H.C.J 806/88

I. Universal City Studios Inc.

2. United International Pictures Ltd.

3. Golan Globus Cannon Israel (1983) Ltd.

v.

1. Films and Plays Censorship Board.

2. Minister of the Interior.

3. Yehoshua Justman.

In the Supreme Court Sitting as the High Court of Justice
[June 15, 1989]
The President (Justice M. Shamgar), A. Barak, J., S. Levin, J. E. Goldberg J. and Y. Maltz J.

Editor's Summary

The Films and Plays Censorship Board decided to prohibit the screening in Israel of the film "The Last Temptation of Christ", on the ground that it was calculated to offend the religious susceptibilities and beliefs of the Christian communities in Israel, and to cause injury to the State of Israel

The producers of the film and its distributors petitioned the High Court of Justice for an order *nisi* against the Board, which was granted. On allowing the petition and making the order *nisi* absolute, the High Court held as follows:

1. The point of departure for examining the legality of the Board's decision is the basic principle of freedom of expression, including freedom of artistic creativity, which is the central feature of freedom of human thought and the ability of the human being to attain self expression.

2. Freedom of expression is widely regarded as a right, enjoying supra-legal status, and at any rate constitutes one of the most fundamental features of a democratic society. It is very wide in extent and covers the right to express views which may be unpopular or unpleasant to certain audiences.

3. Restrictions on the freedom of expression must of necessity be applied as narrowly as possible in order to protect the freedom itself. Nevertheless, the freedom cannot be entirely unrestricted, but must yield, in exceptional cases, to competing values, interests and principles. This applies, however, only to extreme cases where it is clearly shown, for example, that there is a close certainty of imminent danger to public order or security in allowing unlimited freedom of expression.

4. In the present case, it was not sufficient to show that the literary and artistic expression as manifested in the film was liable to cause offence to some persons. In order to disqualify the film on the grounds put

forward by the Board, it must be shown that such expression was so extreme in its offensiveness against the Christian religion, that public viewing of the film must be prevented. In the present case, the intensity and extent of the offensiveness was not proved, so that the decision of the Board could not be upheld.

5. The fact that the film has been released for almost universal showing, including in most Christian countries, removes the basis from the argument that the screening of the film amounts to a serious offence to Christians. The "political" argument as to potential damage to the State of Israel in allowing the film to be shown has no foundation.

6. The High Court of Justice in this case was bound to intervene in the discretion of the Board in disallowing the showing of the film in order to uphold the principle of freedom of expression, since there was no basis for restricting that freedom.

Israel Supreme Court Cases cited:

[1] C.A. 723/74 *"Ha'aretz" Newspaper Publication Co. Ltd. v. Israel Electric Corporation Ltd.,* 31 (2) P.D. 281.

[2] H.C. 14/86 *Laor v. Films and Plays Censorship Board,* 41(1) PD 421.

[3] H.C. 146/59 *Cohen v. Minister of Interior,* 14 P.D. 284.

[4] H.C. 243/62 *Israel Film Studios Ltd. v. Gueri,* 16 P.D. 2407.

[5] F.H. 3/87 *Films and Plays Censorship Board v. Laor,* 41(2) P.D. 162.

[6] H.C. 351/72 *Keinan v. Films and Plays Censorship Board,* 26(2) P,D, 81.

[7] H.C. 399/85 *Kahana v. Executive Committee of Broadcasting Authority,* 41(3) P.D. 255.

[8] H.C. 73, 87/53 *"Kol Haam" Co. Ltd.; "AI Atiahad" Newspaper v. Minister of the Interior,* 7 P.D. 871.

[9] F. H. 9/77 *Israel Electric Corporation Ltd, v. "Ha'aretz"Newspaper Ltd.,* 32(3) P.D. 337.

[10] H.C. 243/81 *Yaki Yosha Co. Ltd. v. Films and Plays Censorship Board,* 35(3) P.D. 421.

[11] Election Appeals 2, 3/84 *Neimann v. Chairman of Central Elections Committee for the 11th Knesset; Avni v. the same* 39(2) P.D. 225.

[12] Cr. A. 255/68 *State of Israel v. Ben Moshe,* 22(2) P.D. 427.

[13] H.C. 372/84 *Klopfer-Naveh v. Minister of Education and Culture,* 38(2) P.D. 233.

[14] H.C. 153/83 *Levi v. Commander of Israel Police Southern District*, 38(2) P.D. 393.

[15] Cr. A. 677/83 *Borochov v. Yefet*, 39(3) P.D. 205.

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

[17] H.C. 448/85 *Dahar v. Minister of Interior*, 40(2) P.D. 701.

[18] H.C. 896/87 *Ayalon Insurance Co. Ltd. v. Broadcasting Authority*, 43(1) P.D. 701.

[19] Bar Association Appeal 13/86 *Hoter-Yishai v. Tel Aviv District Committee of the Israel Bar*, 41(4) P.D. 838.

[20] H.C. 807/78 *Ein Gal v. Films and Plays Censorship Board*, 33(1) PD 274.

[21] H.C. 680/88 *Shnitzer v. Chief Military Censor*, 42(4) P.D. 617.

[22] Cr. A. 126/62 *Disenchik v. Attorney General*, 17 P.D. 169.

[23] H.C. 549/75 *Noah Films Co. Ltd. v. Films Censorship Board*, 30(1) P.D. 757.

American Cases Cited:

[24] *Dennis v. United States* 341 U.S. 494 (1951).

[25] *New York Times v. Sullivan* 84 S.Ct. 710 (1964).

[26] *Joseph Burstyn Inc. v. Wilson* 343 U.S. 495 (1952).

[27] *Superior Films v. Dept. of Education* 346 U.S. 587 (1954).

Jewish Law Source Cited:

[A] *Ecclesiastes*, Ch. 8, v. 8.

Objection to order nisi dated 30.11.88. Petition allowed and order nisi made absolute.

D. Peri, S. Schretzer - for petitioners;

N. Arad, Head of High Court Cases Dept., State Attorney's Office, - for respondents

JUDGMENT

Shamgar P.:

1. This petition concerns the decision of the Films Censorship Board to ban the showing of the film "The Last Temptation of Christ".

2. That film was produced by the first petitioner. The second and third petitioners are the distributors of the film world-wide and in Israel respectively.

The film, which was shot in Morocco, is based on the book of the same name by the Greek author, Nikos Kazantzakis, and was staged by Martin Scorsese.

As to its content, the film describes the life of Jesus from the time of his sojourn in Jerusalem - including his baptism in the River Jordan, the adherence of his apostles, his miracles and the spreading of his doctrines - up to the time of his crucifixion. The film contains realistic overtones which give expression to the clear and obvious tendency of the author and the director to introduce human elements into the image of Jesus, despite the popular conception of his in the eyes of believers in the Christian faith. At the same time there is a dominant thread in the film which is purely Christian, the descriptions of the miracles affording an outstanding example of this. In other words, as in the book so in the film there are deviations from accepted Christian religious doctrine. But as against this the creators of the film could claim that the realism and the bases for the humanisation are included in most of the artistic and theatrical creations influenced by Christian doctrine, and even in those authorised and accepted by it. Nor is it superfluous to recall that this matter has been the subject of many theological and philosophical arguments and has been the cause of theoretical disputes and religious conflicts, as is well-known.

One scene, which the objectors to the screening of the film noted in particular, depicts an ostensibly erotic hallucination in which the hero of the film participates. This episode describes Jesus' reflections on a possible alternative style of living other than being the victim of crucifixion. This is one of the scenes in which descriptions of Satan's attempts at seduction are described, and is the one which gave the film its title (of "The Last Temptation of Jesus").

All comments on the content of the film are made without any intention of identifying, or clearly typifying of, any ideas and descriptions in the film, and are intended only to emphasise the central theme of the dispute based on the clash of opinion between those in favour of banning the film and those in favour of allowing it to be shown.

3. As appears from the letter of the Censorship Board dated October 18, the Board decided not to allow the film to be screened in Israel because "in the opinion of the Board screening of the film which goes to the very foundations of Christianity would be most offensive to the religious feelings and faith of the Christian community."

The petitioners appealed against this decision to the Board, who decided not to alter its earlier decision prohibiting the showing of the film. The petition before us concerns this prohibition.

4. What is the normative framework within which the court's considerations are crystallised when deciding whether or not to interfere with the discretion of the council?

The basis of our examination of this question is the essential rule of freedom of expression from which emanates, inter alia, freedom of artistic creation in the fields of literature and the visual arts. In this matter it is of course irrelevant whether the creation takes the form of theoretical, philosophical treatise, or a play, or any other visual medium. For us it is clear and straight forward that a person is entitled to express his ideas and thoughts publicly, including his interpretation of past, present and future events, without any restrictions. That is the central characteristic of freedom of human thought and man's ability to achieve self-expression.

The theoretical point of departure from which freedom of expression derives is that the law may not prevent a person from behaving as he pleases, unless there be a positive reason for doing so owing to harm or possible harm to others. This is what is called, inter alia, the minimal principle of freedom (see K. Greenawalt, "Free Speech Justifications, 89 *Colum L. Rev.* (1989) 119). In order to give meaning to the principle of freedom of expression, substantial restraint must be exercised at the time of laying down any restrictions or reservations with respect to this right. In other words, for the sake of this end a special protected status must be conferred which safeguards this freedom against any retreat in the face of an opposing interest (F. Schauer, "Free Speech: A Philosophical Inquiry" (Cambridge, 1982) 5.) A similar idea was expressed in C.A. 723/74 [1], at p. 295:

> "...The nature of freedom of expression, described as one of the basic constitutional rights confers upon it supra-legal it constitutes a guideline for the consolidation and drafting obligation to uphold of legislation and the reviewing of the legality of governmental authorities' actions. Furthermore, it has a direct influence on the legal interpretation of every enactment. Every restriction of the bounds and right extent of such emanating from an enactment, must be construed narrowly with the aim of giving this right maximum scope and not restricting it beyond what is clearly and distinctly obligatory according to the law (H.C. 75/76, "Hilron" v. The Fruit and Marketing Board, p. 653). Freedom of expression and a provision of law aimed at restricting it do not have similar and equal status. On the contrary, to the extent to which it is compatible with the text, this right must be given preference at all times over a provision of law which has a tendency to restrict it. To sum up, the criterion to be used in safeguarding the primary of freedom of expression, when it clashes with another right, should be fully manifested not only when the legislator drafts provisions of law, but also when the law is interpreted and its provisions are applied to circumstances in which its nature and implementation are reviewed in practice."

5. The problem is, as has already been hinted, that this freedom cannot be absolutely unlimited, as the rights of one person cannot be allowed to prejudice the rights and freedoms of another or disturb public order.

The question, therefore, arises as to what the extent of the limitation should be or, in other words, how extreme the disturbance of public order, or the prejudice of another's rights, should be in order to justify limiting a man's freedom (of expression). In order to solve this problem recourse symmetry is had to the rules of the application of which in practice is often not easy. We shall return to this matter later.

6. The Censorship Board has been vested with the power to preclude in advance the showing of a play or film which prejudices public order (H.C. 14/86 [2] p. 430). As my colleague, Justice Barak, pointed out there:

> "...The range of the (legislative- M.S.) purpose at the basis of the Ordinance is far-reaching, and includes prejudice of public order, whether as a result of a criminal act or of an immoral act or of any other act which is offensive to the feelings of the public or to its well-being (see H. 281/78, p. 409). Justice Silberg emphasised this as follows: 'It would appear to us-without entering into details - that the criterion by which the Board should be guided, when weighing up a decision to refuse or cancel a permit, should be that a film which is an offence to morals and good taste, or which can lead to demoralisation should not be allowed to be screened (H.C. 146/59, p. 284)."

There is room for questioning whether the above criterion as defined by Justice Silberg is not too broad and sweeping. In accordance with the standards acceptable to us, and in particular in the light of the special status granted to freedom of expression, we would not today think of disqualifying a film or play only because it is 'offensive to good taste'. The Board- and even the courts - are not guardians of good taste, which is a subjective concept by its very nature and content. The court would not presume to educate theatre or cinema audiences in accordance with the artistic taste of the judges, such cultural paternalism being foreign to its philosophy. According to appropriate criteria only a serious, meaningful and extreme infringement of a protected value could serve as a cause for interference of the courts with freedom of expression. A narrowing of what was said in H.C. 146/ 59 [3] to a desirable dimension can be perceived to some extent in the words of Justice Landau in H.C. 243/62 [4] at page 2413. I referred to this in greater detail in F.H. 3/87 [5], page 163:

> "As learned counsel for the petitioner rightly pointed out, we have adopted the test of 'near certainty'. Thus we cannot accept the petitioner's suggestion that we distinguish between publication of news, to which the said rule would apply, and publication of plays, to which a

more stringent rule would apply- that is the rule that the showing of a play or film should not be permitted if it is 'an offence against morality or good taste, or likely to cause demoralisation' (in the words of H.C. 146/59).

As already stated, I do not think that there is room for the suggested distinction and, in particular, I do not think that there is any basis for it in the present case. This court has expressed its opinion on the question of expression on many an occasion (see, for example, H.C. 372/84; E.A. 2,3/84) and the judgment to which this petition refers gave expression to the traditional approach to this matter.

The suggested distinction between implementing and recognising a basic right, according to whether it applies to information or to literature and culture, is inherently inconsistent, with the basic principles which it purports to uphold. In short, the theory that the courts recognise that the Board can lay down standards of morality, consolidate educational standards and ban performances which are not educational in their opinion, is too far-fetched and is not consistent with our legal concepts."

7. As mentioned above, the aim of the Cinematograph Films Ordinance is to vest the Board with the power to prevent in advance the public screening of a film which is prejudicial to public order. That is, in the context of the present case, the "protected value "to which I referred above.

As already explained by Justice Barak in H.C. 14/86 [2]:

"'Public order' is a wide term which is difficult to define and which changes according to its context. In its present context it includes endangering the existence of the State, its democratic regime and the public welfare, and offending morals, religious sentiments and a person's good name, as well as prejudicing the guarantee of fair judicial

process and similar matters concerning public order (see H.C. 243/62, p. 2418; H.C. 81/78. p. 409; H.C. 807/78)."

We have seen that disturbing public order - which includes also outraging religious sentiments - can be a cause for restricting freedom of expression, as has in fact been confirmed by this court in, for example, H.C. 351/72 [6] p. 813; and see also H.C. 399/85 [7], p. 295.

Thus, although freedom of expression also fosters freedom of religion, such freedom does not extend to cases where there is a serious offence to religious sentiments. In other words: freedom of expression produces an atmosphere of tolerance of others' opinions, and this is the breeding ground for freedom of religion (L.C. Bollinger, "The Tolerant Society" (Oxford, 1986) and see also V. Blasi, "The Teaching Function of the First Amendment", 87 *Colum. L. Review* (1987), p. 387).

But this tolerance should not serve as a license for seriously outraging the religious sentiments of others. One can even say that serious offence to religious sentiments is the antithesis of tolerance, which is directed to the positive cultivation and advance of human self-expression and not for outraging and suppressing feelings. Mutual tolerance among persons of different outlook, opinions and faiths is a fundamental precondition for the existence of a free, democratic society, and serious offence to feelings is not consistent with that. We have held, therefore, that both plays and films are not exempt from the obligation to refrain from seriously and substantively offending the religious sentiments of others (H. C. 351/ 72 [6] above). There are, therefore, circumstances in which the basic principle of freedom of expression must retreat before such outrage.

8. Hence comes the derivative question: how serious does the outrage have to be in order to justify restricting freedom of expression? In other words, as already mentioned, we accept the fact that in certain circumstances there could be a clash between freedom of expression and the aim of preserving public order, both of which are basic values of our policy concepts and our system of law.

There is, therefore, a kind of competition, in the language of Justice Agranat (as he then was) in H.C. 73/53 [8], between two interests, each of which is of primary importance from the point of view of social policy.

The solution to this "tug-of-war" lies in finding a balance between the competing, and even conflicting, principles (see H.C. 14/86 [2], p. 434). This balance was struck by the court by laying down a value guideline (F.H. 9/77 [9], p. 361) which is consistent with the enlightened views of our society. According to our concept, freedom of expression cannot be restricted because of an affront which is not serious. Only an extreme, offensive and deep affront would justify restricting freedom of expression (H.C. 351/ 72 [6] and H.C. 243/81[10]).

9. Insofar as the probability of an affront inducing us to restrict freedom of speech for reasons of public order is concerned, we have adopted the test that if there be a "near certainty" in a concrete case that implementation of some particular right would prejudice public safety or order, then a statutory authority with the competence to do so may restrict in practice the implementation of that right (E.A. 3,2/84 [11], pp. 265-266). In that case I quoted as follows from Douglas J.'s judgment in Dennis v. United States [24]:

> "The restraint to be constitutional must be on *more than fear, on more than passionate opposition* against the speech, on *more* than a *revolted dislike* for its contents. There must be some immediate injury to society that is likely if speech is allowed. The classic statement of these conditions was made by Mr. Justice Brandeis in his concurring opinion in Whitney v. California, 274 U.S. 357, 376-377:
>
> > 'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be

> reasonable ground to believe that the evil to be prevented is a serious one'".

This concept was adopted by us, as already mentioned, in that we laid down that the offence must be serious, extreme, and gross and that there must be a near and inevitable certainty that it would harm public order.

The test of "near certainty" is an objective one, and the court will examine, within the scope of judicial review in a concrete case before it, whether the rest served as a theoretical guideline only for the statutory authority or whether it was also applied as a practical criterion in a proper and correct manner.

10. In the case before us was there a near certainty that there would be a serious disturbance of public order as a result of the alleged offence to religious feelings?

The Board decided to impose the ban on the film on the grounds that screening it would cause serious outrage to the religious feelings and faith of the Christian community. Such outrage could, on a suitable occasion, provide a cause for disqualifying a film (H.C. 351/72 [6]). But the question before us is whether there was a real basis for the Board's opinion that the expected outrage would be so exaggerated and serious as to warrant their conclusion, which was based on two main factors: first, an independent viewing of the film and the conclusion concerning the possible outrage which could result from it; and, secondly, the many written requests which they received sought to persuade them that it was only right to ban the picture.

11. I am of the opinion that in the case before us there was no justification for banning the film. I am not oblivious of the fact that the theses and theories put forward in the film often clash with accepted, official Christian doctrine. But the Christian world is also pluralistic and in order to disqualify the film one must be satisfied that the literary and artistic subjective expressions of the author, Kazantakis, and of the director, Scorsese, are so extremely offensive to the Christian faith as to warrant suppression of their public expression in Israel. The fact that the film could arouse opposition, and even disgust, amongst some of those who elect to see it, is not sufficient.

In this context, one cannot ignore the fact that Jesus is portrayed in the film in a positive and sympathetic manner and that his super-human power is a basic element in the concepts of the author and director. Incidentally, the only ones to come out negatively in the film are the Jews who fought against the Romans and those among the common people of Jerusalem who did not follow Jesus. But that, also, would not justify banning the film on the basis of the criteria by which we have formulated our decisions in similar cases.

For my part, the main thing is that the decisive majority of the Christian public will not see this film in Israeli cinemas but will see it throughout the Western world. I cannot see the logic of banning a film in Israel because it is ostensibly so extremely offensive to the Christian community, whereas at the same time it is being shown, without any legal restrictions, in all the countries of the Christian world (including Italy, Spain, Germany and France).

I cannot accept the argument that we should restrict freedom of expression more stringently than is common in Western countries with purely Christian populations. This argument has an uncomplimentary and unconvincing implication: the theory that there is a difference between the level of education and sophistication of the local Christian population and that of other countries, as suggested in several of the letters sent to the Board, contains an unjustified insult against the Christians in Israel, and, in particular, has simply no factual basis. With all due respect, there is no foundation for the opinion that the Christian inhabitants of Nazareth of Ramallah are culturally inferior to the inhabitants of Calabria or Normandy.

There is no near certainty of serious and far-reaching danger to public safety which could justify limiting freedom of expression in the present case. There is no evidentiary foundation for deciding that what the Christians of Rome and Paris may see should be forbidden in Jerusalem. As to the argument about "an inclination towards evil" (in the words of Justice Agranat (as he then was) in H.C. 73/53 [8]) which could have a negative influence, I agree that one should not be oblivious to the fact that in the eyes of the believer every description which differs from the one accepted by, and sacred to him, would annoy him. But "an inclination towards evil" is not sufficient to justify the

suppression of free speech, and the extent and force of the injury must be substantial as explained above in detail. The free showing of the film in purely Christian countries is sufficient, in my opinion, to negate the reasons for banning the film, and to render illogical the adoption of a more extreme stand in our country. We are used to being open-minded and tolerant to the extreme even in the face of serious affronts to values which are at the foundation of our existence (see H.C. 14/86 [2]) so that there is no justification or logic for diverting from our accepted and traditional judicial standards and adopting a more extreme attitude in matters which are the subject of this petition.

I would, therefore, allow the petition and make the order nisi absolute.

A. Barak J.:

I concur with the President's judgment and with the observations of Justice Goldberg. Because of the importance of the problem before us, I should like to add several comments.

1. Freedom of expression is one of the basic values of our law (H.C. 14/86 [2], p. 878). It constitutes a "supreme right" (in the words of Justice Agranat, as he then was, in H.C. 73/53 [8]). There are those who vest it with a supra-legal status (C.A. 723/74 [12], p. 295). But even those who do not go so far regard it as being "the very essence of democracy" (Justice Agranat in Cr.A. 255/68). The justifications for this evaluation are complex and interwoven (see H.C. 399/85 [7]).

One justification is the desire to lay bare the truth. Freedom of expression must be ensured in order to enable different and variegated views and ideas to compete with one another. This competition and not a directive from above, will, in the final analysis, lead to revelation of the truth. Another justification is the need for man's self-fulfilment. Only through freedom of expression can this self-fulfilment be attained. A third justification bases freedom of expression on democracy. "The principle of freedom of expression is connected closely with the democratic process" (Justice Agranat in H.C. 73/53 [8], p. 876).

Freedom of expression is an essential requisite for the existence and development of a democratic regime (H.C. 372/84 [13]).

The connection between freedom of expression and democracy has many different aspects. Freedom of expression guarantees an exchange of opinions between members of a society and thus enables them to formulate their approach to matters of national interest. In that way a government can be moulded, controlled and replaced. Furthermore, freedom of expression contributes towards social stability, as social pressure receives expression from speech rather than from deeds. In addition, a democratic regime is based on tolerance. Freedom of expression enhances tolerance and thus strengthens democracy. Thus between freedom of expression and democracy there is a state of mutual interdependence. Democracy is the basis for freedom of expression and freedom of expression gives democracy the breath of life. Without freedom of expression democracy loses its soul. That is why freedom of expression enjoys a special status. It ensures the existence of a democratic regime which, in turn, ensures the existence of other basic rights.

2. Every discussion of freedom of expression necessarily entails reference to two separate questions: first, what is included in that basic value called freedom of expression and what is excluded from it. This differentiation creates a boundary-line for expressions which are "covered" by the principle of freedom of expression. It competes with the question of what could be called "expression" within the meaning of this basic value. For instance, would freedom of expression "cover" the giving of false evidence in court or would perjury be completely excluded from its framework? Is the right to demonstrate included with freedom of expression, and does such freedom cover commercial advertising?

Secondly, what is the extent of the protection which the law gives to those expressions which are included within the framework of freedom of expression. Do they have "absolute" protection or only relative protection? And if they have only relative protection what are the criteria thereof? (see Schauer, above, p. 89).

3. Our approach to the question of the scope of freedom of expression is a broad one. Such freedom applies to every expression, whether political, literary, commercial or any

other, and whether verbal or behavioural (symbolic or otherwise) such as demonstrations (see H.C. 153/83 [14]). Within the framework of freedom of expression there is no differentiating between truth and falsehood. Therefore, in principle, even an expression which is defamatory is "covered" by freedom of expression (see Cr.A. 677/83 [15]). Freedom of expression extends to every expression, whatever its content, influence, or style. In the words of Justice Agranat in H.C. 73/53 [8], p. 877:

> "The principle of freedom of expression serves as a means and an instrument for discovering the truth, since only by airing all points of view and by a free exchange of all opinions can that 'truth' be clarified."

And President Shamgar supported this approach in holding that:

> "Exchange of opinions, airing of viewpoints, public debate, the desire to know and learn and persuade are all essential tools at the disposal of every opinion, every point of view and very belief in a free society." (E.A 2/84[11], p 278).

Freedom of expression, therefore, covers all opinions, whether popular or unpopular, whether those which people like to hear or those which annoy and are deviant, and those which "antagonise by their content, and disgust" (President Shamgar in E.A. 2/ 84 [11]). Freedom of expression is not only freedom to give quiet and pleasant expression to something. It is also freedom to cry out in a manner which grates on the ears (C.A. 206/61 [16] p. 1728). It also includes freedom to express an "uninhibited, robust and wide open opinion"(Judge Brennan in New York Times v. Sullivan, 1964 [25] p. 721, adopted by President Landau in F.H. 9/77 [9], p. 351) Freedom of expression covers "matters which annoy and grate on the ears" (Justice Beisky in C.A 2/84 [11], p. 325). Even an expression which is "a nasty spread of erotics, politics and aberrations of all kinds" comes within the framework of freedom of expression (H.C. 14/86 [2], p. 433). We have consequently held that racial expressions are covered by the principle of freedom of expression (H.C. 399/85 [7], p. 281). An expression offensive to religious sentiments, or which includes obscene material, is also covered by freedom of expression.

4. Once a positive reply has been given to the question of "scope", the second question must be dealt with. This concerns the extent of the protection given to an expression by a particular system of law. This question assumes that we are interested only in expressions over which the principle of freedom of expression extends its protection. However, every system of law seeks to apply limitations on freedom of expression; and, therefore recognition of an expression as coming with the scope of freedom of expression does not mean that it is protected in all circumstances. The reason for this is that freedom of expression is not the only value which a democratic society seeks to preserve. There are additional values, the recognition of which justifies imposing limitations and restrictions on freedom of expression. For example, in every society it is common to find cause for restricting freedom of expression in order to protect a person's good name. Likewise, it is justified in every society to limit a person's right to demonstrate against the background of another's right to walk in the streets of the town. Similarly, it is natural for rowdy expressions to be restricted in consideration of the quality of life and the environment.

The common approach in all systems of law is to regard freedom of expression as not being "absolute". Our conception is that freedom of expression is "relative". "A distinction must be drawn between freedom and unbridled license" (Justice Agranat in H.C. 73/53 [8], p. 878; President Landau in F.H. 9/77 [9], p. 343).

"Freedom does not mean unbridled license, and there are circumstances in which it is vital to impose restrictions" (President Shamgar in E.A. 2/84 [11], p. 279). It could be argued that the distinction between "cover" and "restriction" is artificial, as when a "restriction" is imposed on freedom of expression then the expression is not "covered" by the principle of freedom of expression.

I cannot accept this argument. The distinction between "cover" and "restriction" is very important. First, it emphasises the fact that prima facie the expression is protected, that it would require special justification in order to restrict it, and that in the absence of such justification it must be permitted. Secondly, where there is some restriction then freedom of expression would continue to exist beyond the restriction. The restriction does not establish the extent of the right, it only lays down limitations.

5. The restrictions on freedom of expression take different forms, three of which are the main ones. The most serious restrictions are those which prevent expression in advance. This actually excludes publication, making the prejudice to freedom of expression immediate. This means that the protection given to the other values worthy of protection is the fullest. A less serious restriction is the criminal or civil liability of the person giving vent to the expression.

Here the expression comes to light "in advance" while the perpetrator is liable "post factum". While restriction in advance "freezes" the expression, "post factum" liability "chills" it (see A. M. Bickel, the Morality of Consent [New Haven and London, 1975] p. 61). The third main restriction of freedom of expression - a "weak" one - is the regime of permits. According to this arrangement the State exercises control, through the medium of permits, over several aspects of freedom of expression. For example, permission is required for the publication of a newspaper, or a permit for holding a demonstration. It should be noted that these forms of restriction are not separated from one another. Very often the system requires a combination of several of them. Of course, the greater the combination the more severe the restrictions on freedom of expression.

6. The restrictions on freedom of expression are of two kinds: first, a restriction whose source is in the content of the expression itself which is of such a nature that it could lead to consequences which a democratic society would seek to prevent. The legal system creates a balance between the freedom of expression value and values which that freedom could prejudice. Examples of instances in which freedom of expression would be curbed can be found in the defamation laws, in the criminal laws with respect to obscenity and in the sub judice rule. Censorship of films and plays would be included in this kind of restriction, as the purpose of censorship is to protect the public against the harmful content of the expression itself. As these restrictions prejudice the very essence of freedom of expression every democratic society will confine them to the most vital instances only.

The second kind of restriction of freedom of expression is not connected with the content of the expression itself, but with its method of communication. The system of law creates a balance between the way in which freedom of expression operates in practice (without any connection with the content of the expression itself) and other values which

are prejudiced by its application. An example of this can be found in laws which curb the freedom of demonstration. This restriction is not aimed against the content of the message which a demonstration seeks to deliver, but to the manner in which it is delivered, which could harm freedom of movement or other values which society seeks to protect (see M. Nimmer, On Freedom of Speech: A Treatise on the Theory of the First Amendment [1984] pp. 2-25; L.H. Tribe, American Constitutional Law [Mineola, 2nd ed. 1988] p. 789).

7. When is it justified to restrict freedom of expression, and how should the restriction be applied? There is no general reply to this question. It all depends on the values, interests and principles with which freedom of expression clashes (see H.C. 153/83 [14]; H.C. 448/85 [17]).

There can, therefore, be instances in which freedom of expression would not be restricted at all, and would be given full force, where there is no value or interest which justifies curbing it. Where there are values and interests which would justify curbing freedom of expression, a clash would be created which would require finding a balance between the restriction and the competing value. This balance could be laid down by the legislature itself. In the absence of any enactment the balance will be laid down by the courts. Since the Kol Ha-am case (H.C. 73/53 [8]) we have accepted the idea that this balance should be one of principle and not an ad hoc one.

We have to establish a "rational principle" (Justice Agranat in H.C. 73/53 [8], p. 881) which would constitute "a yardstick which contains a value guideline", which distancing ourselves from any "random paternalistic yardstick, whose direction and nature no-one can evaluate in advance" (Justice Shamgar in F.H. 9/77 [8], p. 361). This yardstick balances the various conflicting values and provides a "balancing formula" in principle. This formula revolves round two axes: the seriousness of the injury which revolves around freedom of expression causes to other interests deserving of protection; and the probability of such injury occurring. I emphasise this in another case as follows:

> "The Board's powers are determined by the need to preserve public order. This criterion raises two questions, the answers to which are relevant to the petition before us: first, what is the intensity of the harm

> to public order, and whether all harm, however slight, would allow use of the Board's powers; and, secondly, what is the extent of probability which must exist between the showing of the play and the harm to public order, and whether it is sufficient that there was a distant probability of this harm's occurring in order to justify the use of the Board's powers (H.C. 14/86, p. 431)."

8. We must approach an examination of the petition before us against the background of this normative attitude. The first question to be asked is whether a cinematographic expression would come within the framework of the principle of freedom of expression. The unequivocal answer to this question is that freedom of expression covers also cinematographic expressions. It is true that these latter expressions have a commercial aspect, but we have held in the past that commercial expressions are also covered by the principle of freedom of expression (see *Joseph Burstyn Inc. v. Wilson* [26] and H.C. 896/ 87 [18]; see also Bar Association Appeal 13/86 [19]). Freedom of expression does not distinguish between different forms of expression (see Superior Films v. Dept. of Education [27]).

The second question which arises is whether in the circumstances of the case before us there could, in principle, be values or interests which come into conflict with freedom of expression, requiring a balance between them to be found. For example, if freedom of expression results in harming the good name of a person or public, this would usually harm values and interests which must be protected. The balance between these competing values is effected mainly by the legislator, in the Defamation Law, 1965 (see F.H. 9/77 [9] above). Similarly, if freedom of expression violently harms public order (in the case, for instance, of bodily injury or injury to property) then it is usual to restrict this freedom for the sake of protecting physical and proprietary values (see H.C. 907/78 [20]). The same rule applies when an expression endangers the security of the State (H.C. 680/ 88 [21], or judicial integrity (Cr.A. 126/62 [22]). In the absence of sufficient legislative guidance this balance is effected mainly by case law, in which tests with respect to the nature and extent of the harm and the probability of its occurrence are laid down.

9. In the circumstances of the petition before us are there interests and values which justify restricting freedom of expression? It was argued before us that religious sentiments are values which must be protected against injury caused by the implementation of the principle of freedom of expression. Is this an acceptable argument? The question is far from being a simple one. On the one hand, one can say that there is no reason for distinguishing between injury to body or property and injury to sentiments; and just as it might be justified to restrict freedom of expression in the former case so would it be justified in the latter case. But, on the other hand, one can say that every expression might harm some sentiment and recognition of harm to sentiments as a basis for restricting freedom of expression- without drawing any distinction between religious sentiments and other sentiments - could make an empty letter of freedom of expression.

It is difficult to decide between these conflicting opinions. Different systems of law could produce conflicting conclusions and under any system of law the answer to the question could vary in accordance with the differences in the context in which the question arises. We can, therefore, frame the question as follows: within the framework of the Cinematographic Films Ordinance is the Censorship Board, established by virtue of that Ordinance, entitled to take into consideration injury to religious sentiment as a cause for restricting freedom of cinematographic expression? In my opinion the answer to this question is in the affirmative, for the following reasons.

First, the very nature of "censorship" of films calls for granting this power. It is true that one can object to censorship on the grounds that there is no justification for allowing a government body to restrict freedom of expression on account of injury to sentiments. But once censorship exists then the power to restrict freedom of expression on account of injury to sentiments follows from its very nature. It is inconceivable that the only function of the Censorship Board should be to examine whether showing a film would constitute a criminal act or not. The make-up of the Board and its functions point to the fact that injury to sentiments - alongside injury to other values - is a consideration which it should be able to take into account.

Secondly, in Israel it is a criminal offence to outrage religious feelings (section 173 of the Penal Law, 1977). So that the Board would be entitled - although not obliged - to

include the criminal nature of a publication amongst its considerations (see H.C. 351/ 72 [6]). Furthermore, in a long series of judgments the Supreme Court has recognised outrage of feelings (religious, bereavement and others) as an injury to values which justifies, in principle, the use of the Board's powers to restrict freedom of expression (see H.C. 146/59 [3], H.C. 243/81 [10], H.C. 14/86 [2]). '"The consideration which we owe to their feelings counterbalances the abhorrence of all forms of censorship". (H.C. 243/81 [10], p. 425).

10. In short, the feelings of the public are values which the Censorship Board, in its capacity as censors of films, should take into consideration and any outrage of those feelings could justify curbing freedom of expression. Against this background comes the third question which concerns the kind of outrage which would justify curbing freedom of expression. This question can be divided into two subquestions: the seriousness of the outrage and the probability of its occurrence. I shall examine each separately.

11.. An outrage against public feelings must be "harsh, serious and severe" in order to justify imposing a limitation on freedom of expression. (H.C. 14/86 [12], p. 435). What is the meaning of this test? It reflects, in my opinion, the conception that a democratic society, by its very nature and content, is based on tolerance of others' opinions. In a pluralistic society tolerance is the one power allowing for shared existence. Thus, every member of the public takes upon himself the "risk" of suffering some offence to his feelings in the course of free exchange of opinions. A society which is based on social pluralism must, therefore, allow free exchange of opinions even though this may hurt the feelings of those who object to the opinions. "That is the other side of the mutual tolerance necessary in a pluralistic society (Justice Witkon in H.C. 549/75 [24] p. 764). Recognition of the fact that there is bound to be a certain degree of exposure to hurt feelings on the part of members of the public follows from the very nature of a democratic regime. A "harsh, serious and severe" outrage, justifying the curbing of free expression within the framework of censorship of films, is that same outrage which exceeds "the tolerance standard" of a democratic society (see H.C. 243/81 [10] p. 425).

So that when we are concerned with the matter of a film which takes a stand on a controversial subject (historical, religious, social or other) and does so in a manner which does not involve criminal liability - in that it does not contain anything obscene or

outrageous to religious feelings - it would be difficult to imagine situations in which such "harsh, serious and severe" damage is caused as crosses the boundary-line of what is permissible in a democratic society, whether it contains some factual truth or not (see H.C. 807/78 [20], p. 277). It should also not be forgotten that the same creation in the form of literature would be accepted unconditionally, and, furthermore, that no-one is forced to see a film, or be exposed to its message. This would appear to be the rule to be gleaned from the judgment in H.C. 351/72 [6], in which the Supreme Court held that a play outraged the feelings of bereaved parents and assailed moral social values, but that was not sufficient to justify curbing free expression. According to Justice Landau (at p. 816):

> "...there is no doubt that the offences to the feelings of bereaved individuals and the public as a whole with which the words of the play testify to unprecedented strewn callousness and vulgarity. But we would still have hesitated to confirm the banning of the play, however repulsive to us it may be, were that the only reason for doing so, for fear of prejudicing the freedom of expression."

In that way Justice Landau gave expression to this court's opinion that "the tolerance standard" of our society towards the expression of controversial opinions which are not against the law is very high. Only in the rare and exceptional case would there be found to have been "harsh, serious and severe" damage in a film which conveys a message not containing anything criminal to a "non-captive" audience. Such cases could occur, of course (see H.C. 243 / 81 [10]), but our tradition of freedom of expression and the fact that we recoil from imposing an early ban based on the content of the expression itself, limits such cases to only the most exceptional. These must be cases which shock mutual tolerance to the very limit.

And note that the fact that screening a film may constitute a criminal offence (such as publishing something calculated to outrage religious feelings, contrary to section 173 of the Penal Law, or publishing any obscene matter contrary to section 214 of the Penal Law) is not an essential or sufficient precondition for an advance prohibition on the part of the censor. It is not an essential precondition because a film can, in certain exceptional circumstances, cause outrage in a harsh, serious and severe manner without breaking the

law. It is not a sufficient precondition because a balance between conflicting values could justify refraining from imposing an early ban (through censorship) while having recourse to banning "after the event" (through ordinary criminal proceedings). Nevertheless, the criminality of a play has substantial meaning, as it reflects the attitude of Israeli Society to its "red lines".

12. This is of particular significance insofar as a film dealing with religious matters is concerned. It is only natural that religious beliefs should penetrate to the depths of the individual's conscience. A contrary religious belief is not only an intellectual outlook with which one disagrees. It can also constitute an outrage to feelings. The atheist can outrage the feelings of the believer. Followers of opposing faiths can outrage one another's feelings. That is the reality of life which a democratic society must accept. It is this very difference which unites us around what we have in common. Thus, a democratic society must recognise that there are outrages against religious feelings. Only in this way can those who have different religious beliefs live together. The solution is not to repress the offensive opinion. Frankfurter J. noted quite rightly that:

> "To criticize or assail religious doctrine may wound to the quick those who are attached to the doctrine and profoundly cherish it. But to bar such pictorial discussion is to subject non-conformists to the rule of sects". *(Joseph Burstyn, Inc.* [27] p. 519).

But nor does the solution tie in repressing all controversial opinions, as that would suffocate the human spirit. The strength of democracy lies in the freedom it accords to the creative person to release what is locked in his heart, to spread his wings and give free vent to his thoughts. "The writer or dramatist may aim, to his heart's content, the whip of criticism or satire at preachers of religion who sin, as did Moliere in 'Tartuffe' or, in our times, Hochhut in 'The Representative'." (Justice Landau in H.C. 351/72 [6], p. 815).

13. The play which is the subject of this petition does, without any doubt, outrage the feelings of Christian believers. My colleague, Justice Maltz, even points to a particularly serious outrage. However, such outrages do not exceed what is permissible in a democratic society, founded on tolerance and pluralism.

During the course of proceedings we asked respondents' counsel whether in her opinion screening of the film would constitute the criminal offence of publishing something which could outrage religious feelings, contrary to section 173 of the Penal Law. She replied in the negative. To her credit she noted, on the contrary, that the film has artistic value, and does not constitute a criminal offence. If to this one adds the fact - as pointed out by my colleague, the President - that the film is being shown in most countries of the world (except for India and Pakistan), including the Christian countries, in some of which there is film censorship, then it is clear that the film's offensiveness is not so serious as to justify the advance banning of its publication in a democratic state which recognises the tradition of freedom of expression and is built on tolerance of opposing opinions. In this connection any outrage committed by the publication of the book or the making of the film should not be taken into account. We are concerned only with outrages to religious feelings by the fact that the film is being shown in Israel. Furthermore, the outrage which must be considered is to the feelings of those who will not see the film, as no-one is obliged to see it. We are, therefore, not concerned here with a captive audience. In such circumstances, the offensiveness of the film does not cross the threshold of "harsh, serious and severe damage".

14. In the light of my conclusion concerning the nature of the damage, I do not need to examine the question of the probability of its occurrence. According to the precedents on this subject the test of probability to be applied in matters concerning the powers of the censor is that of "near certainty." (see H.C. 243/62 [4], H.C. 14/86 [2]). It is not sufficient that there should be "malice" or the possibility - even if reasonable - that the damage could occur. There is also no need for real certainty that the harsh, serious and severe damage should actually materialise. The demand is for a causal relationship of the nature of "near certainty". If, therefore, I thought that in the petition before us the outrage to religious feelings had overstepped the permitted threshold, I would have thought that the causal test existed, as there would be not only a near certainty, but a real and indisputable certainty - that religious feelings had been outraged. I therefore concur with Justice Goldberg's comments.

15. I have, therefore, reached the conclusion that screening the film will indeed outrage the religious feelings of believers, but that the damage is not harsh, serious and severe to the extent that would justify refusing a permit for the showing of the film. On the other hand, the Censorship Board was of the opinion that showing the film would outrage the religious feelings of believers in a harsh, serious and severe manner. Can we, in these circumstances, exchange the Board's discretion for our own? Would that not be non-permissible interference with the exercise of a government authority's discretion? In my opinion it is our right and duty to interfere, in such circumstances, with the Board's exercise of discretion. I discussed this in a previous case in the following words:

> "The Board does not have the discretion to choose a possibility which does not contain the elements of near certainty and serious danger. The Board's subjective opinion that the danger is serious and that its occurrence as a near certainty is not relevant. The test of near certainty and serious danger is an objective one. The Court must be satisfied that a reasonable Board was entitled, on the basis of the facts before it, to reach the conclusion that the danger was serious and that its occurrence was a near certainty. To that end the Court has to be satisfied that the Board gave proper weight to conflicting basic principles, that is, to freedom of expression on the one hand and public order on the other hand. "Proper weight" in this case means weight that the Court is of the opinion would be consistent with the requirements of an enlightened democratic society." (H.C. 14/86 [2], pp. 438-439).

The question, therefore, which is before us is a basic constitutional one. It touches on the nature of freedom of expression and its limitations. The responsibility for all these matters rests with the courts. The question before us is not that of choosing between opinions in the field of reasonableness. It is the fixing of bounds for that field itself.

For these reasons I concur with my colleagues that the order nisi should be made absolute.

S. Levin J.: like my distinguished colleague, Justice Barak, I too am of the opinion that the extent of our permissible interference with the decision of the Censorship Board is wide, as long as we are dealing with basic rights. From an examination of the minutes of the Board and of their decision, it transpires that the Board gave great weight to letters from intellectuals who objected to permitting the film to be screened. Some of their reasons centered on the fact that the showing of the film would be extremely offensive to the Christian population of Israel in particular, while others concentrated on the damage which could be caused to Israel itself, although even they did not deny the film's artistic value. For the reasons enumerated by Justice Barak in paragraphs 12 and 13 of his judgment, in particular, I think that the decision of the Board is not well-founded, while the "political" reason - that is, that showing the film would cause damage to Israel- is, to the extent that it served as a prop for the Boards' considerations, invalid per se in my opinion. Respondents' counsel agreed that the showing of the film would not constitute a criminal offence, and I shall, therefore, refrain from expressing an opinion on the question of what the law would be if it transpired that showing the film was indeed a criminal offence.

I concur that the order nisi should be made absolute.

Justice E. Goldberg: in a clash between two basic values it is essential to assess the "comparative social importance of the various principles" (Justice Barak in H.C. 14/ 86 [2] p. 434) together with the probability, impact, extent and scope of the damage caused by one of them to the other.

The probability test for the risk of the damage's occurring does not, in my opinion, come within the scope of the present case. The need to consider the probability of a risk of damage arises as long as it is not possible to make a factual finding on the basis of evidence. So then we would have to assess the extent of the likelihood of the damage occurring (or not occurring) and we would then hold that the test of "near certainty" would be the proper test for purposes of the Censorship Board's powers, as "the test of' public order would be a consequential test" (H.C. 14/86 [2] above, pp. 430-1).

We would then have to assess the degree of risk that a film might be prejudicial to public order and whether this reaches the level of "near certainty" or whether this degree of

certainty exists with respect to the film because "the special power of persuasion in the pictorial material would serve as an effective instrument of incitement" (H.C. 8907/78 [20] p. 278).

But when we can establish in an independent way whether the film outrages religious feelings or (to give another example) if it damages the good name of any person, we do not need to assess the probability of damage being caused. We can perceive with our senses whether or not damage has been inflicted (the extent of the damage) constituting a separate question, as stated below). In our case it would appear that no-one disputes the fact that screening of the film would offend a section of those who believe in the Christian faith.

The central question for us to put forward is, therefore, whether there is an irreconcilable conflict between freedom of expression and public order (as personified by an outrage to religious feelings) which obliges us to seek a solution to "the parallelogram of forces" and find a "balancing formula" between principles; or whether we have to regard this as an "ancillary" conflict and not a "frontal" one between principles, which allows for co-existence, even if not a peaceful one, making the balance "natural" and self-understood.

I do not underestimate the offensiveness to some viewers of the film. But neither the gravity of the offensiveness nor its extent make me question the words of the wisest of all men: "There is no man that hath power over the spirit to imprison the spirit" (Ecclesiastes 8.8[A]).

I concur, therefore, with the judgment of the distinguished President.

Maltz J.: I approve of the analysis of the legal position established by our caselaw, as summarised in the President's judgment, and with the conclusion he has reached.

In the whole film I found only one scene which I considered would give serious, extreme and rude affront to the religious feelings of Christians. I refer to the imaginary conversation between Jesus and Paul in which Paul says to Jesus: "If you had not been crucified, I would have crucified you myself"'. I weighed up whether it would not be desirable to make the showing of the film conditional upon the excision of this scene. But

on second thoughts I came to the conclusion that against the background of the film as a whole this scene would not create a near certainty of endangering public safety or order.

I, therefore, concur with the President's opinion that the film should be allowed to be shown.

Petition allowed and order nisi made absolute.

Dov Peri and Shaul Stratzker appeared for the Petitioners, and Nili Arad, Director of the High Court Division of the State Attorney's Office, appeared for the Respondents.

Judgment given on 15.6.89.