrant

83. As stated, it appears that a source can be identified even without asking the journalist any direct questions regarding the source's identity. For example, using a warrant for the search of the home of a journalist, it would be possible to seize his date-book or address book, and thus discover the identity of the source. How should we treat an assertion of privilege by a journalist in the course of such a search? If the seizure of the information regarding which the privilege is asserted is allowed without any judicial review, the privilege may be emptied of all content. This is distinguishable from a situation involving an order pursuant to s. 43 of the Criminal Procedure Ordinance – when the police conduct a search, the privilege is asserted only after the warrant is issued, and because of the nature of the proceedings, the asserted privilege is not discussed prior to the issuance of the warrant. In this situation, the privilege claim must be examined before any use is made of the information (compare Y. Kedmi, *On Evidence*, at p. 1010). Similarly, s. 51b(a) of the Maoz Committee's proposed legislation,

provided that "if a person refuses [. . .] to hand over information to the party that is authorized to investigate in accordance with the provisions of any relevant law – the court may issue an order to hand over documents [. . .]. And in sub-section (b): "No search of a person's home or place of work may be searched [. . .] for the purpose of disclosing information except with a court order, and unless the conditions stated in s. 51a(b) are satisfied."

The criminal proceeding stage

84. The *Citrin* [1] decision dealt with a privilege asserted in order to prevent journalists from being forced to testify during a legal proceeding before the Israel Bar Association's disciplinary court. However, this does not limit the application of a privilege only to situations in which it is asserted in proceedings before a court (or tribunal). A privilege is a concrete exemption – with respect to this matter – from the duty to deliver information, either in the framework of an investigation conducted by a competent authority, or in proceedings before a court, tribunal, or any entity or agency that is authorized to hear testimony (see *supra*, Kedmi, at p. 1007). Section 52 of the Evidence Ordinance provides that the provisions of Chapter C of the Ordinance (which deals with privileged testimony) will apply both to testimony in a court or tribunal and to testimony before an agency, entity or person who is authorized to gather testimony. This provision also applies with respect to the journalist's privilege concerning the disclosure of sources (see Kedmi, at p. 1015; compare to *Sharon v. State of Israel* [3], at p. 14). The privilege therefore also applies to the police investigation stage, and is not limited to the trial stage, and it is of course subject to the relevant restrictions.

The nature of the blocked information.

85. Because we have determined that journalists' information should be somewhat privileged in order to prevent the exposure of the sources, we must also determine the nature of this information that is entitled to the protection. Not all information that leads to the exposure of a source is necessarily entitled to protection. For example, there may be a situation in which a journalist is invited by a particular source to a particular event, but the occurrence of the event is known to all, and many other journalists also arrive at the event. The journalist will take various photographs of the event, including pictures of the source. Can the one journalist – the one who was apparently invited by the source – enjoy protection that is not made available to any other journalist? It would seem that this is an issue of which the drafters of the various legislative proposals from 2006 through 2011 were aware, and their proposals therefore stipulated that the protection would

apply only to information provided by the source, and which "by its nature was provided in the belief that confidentiality would be maintained." This language indicates a need for an objective review of the nature of the information. As noted, the proposal offered by the majority of the Maoz Committee was that information ("items and documents") will enjoy protection if given to a journalist "on the condition that they would not be disclosed". This language also suggests that the nature of the information should also be examined objectively; it reflects the Committee's intention to provide very comprehensive protection for the relationship between the journalist and his sources. Such protection, as has been discussed above, is broader than the scope of the proposed journalist's privilege – which is for information that leads to the identification of the source. Of course, the source's demand for protection means that it is the source who has the right to assert the privilege; when the source has no interest in the protection, there is no reason for the protection to apply. It would appear that a determination of the nature of the protected information in accordance with an objective foundation will reduce the concern regarding the selective disclosure of the information. Furthermore, the undesirable situation in which the source controls the privilege may do a disservice to the rationale for the existence of that privilege. The privilege protects the source, because of the public interest in that protection. I therefore believe that an assertion of the privilege should be conditioned on the information regarding which the privilege is claimed being of the kind which, by its nature, was provided under the belief that it would be kept secret. For a broader view of the matter, see Nakdimon, *Blocking Expression*, at pp. 156-157.

Discussion of the district court's holdings in this matter

86. If my view – that protection should be extended to *information that leads to the identification of the source, which, by its nature was provided in the belief that it will be kept secret* – is accepted, an acceptance that would place Israel at least in a "good place, in the center," in comparison with other countries – the district court's holding, according to which a contractual relationship between a journalist and a source is itself justification for the application of the privilege (a view which is supported by the Press Council's position), cannot stand in full. This argument regarding the scope of the privilege is based on the assumption that the existence of a promise establishes a journalist's privilege; and this would mean, *inter alia*, that the privilege can also apply to information that does not lead to the identification of the source. This should not be allowed, except in situations in which the

court is persuaded that a promise was given as a precautionary measure vis-à-vis the source, to ensure that he will not be exposed, but in such a situation the privilege will apply in any event. As a rule, the privilege is recognized on the assumption that the harm done to the objective of uncovering the truth is allowed for the sake of a clear interest – an interest which should be preferred to that objective. When the privilege protects the source from identification, such an interest does support the privilege, and we can clearly point to the party enjoying the protection; but when the privilege protects a relationship that is contractual in nature only because it is a contractual relationship, the ground for allowing the privilege is diminished. First, it is diminished because it is not clear to all what is the subject of the protection – this will only be clear to those who are parties to the agreement. Second, if the only reason for the protection is a promise, the result will be that the parties' wishes are preferred over the public interest in discovering the truth. The desirability of such a preference is not obvious; it is, in my view, a position that is different than the position that I took in *State of Israel v. Shemesh* [4] (at para. 14), where I wrote that a promise made by a governmental entity must be honored; but this is not the situation in our case. Moreover, the emphasis given to the contractual issue can open the door to manipulation (even after the fact), which is not a desirable situation. Thus, the issue of whether or not a promise has been made will be considered as one of the relevant factors, but it will not have determinative weight.

87. Another issue is the district court's holding that the journalist is subject to an obligation, by virtue of the journalists' Rules of Ethics, including Rule 22, which states that the privilege also applies to information provided to a journalist "on condition that it remains confidential". With regard to this point, I find that the Rules of Ethics constitute criteria that can be considered in order to examine the reasonableness of a journalists' behavior, but they themselves do not bind the court (CA 5653/98 *Peles v. Halutz* [25],, at pp. 896-897 and the references cited there). Furthermore, the Rules of Ethics need to be viewed in their entirety, and the question that needs to be asked is whether they are being observed in their entirety – including all that is imposed on the journalist, with respect to the matter of responsibility.

88. Regarding the distinction that the district court made between a public event and one that is not public – I do not believe that this binary rule is essential for the purpose of determining the application of the privilege. I believe that it can be useful for the court when it examines the relationship between the journalist and the source. The more public the event, the less the

reason for the privilege to apply. This is expressed in the examination of the nature of the information in this type of case – which is in any event open to the public, and as a rule, it will not have been provided in the belief that it would be kept confidential.

89. Regarding the concern that journalists will not be invited to certain events and that they will thus be harmed – I have not found that this is a concern that can justify a change in the scope of the privilege. It appears that this is a general and theoretical concern, and it has not been proven that the problem will, in reality, actually arise.

90. Finally, the above discussion should be understood as establishing a set of flexible tools, to be used while examining each event in light of its own circumstances and with common sense, as a constant source of good counsel.

Conclusion

91. The conclusions described above concerning the scope of the privilege relate, on the one hand, to the rationales for its existence, and, on the other hand, to the circumstances of each particular case. The question of the proper scope of a privilege for information arises in our case in the narrow context of information that leads to the identification of the source, and in that context, the conclusions reached are those which lean in favor of applying the privilege to any information that is likely to expose the identity of sources. Some of the parties' arguments (and those of the Press Council as an *amicus curiae*) went beyond the issue presented in the current case and argued either for or against the holdings of various judicial decisions rendered in district courts – such as the decision in *Hachsarat Hayishuv* [31]; some of the conclusions reached by the district court in this case did so as well. The current proceeding is not an appeal of the decisions rendered in *Hachsharat Hayishuv* [31], *Channel 10 News* [33], or *Glatt-Berkowitz* [34]. However, I do believe that questions regarding the scope of the journalist's privilege require an orderly, comprehensive and careful examination by the legislature. It is fitting that the process that began with the Maoz Committee and continued with the various legislative proposals that were made should eventually develop into concrete legislation, in which the legislature can state its position regarding all the consequences of this type of privilege. It goes without saying that our discussion does not relate to additional issues, which were deliberated by, *inter alia*, the Maoz Committee and which have not yet been resolved – such as the definition of the term "journalist" and the question of whether such a definition is needed; the relationship between the privilege and s. 117 of the Penal Code, 5737-1977 relating to the disclosure

of information by a public servant – which is not a simple issue; the difficulty presented by the difference between the scope of the journalist's privilege as defined by case law and the scope of that privilege in the Journalists' Rules of Ethics, and various other issues. In the absence of an orderly legislative process, it may be that the courts will have no choice but to deal with issues that may arise in the future regarding the scope of the privilege – but which did not arise in full form in the instant case.

Removal of the privilege under the circumstances

92. Regarding the application of the privilege under the circumstances of the instant case: after the district court viewed the pictures and heard the parties' arguments, it found that their delivery to the police could lead to the identification of the source. The court noted that "after the hearing on 22 December 2011, I decided to review the material in the sealed envelope. I did this because I believe that when a journalist's privilege is asserted in court in the context of a petition pursuant to s. 43 of the Criminal Procedure Ordinance, it is the role of the court to conduct an examination for the purpose of determining *whether the material is indeed such as can lead to the exposure of the sources of information.* This is also the case, *a fortiori*, when there is a factual dispute regarding the content of the material regarding which the privilege is being asserted" (para. 7 of the decision dated 3 January 2012; emphases added – E.R.). Later on in the decision, it is noted that "the disc contains, *inter alia*, photographs which do not appear to be relevant to the subject of P/1, comprising a different series of photographs (photographs nos. 001-041 on the disc), which appear to document an event that may have involved a serious crime, and it appears that this event did not take place close to the army base, near it or in the presence of military personnel. It was also noted that *a number of individuals appear at that event, some of whom can be identified*" (para. 8; emphases added). The court did not find that the source appears in the photographs, but it did assume that the delivery of the photographs could lead to the identification of the source: "The question is, whether the short period of time that has passed between the events in which the offenses were committed and the time at which the request for the seizure of the photographs was submitted – before an exhaustive investigation, the purpose of which would have been to identify the participants at the event, could have been carried out – justified the appeal for the order to seize of the photographs, so that they could be used for the purpose of identification of the participants, *on the assumption that their identities appear in the photographs"* (at para. 11; emphases added). Further – "beyond this, I do not accept the determination that the creation or the obtaining of the

information with which we are dealing did not require any cooperation whatsoever with the source. The photographer repeated that her sources invited her to the events that she photographed and that the pictures can identify the sources. Furthermore, I believe that the 'chilling effect' relating to the harm done to the trust between the journalist and his sources will also apply in situations in which a journalist is invited to document events that occur in a public area, if the journalist would not have arrived at the event but for the invitation" (para. 16). This presumption reappears throughout the decision: "Indeed, as I noted, some of the pictures appear to document a different event that was commemorated by the photographer, which could, in part, be interpreted as being an event of a criminal nature. It may be that the investigative authorities, with the tools that are available to them, could have reached some of those who participated in the event by making use of the photographs" (para. 24). In light of this assumption, the court concluded that the attorney's privilege did apply to this case (para. 20), and it therefore turned to the tests required by the *Citrin* rule in order to determine whether the privilege should be removed. The court also found that petitioner 2 was the *only* party to have documented the events, and thus that the information had been given to her in the belief that it would be kept confidential.

93. I believe that under these circumstances there is a journalist's privilege that applies to the photographs, *to the extent that their disclosure could lead to the exposure of the source's identity*. I am aware of the difficulty arising from the court's assumption that the photographs could lead to the identification of the source, without establishing it as a factual finding. This is a difficulty that is inherent in the framework of a recognition of a privilege for information (even if it covers "only" information that leads to the identification of the source), in the context of which the party benefiting from the privilege – meaning the journalist – can make a false claim regarding the danger that the source will be identified, even in situations in which there is no such danger. This difficulty does not arise when a "narrow" privilege has been applied (such as the privilege that is understood to have been established in *Citrin* [1]) – a privilege that applies when the beneficiary is asked to disclose the identity of the source. While it is clear that in such a situation the disclosure of the source's identifying details will necessarily lead to his identification, this is not clear in the situation presented in the instant case, and this is what creates the possibility that false claims will be raised. The district court was also aware of the difficulty, noting that "we cannot ignore the concern that a journalist who has photographed an event

that took place in a public space, and which could have significance as establishing the occurrence of a criminal act – will falsely argue that he was invited to the event by a source who conditioned the invitation on the journalist's promise to maintain confidentiality. It is therefore proper that in such cases, during its hearing about the request, the court should question the journalist who objects to being ordered to disclose information, and receive an impression of whether he is telling the truth." I accept these remarks in full, and I will therefore now move on to the issue of whether the privilege should be removed in this case.

94. The state argues that the district court erred when it distinguished between the two series of photographs and held that only some of them conform to what was requested in the order. According to the state, the court should not have limited the scope of the order to the "narrow form" of matters relating to the Deputy Regional Commander's statement, since the investigation related to all the events that occurred within the brigade's sector on the dates specified in the request. Alternatively, the state argues that the court should have accepted the supplementary pleading, in which the scope of the investigation was clarified.

95. As may be recalled, the state, in its request for the order, asked for the raw material, including the videos and still photographs "which document the events from 12 December 2011 to 13 December 2011, close to the Ephraim District Brigade Headquarters base". Based on the relevancy test, which is carried out in the context of the three-part *Citrin* rule, the court, as stated, distinguished between the two series of photographs: those that conform to what was stated in the Deputy Regional Commander's statement (P/1), and those that do not. Note that the photographs in the second series document an event with a seemingly criminal character, but the event does not appear to have occurred adjacent to the army base. The nature of this other event is not clarified; however it was held that these pictures were less relevant for the purpose of the investigation and the privilege relating to them should not be removed. I note that I have viewed the pictures, and I believe that an exact "reading" of them, without knowing the entirety of the circumstances, would be difficult.

The tests for removing the privilege

96. The tests for removing the privilege were established by this Court in *Citrin* [1]. I will begin with an examination of the *relevancy* test. I believe that the fact that, as stated, the events are described in general language in the request does not indicate that there is no relevance to the investigation.

Instead what is indicated is that the order was not sufficiently specific. There may be several reasons for this. One possible reason is that the investigative authority could not, with any measure of exactness, point to material that it had not yet seen. The Court wrote the following regarding this matter, in *Sharon v. State of Israel* [3]:

> 'Occasionally, the prosecution has only general knowledge about which documents it requires for the purpose of the investigation, and cannot identify or describe each of them in advance. There may be instances in which it will be interested, for the purpose of the investigation, in a certain type of document relating to a certain matter, without knowing any additional details [. . .] In such circumstances, it should not be required, in a request for an order pursuant to s. 43, to indicate specific documents, as the appellant's attorney wishes.
>
> In summation, the degree to which the documents that are to be presented or delivered in accordance with a s. 43 order need to be identified or specified is a matter which is left to the discretion of the court that issues the order. The court must make that decision in accordance with the circumstances. Of course, the order must be clear, so that the party being required to provide the item can know what is being asked of it. Nevertheless, it is not essential that the requested documents be identified and described in detail' (*ibid.* [3], at para. 14, pp. 21-22).

97. An additional reason that a request for an order may lack specificity – and it appears that this is the reason in this case – is that the investigation has not yet advanced far enough at the time the order is requested. The request for an order was submitted less than 24 hours after the events took place. In the two lower courts, the state argued that since the police knew of the existence of the pictures, they saw no reason to wait. This does not reduce the level of the relevancy of the photographs for the investigation. It should be recalled that once the order was issued, all the photographs were delivered to the court's safe, and the respondents did not argue that there was a distinction to be made between the two series of photographs. To the extent that the court believed that the other incident does not fall within the matters described in the Deputy Brigade Commander's statement, but does fall within the definition of the said events that occurred at the Ephraim District Brigade Headquarters, it is difficult to find, unequivocally, that the pictures do not satisfy the relevancy test. There was a single general set of events,

during the course of which the pictures were taken – the pictures that were all sent together to the court without any claim being made that only some of them relate to the events in the Ephraim District Brigade Headquarters base. All that was claimed was that they were subject to the privilege. I therefore believe that the requested information was apparently *relevant* to the investigation, and the first test of the *Citrin* rule has thus been satisfied. Additionally, regarding the second test – *the substantial nature of the material* – there is no dispute that this is a *substantial* matter. Nevertheless, I do not find that the third test, which requires that the authorities show that there is *no alternative way to obtain the evidence*, has been met – as I have explained above. Thus, to the extent that the state is interested in the requested material, it must submit a s. 43 request to the court in which the investigative steps that have been taken to obtain the evidence are specified. The court will then act in accordance with what has been stated in this judgment.

Conclusion

98. If my view is accepted, we will hold that the journalist's privilege preventing the exposure of a source's identity, as established in *Citrin* [1], will also apply to information that is likely to identify the source, subject to the tests established in *Citrin* [1] for the removal of that privilege.

99. Under the circumstances of this case, the request for the removal of the privilege qualifies under the tests for relevancy and substantiality. The state can address the magistrate's court regarding the issue of the effort being made to obtain the evidence in some other way, the third test established in *Citrin* [1]. I propose to my colleagues that they grant the appeal in part, in accordance with what I have stated.

Justice I. Amit

I concur with the judgment of my colleague, Justice Rubinstein, and I will add some brief remarks.

The acknowledgement of an evidentiary privilege signifies the recognition of an interest which is so valued by the legal system that the important and central value of the pursuit of the truth will be superseded by it. Thus, for example, we seek to protect the relationship of trust between a doctor and a patient, between a psychologist and a patient or between a social worker and a patient – in order to encourage the patient to utilize the services of these professions. Yet the interest in encouraging this is limited, and so the privilege that covers these relationships is a qualified one (ss. 49, 50 and 50a

of the Evidence Ordinance [New Version] 5731-1971 (hereinafter, "the Evidence Ordinance")). The trust relationships between a client and an attorney and between a penitent and a priest are given greater protection in the form of an absolute privilege, because of the strength of the interest in protecting the trust involved in these relationships (ss. 48 and 51 of the Evidence Ordinance).

Even before the decision in *Citrin* [1], jurists had expressed the view that the trust relationship between a journalist and his source should be recognized, and that this trust relationship should be encouraged and protected (Eliahu Harnon, "Protection of Trust Relationships: Should a Journalist's Privilege be Recognized?", 3 *Iyunei Mishpat* 542, 552 (1974); Shmuel Hershkowitz "A Journalist's Privilege Regarding the Disclosure of the Sources of his Information", 1 *Mehkarei Mishpat* 251 (1980); Yehoshua Rottenstreich, "Open Source or a Closed-Up Spring? The Issue of a Journalist's Obligation to Disclose the Sources of His Information", 8 *Iyunei Mishpat* 245 (1981)). In *Citrin* [1], this court gave a stamp of judicial approval to the journalist-source privilege, and as a judicially-created privilege, it is undisputed that it is a qualified privilege rather than an absolute one, as was expressly held in *Citrin* [1]. This means that the privilege may be withdrawn in the face of an important public interest such as an investigation directed at discovering the identities of those who have committed a serious crime (compare *Time, Inc. v. Minister of Defense* [14]).

2. The decision in *Citrin* [1] applied the privilege with respect to the identity of the source. I agree with my colleague Justice Rubenstein that the time has come to expand the rule of that case, so that the privilege will also apply to the content of a journalist's information, if the disclosure of the content is likely to lead to the identification of the source. The question presented to us by the parties is whether we should go one step further and expand the privilege so that it also covers the content of journalists' information, regardless of whether or not it will lead to the identification of the source.

As we deliberate this question, we must keep in mind a number of rules that have developed in the case law regarding the privileges. These can be summarized in a few sentences, as follows:

(-) A privilege is an exception to the rule, and the rule is disclosure.

(-) Privileges are to be approached cautiously.

(-) The scope of a privilege should be construed narrowly.

(-) The burden of proof regarding the existence of a privilege is borne by the party asserting the privilege.

(For a discussion of these rules, see, for example, HCJ 844/06 *University of Haifa v. Oz* [26] ; LCA 8943/06 *Yochanan v. Cellcom Israel Ltd.* [27] , at paras. 18-19).

Against the background of these rules of thumb, we find that the case law has refused to create privileges that are based on a contractual undertaking given to a source of information regarding confidentiality, even though this may cause harm to the informant and despite the concern of a, possible "chilling effect". (See, for example, the *Oz* decision – in that case, a voluntary investigative commission created by the university had given an undertaking of confidentiality.) This rule intensifies the question of whether a journalist is more important than other bodies, such that a private-contractual undertaking given by a journalist to an informant – either expressly or implicitly – will have the power to create a privilege that extends to the content of the information as well.

3. It appears that a privilege for information – as distinct from a privilege for sources of information – was not the focus of the Maoz Committee's deliberations. The majority opinion, which proposed that the privilege should apply to information given to a journalist in the belief that it would not be disclosed, put the primary emphasis on the concern that the disclosure of the information would lead to the identification of the sources of the information (see pp. 15 and 24 of the report). The concern regarding the exposure of the information itself that was given to the journalist on a not-for-publication basis is mentioned by the majority opinion only once (at p. 26). Nevertheless, I note that Committee member Moshe Ronen placed the issue of a privilege for information itself at the center of his opinion (*ibid*., at p. 46).

My colleague Justice Rubinstein surveyed the law of other countries and demonstrated that despite the fact that the press is perceived to be one of the most important tools for expression and for the exercise of the freedom of expression, many established democracies have chosen not to expand the application of the privilege to journalists' *information*, when such information is not likely to lead to the exposure of the source.

It may be argued that the delivery of information to a journalist while asking that it not be publicized does not serve the public's interest in the publication of information concerning a matter of public interest. Usually, information is given to journalist for the purpose of it being published, and the use of the journalist's privilege as a tool for blocking information or for

the purpose of creating a selective flow of information would appear to be in conflict with the objective of the journalist's privilege. On the other hand, some types of information are given to a journalist on a not-for-publication basis, but are nevertheless essential to the journalist's work – and if the journalist loses the ability to obtain information which is "not for quotation or for attribution", the basis of his ability to gather information in general is also lost. From this perspective, despite the fact that the protected information itself is not published, it contributes to the publication of other information, and it thus furthers the purpose of freedom of expression and of the press, and the right of the public to know (see Nakdimon, *Blocking Expression*, at pp. 156-157).

Like my colleague Justice Rubinstein, I also believe that we do not need to make a final determination in this case with respect to the question of the scope of the journalist's privilege, and we will leave that task for others, who will make that determination on the basis of concrete issues that may arise in the future (paras. 81 and 91 of my colleague's opinion). I doubt that we need to recognize, in advance, a privilege for information given to a journalist in light of a trust relationship. In any event, the law recognizes the need to protect substantial interests, even if these do not benefit from the label of a "privilege". A clear example of this is the right to privacy, which is not protected as a privilege, but which is anyway recognized as a powerful interest. It is common practice for a court to balance the right to privacy against the interest in uncovering the truth, in both civil and criminal proceedings (such as the issue of exposing the personal diary of a complainant in a sex crime case). The court balances these interests on an *ad-hoc* basis, in accordance with the circumstances of the case before it, and this is what should be done with respect to the privilege for journalists' information as well.

Having mentioned the interest in privacy, I will further clarify that it may be that the journalist's information privilege is not asserted for the sake of the privilege of the information itself, but because the journalist is concerned that the source's privacy will be harmed, and in such a case, the court will examine the question while balancing the interests as discussed above.

4. Before I conclude, I note that we find that various considerations are presented in connection with the question of a privilege for journalists' information obtained and received during the course of a mass public event – and these considerations pull in opposite directions.

A person who participates in a mass event such as a disturbance, a mob, a demonstration or a confrontation between police and soldiers and citizens, etc., has no reasonable expectation that information about an event that took place in the public arena will be privileged, nor is there any trust relationship with a journalist who arrives at the event to cover it. Moreover, it would appear that a party who invites a journalist to be present at a multi-participant event does so in order to have the journalist report on and publicize the event, and it can be argued that this could be understood to constitute a waiver of a privilege for information (compare CrimA 8947/07 *Honchian v. State of Israel* [28] , where my colleague, Justice Rubinstein, concluded that a party who has consented to a psychiatric examination has waived the psychiatrist-patient privilege). And with regard to waivers – the partial disclosure of information with the source's consent would appear to constitute a waiver of the right to assert a privilege regarding the entirety of the information. Thus, the risk that the recognition of a privilege will lead to a selective and tendentious flow of information – often accomplished through falsification or manipulation of the information – has been reduced. Indeed, even with regard to an absolute privilege such as the attorney-client privilege, it is possible to conclude that the client has waived the privilege. Thus, for example, when a client meets his attorney in the presence of a third party, who is not obligated to maintain confidentiality, the assumption is that the attorney-client privilege does not apply to the matters discussed (E. Harnon, *Law of Evidence*, Part II, (1977), at pp. 101-102; CA 44/61 *Rubinstein v. Nazareth Textile Industries Ltd.* [29] [29] , at p. 1602). In addition, in certain cases, when a client discloses some of what has been stated in the framework of the attorney-client relationship, he will not be allowed to assert an attorney-client privilege. Thus, the client has the choice whether to maintain the privilege or waive it, but he may not waive the privilege only partially. (For example, if a client submits a complaint or a claim against his attorney, this will be viewed as the client's waiver of the privilege – Limor Zer Gutman, "Ensuring Free Communication Between an Attorney and a Client Through the Attorney-Client Privilege and the Ethical Duty to Maintain Confidentiality – A Call for Reform", *Hapraklit – the David Weiner Volume* 79 (2009), at p. 111; BAA 5160/04 *Ashed v. Jerusalem Regional Committee of the Israel Bar Association* [30], at pp.234-237.) The claim that there has been a waiver of the privilege in light of the public disclosure of the information, or in light of a partial disclosure of the information, done with the source's consent – can be made even more strongly with respect to the journalist's privilege, which is a qualified privilege.

In contrast, there are those who argue that the delivery to law enforcement authorities of documentation of an event that took place in the public arena can transform the journalist who has documented the event into a "sub-contractor" who gathers material for the authorities, which can lead to a number of negative consequences: the journalist's credibility may be adversely affected and the boundaries between the authorities and the media will be blurred; access for journalists to various events will be blocked; and journalists may be subjected to violence and physical harm as well as their professional equipment, such as cameras, recording equipment, etc. (Nakdimon, *Blocking Expression*, at p. 164).

The Maoz Committee wavered between various considerations and noted, on the one hand, that a privilege should not be recognized for the coverage of a mass event. On the other hand, a journalist should not generally be required to provide information to law enforcement authorities.

> 'We should not confer a privilege for the activity of a journalist who is covering an open media event, such as a demonstration, disturbance, etc. Regarding these, the journalist is to be treated, in principle, like any other person. Nevertheless, because of the sensitivity of the issue, the intensive involvement of journalists in the coverage of such events, and the need to ensure that they are not transformed, against their will, into police informants [. . .] The Committee believes a demand addressed to a journalist that he expose material that he collected while doing his job as a journalist will only be justified in unique circumstances.'

It appears that a distinction should be made between a journalist who was invited to the scene of an event by one of his sources and a journalist who arrived at an event without relying on one of his sources. A helpful test would be to distinguish between a situation in which only a single journalist is present, and one in which a number of members of the press are in attendance. At the same time, we do not, at this stage, need to make a final determination regarding this matter, and these questions and distinctions can be left for further review.

Justice U. Vogelman

Undoubtedly, information provided to a journalist with the intention that it not be published, and which could disclose the identity of the source, is protected by the journalist's privilege discussed by President M. Shamgar in *Citrin* [1]. In my view, any other interpretation will render the principle of a

journalist's privilege, as outlined in *Citrin* [1], empty of substance. I therefore join in the determinations made in paragraphs 98 and 99 of my colleague Justice E. Rubinstein's opinion, and in his holding that the state may petition the magistrate court to remove the privilege in accordance with the tests established in *Citrin* [1]. This does not mean that I take a position – in either direction – regarding the scope of the journalist's privilege with respect to the handing over of information that will not necessarily lead to the exposure of the source of the journalist's information, and I wish to leave that question for further review.

Decided *per* the opinion of Justice E. Rubinstein.

15th of Kislev 5773
29 November 2012.