

Patient's Condition – Severe but Stable

The Press and the Medical Community: Mutual Expectations Surrounding the Health of National Leaders

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Abstract

A value system that espouses the right of an individual to guard his privacy has moral, theoretical and practical validity, while equal weight must be given, morally, conceptually and socially, to a concept that extols freedom of expression and the public's right to know. The built-in contradiction between these two schools of thought is expressed, *inter alia*, in the inter-relationship between the media and the medical community when the health of a national leader ceases to be his private affair and becomes the legitimate concern of the public. In Israel, no set rules exist regarding how such situations are reported. This article aims to suggest such a procedure.

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Article 8 of the regulations governing professional ethics in the press states: "No newspaper or journalist shall report anything liable to damage an individual's privacy or reputation without his consent, except in such case as it is in the public's interest and then only to a reasonable extent. Such reporting requires prior clarification with the person involved as well as provision of space for his comments."¹ Similar instructions appear in regulations governing ethics for the Second Authority for Television and Radio,² the Cable Television Broadcasting Council³ and the Israel Public Broadcasting Authority.⁴ They may also be found in the behavioral patterns of journalists in developed nations and are embedded in documents governing the behavior of their institutions.⁵ The ethical code for Israeli journalists with respect to the individual's right to privacy is backed by state law, including the Privacy Protection Law⁶ and Basic Law: Human Dignity and Liberty.⁷

A person's health is seen as strictly belonging to the realm of privacy. Article 2 of the Privacy Protection Law specifically states that "reporting on a matter involving one's private life ... or one's health or one's actions in the private realm" is considered a violation of privacy. The law regards such violation as constituting a civil transgression as well as a criminal action. The ethics code of the Israel Press Council forbids divulging the identifying characteristics or photographs of terminal or mental patients, or of organ donors or recipients, without their prior consent or that of their families, except when the public interest is involved and then only to a "reasonable extent."

The stipulation "where the public interest is involved" limits the entitlement of journalists to violate an individual's privacy only to those cases where it serves the public interest. Journalists view their profession as a public service whose essence is the transmission of information, founded on the principle that the more the public is exposed to information affecting people's lives, the better. The press assumes that its task is to make the public aware of events occurring in and around society. This is a multi-faceted task, expressed in the transmission of various pieces of information regarding the lives of individuals, the state of society, the progression of events occurring throughout the world and, of course, the manner in which the affairs of state are handled. In assuming this task, the press experiences a built-in tension between its obligation to provide information and the right of individuals and institutions, from whom it derives this information, to guard their privacy.

The law indirectly recognizes this contradiction by providing the journalist with safeguards against lawsuits claiming a violation of privacy. The Defamation Prohibition Law⁸ stipulates that a journalist under indictment for libel may be acquitted if he is able to prove that he was acting in the public interest. Here the emphasis is on "whether it serves the public interest" as opposed to whether it "interests the public." In other words, the journalist, in his defense, must persuade the court that his aim in reporting the information was not merely to satisfy the public's curiosity, but to benefit the public – whether to steer it towards

¹ Eyal B. (ed), 1999, Israel Press Council, *Regulations Governing Professional Ethics in the Press*.

² *Guidelines Concerning Ethics for the Second Authority for Television and Radio*, second edition, 2005, clause 10.

³ *Bezeq Regulations* (Broadcasting Concession) 1987, regulation No. 6 (10).

⁴ Rogel N. *Nakdi Document, Guidelines for News Covering*, Israel Public Broadcasting Authority, 1998, p. 63.

⁵ Such as the ethical regulations of the press in Spain, Denmark, Germany (see: www.uta.fi/ethicent/spain www.uta.fi/ethicent/denmark; www.uta.fi/ethicent/germany) or the Code of Ethics adopted by the American Society of Professional Journalists (see: www.spj.org/join-insidestoy.asp)

⁶ Privacy Protection Law, *Book of Laws*, 1981, p. 128.

⁷ Basic Law: Human Dignity and Liberty, *Book of Laws*, 1992, p. 150.

⁸ Defamation Prohibition Law, *Book of Laws*, 1965, p. 240.

forming an opinion on matters of public interest or towards improving its daily life.⁹ Where this stipulation does not exist, i.e., where it cannot be shown that the public interest is served by reporting information that infringes upon one's privacy, not only does the journalist have no recourse under the law, but he also transgresses against the ethical code of his profession.

The special status of public figures with respect to their appearance in newspaper reports has been recognized by the courts. In a long line of verdicts, the courts, both in Israel and throughout the free world, have distinguished between the right of the press to violate the privacy of public figures when carried out in the public interest and the obligation to respect the privacy of private citizens. In certain countries, this distinction is embedded in law. In Israel, legal tradition, which is not yet clearly defined by law, allows for media exposure of a public figure even at the expense of his or her privacy.

On the other hand, the Patient's Rights Law¹⁰ obligates every independent care provider or employee in a medical institution to refrain from disclosing any information regarding any patient with whom he or she comes in contact, whether in his/her position as care provider or capacity as employee. The law allows for a divergence from this standard obligation only in exceptional circumstances: where the patient has given permission to disclose medical information pertaining to him, where there is an obligation by law to provide this information, where this information is necessary for the health and well-being of another individual or of the general public. These values are set forth in the physicians' ethical code as well:¹¹ in the chapter dealing with medical confidentiality and protection of the patient's privacy, it states, *inter alia*: "The protection of confidentiality is a necessary condition for the patient's trust" (article 18); "It is necessary to ensure that any information divulged to the physician or which is revealed to the physician as a result of his treatment of the patient will not be transmitted to any other person or body, unless the patient has requested it" (article 19); "The physician must not receive an overall waiver of confidentiality (from the patient). A waiver of confidentiality does not relieve the physician from an obligation to confidentiality unless he is certain that the patient is aware of the significance of this waiver and the use to which it may be put" (article 20); "The obligation to maintain confidentiality also pertains to contacts among physicians: a physician will divulge information to another physician only in the event that it is required for the patient's treatment. The physician is subject to the same limitations as those falling on any other person or institution when transmitting information to another physician (article 23).

The medical community has surrounded itself with a brick wall of prohibitions geared towards respecting patient privacy. This is hardly surprising, given the Hippocratic Oath according

to which generations of physicians have been educated, which states, *inter alia*: "All that may come to my knowledge in the exercise of my profession, or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal."¹² Physicians view their loyalty to their patients as an absolute value, from which they must never stray, and which commands them to respect their patients' privacy and never to divulge secrets regarding their health.

The conflict between two value systems, the one guiding journalists and the other guiding physicians, is self-understood. Each of these professional codes is valid in itself and neither takes precedence over the other. Furthermore, each of these two value systems contains guiding principles that are true for both professions: physicians are obligated, under certain circumstances, to provide information regarding a patient's condition (for example in order to prevent the outspread of epidemics), and journalists are required, in certain cases, to choose the right of the individual to protect his privacy over the right of the public to know (for example in order to protect the privacy of minors). Such lofty principles as autonomy, liberty, democracy, human relationships, which pertain to privacy, justify a decision by society to preserve and respect them. At the same time, however, they themselves require at times that privacy be limited.¹³ Values that are at the base of freedom of expression, such as the right to know, the striving for truth, the right of the public to supervise its governing body – are no less noble, and to a certain extent are congruent with those values on which the right to privacy is based. Thus, one set of values has no absolute preference over the other. Both the law and professional ethical codes have put forth suggestions for practical, measured arrangements by which these two conflicting value systems can be reconciled.

When dealing with the privacy of a public figure, the relevant question is to what extent is his health part of his private realm? It is customary to argue, and legislation and court verdicts have upheld such argument, that a person who has been elected to hold public office has by her own volition given up a considerable part of her right to privacy. Basic Law: Human Dignity and Liberty (article 7) for example, affords a constitutional right to privacy and protects against its infringement. At the same time, in cases where the public interest is involved, the law does not uphold the principle of privacy. It is clear that the private affairs of a public figure are of much greater public interest than those of a private citizen. The Privacy Protection Law stipulates that reporting a matter pertaining to one's private life, *one's health*, or one's behavior within the private realm constitutes an infringement of privacy.¹⁴ However, the law does provide "proper defense" in cases of violation of privacy where "the public interest justified such violation, provided that if the violation resulted from a press

⁹ Segal Z. *Freedom of the Press – between Myth and Reality*, Tel Aviv: Papyrus Publishing House, Tel Aviv University, 1996, p.122.

¹⁰ Patient's Rights Law, *Book of Laws*, 1996, p. 1591.

¹¹ *The Israel Medical Association's Code of Ethics*, 1995.

¹² Quoted in: Achmon Y. Confidentiality, in: Shefler G, Achmon Y, Weill G (eds): *Ethical Issues for Professionals in Counseling and Psychotherapy*, Jerusalem: The Hebrew University, Magnes Press, 2003, p. 139.

¹³ Gavison R. "The Right for Privacy," in: *Human and Civil Rights in Israel*, The Israel Civil Rights Association. Vol. 3, 1992, p. 306.

¹⁴ Privacy Protection Law, *Book of Laws* 1981, p. 128, article 2 (11).

report, the report was not shown to be false.”¹⁵ No one would argue that the medical condition of a public figure who manages the affairs of state is not a matter of “public interest,” i.e., that the public would benefit from receiving information regarding the above. Furthermore, the law recognizes that certain situations require one “legally, morally, socially and *professionally*” to infringe upon the privacy of another.¹⁶ The press constitutes that very profession by means of which beneficial information is brought before the public, even if this means violating an individual’s privacy. Thus, the law permits a journalist to publish information on the medical condition of a public figure, when justified, even though this constitutes a violation of his privacy.

Permission, in principle, to report on the medical condition of a public figure – in cases where it serves the public benefit – does not relieve one from posing the question whether disclosure should be all-encompassing, or whether it should be limited to defined circumstances; in other words, whether in the name of the public’s right to know and the right to freedom of expression, it is befitting that journalists should divulge medical information regarding a public figure in every case, or only when illness is involved. Does the public require general information regarding her state of health or only as it pertains to the reasons why she fell ill? Which public figures are we permitted to seek information about? Generally, and this is true for western democracies as well, not to mention autocratic regimes, no norm exists with respect to a voluntary disclosure regarding the health of national leaders: their medical condition becomes a public matter only when it comes out in the open (when they are absent from their posts due to illness, when they require medical treatment outside of their residences, or when their public behavior attests to the fact that they are suffering from a medical problem). One is reminded of the French President Francois Mitterand’s illness with cancer which was not reported during his term of office. Even after his death, a legal procedure was necessary before his illness could be disclosed to the public. The French authorities did not report on President Jacques Chirac’s hospitalization in September 2005. The Vatican published a medical bulletin on Pope John Paul II only after it became clear that his health had deteriorated. The Kremlin published false reports on Boris Yeltsin’s medical condition after he suffered a heart attack and underwent an operation. All these cases demonstrate the ways in which national figures avoid sharing their medical secrets with their public. Even in the United States, candidates are not required under the Constitution to report on the state of their health (while they are required to report on their financial situation). Even the president, after he is elected, is released from such obligation. The 25th Amendment to the Constitution stipulates that if the president should fall ill, he must notify the vice president and the members of his Cabinet – there is no obligation to notify the public. A public

announcement will be made only when it becomes clear that the president cannot fulfill his duties, and his powers must be relegated, even temporarily, to the vice president.¹⁷ However, it has become customary in recent years to publish an annual report on the president’s health, following periodic checkups that he undergoes.

Concealing information on the health of national leaders is a pattern of behavior that is customary in Israel: Prime Ministers such as Golda Meir, Levi Eshkol, Menahem Begin did not publicize their illnesses. Their personal physicians, as well as the medical institutions in which they were treated, cooperated with this policy. It was only many years after their death that the state of their health was exposed, often by way of “confessions” by their personal physicians. The law does not require a prime minister to report to the public on his health and even obligates his physicians to protect his privacy and conceal information that is revealed to them during treatment. It may be assumed that such behavior by physicians was influenced by external considerations – for instance, the state of the country as they saw it or how they considered that the public would react to information regarding the prime minister’s health. It was also necessary for them to consider their patient’s morale. At the same time, such noble considerations should not take precedence over the public’s right to know whether its leaders, who hold the fate of the nation in their hands, are capable of functioning properly. Neither should they be deemed to override the obligation of the press to provide the public with information regarding their leaders’ ability to function.

In order to try and improve upon the current procedure, two bills were placed before the Knesset – in 2002 and the most recent one in 2005.¹⁸ Both bills, worded differently, aimed at requiring the prime minister alone or members of the Knesset as well, to provide a proper report, at fixed intervals, on the state of their health. These bills were voted down. The failure to pass these bills does not relieve Israeli society and its leadership from the need to establish a procedure that will regulate the manner in which medical information is transmitted, thus settling the built-in contradiction between the school of thought that views privacy as “the right to be left in peace” and that which sees a public figure as “public property.”¹⁹ (While this article was being completed, a new bill, proposed by MK Danny Naveh, the former Minister of Health, was submitted to the 17th Knesset, aimed at requiring the prime minister, as well as party leaders running for the office, to provide a proper report on the state of their health; the government objected to the bill and its prospects to become a law are not yet clear).

A practical solution is needed: a reporting procedure, affixed by law or ordinance, by which information will be provided, at a known interval, on the prime minister’s mental and physical state of health. This information will be provided by a small and fixed team of physicians, appointed for a period of 5 years by

¹⁵ Ibid, article 18 (3).

¹⁶ Ibid, article 18 (2) (B).

¹⁷ Lehman-Wilzig, S. “Political ill-health coverage: Professional-ethical questions regarding news reporting of leaders’ ailments,” *Journal of Health Communication*, Vol. 8, no. 1 (January-February 2003): 59–77.

¹⁸ Bill by MK Avraham Yechezkel, the 15th Knesset, p/ 3813; Bill by MK Yuly Tamir, the 16th Knesset, p/ 3658.

¹⁹ Segal Z. “The right to be left in peace,” *Haaretz*, 16 January 2006.

the state, on the basis of recommendations by non-governmental bodies such as the Israel Medical Association, and whose medical expertise is relevant to the proper functioning of a prime minister. Information will be provided by a (non-governmental) spokesperson, in layman's terms, in order that the public can be made aware of the medical condition of the leader elected to manage the affairs of state. This information will also include a clear and succinct summary of the prime minister's laboratory results.

In effect, what is being proposed here is the establishment of an additional medical authority, supplementary to the prime minister's personal physicians, whose task it will be to keep tabs on the prime minister's health, at given intervals, and to report to the public. For this purpose, the medical team will be authorized to receive from the prime minister's personal physicians all the information concerning his health as well as to conduct its own medical tests. In the event of professional differences of opinion between the prime minister's personal physicians and this external team of physicians, both conflicting reports will be published so that a public discussion can ensue. In cases where the prime minister falls ill, this team of physicians, together with a specialist in the particular field of medicine, will be called upon to evaluate his medical condition, and the external spokesperson will update the public, in layman's terms, on changes in the prime minister's condition. Announcements must include a reliable and authoritative prognosis on his chances of being cured and returning to his post. This will apply in cases where the prime minister is treated in his residence as well as when he is hospitalized. Information will be provided by the medical authority, by way of its spokesperson, and not by the prime minister's personal physicians and spokespersons or by the hospital's physicians and spokesperson. As soon as the prime minister has regained his strength, emergency measures will be rescinded and announcements concerning the prime minister's health will return to standard procedure. In case the prime minister's health deteriorates to such an extent that he is unable to carry out his duties and in effect can no longer serve as prime minister, he has the right to be left in peace and can be relieved of the burden of being "public property."

Of course, one can suggest other solutions, or try to improve upon the above suggestion. However, the principles embodied herein should be preserved: the privacy of a leader can be invaded only so long as he serves in his public capacity; in such a case, the public has a right to receive updated reports on the state of his health; information regarding his health should be provided in layman's terms, the purpose being to shed light on whether he is capable of fulfilling his function; information must be reliable and accurate, but will exclude those details that do not directly impinge upon his ability to carry out his duties properly; information should be provided by an external team of physicians through a special spokesperson, not forming part of the leader's close associates or providing him with any services on a regular basis; medical information will be transmitted to health reporters only and not to political reporters.

One question remains to be dealt with: Who are these "public

figures" for whom the above recommendations apply? Israel's political structure and culture are such that we can make do with applying them only in the prime minister's case. Other office holders have the right to a greater degree of privacy, since they do not bear the same level of responsibility for the affairs of state. There are two exceptions: a) the period before elections, when the public has the right to information regarding the health of party leaders running for the office of prime minister, and b) ministers responsible for exceptionally delicate matters, who will be required to notify the public regarding their medical condition, if they have fallen ill and cannot carry out their duties.

The above survey and the conclusions reached from it are in response to the behavior of the media during former Prime Minister Sharon's hospitalization, despite the fact that, paradoxically, the contradiction between the public's right to know and the patient's right to privacy was not relevant at the time. It was Sharon himself who knowingly waived his right to privacy in matters relating to his health, when he ordered his assistants to set up an interview with his personal physicians for reporters from *Yediot Aharonot*.²⁰ During this interview,²¹ Sharon's physicians provided details regarding his medical condition, proclaimed him to be a healthy person, and even produced a photocopy of laboratory test results taken several weeks before. Moreover, following Sharon's first hospitalization, his bureau called a press conference during which Hadassah's physicians reported on his condition as revealed to them from tests they had done. This briefing was called with Sharon's consent and after his express authorization to Hadassah's management to disclose his medical file.²² Thus, although Sharon responded wholeheartedly and in full to the expectations of the media, the medical reports provided during his hospitalization caused dissatisfaction among his treating physicians, the media, and specifically among the general public.

These negative reactions derived from conflicting expectations and from a faulty management of the situation. Although the medical bulletins contained accurate information, in real time, on Sharon's condition, they were not clearly understood by the public. It is no wonder that the various media outlets were inundated with physician-commentators who filled the vacuum. Hadassah's announcements were influenced by "non-medical" considerations put before the hospital by the patient's bureau chiefs and family members. During one stage of Sharon's illness (when he was diagnosed with cerebral amyloid angiopathy), the text of the announcement was so vague as to mislead the reporters (who were not health reporters). In addition, after it became clear during Sharon's second hospitalization that he had suffered severe brain damage, the hospital refrained from making clear

²⁰ Reuven Adler, in: Dayan I. "Uvda," (investigative TV program), 26 April 2006.

²¹ Barnea N. Shiffer S. "The brain, the heart, the belly, the leg, the blood," *Yediot Aharonot*, 23 December 2005.

²² Benziman U. "The bureau will recommend and approve," *Haaretz*, 18 January 2006.

to the public that the logical outcome in such cases is that the patient is unable to resume his former duties. Had the hospital done so, the drama that the media gave to Sharon's hospitalization would have diminished immediately. Sharon's personal physicians on their part did nothing to clarify the situation: at one point they shared with the public all the information regarding his medical condition as they knew it; however, afterwards they remained silent. Sharon's assistants and publicists played their part in presenting a false picture of his condition (during his first hospitalization and after his release from the hospital), aware as they were of the importance of preserving his image and his chances for reelection. Journalists also played a negative role: they failed to draw the proper distinction between Sharon's condition during his first and second hospitalizations. Whereas during his first hospitalization, they did their utmost, within their limited professional capabilities, to provide the most complete information on Sharon's condition, during his second hospitalization they provided an enormous amount of detail regarding the medical procedures he was undergoing at a time when his condition, defined as "severe but stable," did not change and it became clear that he would not return to his post. This criticism of the media's performance does not apply to those few reporters who presented the public with a version of the prime minister's treatment that differed from the official version, and who raised pointed questions on the accuracy of the information related to the public and on the medical judgment of physicians treating Sharon. In terms of how the press operates nowadays, these reporters should be commended.

A great deal of anguish to Sharon's physicians, family members, and assistants, as well as to reporters, could have been avoided, had a different media culture existed in Israel. The recommendations put forth above, regarding reporting procedures, are aimed at preventing such mutual frustrations in the future.

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