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YIFAT BITTON

MIZRAHIM AND THE LAW: ABSENCE AS EXISTENCE

This article explores the aptitude of discriminated groups to utilize Israeli antidiscrimination laws to improve their social mobility. Specifically, this is the first time that the Israeli legal system's treatment of Mizrahim as a discriminated group is explored. The article's main contention is that the Israeli legal system both reflects and establishes a practice of ignoring the existence of Mizrahim's as a discriminated group. Revealing the socio-legal roots of this bias, the author identifies it as a "denial dynamic". The denial dynamic creates structural socio-legal barriers for Mizrahim who wish to utilize antidiscrimination laws, rendering their legal fight for equality flawed and limited. Using both quantitative and qualitative tools to analyze a decade of case law, the article demonstrates how these barriers come into play in the Law against Discrimination in Services, Products, and Public Places. Data indicate that this statute is mostly employed by Mizrahim who have been denied entrance to nightclubs. Though designed primarily to eradicate discrimination of this kind, the statute fails to provide the necessary tools to eliminating the prejudice that Mizrahim suffer as a group. The author suggests re-reading the statute in a way that will allow Mizrahim to utilize it to its fullest effect, to resist the denial dynamic, and to set up effective anti discrimination legal tools that will end their enduring discrimination in other areas too.

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NILI KARAKO-EYAL

LIMITING AUDITORS' TORTIOUS LIABILITY TOWARD THIRD PARTIES

The existence and scope of auditors' tortious liability have been the focus of extensive and dynamic professional and academic discourse for at least two decades. The question of whether or not to limit auditors' liability vis-à-vis third parties has been given considerable attention by accountants, economists, jurists, and policymakers.

The importance of this question is not merely theoretical. An international trend of restricting the liability of auditors vis-à-vis third parties has been apparent since the early 1990s. This trend reached its peak when the European Council recommended in June 2008 that such liability be restricted by limiting liability in a contract, by adopting a statutory liability cap, and/or by switching to a rule of proportionate liability.

Advocates of limiting auditors' liability vis-à-vis third parties primarily argue that a limited liability arrangement is a prerequisite for the creation of a stable, competitive, and high-quality auditing market. Opponents of such arrangements argue, by contrast, that limiting auditors' liability is likely to detract from the quality of auditing services, that it cannot be reconciled with considerations of fairness, and that it is therefore inappropriate.

Though the debate over these questions has not been entirely neglected by the legal community or the accounting profession in Israel, the issue has not yet benefited from any in-depth local academic discussion. Furthermore, contrary to the prevailing international trend of limiting auditors' liability, Israeli law still favors a stricter approach, and suggestions to limit auditors' liability have been regularly rejected.

This paper will examine the question of whether it is appropriate to limit auditors' liability toward third parties in Israel against the background of Israeli law, the characteristics of Israel's auditing market, and the

regulation to which it is subject. It will apply a pluralistic approach, considering economic efficiency, fairness, and legal coherence. In addition, the discussion will be founded on data collected from the Israeli Association of Certified Public Accountants and on studies performed in various countries. Some of these studies deal directly with the implications of adopting a limited liability arrangement, while others discuss issues indirectly relevant to the question.

The central thesis of this paper is that considerations of fairness and justice, as well as the aim of reducing secondary and administrative costs, support the adoption of a legal arrangement that limits the tortious liability of auditors vis-à-vis third parties. It further suggests that adopting an arrangement of this type will not detract from the quality of audits, as its opponents argue, and that, in fact, it may be expected to promote efficient deterrence. Additionally, adopting a limited liability arrangement is supported by considerations of legal coherence, as well as by the unique characteristics of auditing.

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GUY KLES

UNIVERSITY IN EXILE: THE HISTORY OF LEGAL EDUCATION IN THE FIRST DECADE OF ISRAEL

This article critically examines the prevalent assumption that in the first decades of Israel, legal education in the Hebrew University was formalistic. The history of legal education during Israel's first decade has yet to be comprehensively and thoroughly examined in both legal and general literature. In the absence of such an examination, key insights regarding legal education during that period rely principally upon sweeping inferences from rulings handed down by Supreme Court judges of the time. This article wishes to deviate from the familiar theoretical outline that, among other things, presents Israel's early legal education system as introverted, distinct, and autonomous. I argue that the autonomous nature of legal education changed to an interdisciplinary one during Israel's first decade.

The first part of the article provides a brief review of Legal Formalism. The second part reviews the history of the Hebrew University during Israel's first decade. The third and fourth parts present the main argument of this essay, according to which, legal education at the Hebrew University was not formalistic during Israel's first decade. This argument is based on two basic arguments: First, the institutional argument, which cites early sources (such as minutes of discussions by the professional committee for the foundation of the Faculty; the Faculty's official curriculum in its early years and so forth) that indicate the efforts of Faculty leaders to introduce interdisciplinary education. This attitude is not consistent with a formalistic educational method and, in fact, does not conform to such a method. The second argument rests upon the personal aspect, focusing on the senior staff of the Law Faculty in the Hebrew University. Here, I review the personal files of the faculty members, the contents of their lectures, and their interdisciplinary papers. The examination of the professors' personal and intellectual backgrounds, aims to offer

information about the connection between legal and non-legal academia. It stands to reason that a strong connection to other disciplines indicates the introduction of a non-formalistic regime in legal education in the early years. Finally, the institutional and personal arguments are combined with historic events of the first decade of the State of Israel, during which the Hebrew University suffered both physical damage, in the loss of its material assets, and symbolic damage, as a result of the loss of its unique place in the fabric of the city of Jerusalem.

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MICHAL TAMIR & ASSAF HAREL

ON HUMAN DIGNITY AND PRIVATIZATION

PURSUANT TO HCJ 2605/05 ACADEMIC CENTER OF LAW AND BUSINESS, HUMAN RIGHTS DIVISION V. MINISTER OF FINANCE (2009)

One of the constitutional questions arising from the privatization of government authorities pertains to the power of individuals interested in the benefits of privatization to waive their right to have the privatized authority run by the state. This article addresses the Supreme Court's majority-opinion ruling whereby a law that facilitates the establishment and operation of a privately-run prison violates the constitutional rights to personal liberty and human dignity, as enshrined in Basic Law: Human Dignity and Liberty. The prison-related law was rejected because it violates the rights to personal liberty and human dignity by violating the social and symbolic significance attributed to imprisonment in a public jail. The article argues that the court's conclusion does not necessarily follow from an analysis of the issue based on human rights theories. The court implicitly opted for *the interest theory of rights* by incorporating the *institutional argument* – namely, that it is an authority which by its very nature cannot be privatized – into the *rights argument*, according to which privatization violates human rights. It therefore ruled that the inmates' right to human dignity is violated in the wake of the violation of the symbolic meaning of law-enforcement by the state. The true significance of the ruling is that institutional and constitutional considerations supersede the constitutional right to human dignity and this has problematic implications. Not only did the ruling fail to include an independent discussion of the institutional argument; the claim that the rights to personal liberty and human dignity were violated is also not convincing. The personal liberty and human dignity aspects were not sufficiently developed, and important issues such as the power to waive them were not discussed. By incorporating the institutional argument into the rights argument, the court implicitly gave preference to

institutional considerations over *the minimal right to dignity*, *freedom of choice and individual autonomy*. The article proposes an alternative perception based on the *will theory of rights*. According to this perception, and under appropriate conditions of choice, inmates may choose to waive their right to be imprisoned in a public prison.