

HCJ 6126/94
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1. Giora Szenes
2. Eitan Szenes
3. Dr. David Szenes
4. Deputy Chairman of Yad Va-Shem

HCJ 6143/94

1. Nadia Matar
 2. Women's Association for the Future of Israel
- v.
1. The Broadcasting Authority
 2. Chairman of the Broadcasting Authority
 3. Director-General of National Television
 4. Mordechai Lerner
 5. Uri Barbash

The Supreme Court Sitting as the High Court of Justice

[July 26, 1999]

Before President A. Barak, Justices E. Mazza, M. Cheshin

Petition for an *order nisi* and Interim Order

Facts: Chana Szenes, born in Budapest, Hungary in 1921, emigrated to Mandatory Palestine alone at the age of 18. In 1943, during World War II, she enlisted in the British army. In June 1944, Chana Szenes parachuted in Yugoslavia, and crossed the border into Hungary with the aid of partisan groups. The German army captured her almost immediately. Chana Szenes was executed by a German firing squad on November 8, 1944. The current petition concerns the play "The Kastner Trial," written by respondent no. four. The play, based on

the true story of the Kastner affair, was intended to be televised. In one of the scenes of the play, one of the characters claims that Chana Szenes broke under interrogation by the Hungarian police and betrayed her comrades. Petitioners, including relatives of Szenes, petitioned this court to prevent the broadcast of that scene in the play. Petitioners claimed that the scene contained falsehoods, defamed Chana Szenes, and injured the feelings of many, including survivors of the Holocaust.

Held: For the purposes of the petition, the Court assumed that the play, with the scene in question, defamed Chana Szenes, and also injured the feelings of the public in general and that of Holocaust survivors in particular. The Court held, however, that, in a democratic society, only a near certainty of grave and severe injury to feelings can justify the prior restraint of expression. The court held that the scene in question did not present a near certainty of such injury. As such, the petition was denied. Justice Cheshin dissented.

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- [2] CA165/82 *Kibbutz Hatzor v. Assessment Clerk Rechovot*, IsrSC 39(2) 70.
- [3] H CJ 953/87 *Poraz v. Mayor of Tel-Aviv/ Jaffa*, IsrSC 42(2) 309.
- [4] FH 9/77 *Israel Electric Company v. "Ha'aretz" Newspaper*, IsrSC 32(3) 337.
- [5] H CJ14/86 *Laor v. Film and Play Review Board*, IsrSC 41(1) 421.
- [6] EA 2/84 *Neiman v. Chairman of the Central Elections Committee of the Eleventh Knesset*, IsrSC 39(2) 225.
- [7] CA 723/74 *"Ha'aretz" Newspaper Publications v. Israel Electric Company*, IsrSC 31(2) 281.
- [8] H CJ 73/53 *"Kol Ha'Am" v. Minister of the Interior*, IsrSC 7 871.
- [9] H CJ 153/83 *Levi v. District Commander of Israeli Police Southern Command*, IsrSC 38(2) 393.
- [10] CA 105/92 *Re'em Engineers and Contractors v. Municipality of Upper Nazareth*, IsrSC 47(5) 189.
- [11] CrimA 225/68 *State of Israel v. Ben Moshe*, IsrSC 22(2) 427.
- [12] H CJ 4804/94 *Station Film Company v. Film and Play Review Board*,

IsrSC 50(5) 661; [1997] IsrLR 23.

- [13] HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board*, IsrSC 43(2) 22.
- [14] HCJ 399/85 *Kahane v. Broadcasting Authority*, IsrSC 41(3) 255.
- [15] HCJ 5503/94 *Segal v. Speaker of the Knesset*, IsrSC 51(4) 529.
- [16] CA 214/89 *Avneri v. Shapira*, IsrSC 43(3) 840.
- [17] HCJ 2481/93 *Dayan v. Jerusalem District Commander*, IsrSC 48(2) 456.
- [18] CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum*, IsrSC 46(2) 464.
- [19] HCJ 5688/92 *Vichselbaum v. Minister of Defense*, IsrSC 47(2) 812.
- [20] FH 3299/93 *Vichselbaum v. Minister of Defense*, IsrSC 49(2) 195.
- [21] HCJ 109/70 *The Orthodox Coptic Patriarch of Jerusalem v. Minister of Police*, IsrSC 25(1) 225.
- [22] HCJ 5016/96 *Horev v. Minister of Transportation*, IsrSC 51(4) 1; [1997] IsrLR 149.
- [23] HCJ 4541/94 *Miller v. Minister of Defence*, IsrSC 49(4) 94; [1995-6] IsrLR 178.
- [24] CrimFH 2316/95 *Ganimat v. State of Israel*, IsrSC 49(4) 589.
- [25] HCJ 372/84 *Kloppfer-Naveh v. Minister of Education and Culture*, IsrSC 38(3) 233.
- [26] HCJ 953/89 *Indoor v. Mayor of Jerusalem*, IsrSC 45(4) 683.
- [27] HCJ 257/89 *Hoffman v. Appointee for the Western Wall*, IsrSC 48(2) 265.
- [28] HCJ 606/93 *Kiddum Yazamoth (1981) and Publishing v. Broadcasting Authority*, IsrSC 48(2) 1.
- [29] HCJ 2888/97 *Novik v. Channel Two Television and Radio*, IsrSC 51(5)193.
- [30] CrimA 126/62 *Dizenchik v. Attorney General*, IsrSC 17 169.
- [31] CrimA. 696/81 *Azulai v. State of Israel*, IsrSC 37(2) 565.
- [32] CrimA 6696/96 *Kahane v. State of Israel*, IsrSC 52(1) 535.
- [33] HCJ 987/94 *Euronet Kavei Zahav (1992) v. Minister of Communications*, IsrSC 48(5) 412.
- [34] HCJ 3477/95 *Ben-Attia v. Minister of Education, Culture and Sport*, IsrSC 49(5) 1.

- [35] HCJ 351/72 *Keinan v. Film and Play Review Board*, IsrSC 26(2) 811.
- [36] HCJ 7128/96 *Temple Mount Faithful Movement v. Government of Israel*, IsrSC 51(2) 509.
- [37] HCJ 807/78 *Ein Gal v. Films and Play Review Board*, IsrSC 33(1) 274.
- [38] HCJ 273/97 *Association for the Preservation of Individual Rights of Homosexuals, Lesbians and Bisexuals in Israel v. Minister of Education, Culture and Sport*, IsrSC 51(5) 822.
- [39] HC 1/81 *Shiran v. Broadcasting Authority*, IsrSC 35(3) 365.
- [40] HCJ156/75 *Dakah v. Minister of Transportation*, IsrSC 30(2) 94.
- [41] HCJ 266/81 *Avron v. Broadcasting Authority*, IsrSC 35(3) 502.
- [42] HCJ 2137/98 *Elias v. Chairman of Managerial Committee, Broadcasting Authority* (unreported case).
- [43] HCJ 935/89 *Ganor v. Attorney General*, IsrSC 44(2) 485.
- [44] HCJ 6163/92 *Eisenberg v. Minister of Construction and Housing*, IsrSC 47(2) 229; [1992-4] IsrLR 19.
- [45] HCJ 259/84 *M.I.L.N Israeli Institute for Better Business and Product v. Broadcasting Authority*, IsrSC 38(2) 673.
- [46] HCJ 243/82 *Zichroni v. Directorial Committee of the Broadcasting Authority*, IsrSC 37(1) 757.
- [47] CrimA 232/55 *Attorney General v. Greenwald*, IsrSC 12 2017.
- [48] FH 7325/95 *Yediot Acharonot v. Krauss*, IsrSC 52(3) 1.
- [49] CrimApp 537/95 *Ganimat v. State of Israel*, IsrSC 49(3) 355.
- [50] CA 506/88 *Shefer v. State of Israel*, IsrSC 48(1) 87; [1992-4] IsrLR 170.
- [51] CA 1482/92 *Hagar v. Hagar*, IsrSC 47(2) 793.
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- [53] CA 6024/97 *Shavit v. Rishon Lezion Jewish Burial Society*, IsrSC 53(3) 600; [1998-9] IsrLR insert.
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- [57] *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).
- [58] *Davis v. Costa-Gravas*, 654 F. Supp. 653 (S.D.N.Y. 1987).
- [59] *Seale v. Gramercy Pictures*, 964 F. Supp. 918 (E.D. Pa. 1997).
- [60] *Whitney v. California*, 274 U.S. 357 (1927).

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- [68] H. Sommer, *Hazchuyot Habilti Minuyot Vihekefa shel Hamahapacha Hachukatit* [The Unspecified Rights – The Scope of the Constitutional Revolution], 28 *Mishpatim* 257 (1997).
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- [70] Y. Karp, *Mikztat Shielot Al Kvod Haadam lifi Chok Hayesod: Kvod Haadam Vicheruto* [Questions about Human Dignity], 25 *Mishpatim* 129 (1995).

- [71] A. Bendor, *Chofesh Lishhon-Hara [Freedom of Defamation]*, 20 Mishpatim 561 (1990-1991).

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[77] Bamidbar Rabbah, Pinchas, 21:2
[78] Babylonian Talmud, Tractate Baba Metzia, 58b
[79] Maimonides, *Mishneh Torah*, Hilchot Deot, 7:2.
[80] Mishnah, *Ethics of our Fathers*, 2:14, 3:14.
[81] Babylonian Talmud, Tractate Taanit, 23a.
[82] Exodus 1:6, 1:8
[83] Judges 2:8, 2:10.
[84] Genesis 1:27.
[85] Mishnah, *Ethics of our Fathers* 3:14.
[86] I Samuel 2:30.

JUDGMENT

President A. Barak

1. “The Kastner Trial” is a screenplay, penned by M. Lerner. It was intended for television broadcast. The play, an artistic creation divided into three parts, was inspired by the Kastner affair, especially by the trial in the Jerusalem District Court. *See* D.C. 124/53 *The Attorney-General v. Greenwald* [55]. The screenplay takes place primarily in the courtroom. It retells the story of the rescue of the Jews of Hungary during the Second World War and the moral dilemmas that these efforts involved. It is a docudrama – an artistic genre that does not purport to accurately reflect the events that it depicts. Quite naturally, it mixes both reality and fiction. Each episode is prefaced by a notice which states:

The events depicted in this film were inspired by the Kastner-Greenwald trial. Nonetheless, the movie should not be regarded as a recreation of these events, but rather as a drama of historical fiction.

2. One of these episodes features the mother of Chana Szenes, Mrs. Catherine Szenes. She is seen testifying as a witness in the criminal trial of Mr. Greenwald. As Mrs. Szenes is being cross-examined, Mr. Kastner, who is sitting in the courtroom, interrupts. In one of his outbursts, he lashes out at Catherine Szenes, exclaiming:

How dare you criticize me? Who even asked your daughter to come to Budapest? What did she think she would do? Due to her own recklessness, and the arrogance of those who sent her, she crossed the border like a new recruit and was captured five minutes later. *And I will tell you who told the Hungarian police that Palgi and Goldstein were on their way to me. It was her! Your daughter, Chana Szenes, the heroine! She broke under interrogation and revealed everything.* I can imagine the sort of tortures she underwent. Nobody could have withstood such

torture. But it was not because of me that Palgi and Goldstein were arrested, but because of her! (emphasis added).

To this Catherine Szenes replies: “Not true!”

3. Kastner’s lines in the script, which I italicized, offended Chana Szenes’ brother and his sons, the petitioners in HCJ 6126/94. They also offended Ms. Matar and the Women’s Association for the Future of Israel, the petitioners in HCJ 6143/94. The petitioners approached the Broadcasting Authority and the playwright and requested that the italicized lines – according to which Chana Szenes broke under interrogation and revealed that Palgi and Goldstein were on their way to meet Kastner – be deleted from the broadcast. They claimed that the lines were false, that Chana Szenes had bravely borne her interrogation and did not betray her comrades. Furthermore, they maintain, these falsities tarnish the image of Chana Szenes as one of the greatest Jewish heroines in history. They argued that broadcasting the lines will deeply offend thousands of people who cherish Chana Szenes’ memory. These include both Holocaust survivors and native-born Israelis. Both the author and the Broadcasting Authority rejected the petitioners’ requests, emphasizing the principles of the freedom of expression and artistic creativity. They noted that the screenplay was a fictional drama, merely inspired by events that had actually occurred. Mr. Lerner explained that he had attempted to balance between historical facts and the need to express his own worldview, as well as his commitment to artistic quality. It was for the public to judge whether he had fulfilled these tasks. In its response, the Broadcasting Authority stated that the screenplay was prefaced by the “Author’s Explanation,” which stated that the play is:

A fictional drama inspired by events that actually occurred. The drama strives to integrate these historical events with the behavioral patterns of dramatic characters. Casting events in this manner obviously necessitated divergence from how the events actually occurred and, as such, posed a difficult

dilemma concerning the degree of historic accuracy required in an artistic creation.

Respondents informed us that it would be stressed, at the beginning of each episode, that the film should not be seen as a documentary presentation, but rather as historical fiction. They also stated that, after the film's conclusion, an in-studio discussion would be held to which Chana Szenes' brother would be invited, along with historians and journalists. In this forum, all those dissatisfied with the series would have an opportunity to respond.

4. The response of the Broadcasting Authority did not satisfy petitioners. They petitioned this Court to order the Broadcasting Authority to delete the paragraph in which Kastner states that Chana Szenes had broken under interrogation and revealed the imminent arrival of Palgi and Goldstein. Petitioners asked the Court for an interim order preventing the broadcast, scheduled for November 7, 1994, from being aired until the petitions were decided. That same morning, the Court convened to hear the claims. All agreed that Kastner never actually spoke the words attributed to him by the script. Nor was it disputed that Kastner's lines were substantively untrue and lacked historical basis. As such, petitioners argued that the Broadcasting Authority, as a national agency, must refrain from airing misleading and unreliable information. *See* The Broadcasting Authority Law-1965, § 4. Petitioners also argued that airing the false statements would deeply and seriously taint Chana Szenes' dignity and good name. Thus, petitioners submit, Kastner's lines constitute intentional defamation, without the protection of the defenses of "good faith" or "truth." Moreover, petitioners argue that this injury is magnified by the inability of the late Chana Szenes to protect her rights. Petitioners further argue that broadcasting the false paragraph will offend the feelings of the public. The tale of Chana Szenes' bravery belongs to the history of the Jewish nation. It is part of our national folklore. This being the case, petitioners maintain, in the conflict between freedom of expression on the one hand, and the public's feelings and the individual's right to dignity on the other, the latter must prevail.

5. Respondents defend their position. They argue that freedom of expression may only be infringed under extreme circumstances, which involve a clear and present danger to the public peace. Such circumstances do not characterize the case at bar. The Broadcasting Authority, they argue, gave appropriate weight to the conflicting interests. Its decision is reasonable and the necessary measures were adopted in order to mitigate the damage to the dignity of Chana Szenes, and that of her family and the general public.

6. On that same day, we rendered our decision and held as follows:

We have decided to reject the petition, in accordance with the majority opinion of Justices Barak and Mazza, with Justice Cheshin dissenting. Our reasons for this decision will be provided separately. The three of us are convinced that deleting the disputed paragraph would not interfere with the flow of the screenplay. Even so, the majority held that such a decision is subject to the authority of the Broadcasting Authority, it is not the Court's place to instruct them in this regard. The dissent, for its part, contended that, since the Broadcasting Authority was not the drama's original author, it may be ordered to comply with the petitioners' request.

The time has come to give our reasons for that decision.

The Normative Framework

7. Our point of departure is the Broadcasting Authority's power and discretion, which derive from the Broadcasting Authority Law. According to the provisions of that law, the Broadcasting Authority shall "broadcast educational, entertainment and informational programs in the areas of politics, social life, economics, culture, science, and art." *See* the Broadcasting Authority Law-1965, § 3. In these broadcasts, the Authority must present the "different outlooks and opinions of the public, as well as supply reliable information." *Id.*, § 4. The scope of this power and

discretion is determined by the interpretation of the law's provisions, in view of the fundamental principles of our legal system. Indeed, a statute is "a creature of its surroundings." H CJ 58/68 *Shalit v. Minister of the Interior* [1] at 513 (Sussman, J.). A statute's surroundings are not limited to its textual setting but also include the statute's broader context. This context is predicated on "broad circles of accepted principles, fundamental goals and basic criteria." CA 165/82 *Kibbutz Hatzor v. Assessment Clerk Rehovot* [2] at 75. These values and principles form the statute's general purpose. It may be presumed that the legislature intended to bring these values to fruition. See H CJ 953/87 *Poraz v. Mayor of Tel-Aviv/Jaffa* [3] at 329.

8. There are three principles and values applicable to our case. First, we must consider the freedom of expression and creativity. Second, we must bear in mind a person's right to his or her good name. Finally, we must consider the public welfare. At times, these values are compatible. Occasionally, however, they conflict, making it necessary to strike an appropriate balance. Quite often, the values and principles come in pairs, each one pulling in its own direction. The thesis confronts the antithesis, and a synthesis between the two is required. This synthesis is achieved by examining the relative weight associated with the different values in the conflict. The balancing must be normative and principled; the basic criteria for deciding this balance must be determined. See FH 9/77 *Israel Electric Company v. "Ha'aretz" Newspaper* [4] at 361; H CJ 14/86 *Laor v. Film and Play Review Board* [5] at 434.

9. In interpreting the scope of the Broadcasting Authority's discretion, the first value to be considered is the freedom of expression. This is a basic value derived from the values of the State of Israel as a Jewish and democratic state. Indeed, Jewish heritage is based on a plurality of opinions and views. See Justice Elon's opinion in EA 2/84 *Neiman v. Chairman of the Eleventh Knesset Elections Committee* [6] at 294. "Both are the words of the Living God." See Babylonian Talmud, Tractate Eruvin 136b [76]. Jewish Law is characterized by pluralism, without the interference of the sovereign. "Just as people's faces are not alike, so too

their opinions are not the same. Rather, each one has an opinion of their own.” Bamidbar Rabbah, Pinchas 21:2 [77]. Justice Elon, in *Neiman* [6] at 296, summed up the Jewish approach to freedom of expression in the following manner:

This is the doctrine of leadership and government in the Jewish tradition. Every single person should be tolerated. Every single group, according to its own views and opinions. This is the great secret of tolerance and listening to the other, and the great power of the freedom of expression for every person and community. Not only is this essential for proper and enlightened government, it is also essential for its creativity. In this world, two opposing forces confront each other and reproduce, and how much more so is this true in the spiritual world.

A classic expression of this is the freedom of expression granted the biblical prophet, as H. Cohen noted:

The typical embodiment of freedom of speech in ancient Jewish history is not negative, but positive, namely the institution of prophecy ... there arose for us prophets, whose prophecies embodied the freedom of speech.

H. Cohen, *Z’chuyot Haadam Bimikra Ubitalmud* 69 (1984) [62].

Freedom of speech is one of the State of Israel’s fundamental values as a democratic state, which regards freedom of speech as a “supreme” or “sublime” right. See CA 723/74 “*Ha’aretz*” *Newspaper Publications v. Israel Electric Company* [7] at 295; HCJ 73/53 “*Kol Ha’Am*” v. *Minister of the Interior* [8] at 878. As such, it occupies a “place of honor in the pantheon of basic human rights.” HCJ 153/83 *Levy v. District Commander of the Israeli Police – Southern Command* [9] at 398. Indeed, freedom of speech is “an integral part of our legal system’s ethos.” CA 105/92 *Re’em Engineers v. Municipality of Upper-Nazareth*

[10] at 201, and it is said to constitute democracy's "soul." CrimA 255/68 *The State of Israel v. Ben Moshe* [11] at 435 (Agranat, J.). Artistic expression is a central element of the freedom of expression. HCJ 4804/94 *Station Film Company v. Films and Play Review Board* [12] at 680 {41}.

Freedom of expression "forms a basis of the freedom of artistic creation in the literary sphere and in forms of visual expression." HCJ 806/88 *Universal City Studios v. Film and Play Review Board* [13] at 27 (Shamgar, P.). "Freedom of expression is the freedom of the creator to burst out of the confines of his or her heart, spread out his or her wings and let his or her thoughts roam free." *Laor* [5] at 433. Freedom of expression is not the only source of the individual's freedom of artistic creation. This latter freedom can also be regarded as an independent human right, existing in its own right. This is a person's right to freedom of artistic creation, to which I referred in *Station Film* [12] at 680 {41}, stating:

It may be understood as a constitutional right that "stands on its own two feet," so to speak. It is based on the notion that man is an autonomous creature, entitled to self-actualization, as both a creator and as one who benefits from creation. Indeed, freedom of artistic expression is the artist's freedom to create. It is the freedom to choose a subject and the manner in which it is presented. It is also the freedom of others to listen and absorb.

In our case, the freedom of artistic creation in question is that of Mr. Lerner. It is his freedom of expression. From the perspective of the Broadcasting Authority, this case also involves its own freedom of expression, as both speaker and as the forum. HCJ 399/85 *Kahane v. Broadcasting Authority* [16] at 268; HCJ 5503/94 *Segal v. Speaker of the Knesset* [15] at 545. Freedom of expression and freedom of artistic creation include the freedom of every one of us to read, to look, and to absorb. The public's "right to know" is to be taken literally. It signifies

the right of everyone to listen and to understand, to form an opinion, to debate and to persuade.

10. Do freedom of expression and artistic creation extend to expression that is not true? The answer to this question is affirmative. Speech which is false is contained within the freedom of expression and creation. Speech which is false and defamatory is included within the definition of freedom of expression. *See* CA 214/89 *Avneri v. Shapira* [16] at 857. An obscenity based on a falsehood is included in freedom of expression. *See* *Station Film* [12] at 676 {35}. An artistic work based on falsehood is included in freedom of expression. *Compare* *Laor* [5] at 433.

11. This having been said, freedom of expression and creation are not the only values that we must consider. A democratic society is founded on a spectrum of values and principles, with the freedom of speech and of artistic creation being only one of these. Realization of these other values dictates that we rein in the protection afforded the freedom of expression and creation, in order to extend appropriate protection to these other values. My freedom of movement ends where your body begins. My freedom of expression does not give me license to defame another, nor does it allow me to disclose confidential state secrets or to endanger the public welfare. Freedom of expression is not the freedom to commit perjury. Constitutional theory distinguishes between the scope of a human liberty and the degree of protection that the legal system confers upon it; between the coverage of the freedom and its protection. *See* *Kahane* [14] at 270; *Avneri* [16] at 857; F.F. Schauer *Free Speech: A Philosophical Enquiry* 89 (1982) [72]. I addressed this distinction in *Universal City Studios* [13] at 33, where I wrote:

Any discussion of freedom of expression demands consideration of two separate questions. First, we must examine the content of freedom of expression – what it includes and what it does not. This examination delineates the scope of the expression “covered” by freedom of expression. It deals with the issue of what constitutes “expression” for the

purposes of this fundamental value. For example, is giving false testimony in court included in the freedom of expression? Does the freedom of expression include demonstrations; does it extend to commercial advertising? Second, what is the scope of protection afforded by law to those expressions covered by the freedom of speech? Do they enjoy absolute or only relative protection? If the protection accorded to them is relative, what are its criteria?

On the basis of this distinction it was held, for example, that the freedom of expression, as a constitutional right, extends to “any opinion, view and belief in a free society.” *Neiman* [6] at 278 (Shamgar, P.). Freedom of expression is the freedom to voice an opinion in a manner that is “uninhibited, robust and wide-open,” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (Brennan, J.) [56], regardless of its content. Even so, not everything that is included within the constitutional definition of free speech is necessarily granted constitutional protection. The scope of protection given to this freedom is a function of balancing between freedom of expression and other conflicting principles. It is the product of the horizontal balancing between the rights of two persons. My freedom of speech ends where the protection of your good name begins. It is also the product of the vertical balance between individual freedom and the public interest. My freedom of expression ends where there is a near certainty of imminent actual harm to public safety. H CJ 2481/93 *Dayan v. Jerusalem District Commander* [17] at 475. Practically speaking, the main problem that generally arises, which in fact is the issue in the case before us, is the demarcation of the borders of the respective rights – an individual’s right as opposed to the public’s needs. To do this, we must balance, either vertically or horizontally, between the competing values and interests. We must, in the words of Justice Agranat in *Kol Ha’Am* [8] at 879:

weigh the various competing values in the balance and, after reflection, select those, which, under the circumstances prevail.

We therefore now examine the other values and principles to be taken into account.

12. The second value we must consider is human dignity. In the context of this petition, our concern is with the aspect of human dignity relating to a person's good reputation. This aspect of human dignity is vital to all people. A person's right to his or her good name is a basic value in every democratic system. It is a necessary condition for a freedom-loving society. It is predicated on the need for an internal sense of value, personal pride and personal recognition among people. I mentioned this in *Avneri* [16] at 856, in which I wrote:

A person's dignity and good name may be as important to him or her as life itself. They can be cherished by that person above and beyond all other assets.

The above is derived from the values of the State of Israel as a Jewish state, as our Jewish heritage attaches central importance to a person's good name. Indeed, our sources teach that "slander kills" and that "whoever publicly shames his neighbour is deemed to have shed blood" Babylonian Talmud, Tractate Baba Metzia 58b [78]. Even if the victim forgave the slanderer, the slander continues to "burn within him." To this effect, the sources further state that "our forefathers in the desert were not punished for any reason other than slander" Maimonides, *Mishneh Torah*, *Hilchot Deot*, 7:2 [79].

The significance of preserving a person's reputation also derives from the values of the State of Israel as a democratic state. One who steals my property can compensate me monetarily, but he who robs me of my good name has stolen the very reason for my existence. One's good name determines the manner in which one perceives oneself and how one's peers and society relate to one. In effect, the only asset of many people, both public servants and those working in the private sector, is their reputation, which they cherish as life itself. This applies to both the living and the dead. We must protect the dignity of the deceased and their good

name. See CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [18] at 519; HCJ 5688/92 *Vichselbaum v. Minister of Defense* [19] at 827; FH 3299/93 *Vichselbaum v. Minister of Defense* [20] at 195. In the case at bar, the paragraph in dispute in Mr. Lerner's screenplay, as produced by the Broadcasting Authority, offended the memory of Chana Szenes; it maligned her dignity and the myth surrounding her. The petitioners emphasize this point, stressing that "the name of one of the heroes of Israel, who gave her life to save her brethren and who, in the middle of the Holocaust, was prepared to enter the lion's jaws of the Nazi regime in an attempt to rescue the remnants of the survivors, is being disgraced." Sec. 3 of the petition in HCJ 6143/94.

13. The third value to be considered is the public interest. A person is a social creature; he or she does not live on an island but is part of a society. Society has interests that it seeks to realize, including the state's existence, its democratic character, public security and welfare, the integrity of the judiciary and other similar values. If these public interests are not realized, human rights cannot be upheld. Human rights cannot be a national suicide pact. In the absence of public order there can be no freedom. Freedom is not anarchy and a democracy should not commit suicide in order to prove its vitality. Without public order, a democratic system cannot be maintained. See HCJ 109/70 *The Orthodox Coptic Patriarch of Jerusalem v. Minister of Police* [21] at 246. Each state has its own collective identity; each state has its national history and its own social goals, the realization of which forms part of the public interest. See *Laor* [5] at 433.

14. The public interest is not a static, defined concept. Rather, it reflects society's basic credo. It is an expression of the general interest, required by it as an organized collective. See *Dayan* [17] at 472. It also includes various aspects of the individual's interests. Consequently, protection of freedom of expression and of artistic creation is in the public interest. Similarly, protection of a person's dignity and good name are also in the public interest. It is in the public interest that human rights be protected and upheld. It is in the public interest that the freedom of

expression and artistic creation be maintained. But, in addition to this, the public interest also includes the interests of the general public. It includes the nurturing of culture, art and language. It includes the protection of language as a tool for national expression and cultural value, *Re'em Engineers* [10] at 203, the consideration of public sensitivities as an expression of social tolerance, H CJ 5016/96 *Horev v. Minister of Transportation* [22] at 44 {196}, the maintenance of historical continuity, and honoring national values. In our case I will assume that the paragraph in dispute does disgrace the good name and dignity of Chana Szenes. I will assume that it does harm national values, that it offends public feelings in general and the feelings of Holocaust survivors in particular. I will assume that it injures all those who cherish the memory of Chana Szenes.

The Balance

15. We began by addressing the freedom of expression and of artistic creation. We distinguished between the scope of these rights and the protection that we accord them. The paragraph in dispute in Mr. Lerner's screenplay, as it appears in a film prepared by the Broadcasting Authority, is included in both Mr. Lerner's and the Broadcasting Authority's freedom of expression. It is part of their freedom of artistic creation and part of the freedom of creation of every member of the public. Freedom of expression and creation also includes the freedom to create and express that which is untrue. The issue before us, however, is whether the paragraph in dispute is constitutionally protected. Freedom of expression and creation, be it the creator's, the producer's or the public's, is not absolute. Rather, it is relative. Its full scope is not protected. Does the paragraph in dispute benefit from the protection of Israeli law? In order to respond to this question we must first consider the other values and interests to be taken into account. Each of these values and interests must be given the weight that reflects its relative importance. Each must be placed on the scales and balanced. This balancing exercise is not conducted according to a single balancing formula. Instead, it is the substance of these conflicting values that determines how the balancing is

to be carried out. Thus, the appropriate balance between the freedom of expression and between one's good reputation is not the same as the appropriate balance between the freedom of expression and between the public peace. "The variety of nuances necessitates many points of balance." *Levy* [9] at 401. We will now examine the appropriate modes of balancing.

16. The first pair of values to be discussed is freedom of expression and a person's right to his or her good reputation. Where these two values conflict, which takes precedence? The answer is that speech which harms a person's reputation does not cease to be protected speech, merely by virtue of its offensive content. The constitutional right to freedom of expression also extends to speech that harms an individual's reputation. Even so, our legal system is sensitive to the need to safeguard a person's good name in addition to protecting the freedom of expression. In the final analysis, they are both sustained from the same source – human dignity. Every legal system attempts to balance between conflicting values. This balance determines both the scope of the values and the extent of legal protection afforded the freedom of speech and reputation. This balance is reflected in the laws prohibiting defamation. These laws are the product of the balance which the legal system establishes between the freedom of expression on the one hand, and the need to protect a person's reputation, on the other. They are the "conduit" via which the correct balance between freedom of expression and reputation is infused into the legal system. Whatever falls within the category of defamation loses the protection given to the freedom of expression. This balance is a "horizontal one", for it determines the borders of the pertinent rights. The remedies for infringing these rights constitute part of the private law. Sometimes, the laws of defamation are not commensurate with the appropriate criteria for balancing between conflicting values. In such cases, the defamation laws may be adjusted in order to reflect the correct balance. *See Sullivan* [56].

17. Within the framework of the law of defamation, the genre of the docudrama is liable to raise special problems. The author of a docudrama

is a creative interpreter. Reality is initially only the basis of his or her screenplay, but it eventually becomes an inseparable part of the artistic creation. The artistic creation reconstructs reality and supplements it. See D.A. Anderson, *Symposium: Defamation in Fiction; Avoiding Defamation Problems in Fiction*, 51 Brook. L. Rev. 383 (1984) [75] at 393. In these circumstances, the line between reality and imagination may be blurred, as well as the distinction between facts and assessments. In such a case, unique difficulties may be encountered in enforcing defamation laws. See *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991) [57]; *Davis v. Costa Gravas*, 654 F. Supp. 653 (S.D.N.Y. 1987) [58]; *Seale v. Gramercy Pictures*, 964 F. Supp. 918 (E.D. Pa. 1997) [59]. We have no need to discuss these issues here, for the petitioners' suit is not based on the law of defamation. Rather, their claim was filed within the framework of public law. They have requested that the Broadcasting Authority refrain from broadcasting the paragraph in dispute, for reasons of public interest, and for these reasons only.

18. In this case, in the context of public law, the freedom of expression and of artistic creation conflict with the public interest. The freedom of expression and creation at issue here is that of the playwright, Mr. Lerner. It is also that of the Broadcasting Authority. It is also the freedom of expression of every member of the public wishing to view the program, in the sense of "the public's right to know." The public interest in the case before us is complex, for it includes the public interest in protecting the rights of Mr. Lerner, of the Broadcasting Authority and of Chana Szenes, including the dignity and good name of Chana Szenes. The public interest also includes the interest in protecting historical truth and honoring national values. It further extends to the public interest in seeking not to offend public feelings in general and the feelings of Holocaust victims in particular. Indeed, these Holocaust survivors were particularly offended by the harm to the legend of Chana Szenes. How is this conflict then to be resolved?

The issue is not a new one for us; it raises the well-worn question regarding the "vertical" balance between individual rights and the public

interest. This balance does not establish the scope of the right, but rather determines the degree of protection afforded it, and the license given to government authorities to violate it. In a long series of judgments, which anchored the tradition of freedom of expression in Israel, this Court examined this balancing exercise. *See* A. Barak, *Chofesh Habitoi Umigbaloteha*, 40 Hapraklit 5 (1993) [66]; A. Barak, *Hamisoret shel Chofesh Habitoi Biyisrael Ubiayoteha*, 27 Mishpatim 233 (1997) [67]. Our point of departure is that, in a freedom-loving, democratic society, it is justified to limit the protection granted to freedom of expression and creation when doing so harms the public interest. Nonetheless, not all harm to the public interest warrants circumscribing the protection granted freedom of speech and expression. Such limitations are considered justified only if they are consistent with the values of the State of Israel as a Jewish and democratic state, if the limitation is for a proper purpose and if the limitation is not greater than necessary to prevent the harm. These requirements are entrenched in the limitation clause of the Basic Law: Human Dignity and Liberty, § 8, and reflect the position of the legislature regarding the public interest's ability to curtail individual freedom. *See* HCJ 4541/94 *Miller v. Minister of Defence* [23] at 138 {231}; CrimFH 2316/95 *Ganimat v. State of Israel* [24] at 653; *Horev* [22] at 41-43 {193-95}. Indeed, if every public interest justified withdrawing the protection granted to the freedom of expression, these freedoms would be dealt a fatal blow, seriously undermining the democratic character of the state.

19. Do the values of the State of Israel as a Jewish and democratic state allow for the freedom of expression and artistic creation to be violated in order to uphold a public interest? The answer to this question is in the affirmative. Admittedly, the freedoms of expression and creation are integral parts of a democracy. Democracy and the freedom of speech are inextricably intertwined. An improper infringement of the freedom of expression and creation infringes all other human rights and jeopardizes the democratic nature of the regime. *See Israel Electric Company* [4] at 293. Democracy is the heart of freedom of expression, and freedom of expression revitalizes democracy. *See Kol Ha'Am* [8] at 876; HCJ 372/84 *Kloppfer-Naveh v. Minister of Education and Culture* [25] at 238;

Kahane [14] at 274. This having been said, in order to sustain a democratic regime that protects human rights, it is sometimes justified to infringe the freedom of expression and artistic creation.

20. In the framework of the public interest, harm to which justifies curtailing the freedom of expression and creation, we should also consider offense to public feelings. This conclusion is by no means obvious; it poses a difficult dilemma for any legal system founded on democratic values. *See Horev* [22] at 47-48 {200-01}. On the one hand, there is a serious danger of violating freedom of expression and artistic creation if offense to public feelings is cause for restricting these freedoms. Expression can offend another person's feelings; if every such offense was to justify infringement of the freedom of expression and creation, surely these freedoms, and indeed democracy itself, would be emptied of meaning. HCJ 953/89 *Indoor v. Mayor of Jerusalem* [26] at 690. A democratic society is based on the recognition that the feelings of some will inevitably be offended by their fellows' exercise of their respective freedoms. This is part of tolerance for the opinions of others, which characterizes the democratic regime. *Universal City Studios* [13] at 37. On the other hand, a democratic regime is sensitive to these feelings, for this too is an aspect of tolerance:

The sons and daughters of a free society, in which human dignity is a cherished value, are all called upon to respect the personal religious feelings of the individual and his or her human dignity. This must be based on tolerance and the understanding that personal religious feelings and their various modes of expression differ from one individual to another.

HCJ 257/89 *Hoffman v. Appointee over the Western Wall* [27] at 354 (Shamgar, P.).

The solution to this dilemma is found in the understanding that only severe offenses to feelings warrant curtailing the freedom of expression and creation. Thus, a democratic regime must arrive at a "level of

tolerance” for offending feelings. Only where the degree of offensiveness exceeds this “level of tolerance” can restrictions on the freedom of expression and creation be justified in a democratic society. See *Horev* [22] at 47-48 {200-01}. I explained this in *Indoor* [26] at 690, in which I wrote:

A democratic society that endeavors to protect both freedom of expression and public feelings must set a “level of tolerance,” according to which only an offense to public feelings that exceeds this level can justify curtailing the freedom of expression.

In *Horev* [22] at 48 {201}, I added:

[I]t is possible to infringe human rights for the purpose of protecting feelings – particularly religious feelings and lifestyle – in a society with democratic values, provided that the harm exceeds the threshold of tolerance accepted in that society.

In H CJ 606/93 *Kiddum Yazamoth and Publishing (1981) v. Broadcasting Authority* [28] at 16, Justice Dorner wrote:

A democratic society, characterized by tolerance extended to differing views, assumes and permits that feelings be offended up to a certain point. For expressions that are pleasant to the ears of all do not require protection... Harm which is sufficiently great to warrant restricting freedom of expression must be both severe and significant.

The same idea was raised by Justice Mazza, in H CJ 2888/97 *Novik v. Channel Two Television and Radio* [29] at 201, who wrote:

In order for the Court to impose prior restraints on speech, based on the argument that publishing the expression will harm public feelings, it must first be convinced that the speech’s content is so severe, and the harm expected to the public so

grave, that failing to prohibit the publication will create a clear and imminent danger of undermining public order or will severely and concretely disrupt it.

Thus, in view of the priority that democracy sees in the freedom of expression and artistic creation, only an offense to public feelings that is both severe and grave – one which exceeds the level of tolerance level that a person assumes in a democratic society – will justify restricting or withdrawing the protection normally afforded freedom of expression and artistic creation. Moreover, the likelihood of the harm actually occurring must be one of “near certainty.” A. Rubinstein, *Hamishpat Haconstitutzioni shel Midinat Yisrael* 1003 (5th ed. 1997) [63]. Even so, special and exceptional circumstances may justify a standard of “reasonable likelihood.” See *CrimA 126/62 Disentzik v. Attorney General* [30] at 169; *CrimA. 696/81 Azulai v. The State of Israel* [47]; *CrimA 6696/96 Kahane v. The State of Israel* [32].

A Proper Purpose and the Appropriate Means

21. An infringement on freedom of expression and creation is only justified when the infringement is for a proper purpose and the least restrictive means are used to achieve that purpose. A purpose is deemed proper if it constitutes a social goal in a society sensitive to human rights. An infringement will be considered not to exceed that which is necessary if it adheres to the standards of proportionality. See *H CJ 987/94 Euronet Kavei Zahav (1992) v. Minister of Communications* [33]; *H CJ 3477/95 Ben Attia v. Minister of Education Culture and Sport* [34]. An examination must always be conducted in order to ascertain whether it is possible to adopt less restrictive measures for the purpose of achieving the purpose in question.

From the General to the Specific

22. My presumption is that the paragraph in dispute offended the dignity and good name of Chana Szenes and harmed the legend of Chana

Szenes. It is not an accurate description of historical events. It offended the feelings of the public and, specifically, the feelings of Holocaust survivors. All of these harm the public interest. Does this harm justify withdrawing the statutory protection afforded Mr. Lerner, the Broadcasting Authority and the freedom of expression and creation? My answer is in the negative. This answer is based on the fact that infringing the freedom of expression and artistic creation of Mr. Lerner and the Broadcasting Authority is inconsistent with the values of the State of Israel as a Jewish and democratic state. This being the case, I need not conduct the further examination of determining whether the infringement was for a proper purpose and did not exceed that which was necessary.

23. The values of Israel as a Jewish and democratic state include the freedom of expression and artistic creation of every individual, even when his or her expression is offensive to the feelings of others. For it is precisely in those cases, when expression is provocative, that the speech and its author require protection. A democracy's strength lies in the protection that it extends to unpopular opinions and works. The test of democracy is not the protection granted to expressions that are pleasant to hear. Its test is in those difficult cases, in which the population rejects the expression and shuns the creation. *See H CJ 351/72 Keinan v. The Film and Play Review Board* [35] at 816. This is the doctrine of tolerance, on which democracy is founded. Each individual in society accepts that certain expressions will, to some extent, hurt his or her feelings, as long as the offensiveness does not exceed the appropriate level of tolerance. In my opinion, the offensiveness of the disputed paragraph, to the feelings of the public in general and of the Holocaust survivors in particular, does not exceed the level of tolerance which binds the members of a Jewish, democratic society. It is true that many have been offended, and the offense is real and sincere. Yet this is not sufficient; much more is required. To be precise, our concern here is not whether the heirs of Chana Szenes have a legal claim to civil damages. We are not dealing with the horizontal balance between the rights of the speaker and creator and between the rights of the maligned and defamed person. Our concern is with the restriction of freedom of speech for reasons of public interest,

and as part of the offense caused to public feelings. In this context, my position is that the harm to Chana Szenes' dignity and good name does not exceed the tolerance level assumed by every member of Israeli society.

24. The "level of tolerance" for offense to feelings differs from freedom to freedom. H CJ 7128/96 *Movement for Temple Mount Faithful v. Government of Israel* [36] at 521. The tolerance threshold is particularly high in the context of limitations on the freedom of speech and creation. Only in exceptional and extreme cases will we find that feelings are offended beyond that high level of tolerance. In reference to these instances, I noted in *Universal City Studios* [13] at 38 that:

Our tradition of freedom of expression and our reluctance to impose content-based prior restraints, limits these cases to those that are exceptional and unusual. These must be cases that shake the very foundations of mutual tolerance.

As such, expression can only be limited if it offends public feelings to the extent that it shakes the foundations of mutual tolerance. This high degree of offensiveness does not exist in the case before us. Despite all the pain that results from the maligned image of Chana Szenes, it certainly cannot be contended that the screenplay shakes the foundations of mutual tolerance. It is no different than instances of offended feelings in other cases, in which this Court ruled that the offensiveness does not exceed the level which warrants imposing restrictions on freedom of speech. *See e.g., Keinan* [35]; *Laor* [5]; *Universal City Studios* [13].

25. The disputed paragraph is not historically accurate. Indeed, it lacks any historical basis and is false. Is it appropriate to protect false expression? Is the expression's falsehood sufficient to transfer it beyond the "level of tolerance"? The answer to these questions is that a democratic, freedom loving society does not predicate the protection of speech and creation on that speech being an accurate reflection of the truth. This point was made by Acting President Landau:

If it was only an issue of fabricating historical facts, this in itself would be insufficient to ban the film. For the authors could argue that there is no one historical truth and that each historian has his own truth. In any event, generally speaking, since when does falsehood in a film or play provide grounds for banning it in a state which guarantees freedom of expression to its citizens?

HCI 807/78 *Ein Gal v. Film and Play Review Board* [37] at 277.

The rationale underlying this approach is not that we cannot know what the truth is, as yesterday's lie may yet become tomorrow's truth. This approach does not derive from our indifference to the lie and or our placing it on equal footing with the truth. This approach does not attach the same degree of importance to truths and lies. Rather, it is premised on a preference for the truth. Underlying this understanding is an approach beckoning us to seek to reveal the truth and frustrate the lie. At foundation, this stance is based on the philosophy of freedom, according to which the test of truth is its persuasive power. The way to deal with falsehood is not by suppressing it but by explaining the truth. Falsehood fails when it is exposed, not when it is suppressed. *Compare* R. Cohen Almagor, *Gvulot Hasavlanut Vihacherut* 130 (1994) [64]. Lies are not fought by suppressing the freedom of the one who lies, but by strengthening the freedom of the one who speaks the truth. *See Kahane* [14] at 272. The truth shall prevail by virtue of its own inner power and ability to defeat falsehood in the clash of ideas. The truth shall emerge from the struggle between it and falsehood. President Agranat made this point in *Kol Ha'Am* [8] noting:

At foundation, the process is no more than the process of clarifying the truth, so that the state may learn and know how to choose a course of action and achieve that action in the most efficient manner. Freedom of expression serves as a means and as an instrument to clarify what that truth is, since it is only by

considering “all” points of view, and through the free exchange of all ideas that “truth” can be uncovered.

Id. at 877.

The following statements made by Justice Brandeis, in *Whitney v. California* (1927) [60] at 377, are also well-known:

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

These words reflect the tradition of freedom of speech in Israel. Falsehoods shall fail as a result of education. Lies will be put to the test in confronting the truth. Encouraging public discussion, rather than its suppression, is the remedy that democracy supplies against the malady of falsehood. With respect to Chana Szenes, the truth will emerge in the public discussion likely to follow in the wake of the screenplay’s broadcast. Public discussion, together with the publication of articles on the matter by researchers and writers, will lead to the triumph of truth over falsehood. These will enhance Chana Szenes’ grandeur and illuminate the flame that she kindled. Internal conviction, not government prohibition, shall lead to the victory of truth over falsehood. *See* HCJ 273/97 *Association for the Preservation of Individual Rights of Homosexuals, Lesbians and Bisexuals in Israel v. Minister of Education, Culture and Sport* [38].

26. This high threshold required to justify restricting the freedom of speech is especially applicable to the literary genre of the docudrama. This genre combines historical truth and literary imagination. Classic creations throughout the generations were premised on this combination. Indeed, human culture would be stunted were creators unable to draw upon historical characters. Authors and playwrights are not historians and one should not expect them to reconstruct the truth. Their freedom of imagination should be protected and they should be subject to an artistic, rather than scientific, examination. An artistic creation should be assessed artistically and comprehensively, not historically.

27. Is this case unique since the work in question damages the legend of Chana Szenes, a national heroine and revered figure? Should this myth be shattered in the name of freedom of expression? The paragraph in dispute is quite unfortunate. Had I written the screenplay myself, I would have done without it. But the play was written by Mr. Lerner – he is its creator. In his opinion, his artistic criteria necessitated the paragraph. It is not for us to censor plays and movies. One can only be sorry for the possible damage to the legend of Chana Szenes. However, a democratic society does not preserve the image of its heroes by repressing freedom of expression and artistic creation. The legend must flow from the free exchange of ideas and opinions. It cannot be the fruit of governmental restrictions imposed on freedom of expression and creation. The legend of Chana Szenes will survive and flourish by virtue of the truth that lies in freedom, not by way of stifling falsehood. The legend is founded on Chana Szenes' poetry and bravery. Falsehood can harm neither her nor her memory. In the struggle between them, in the "free market" of ideas, truth shall reject falsehood.

28. Mr. Lerner and the Broadcasting Authority offended both the dignity of Chana Szenes and her good name. Is this offense protected by the freedom of expression? We must be precise: we are not concerned with conflicting basic rights in the framework of private law. Our concern is not deciding whether private law – for example, the law of torts or contracts – recognizes a right of action and offers a remedy. We are not

dealing with an action by Chana Szenes or her heirs against Mr. Lerner and the Broadcasting Authority. This is not an issue of defamation or damages. Nor is it an issue of an injunction within a civil claim. As we observed above, a civil claim is both difficult and complex.

Our concern is different, for we are dealing with Chana Szenes' human dignity and good name as part of the public interest. In this context, human dignity, as a right, is subsumed within the public interest. We are therefore dealing with the vertical balance between a person's right to freedom of expression and the public interest in preserving Chana Szenes' good name and dignity. The issue is whether the injury to her dignity and good name warrants the violation of the freedom of speech and artistic creativity. The answer to this question is provided by the vertical balance, according to which freedom of expression and creativity can be violated only if such violation is consistent with the values of the State of Israel, is for a proper purpose, and does not exceed the necessary means. The infringement is deemed to be consistent with the State of Israel's values only if the probability of its materialization is nearly certain, and only if the harm to the public interest is harsh, serious and severe. Such harm will be considered to have occurred when it exceeds the "level of tolerance." As such, the fact that Chana Szenes' dignity and good name were violated is insufficient to justify a parallel violation of freedom of expression and creativity. Nor is it sufficient that the violation of dignity and reputation are extreme and severe. Within the framework of the vertical balance between freedom of expression and creativity and the right to preserving one's reputation, the question we must ask ourselves is whether the harm to dignity and reputation, as part of the public interest, is so grave as to exceed Israeli society's level of tolerance. The question is whether the harm to Chana Szenes can be said to shake the very foundation of mutual tolerance. We do not ask ourselves whether the rights of Chana Szenes or her heirs were transgressed; instead, we ask whether the public interest was gravely harmed so as to justify restricting freedom of expression and artistic creation, irrespective of the rights of Chana Szenes and her heirs. These questions must be answered in the negative. Within the framework of public law, even serious damage to

Chana Szenes' reputation and dignity cannot be considered sufficient to justify violating freedom of expression and creativity. Such a violation becomes possible only when it appears that the harm to the dignity and reputation of Chana Szenes, including the damage to her ethos, to historical truth and to the other components of the public interest, is serious and grave, so that it may be said, with near certainty, that it is above and beyond that which can be tolerated in a freedom-loving democratic society. As we have seen, the harm in question did not reach this dimension. The remedy for the damage to Chana Szenes' dignity can only be sought in the realm of private law.

I am aware that, under similar circumstances, the German Constitutional Court recognized the possibility of restricting freedom of expression. *See* 30 BverfGE 173 (1971) [61] [hereinafter *Mephisto*]; D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* [73] at 301. Even so, this ruling – itself the subject of controversy, D. Currie, *The Constitution of the Federal Republic of Germany* [74] at 195 – related to private law relationships and had no application to public law. The case dealt with the right of an actor's relatives to request an injunction against the publication of a book that, in their opinion, defamed their relative, the deceased. It does not address the duty of a public authority to prevent the work's publication for reasons of public interest. *Mephisto* [61] involved a conflict between two rights – the freedom of expression and artistic creativity as opposed to human dignity. The remedy requested was within the realm of private law. In the petition at bar, the right of freedom of expression and artistic creation conflicts with the public interest (human dignity). Accordingly, the balance in the two cases may be different.

29. Prior to completing my remarks on this subject, I will stress that there is no sharp distinction between balancing in public law and in private law. Just as considerations of individual rights form part of the public law, so too do public policy considerations flow into the private law realm and help shape the rights protected there. *See* CA 294/91 [18]; *see also* 3 A. Barak, *Parshanut Bimishpat, Parshanut Chukatit* 649 (1994)

[65]. This having been said, we are not dealing here with total identity of interests. Rather, the weight that attaches to the different considerations and interests is likely to vary with the context – private or public law – and with the specific case. Accordingly, the final balance may also change. In our case, both the horizontal balance, which determines the scope of the right to freedom of expression and artistic creation when these conflict with human dignity (as part of the public interest), and the vertical balance, which determines whether freedom of expression and artistic creation may be violated in order to protect human dignity, are conducted within the framework of public law. The question before us is whether the public interest, in its broad sense, justifies violating the freedom of expression and artistic creation. My answer to this question is in the negative.

The Discretion of the Broadcasting Authority

30. Until now, we have discussed the freedom of expression of Mr. Lerner, the Broadcasting Authority and of the public. We have concluded that Mr. Lerner and the Broadcasting Authority are free to publish and broadcast the screenplay, without that freedom being restricted for reasons of public interest. In our analysis, we did not distinguish between Mr. Lerner and the Broadcasting Authority. We related to them as to any other person in the State of Israel. But is the Broadcasting Authority like any other person? Is the Broadcasting Authority, by virtue of its special status, not subject to restrictions which are not applicable to Mr. Lerner? The Broadcasting Authority Law provides that the Broadcasting Authority shall conduct its programming as “a government service.” The Broadcasting Authority Law, § 2. Can a government authority televise a program, fully aware of its historically inaccurate basis, which disgraces a revered public figure like Chana Szenes? One of the Broadcasting Authority’s functions is to reflect the life of the State of Israel. The Broadcasting Authority Law, § 3(1)(a). Does it discharge this duty when it publishes falsities regarding Chana Szenes? How does this broadcast comply with the Broadcasting Authority’s duty to ensure that “reliable information,” *see* The Broadcasting Authority Law, § 4, is available to

the public? Can it not be said that the Broadcasting Authority exercised its discretion in an unreasonable manner?

31. These questions are not new for us. The scope of the Broadcasting Authority's discretion has been examined by our case law. In this respect, this Court emphasized two basic propositions, one general and the other specifically relating to the Broadcasting Authority. The general proposition is that a decision is only deemed unreasonable if no reasonable agency could have adopted such a decision. The degree of unreasonableness, it follows, must therefore be extreme. Indeed, "only a blatant affront to our sense of justice can justify striking down an agency's act." HCJ 1/81 *Shiran v. Broadcasting Authority* [39] at 378 (Shamgar, J.). The unreasonableness must be extreme, going to the root of the matter. HCJ 156/75 *Dakah v. Minister of Transportation* [40] at 103.

The specific proposition, for its part, relates to judicial intervention concerning the freedom of expression. To this effect, Justice Shamgar wrote, in *Shiran* [62] at 378:

[t]he fact that we are dealing with the broadcasts or publication of written material prompts us to act with further restraint. This is due to the additional guiding principle of freedom of expression, which is a component to which special weight attaches. Thus, in order for this Court to prohibit a public authority from broadcasting or publishing a particular broadcast or publication, extreme circumstances indicating the presence of a tangible and nearly certain danger to public peace ... or other clear and obvious illegality, must exist.

Justice Shamgar continued, *Id.* at 379, holding:

[E]verything must be done in order to prevent issues which are no more than disputes over culture, education, good taste or the like, from being dragged into Court. For, as stated, this Court

cannot take upon itself a supervisory role over the contents of broadcasts, nor should it do so ... except in extreme circumstances, as mentioned above.

Justice Shamgar pointed out that the supervision over the Broadcasting Authority's exercise of its discretion in such matters is administrative and internal, rather than judicial and external. He noted that the Authority's organs are charged with this role. Hence, the Court should not intervene except where a blatantly unreasonable decision, which creates an almost certain danger to the public interest, is adopted. *See also* HCJ 266/81 *Avron v. Broadcasting Authority* [41]. Indeed:

Be the historical truth what it may, the Court will not censor the Broadcasting Authority by prohibiting programs which any particular petitioner, the Court, feels that it does not reflect the real truth. This is the dictate of freedom of expression, upon which the State of Israel as a democratic state is founded.

HCJ 2137/98 *Elias v. Chairman of the Broadcasting Authority's Managerial Committee* [42].

32. I accept that the Broadcasting Authority has discretion in determining its programming. Mr. Lerner's freedom of expression, however, does not necessarily obligate the Broadcasting Authority to broadcast his screenplay on the radio or television. The Broadcasting Authority functions both as a forum and a spokesman and its freedom of expression allows it to decide what to broadcast and what not to broadcast. Indeed, the Authority is entitled to decide that, for any particular reason, that it will not broadcast Mr. Lerner's screenplay. I am even prepared to grant that the paragraph in dispute would have constituted an appropriate reason for such purposes. However, the Broadcasting Authority did in fact decide to broadcast Mr. Lerner's screenplay and we are now being asked to interfere with that decision. This we cannot do, for two reasons. First, the Authority's decision is not so unreasonable as to justify the intervention of the High Court of Justice.

Second, it certainly cannot be said that no reasonable Broadcasting Authority could have decided to broadcast Mr. Lerner's screenplay, including the paragraph in dispute. The reasonableness of a decision is a function of the appropriate balance between conflicting values. H CJ 935/89 *Ganor v. Attorney General* [43] at 513; H CJ 6163/92 *Eisenberg v. Minister of Construction and Housing* [44]. The conflicting values in this case are freedom of expression and artistic creation, on the one hand, and the public interest, on the other. Additional factors to be considered are the Broadcasting Authority's status as a government service provider, its role and its integrity. As we observed, with respect to the conflict in the case before us between freedom of expression and artistic creation, on the one hand, and the public interest, on the other, the freedom of expression and artistic creation prevail. Considerations relating to the Broadcasting Authority's status cannot cause the decision to broadcast the program to be regarded as exceeding the parameters of reasonability. Certainly, it cannot be said that this decision's unreasonableness is so extreme that no reasonable Broadcasting Authority could have adopted it.

33. Second, the scope of the High Court of Justice's intervention in the Broadcasting Authority's freedom of choice is narrow. As Justice Shamgar noted in *Shiran* [39] exceptional circumstances are required to justify a judicial decision enjoining the Broadcasting Authority from exercising its freedom of expression and artistic creation. Deputy President Justice Ben-Porat dwelled on this point, in H CJ 259/84 *M.I.L.N., Israeli Institute for Better Business and Product v. Broadcasting Authority* [45] at 680, stating:

It is established that when freedom of publication or broadcast is involved, this Court will act with great restraint and will limit its intervention to extreme cases, such as a tangible and nearly certain danger to the welfare of the public at large... or clear and obvious illegality. The public has a right to freedom of expression being preserved in the media. The broadcast spectrum belongs to the public and the Broadcasting Authority's various organs are entitled, and even obligated, to

assume the responsibility for complying with the law when gathering and broadcasting information. Thus, this Court's powers of supervision and review are to be exercised cautiously and rarely when considering intervention in the freedom of publication.

Such exceptional circumstances are said to exist only if the broadcast will cause severe, grave damage to the public interest. When the alleged damage is injury to feelings, such injury must be extreme to the point of shaking the foundations of mutual tolerance in a democratic society. Harm of this nature is not present in this case. Consequently, there are no grounds for the intervention of this Court.

34. These two are interrelated and are bound up with the balance between freedom of expression and artistic creation, on the one hand, and the public interest, on the other. Indeed, the discretion of the Broadcasting Authority must not be isolated from the total complex of constitutional values and the appropriate balance between them. *See* H CJ 243/82 *Zichroni v. Directorial Committee of the Broadcasting Authority* [46] at 785; *Kahane* [14] at 307. Our determination that harm to the public interest does not justify suspending the protection offered by freedom of expression and artistic creation necessarily affects the reasonableness of the decision of the Broadcasting Authority. This is certainly the case when the Broadcasting Authority's decides to permit, rather than censor, a publication. This is certainly the case when we are requested to impose a prior restraint on a program, despite the Broadcasting Authority's decision to televise it. We will only adopt the role of censor as a last resort. In this context, I concur with the comments of my colleague, Justice M. Cheshin: "the director of the Broadcasting Authority is responsible for its broadcasts; this Court is not responsible for the content of the broadcasts. I refuse to assume the management of the Authority." *Kiddum* [28] at 37.

As such, when the Broadcasting Authority decides to broadcast a particular program that offends the feelings of the public, only very

extreme and exceptionally severe cases will warrant this Court's intervention. Such intervention, in the form of the prior restraint of the expression, infringes on the freedom of expression and artistic creation of the program's author. It violates the Broadcasting Authority's freedom of expression, both as a speaker and forum. Moreover, it violates the right of every member of the public. This three-tiered violation can only be allowed when the harm to the public interest is so severe and serious that it shakes the very foundations of mutual tolerance. The case must be extreme to the extent of shattering all that unites us. The harm to the public interest must be, in the words of Justice Mazza, "so fatal that refraining from prohibiting the publication will create a concrete and imminent danger of uprooting the public order, or of severely and gravely disrupting it." *Novik* [29] at 202. These are not the circumstances in the case before us.

35. What then will become of the Broadcasting Authority's public role? My response to this is that airing the play will not interfere with the function of the Broadcasting Authority. The play is a docudrama, interpolating imagination with reality. It is based on a combination of historical figures and historical events. The falsehoods in the play are peripheral, intended for artistic effect. All of these factors bring the decision to broadcast the screenplay within the boundaries of reasonableness. Admittedly, the Broadcasting Authority is under a duty to broadcast "reliable information." A docudrama, however, is not a program that broadcasts information. It is an artistic creation and must be viewed as such. It must be assessed according to its artistic character, not according to its historical message. It must be understood as an artistic whole, comprising elements both true and false. With respect to the Broadcasting Authority's role and the reasonableness of the decision, the work's artistic character is decisive. The case is not so extreme as to justify our intervention.

It is for these reasons that I have decided to reject the petition.

Justice E. Mazza

I concur with the judgment of my colleague, the President.

Justice M. Cheshin

He was born on March 25, 1992. When he was two years old, we improved his appearance and gave him understanding. Today he is about seven and a half. Long may he live. I am, of course, referring to the Basic Law: Human Dignity and Liberty, the law enacted in honor of human dignity and liberty. Human dignity is this central pillar of this law. The law is infused with human dignity. Human dignity gives it life. I had hoped that the petition before us would drive a stake deep into the bedrock of our law and that, above ground, this stake would be a mast, flying the flag of human dignity. All would know – all over the land – that the beginning, the middle and the end are human dignity. That in the absence of human dignity there is neither man nor society. This was my hope; this was my expectation. I am sorry that we missed this opportunity. We will not despair; we wait for tomorrow.

The Facts

2. Our case concerns a screenplay written by the playwright Motty Lerner. It is called “The Kastner Trial.” Israel Television was scheduled to broadcast, and did broadcast, the screenplay in three parts, beginning on November 7, 1994 – the 50th anniversary of Chana Szenes’ murder by the Gestapo. The screenplay is rooted in the actual events that occurred in Hungary during the Second World War, in 1944, and during the Kastner trial, which took place in Israel from 1953 through 1958.

3. First, there was the terrible tragedy that befell the Jews of Hungary during the Second World War – the murder of these Jews by the Nazis and the attempts made to rescue some of them from this inferno. This tragedy was the background to the indictment filed by the Attorney-General of Israel against Malchiel Greenwald, charging him with defaming Dr. Yisrael Kastner. In 1944, Dr. Kastner was one of the leaders of Hungarian Jewry. Greenwald distributed a pamphlet in which

he publicly accused Dr. Kastner of being guilty of the following four charges, in the words of the court:

- (a) Collaboration with the Nazis;
- (b) The “indirect murder” or “preparing the ground for the murder” of Hungarian Jewry;
- (c) Profiteering with a Nazi war criminal [S.S. Commander Kurt Bacher];
- (d) Helping that criminal evade punishment after the war.

Greenwald’s trial was conducted in the Jerusalem District Court, with President B. Halevi presiding. Ultimately, President Halevi decided to acquit Greenwald of three of the four counts of defamation. Greenwald was only convicted on the third count. In recognition of his acquittal on all the other counts, he was fined the token sum of one Israeli Lira. DC (Jer) 124/53 *Attorney General v. Greenwald* [55].

The Attorney-General appealed the district court’s judgment. In a panel of five judges, the Supreme Court accepted the main part of the appeal. Greenwald was convicted of charges (a) and (b). With respect to charge (a), he was convicted by a majority opinion of four against one. His acquittal on charge (d), however, remained intact. *See* CrimA 232/55 *Attorney-General v. Greenwald* [47].

4. Motty Lerner’s screenplay is the third floor of the story, built on the two floors underneath. The first floor is the tragedy that struck Hungarian Jewry in 1944. The second floor is the drama played out in the Jerusalem District Court during the Greenwald trial, the trial known as the “Kastner Trial.” The third floor is the drama on stage – Motty Lerner’s screenplay “The Kastner Trial.” Whoever saw the play on television – and I saw it – knows that the playwright is particularly gifted. And we know that the play’s impact on viewers is directly proportional to the talent of the playwright and the power of the play.

5. One paragraph in the play particularly troubles the petitioners here. We refer to the part where Mrs. Catherine Szenes, the mother of Chana Szenes, is cross-examined. Mrs. Szenes appeared as a witness in the trial and was cross-examined by Greenwald's attorney. During her testimony, Dr. Kastner repeatedly interrupts her, until the climax in which he accuses Chana Szenes of betraying her comrades to the Gestapo. The script reads as follows:

“Kastner

(angrily, at Catherine Szenes):

How dare you criticize me? Who even asked your daughter to come to Budapest? What did she think she would do? Due to her own recklessness, and the arrogance of those who sent her, she crossed the border like a new recruit and was captured five minutes later. And I will tell you who told the Hungarian police that Palgi and Goldstein were on their way to me. It was her! Your daughter, Chana Szenes, the heroine! She broke under interrogation and revealed everything. I can imagine the sort of tortures she underwent. Nobody could have withstood such torture. But it was not because of me that Palgi and Goldstein were arrested, but because of her!

Catherine Szenes:

Not true!!! “

These lines formed the basis of the petitioners' claim. The petitioners request that the paragraph be deleted from the play. They claim that the statement that Chana Szenes betrayed her two comrades, Peretz Goldstein and Yoel Palgi, to the Gestapo, is a lie, and that this will irreparably defame Chana Szenes. In fact, they claim, Chana Szenes bravely endured severe torture at the hands of the Gestapo and did not divulge secrets to her torturers. This was the case with Goldstein and Palgi, and it was also the case regarding the secret code that she had for British intelligence

transmissions, which the Nazis wanted in order to transmit disinformation.

6. Petitioners submitted evidence to prove their claim. In fact, it is undisputed that Kastner's statement in the play was false. There is not even a shred of evidence that Chana Szenes betrayed her comrades to the Gestapo. Thus, we may dispense with the first floor, the events that occurred in Hungary in 1944. Proceeding to the second floor – the trial itself – all agree that, at Greenwald's trial, Kastner never made the allegation attributed to him by Lerner. In other words: Kastner's words in the play, as cited above, have no basis in reality and are no more than a figment of the playwright's imagination.

7. Motty Lerner and the Broadcasting Authority were obviously aware of the sensitivity of televising the play. Thus, each segment was prefaced by the following paragraph:

The events depicted in this film were inspired by the Kastner-Greenwald trial. Nonetheless, the movie should not be regarded as a recreation of these events, but rather as a drama of historical fiction.

Furthermore, the play was shown at the Tel-Aviv Cinematheque. At the time of the screening, an explanatory sheet was distributed to the audience, entitled "The Author's Apology." The following is Motty Lerner's explanation of the screenplay:

The film 'The Kastner Trial' is a fictional drama inspired by events that actually occurred. The drama strives to integrate these historical events with the behavioral patterns of dramatic characters. Casting events in this manner obviously necessitated divergence from how the events actually occurred and, as such, posed a difficult dilemma concerning the degree of historic accuracy required in an artistic creation.

This dilemma may be avoided by responding that the film is merely an artistic creation, not a historical document. As such, it must be assessed according to artistic standards, as opposed to historical ones. Even so, there is no escaping the fact that *the script offers an interpretation of events which are the subject of sharp controversy; clearly many viewers will choose to see it as interference with the historical record*, rather than simply as an artistic creation. Given that, while writing the script, I wavered between these two approaches. As such, I think that I should clarify some of the rules that I set for myself.

As a rule, I strove to be as accurate as possible. Even so, and specifically with respect to scenes that took place behind closed doors, where I was unable to discover what had actually happened, I assumed poetic license to recreate events with my own imagination, with the reservation that the events must be consistent with the historic reality. I did my best to utilize this freedom in order to give the characters depth, and to put the events that actually occurred into a sharper focus. My working principle was that I would not facilitate my task by deleting events that contradicted my own political, historical world-view. This was not just because I wanted to act with artistic and intellectual integrity, but also because it was precisely those events that challenged my political views that created a more authentic, penetrating and moving drama.

I hope that I have succeeded in finding the optimal balance between the historical imperatives, the need to express my own personal worldview, and my commitment to the quality of the artistic creation.

Motty Lerner (emphasis added).

About ten days before the first showing, on October 28, 1994, an article appeared in the weekend section of the newspaper *Yediot Aharonot*, entitled “Did She Break?”

A huge controversy is liable to erupt following the new television series, which will accuse the paratrooper Chana Szenes, who was sent to the aid of Hungarian Jewry during the Holocaust, of breaking under interrogation and betraying her comrade paratroopers to the Fascist police. The accusation comes from the mouth of Yisrael Kastner, the organizer of the rescue train from Budapest and the man “who sold his soul to Satan.” Author Aharon Meged: “this is a travesty and lies.”

Ms. Aspa Peled, the author of the article, interviewed Mr. Lerner:

[Peled:] “... Motty Lerner, is the legend a lie?”

[Lerner:] I see myself as someone disclosing the subjective truth of Kastner and the members of the Rescue Commission, who were trapped in a web of mythology and myth, one which they could not escape. Perhaps they were even afraid to do so. It seems to me that today we have the maturity to understand that Chana Szenes was indeed a great heroine, even though she may have broken under interrogation. In the final analysis, how many of the Israeli soldiers who fell prisoner to the Egyptians or the Syrians did not break under interrogation? In my view, this in no way detracts from her bravery.

[Peled:] So was she a traitor or not?

[Lerner] I was not present at the interrogation and I do not know. What is clear is that Chana crossed the border and she had one contact address that she had to reach – Kastner. Three days later, Goldstein and Palgi reached Kastner without him even knowing that they were on their way to him. I have no tools with which to examine the matter and so in the film, I present it as Kastner’s opinion.

[Peled:] But Kastner never said that.

[Lerner:] Kastner was convinced that Chana had turned the paratroopers in. This I know from hints in his writings.

In reaction to Mr. Lerner's last comments regarding the "hints" in Dr. Kastner's letters, we note that this argument, nor anything similar to it, was ever raised at the trial before us, neither directly or even by implication. All agree that the words attributed to Dr. Kastner in the play are false, both in that cursed year 1944 in Hungary, and in Greenwald's trial. There is not a shred of evidence that Chana betrayed her comrades to the Gestapo. Quite the opposite. Furthermore, Dr. Kastner never made the statements attributed to him by the screenplay's author. In plain language, it may be said that the accusation leveled at Chana Szenes by Dr. Kastner in the play is defamatory.

This completes our review of the facts, some of which we shall revisit during the course of our comments.

The Broadcasting Authority's Duty and Our Authority to Disallow the Broadcast

8. Prior to entering the chamber of values and truth, we will say a few words regarding our authority to order the Broadcasting Authority to comply with the petitioners' request. No one questions our authority to prevent the Broadcasting Authority from televising the disputed paragraph. The Broadcasting Authority was entitled to refuse to broadcast "The Kastner Trial," either in its entirety or in part, and its decision to reject the petitioners' request to delete the paragraph in question is subject to our judicial review. The question is not whether this is the sort of matter that the High Court of Justice can review and reverse. Up to this point, my colleagues and I agree. But from here on, our ways part. My colleagues argue that the petitioners did not succeed in crossing the threshold; in my opinion they indeed crossed it, and with room to spare.

The Issue in Dispute

9. These are the two forces, each pulling in different directions. On one end, Motty Lerner's freedom of expression and artistic creation and, on the other, human dignity. The dignity of Chana Szenes, a young woman murdered by the Gestapo, who is unable to come and defend her dignity. Shall we accede to the petitioners' request and enjoin the Broadcasting Authority from broadcasting that paragraph, about one minute long, since it violates Chana Szenes' dignity? Or, in recognition of the creative author's freedom of expression and creation, shall we refuse to grant their request?

For the purpose of examining the matter, let us position all the leading actors on stage, present them individually, and listen to their monologues. All being assembled on the stage, we will allow them to converse among themselves and we will then know whose rights prevail. We shall divide our comments in this respect into three sections. First, we shall discuss freedom of expression and the right to reputation, as concepts and legal principles. We shall then examine the hierarchical status of freedom of expression and the right to reputation. Finally, we will have them confront one another, so that we can measure the power of one against the other.

We will begin our discussion by examining the freedom of expression and creation, and thereafter we shall proceed to human dignity.

Freedom of Expression and Artistic Creation

10. Freedom of expression and artistic creation have deep roots in Israeli law. We need not recap their origin; this has been explained on many occasions. I have expressed my own opinion regarding certain aspects of the freedom of expression and the conflict between freedom of expression and other values, occasionally at length, in at least three places. They are, in chronological order, HCJ 606/93 *Kiddum* [28] at 17; HCJ 4804/94 *Station Film* [12] at 688 {55}; FH 7325/95 *Yediot Acharonot v. Krauss* [48]. In these three decisions, as in this case, I was in the minority. My opinion has not changed. While I obviously do not

contest the basic right of freedom of expression and artistic creation, I nonetheless feel that my colleagues have gone too far in the protection they grant freedom of expression, in the process curtailing other, extremely important rights.

11. I will not repeat what I wrote and will limit my comments to the issue at hand. Freedom of expression is not a single unit. It is a federation, a federation of rights and interests. There is the chronicle and the speech, the polemic article, fiction and poetry, criticism of the government and commercial advertising. There is the procession and the demonstration, the play and the film. Each of these modes of expression reflects a particular value, and one interest is not identical to the other. Commercial advertising does not benefit, nor should it, from the same protection granted to a chronicle. Instead of referring to freedom of expression in the abstract, we must pick out the particular component relevant for our purposes. Obviously, our concern is not merely with labels – fiction, non-fiction, poetry or demonstration. It is incumbent upon us to conduct a deep investigation in an attempt to understand the interest requiring protection, its substance and the substantive content of the right presented before the Court. It was in this context that I wrote in *Station Film* [12] at 689 {56-57}:

In the house of freedom of expression there are various modes of expression and speech, which have a place in the sanctuary, and there are other modes of expression and speech that do not. When freedom of expression clashes with opposing interests, the various modes of expression and speech will wage the battle, each with its own intensity. Freedom of expression is not an idol, before which we should prostrate ourselves wherever we encounter it. Upon concluding that the matter at hand involves one of the derivatives of freedom of expression – an expression that finds shelter under the wings of the broader principle – we test its mettle before sending it out to battle with conflicting interests. Our way is the way of *atomization*, or, if one prefers: the way of *molecularization* - dividing the field of

freedom of expression into individual categories, according to the type of interest which we protect. There is an article in a newspaper and then there are *belles-lettres*, there is a description of events and then there is a speech, there is a commercial advertisement and then there is criticism of the regime, there is societal criticism and then there are parades. Each one of these, and others besides them, reflect a certain interest, and the strength of the right will be equal to the strength of the interest. The same applies to modes of expression and speech: there are newspapers and then there are films, there is theatre and then there is television, there is radio and then there is the stage.

In the same vein I also wrote:

[P]eople often try to explain the nature of one type of freedom of expression using interests that support freedom of expression of another type, and thus we find ourselves mixing apples and oranges. Hence, for example, when considering freedom of the press or a documentary report on certain events, it is simple for the Court to establish the boundaries and strength of freedom of expression in a way which is commensurate with the issue in a manner compatible with the issue being discussed before it - an issue forming one of the pillars of the democratic regime.

Id. At 689 {57-58}.

See also Id. at 688-91; *Kiddum* [28] at 25-28; *Krauss* [46] at 78-80.

12. Let us return to our case. Which kind of freedom of expression are we referring to? If you will, what is the interest that freedom of expression, in this case, places against other conflicting interests? We are dealing with a screenplay, but not one that is the fruit of the playwright's imagination from beginning to end. Our concern is with a special kind of

play known as a docudrama. In other words – a creation including both drama and documentation. Facts based on reality interpolated with dramatic foundations. The veneer is dramatic, but actual events, which all or at least some of the spectators have heard of and are familiar with, are inseparably woven into the drama. Needless to say, in this kaleidoscope of life and imagination, each docudrama is different. There is no fixed degree of imagination or historical facts; it is entirely up to the creator, who may broaden or narrow either.

13. “The Kastner Trial” is deeply rooted in historical facts. The plot is basically true, taken from “real life,” and the heroes of the play appear with their own names. Thus, the judge is Judge Binyamin Halevi, the prosecutor is the Attorney-General, Haim Cohen. The attorney for the defense is Shmuel Tamir. The accused is Malchiel Greenwald. Ms. Catherine Szenes, Ms. Hanz Brand, Yoel Palgi and, most importantly, Chana Szenes, also appear in the play. Motty Lerner, the playwright, took specific real life events and cast them into dramatic format. The innocent viewer, as well as the informed viewer, do not know which parts of the play are true and which are false. Did Kastner really say the words attributed to him? Is there any factual basis for Kastner’s allegations against Chana Szenes, or perhaps Kastner is not telling the truth? The viewer does not know.

This is the artistic creation before us; it contains elements of both life and drama. Given what we know about the play, I reject Lerner’s statement that the play is “a fictional drama inspired by events that actually occurred.” The drama is by no means fictitious and the “events that actually occurred” were not just a source of “inspiration” for the author. They are an integral, indistinguishable part of the creation. Nor can I concur that “the script offers an interpretation of events which are the subject of sharp controversy”. The issue before us is not disputed – all agree that Chana Szenes did not betray her comrades to the Gestapo. I also find it difficult to accept Lerner’s statement that “I strove to be as accurate as possible.” His intentions may have been commendable, but his actions were not. In the disputed paragraph Motty Lerner was not just

inaccurate – he spoke untruthfully. This is not a question of “poetic license,” as Motty Lerner claims. Motty Lerner did not even comply with his own commitment that “the result of the events must be consistent with the historic reality.” Kastner did not say the words that Lerner attributed to him. Nor are the words substantively correct. Motty Lerner thought that Kastner’s outrageous words in the play would raise the dramatic tension; this indeed is their effect. I am, indeed, at a loss to find any other reason for the scene in which the actor portraying Dr. Kastner lashes out at Chana Szenes. The actor playing Dr. Kastner was Sasson Gabbai; his performance was superb and moving and anyone who saw Dr. Kastner in the play making his accusation against Chana Szenes could not fail to be convinced that his words were true. I find it difficult to accept the claim that “The Kastner Trial” is a “fictional drama.” The drama is far from being “fictional.”

14. This cocktail of imagination and reality situates the play somewhere between a documentary-chronicle and a dramatic creation. As its name indicates, it is a docudrama, with the primary emphasis being on the documentary-chronicle component. Chana Szenes was imprisoned and tortured by the Nazis. Yoel Palgi and Peretz Goldstein were captured by the Nazis. Chana Szenes was executed by the Nazis. All of these are historical facts, and they are all woven around Dr. Kastner’s outrageous accusation thrown at Chana Szenes’ mother. If all of the surrounding facts are true, then wouldn’t the innocent viewer believe that statement to be equally accurate? Why wouldn’t one believe that Dr. Kastner had actually said those words and why wouldn’t he believe that Kastner knew, or believed, that Chana Szenes had betrayed her friends to the Nazis? It would have been different had Kastner stood up in the middle of Catherine Szenes’ testimony, attempted to open his mouth and then begun to float around the room, like a character out of one of Marquez’s books. But this was not the case.

Personally, it seems to me that the playwright cannot hide behind the label of a “fictional drama,” nor would it be appropriate for us to allow him or her to do so. The words attributed to Dr. Kastner regarding Chana Szenes are clearly perceived as part of the docudrama’s documentary

aspect. In any event, we certainly cannot see this as belonging to the dramatic part of the play, distinct from the reality being displayed on stage. If we imagine the documentary and dramatic parts of the play as celestial objects with their own individual gravitational pull, then Dr. Kastner's fabricated statement revolves in a "figure 8" around these two bodies. In other words, Dr. Kastner's fabricated statement purports to have a little of this and a little of that: a description of the reality, as it supposedly was – in Hungary of 1944 and in the Jerusalem Court – and dramatic elements. The viewer does not know whether he or she is viewing reality or a figment of the playwright's imagination.

15. Freedom of speech and of creative expression have therefore produced a sort of hybrid creation, a documentary presenting the truth as it (supposedly) was, as well as drama which is the product of the playwright's imagination.

16. Until now we have discussed freedom of speech and artistic creation. We shall now proceed to examine a person's right to his or her good name.

Human Dignity – One's Right to One's Good Name

17. A person's deep, psychological need for a good reputation, a natural yearning, has long been legally recognized. Our nation has been escorted by rabbinic dictums such as "whoever publicly shames his neighbour is deemed to have shed blood" Babylonian Talmud, Tractate Baba Metzia 58b [78]. Similarly, "all who descend into *Gehenna* reascend, except for three persons who descend and do not reascend... he who publicly shames his neighbour..."*Id.* [78]. Indeed, "a person's good name and dignity may be dearer to him or her than any other asset" CA 214/89 *Avneri* [16] at 856 (Barak, J.) A person's dignity and reputation are at least as dear to that person as his or her body. Just as a person has a right to bodily integrity, so too is a person entitled to protect his or her dignity and good name. Maligning a person's dignity and reputation can be likened to rape or an indecent act performed on a person's body. The difference between both forms of damage is only that, in the case of rape,

one first damages the body and only after the soul. In the case of a person's dignity and reputation, it is the soul that is initially damaged, which may lead to the body being harmed as well.

18. A person can look to two legal sources for recognition of his or her right to reputation: namely, the Basic Law: Human Dignity and Liberty and the Defamation Law, 1965. We shall discuss the Basic Law at a later juncture. *Infra.* paras. 28 and 29. For now, we shall turn to the Defamation Law.

19. The Defamation Law expressly and specifically sets out the rights a person has to his or her good name. The law itself balances between a person's reputation and his fellow's freedom of expression. If Chana Szenes were with us today, I do not have the slightest doubt that she would have a claim, under the Defamation Law, against the playwright and against the Broadcasting Authority. As defined in section 1(1) of the Defamation Law, defamation is anything the publication of which may "lower a person in the estimation of others, or make him or her the object of hatred, contempt, or ridicule on their part." Defamation Law, 1; or a publication which may "bring a person into disrepute because of acts, conduct or qualities attributed to him or her." Sec. 1(2) of the Law. As such, the statement of Dr. Kastner in the screenplay constitutes defamation. There are those who will claim that it is not for us to pass judgment on one who suffered and, in his pain, revealed such secrets. As our rabbis said: "Do not judge thy neighbour until you are in his place" Mishnah, Ethics of our Fathers, 2:4 [80]. One could even claim that, as such, neither the playwright nor the Broadcasting Authority defamed Chana Szenes. Even having cited the words of our rabbis, however, it would seem that there are few who would dispute that the words uttered by Dr. Kastner constitute defamation.

Were Chana Szenes with us today – seventy-eight years old – she would be able to petition this Court to enjoin the statement attributed to Dr. Kastner. Chana Szenes, however, returned her soul to God in suffering, after being tortured and murdered, on November 7, 1944, at the

age of twenty-three. Chana Szenes is no longer with us, and the question is only whether there is another who can file suit to reclaim her dignity. The following people have claimed to represent Chana Szenes' dignity: In HCJ 6126/94 the petitioners are her brother, Giora Szenes, his two sons Eitan Szenes and Dr. David Szenes, as well as Reuven Dafni, the chairman of Yad Vashem, who, in 1944, parachuted into Yugoslavia with Chana Szenes. In HCJ 6143/94 the petitioners are Ms. Nadia Matar and the Women's Association for the future of Israel ("Women in Green").

What is the law regarding the defamation of the dead?

20. It turns out that the law has changed in this matter. Initially, at the time of its enactment, the Defamation Law provided:

Defamation of a Deceased Person	5. Where defamatory matter is published after a person's death, it shall be treated as the defamation of a living person. The spouse, children, parents, brothers and sisters of the deceased shall be regarded as persons injured by the defamation.
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This is to say, defamation of the deceased was the same as defamation of the living, except that the right to file for judicial redress was exclusively reserved to the deceased's spouse, children, parents, brothers and sisters. Under this law, Chana Szenes' brother, Giora Szenes, was fully entitled to demand that the disputed paragraph be expunged from the play. This was in contrast to the previous law. *See* section 6 of the draft proposal for the Defamation Law-1962.

The law, however, was amended in 1967, *see* Defamation Law (Amended Version), 1967, and the right to file suit for the defamation of a deceased was curtailed. The following is the current language of section 5 of the Defamation Law:

Defamation of a	5. Defamatory statements regarding a
-----------------	--------------------------------------

Deceased
Person

person that are published after his or her death shall be treated as the defamation of a living person, but do not constitute cause for a civil claim or a private criminal complaint, and no indictment shall be submitted for an offense under this section unless it is requested by the deceased's spouse or one of his children, grandchildren, parents, brothers or sisters.

This amended Defamation Law contains three principles. The first is that defamatory matter regarding a dead person "does not constitute cause for a civil claim or a private criminal complaint." The second is that charges may be laid for defamatory statements regarding the deceased, after a request by the deceased's spouse or one of his children, grandchildren, parents, brothers or sisters. The third principle is that, subject to the first two principles, defamation of the dead shall be treated as defamation of the living. We regard this third principle as constituting the heart of the law: essentially, defamation of the dead is the same as defamation of the living, even though, procedurally speaking, the law imposes restrictions on the ability to seek legal redress, either in a civil claim or in a criminal indictment.

To complete the picture, we will also mention section 25 of the law, which deals with the institution of legal proceedings by one of the deceased's relatives, within a limited period after the death of the deceased. It also deals with the continuation of defamation proceedings begun by the deceased, if he or she passed away prior to the termination of such proceeding.

21. What does all of the above tell us? We see that defamation of the deceased is subject to the same law as defamation of the living. This is the credo of the law and its message. This is the version of human dignity presented by the Defamation Law. Defamation of the deceased does not

constitute grounds for a civil claim or a private criminal complaint, but sealing off the road to the Court does not detract from the substantive prohibition against publishing material defamatory of the dead and does not lessen the statutory moral-legal condemnation of such defamation.

Defamation of the dead does not provide grounds for a civil claim – a claim for damages, an injunction or a declaratory judgment within the framework of the civil law. However, I am unable to see any good reason why a person should not be able to file suit within the framework of public law, provided that the issue concerns a body or person subject to public law. The Broadcasting Authority is indeed exempt from the yoke of private law with respect to defamation of the dead, as is any other person or body operating within the realm of private law. However, as a body which is also subject to public law, it must be held legally accountable within the parameters of that law.

22. Thus, the Defamation Law does not prevent the petitioners from petitioning the High Court of Justice for a public law remedy against the Broadcasting Authority. Granted, the petition of the brother, Giora Szenes, is not equivalent to the petition filed by the Women in Green. By its very nature, the latter is a public petition, relating to the collective interest. As such, it raises the issue of the public interest regarding the publication of a statement defaming Chana Szenes. In other words, in this petition, the defamation of Chana Szenes does not appear as an independent and exclusive basis for the legal claim, but rather as a component of the public interest in the wider sense of that concept. The public interest includes many other elements besides the protection of a person's good name, including the freedom of expression and the playwright's freedom of artistic creation. In this petition, the right to one's good name must battle all the other components of the public interest. It is only then, if it finds itself victorious in this battle, that the right to a good name can wage its war against the freedom of expression and of artistic creation.

Giora Szenes' petition, for its part, is different. It is, by its very essence, a private petition, one that raises the interest of the individual. I would go a step further and say that it is an intimate petition. Should we be surprised when a son or daughter comes to protect the honor of his or her mother or father? Does it astonish us when a brother battles for his sister's dignity, or when a sister fights for her brother's dignity? Surely, a father and mother would protect their children in the same way. While Giora Szenes refers to his sister as "the soldier-poet who sacrificed her life on the altar of human dignity and liberty," he makes it equally clear that his petition is focused on the "maligning of the dignity of Chana, of blessed memory, and that of her family," and that the injury "is further intensified by the series being scheduled *on the fiftieth anniversary of her execution.*" It is no wonder that, in his affidavit, Giora Szenes speaks of "my sister" and states that, "since becoming aware of the scheduled broadcast, I feel as though my world has fallen apart and that I am powerless." This is the statement of a brother afflicted.

As such, the petition of Giora Szenes raises the issue of defamation in its purest sense, as a right to reputation standing on its own, as though Chana Szenes herself had petitioned the Court. This is not the nature of the petition of the Women in Green, which seeks to protect the right to a good name as a component of the public interest. Giora Szenes carries the sword of reputation, not the sword of the public interest. It is with this sword that he sets out to battle.

Giora Szenes brings a private claim in the realm of the public law. Chana Szenes is unable to file suit to reclaim her dignity, and her brother does so in her stead. Here, Giora Szenes and Chana Szenes are one and the same. The same applies to the other relatives in section 5 of the Defamation law.

23. A question: are the relatives named in section 5 of the Defamation Law the only ones who possess a "private right" in the public law realm? I would not restrict the right to these relatives exclusively. There are situations in which a friend is like a brother to the deceased and if

“spouse” means a husband and wife who are legally married, then it would seem that even those who are not legally married, but who are also a couple, have a private right within the public law realm. However, we need not decide this question, since it is Giora Szenes, Chana Szenes’ brother, who has come to protect the dignity of his sister.

24. A final word: “Defamatory statements regarding a person that are published after his or her death shall be treated as the defamation of a living person.” Does this apply to everyone that has lived since the dawn of mankind? Can one defame Abraham? Moses? Miriam? Yael, the wife of the Keni? Samson? King David? Jeremiah? Judah the Maccabee? Hillel the Elder? Bar-Kochba? Maimonides? Spinoza? Does the defamation of any of these figures confer rights under public law?

It could be argued that the question is whether all of these, our nation’s historical figures, are included in the definition of “person” as provide by the law. It could further be claimed that a distinction must be made between a “person” and a “historical figure.” The law intended to protect a “person” and not a “figure.” All of the above are “figures,” not “persons,” as defined by the law. When then does a person become a “historical figure”? Is Ben Gurion a “figure” or a “person”? The question is far from simple and at this stage we shall be satisfied with the tentative determination that a “person,” within the meaning of the Defamation Law, is someone whose family members, as specified in section 5, bring a claim of defamation. The determination of those entitled to file suit establishes the confines of the right and delineates the border between a “person” and a “figure.”

Another criterion for defining a dead “person,” for the purposes of defamation, is whether there are people alive who knew him or her personally. For as long as there are people living who knew the deceased, he or she continues to live as a “person.” As the poet Chanoch Levin wrote in “When My Eyes Shall Grow Dark,” in his book *The Lives of the Dead* (1999):

When my eyes shall grow dark
Draw my dead eyes
Towards your open eyes
And welcome my lifeless image into your embrace,
...
...draw my eyes
my dead eyes towards your eyes
there I will live a little longer
I will see through your living, seeing eyes
I will see the world that I cannot see
The world I so loved, and now
It is lost to me, and I am no more,
Only my dead eyes peering through your seeing eyes
In your living eyes, my dead eyes
live a little more, so long
as you will live
I too live, so long
as you will remember,
so long.

In this context we cannot but refer to the wonderful legend of Choni the Circle Maker who was overtaken by slumber and slept for seventy years. When he woke up there was no one that knew him, and he knew no one, as his generation had already passed away. "His resolve was weakened, begged for mercy - and died." Babylonian Talmud, Tractate Taanit, 23a [81]. And so it is in every generation. "And Joseph died, and all his brethren and all that generation" (Exodus, 1:6 [82]); and

immediately following: “Now there arose a new king over Egypt who knew not Joseph.” *Id.* Thus it was in the days of the prophets: “And Joshua the son of Nun, servant of the Lord died, being an hundred and ten years old ... And also all that generation was gathered to its fathers; and there arose another generation after it which knew not the Lord nor yet the work which He had done for Israel.” Judges 2:8, 2:10 [83].

Needless to say, this question does not arise in the case at bar. Chana Szenes’ brother, her own flesh and blood, stands before us, and demands that his sister’s dignity be restored. These being the circumstances, is it possible or appropriate that we refer to her as a “figure”? There can be no doubt – Chana Szenes is a national heroine, a historical figure. We were educated through her heritage and sang her songs. This is the Chana Szenes of the petition of the Women in Green. However, this is not the case in the private, personal petition of Giora Szenes.

Intermediate Summary

25. Up to this point we have addressed the freedom of expression and a person’s right to reputation as substantive legal concepts. They are independent principles in their own right, which grant rights to some and obligate others. They also serve as foundations for the interpretation of statutes and case law. They are interpretative principles both in the narrow sense and in the creative sense. However, the examination of the essence of the rights is not sufficient. Given our awareness that these two rights will come into direct conflict, we must further examine their hierarchical status in the legal system and whether one of the two has prevalence over the other in the legal hierarchy, or whether they share the same status in the legal pyramid. Deciding this question is a prior condition for preparing the rights for the struggle in which they are to engage. We will therefore examine the legal hierarchy of the rights, and we will begin with freedom of expression.

Human Dignity – Freedom of Expression’s Hierarchical Status

26. Until the enactment of the Basic Law: Human Dignity and Liberty, the right to reputation and the right to freedom of expression possessed equal legal status. The right to reputation was already enshrined in statute – in the Defamation Law, as well as in preceding case law. Freedom of expression, in contrast, was exclusively a product of case law. Of course, that case law had the status of law. In other words, with the exception of the internal balancing tests within the parameters of the law itself, all of which defined the scope of freedom of expression, it was an accepted presumption that freedom of expression could only be curtailed or circumscribed by force of Knesset legislation. *See e.g.*, CrimFH 537/95 *Ganimat v. State of Israel* [24] at 400, and citations there. As with other basic rights, freedom of expression had the status of law. This was so until the enactment of the Basic Law Human Dignity and Liberty. Since the promulgation of the Basic Law, there has been some confusion as to the exact state of the law.

27. The right to freedom of expression was not specifically recognized in the Basic Law: Human Dignity and Liberty, or in any other Basic Law. Even so, there are those who maintain that the concept of human dignity in the Basic Law also includes the freedom of speech, which they see as one of the derivatives of human dignity. According to this view, “Human Dignity” is an overflowing fountain, nourishing all those human rights that may possibly derive from it, or that are implicit therein. One of these basic rights is the right to freedom of expression. On the other hand, there are those who maintain that human dignity is human dignity and in the Basic Law: Human Dignity and Liberty, human dignity does not include freedom of expression. This, they claimed, is particularly true in the case of this specific Basic Law and its legislative history. Between these two extremes there are a number of variations on this theme. *See e.g.*, H. Sommer, *Hazchuyot Habilti Minuyot Vihekefa shel Hamahapacha Hachukatit*, 28 *Mishpatim*, 259-61 (1997) [68]; A. Barak, *Zchuyot Adam Miganot: Hahekef Vihahagbala*, [69], 253; Y. Karp, *Mikztat Shielot Al Kvod Haadam lifi Chok Hayesod: Kvod Haadam Vicheruto*, [70]; A. Barak, *Interpretation in Law* [65] at 413. Judges too are occasionally

tempted to speculate, in *obiter dictum*, regarding the nature and scope of the concept of human dignity.

We will not take that path and will not reveal our inner-most thoughts. For our purposes, without ruling upon the matter, we shall agree that freedom of expression is a derivative of human dignity in the Basic Law: Human Dignity and Liberty. We shall therefore presume, without ruling upon the matter, that since the enactment of the Basic Law: Human Dignity and Liberty, freedom of speech has ascended the legal hierarchy and today reigns supreme on the throne of rights set out in the Basic Law: Human Dignity and Liberty.

An Aside

In his opinion, my colleague, the President, distinguishes between the scope of freedom of expression and the protection that the law should grant that expression. That is to say, there are times when a person has freedom of expression even though the law may not extend its protection to him or her. Thus, for instance, a lie will find shelter under the wings of free speech, even if it will not be protected. This statement requires further examination, but, given that there is no need to decide the matter, I have not discussed it.

Human Dignity – The Hierarchical Status of the Right to Reputation

28. Since the enactment of the Basic Law: Human Dignity and Liberty we all know, including those who were previously ignorant, that human dignity is the crown jewel. The concept of “human dignity” is expressly referred to four times in the Basic Law, and once by implication. First, in the law’s title – The Basic Law: Human Dignity and Liberty. Second, section 1(a) of the law provides that “[t]he purpose of this Basic Law is to protect human dignity and liberty.” Third, section 2 of the law provides that “[t]here shall be no violation of the life, body or dignity of any person as such.” Fourth, section 4 of the law establishes that “[a]ll persons are entitled to the protection of their life, body and dignity.” In

addition to these, section 1 of the law specifies the “basic principles” according to which “[b]asic human rights in Israel are founded upon recognition of the value of the human being.” The “value of the human being,” as is self-evident, includes human dignity.

And so, one must conclude that human dignity is the fundamental pillar of the Basic Law: Human Dignity and Liberty. Further on in our remarks, we will address the force of a person’s right to dignity. Here we have merely noted its centrality in the system of basic rights.

29. Be the territory covered by “Human Dignity,” as distinct from the freedom of expression, what it may, it is unanimously agreed that human dignity includes a person’s reputation. Human dignity has a number of progeny, but it is clear that one’s good name – or perhaps we should say one’s very name, it being one’s own name – is one’s first-born child. For if human dignity does not include a person’s good name, what then is human dignity? Seeing as how our concern is with human dignity, we need not pursue our search for other basic rights implicit in the concept of human dignity. Furthermore, a person retains his or her dignity both in life and after death. This is the specific stipulation of section 5 of the Defamation Law. Case law further added expressly and definitively that the human dignity in the Basic Law: Human Dignity and Liberty also extends to the dignity of the deceased. *See e.g.*, CA 506/88 *Shefer v. State of Israel* [50] at 102 {184}; CA 105/92 [10] at 201; CA 1482/92 *Hagar v. Hagar* [51] at 801; HCJ 294/91 [18] at 523; HCJ 5688/92 [19] at 820, 827-28; FH 3299/93 [20] at 201, 205, 208, 211; HCJ 3933/92 *Barachat v. C.O.S. Central Command* [52] at 6; A. Barak Interpretation in Law [65] at 437-38; CA 6024/97 *Shavit v. Rishon Lezion Jewish Burial Society* [53].

A person’s good name has therefore been directly recognized and protected by the Basic Law: Human Dignity and Liberty.

The Hierarchical Status of the Right to Freedom of Expression and the Right to Reputation – A Summary

30. It appears to us, therefore, that both the right to freedom of expression and the right to one's reputation are protected on two levels. One level is that of the law. With respect to freedom of expression, we are dealing with case law that has the status of statutory law. The higher level is that of the Basic Law: Human Dignity and Liberty. Chana Szenes, too, has the right to her good name – some will say the right of the living to maintain the good name of Chana Szenes. This right, as well as the freedom of expression of the playwright and the Broadcasting Authority, enjoys the status of basic rights, or supreme rights. It is these two supreme rights that are locked in a duel. Which of them will prevail?

We cannot decide between the two rights on the basis of their fundamental essence. They are both deeply rooted rights – rights without which our democratic society could not survive. Nor can we decide between them according to their hierarchical status in the legal system, for both are of royal stature. We must therefore search for an appropriate criterion for deciding between the rival rights. Such a criterion can be found by a deeper examination of the essence of the rights. We will not refer to each of the rights purely as principles, or by reference to their respective proximity to the apex of the pyramid of rights. Instead, by way of metaphor, we will use a geiger-meter, to measure the internal power of each of the rights claiming supremacy. We will measure the internal power of the right to freedom of expression of the playwright and the Broadcasting Authority and we will then measure the internal power of Chana Szenes' right to her good name, as it is carried on the petitioners' shoulders. Finally we will compare their respective powers. The right which has more power, its internal light shining brighter, is the right which will prevail in the case before us.

We will now examine the internal power of each of the rights before us.

The Right to Freedom of Expression and the Right to a Good Name

31. We will begin with freedom of expression and artistic creation. As we saw, we cannot be satisfied with the examination of the right of freedom of expression in the general sense. It is incumbent upon us to further examine that particular thread of freedom of expression presenting itself before us. Its internal power must be evaluated in order to assess its strength in the confrontation with other basic rights that it attempts to curtail.

32. In fact, we already examined the aspects of freedom of expression relevant for our purposes. We found that we are dealing with part fiction and part drama. As indicated by its name, it is a “docudrama.” To the extent that the dramatic element is involved, we have no quarrel with either the playwright or the Broadcasting Authority. Furthermore, even if, for dramatic effect, the playwright occasionally diverges from the truth, we would not take issue with the matter. The dramatic element of the play is the life-breath of the docudrama’s author. It forms that creation’s soul and we would dare not damage it.

This is not the case with the other element, that of the chronicle. Indeed, here too we will not be overly meticulous, nor can we be, for the author is a playwright, not a historian. Thus, for example, regarding the crossing of the border from Yugoslavia to Hungary: Chana Szenes crossed the border on the night between the 9th and 10th of June in 1944 and was caught after two hours. Yoel Palgi and Peretz Goldstein crossed the border two weeks later, on June 23rd. Chana did not know when they were to cross the border, and the two of them crossed the border about 100 kilometers away from where Chana herself crossed the border (see the affidavit of Reuven Dafni, who, as their leader, was responsible for the group of paratroopers in Yugoslavia). Diverging from this fact, Yoel Palgi in the play says – as does the playwright in his interview with Yediot Aharonot, *supra* para. 7 – that he crossed the border three days after Chana Szenes. By distorting their respective dates of crossing the border, reducing the period between crossings from two weeks to three days, the playwright sows the seeds that give rise to Kastner’s accusation that Chana betrayed both Palgi and Goldstein to the Nazis. The proximity

of the dates could indicate that Chana knew the date when Palgi and Goldstein would arrive. Had this been the total extent of the divergence from the truth, no one would have criticized the playwright. The same applies to other similar divergences. However the divergence in the case before us is different. For it is not only a divergence from the truth; while diverging from the truth it viciously damages a person's good name.

33. Freedom of expression regarding actions or events that occurred is of the highest importance. The freedom and right to report events and actions, especially events and actions about which the public must know, is not just a right. When speaking of the media, the right goes hand in hand with the obligation. There is a public duty on those reporting, to report that which should be reported. It is for this reason that the reporter has the defense of "truth of publication" under section 14 of the Defamation Law. I dwelt at length upon the defense of truth in my opinion in the *Krauss* [48] and will not deal with it here (In that decision, my opinion was the minority view, but not with respect to the defense of truth).

The freedom of expression with regard to the publication of a chronicle, as well as the defense of truth, also subject the reporter to a special duty to restrict himself or herself to the truth and not to report untruths – even if unintentionally and unwittingly. Certainly this is the case when the reporter knowingly or recklessly reports untruths. In any event, even if we say that the freedom of expression includes falsehood – and we express no opinion on this point – I am at a loss to understand why the law should protect falsehood with the same protection granted to freedom of expression. I cannot see what the protected interest is. Just as my right to lift my hands on either side terminates when I reach another person's nose, so too, the freedom of expression terminates upon encountering a person's good name. One way or another, regarding a false report, I find no interest capable of supporting the right to freedom of expression in its battle with another person's right to his good name.

All of this relates to the power of the rights of the playwright and the Broadcasting Authority to freedom of expression and artistic creation.

34. With respect to Chana Szenes' right to dignity and her good name, as they are borne on the petitioners' shoulders, I find it difficult to find a more noble right. Regarding human dignity, I said the following in *Krauss* [48] at 74:

With respect to human dignity, truth be told, we will find it exceedingly difficult to distinguish between a person and his or her dignity. A person and his or her dignity enter this world intertwined. One is one's dignity, and one's dignity is oneself. "A person and his or her dignity emerged together from the mother's womb, and the two become one. A person is his or her dignity, and that dignity is the person." CA 3077/90 A. v. B. at 592. One who lost one's dignity is merely the shell of a person, if you will: the shadow of a person.

Thus, a person and his or her dignity are identical, and a person without dignity is but nothing more than the shell of a person. To quote the sublime words of Shakespeare in *Richard the Second*:

The Purest Treasure mortal times afford
Is spotless reputation; that away,
Men are but gilded loam or painted clay.

...

Mine honour is my life, both grow in one,
Take honour from me and my life is done"

See William Shakespeare, *Richard II*, act I, sc. I.

In our own sources, human dignity is reserved a place of honor in the Temple of basic rights. The reason, we are taught, is that man was created

in God's image: "So God created man in His own image, in the image of God created He him." Genesis 1:27 [84]. And Rabbi Akiva taught us "Beloved is man, who was created in the image of God." Mishnah, Ethics of our Fathers 3:14 [85] To this the Court added, in *Krauss* [48] at 75:

Those who are believers and observe the commandments derive the dignity of man from the honor of The Holy One, Blessed be He. In so doing, they elevate human dignity to supreme heights. And what will those say who do not believe and who do not observe? They will say: why should we anchor our recognition of the noble value of human dignity in God? Isn't a person *qua* person sufficient reason for protecting one's dignity? For a person is his or her dignity, and that dignity is the person. Nor can we forget the Basic Law: Human Dignity and Liberty, the basic law that engraved human dignity both in its name and content, establishing it in the Israeli legal system.

From all of the above, we know that the power emanating from Chana Szenes' right to dignity is unparalleled. Regarding Chana Szenes, we can further say that her dignity and good name are larger than life itself, for as much as she was tortured, until she was murdered, she did not divulge her secret. To be precise, our concern is with Chana Szenes' refined and pure right to her dignity and reputation, both of these having been carried by Giora Szenes from the battlefield and presented to us.

35. Chana Szenes' right to dignity and reputation are laid before us in all their grandeur. We no longer need to examine the claims of the "Women in Green," who present Chana Szenes' interest as part of the public interest. The private, immediate interest of the brother Giora is sufficient, and we need not discuss the collective interest of the Women in Green. Nonetheless, it bears mentioning that all of the judgments cited by my colleague, the President, in support of his opinion, deal with freedom of expression conflicting with the collective interest and not with freedom of expression conflicting with an individual interest. In referring to an individual interest our intention is to a particular person cited by

name and description. The only exception is the ruling in *Avneri* [16] with regard to which we have two comments. First, the issue there concerned a temporary injunction, in circumstances that were not entirely clear. Second, in any event, the rule established in that case warrants renewed examination for since then the Basic Law: Human Dignity and Liberty has been enacted. My colleague, the President, also agrees with this. In his own words in *Ganimat supra* [49] at 418:

The new status for the right to a good name, part of the right to human dignity, may justify a renewed examination of the exercise of judicial discretion in granting temporary injunctions against publications which are allegedly defamatory.

Compare CA 214/89 *Avneri v. Shapira*. *See also* A. Bendor, *Chofesh Lishhon-Hara*, 20 *Mishpatim* 561 (1990-1991) [71].

36. Here we must add and understand the need to peel off the label of “freedom of expression” from the group of interests to which it attaches, and to further examine the nature and texture of the particular component of the specific interest. Having peeled off the label, we now know that even if we state that human dignity encompasses freedom of expression – and we take no position either way on the matter – the dignity of Motty Lerner confronts the dignity of Chana Szenes. This being the case, we can further ask: could anyone dare to claim that Motty Lerner’s dignity prevails over that of Chana Szenes? Motty Lerner’s dignity is indeed dignity and he is worthy of it, but we will not agree to his dignity being constructed over that of Chana Szenes, or to his dignity dismissing the dignity of Chana Szenes. As the verse says: “for them that honor me, I will honor.” I Samuel, 2:30 [86].

37. The results of the confrontation between the rights are clear. Our concern is not with rights of equal standing. We are dealing with a right of dimensions struggling against a smaller right. The dignity and reputation of Chana easily prevail over the rights of the playwright and the Broadcasting Authority.

In H CJ 1/81 *supra* [39] at 378, Justice Shamgar wrote:

In order for this Court to *prohibit* an individual, responsible for public broadcasting and advertising, from publishing a particular broadcast, there must exist *extreme* circumstances, posing *a tangible and near certain danger to the public welfare at large...* or a *clear and obvious illegality* (emphasis added).

In the paragraph that the petitioners requested be deleted, there is a “clear and obvious illegality.”

Epilogue

38. Soon after turning twenty-three, Chana Szenes returned her soul, in all its purity, to God. Chana Szenes cannot come to claim her dignity. It is incumbent upon us to restore her dignity to her. In CA 1182/90 *Shacham v. Rothman* [54] at 347, the Court decided to honor a person’s wishes expressed in his will, and I concluded my opinion there with the following words:

I am happy with the result that I have reached, which in my opinion is the fulfillment of the deceased’s wishes. A person’s will is his or her dignity; it is human dignity. But the dead are unable to realize their wishes and preserve their dignity. We have therefore acted for the fulfillment of the deceased’s wish and the preservation of the deceased’s dignity.

Chana Szenes was a soldier-poet, or perhaps we could say poet-soldier. She was a poet, a soldier, and a dreamer. Chana loved life. And when Chana wandered barefoot on the golden sands of Caesarea, a young girl, twenty years old, she prayed to God:

O Lord, my God

I pray that these never end

the sand and the sea,

the rush of the water,
the flash of the heaven,
the prayer of man.

In those days that were blacker than black, redder than blood, before she entered the inferno, Chana sang of the rebellion, of death and dignity. This was Chana's song in Serditz, Yugoslavia:

Happy...
Happy is the match that burnt and ignited the flames
Happy is the flame that burnt in the recesses of hearts
Happy are the hearts that knew to extinguish in dignity...
Happy is the match that burnt and ignited flames.

Chana Szenes' heart knew how to extinguish in dignity. Whether by words or by action, the dignity and good name of Chana Szenes cannot be taken away.

Chana Szenes

11 Tammuz 5781 – 28 Cheshvan 5805

July 17, 1921 – November 7, 1944

The case was decided in accordance with the majority opinion, as per the opinion of President A. Barak, with Justice Mazza concurring and against the dissenting opinion of Justice M. Cheshin.

July 26th, 1999.

