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AYELET BLECHER-PRIGAT & DAPHNA HACKER

STRANGERS OR PARENTS: THE CURRENT AND THE DESIRABLE LEGAL STATUS OF PARENTS' SPOUSES

Changes in family structures lead to situations where children live with their parent's spouses, often labeled as “step parents”. This family structure emerges mainly in cases of parental divorce or when one of the parents passes away, and one or both parents remarry or cohabit with a new spouse. Israeli law has not yet comprehensively addressed the relations between children and their parents' spouses, and this article intents to fill this lacuna. First, we examine the Israeli law's attitude towards parenthood, and criticize its inconsistency when dealing with the status of parents' spouses. Next, we suggest a normative framework that seeks to preserve the unique parental status while weakening parental exclusiveness, to help the law recognize the variety of relations that emerge between children and their parents' spouses. Finally, we test the suggested normative framework on a variety of legal issues that affect relations between children and their parents' spouses, elaborating on both the prevailing and the desirable law.

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SUZIE NAVOT

PARLIAMENTARY IMMUNITY FROM LIBEL AND SLANDER

Knesset members enjoy parliamentary immunity for opinions expressed in the framework of fulfilling their duties. This immunity ensures that an MK can carry out his duties and represent his electorate while fully and freely expressing his opinions and views. *Prima facie*, this means that statements made by MKs are ***immune*** against libel and ***slander*** suits, and that they would not be held criminally or civilly liable for statements made in their capacity as MKs.

This paper examines the appropriate balance between the MKs' immunity and the interest of protecting the good name of another person, proposing that the scope of parliamentary immunity in libel and slander cases be limited. First, the paper addresses the question of defining the limits of parliamentary immunity. Second, it presents a framework for comparative analysis and focuses on considerations that should be taken into account when balancing the need to maintain the fundamental goals of parliamentary immunity with the need to protect "the right to a good name," both in Israeli law and in foreign law. Comparative research indicates that in many Western states there is a growing tendency to restrict parliamentary immunity so as to limit its potential infringement of other constitutional values, such as equality and the principle of the rule of law.

In the third part of the article I claim that the criterion in the Israeli case law - the "range of natural risk" test, used to determin the scope of parliamentary immunity - does not reflect an appropriate point of balance in cases of libel and slander. To date, the criterion of the "range of natural risk" conferred a relatively broad defense, particularly to the MKs' freedom of expression.

A conflict between the MKs' freedom of expression that is protected by this immunity and another person's right to a good name should be resolved on a sub-constitutional level, within the framework of the Defamation Law. My claim is that when relying on the "range of natural risk" in determining the scope of section 13(1) of the Defamation Law - i.e. in the case of concrete damage to a person's good name - the balancing point should be determined in accordance with the criteria prescribed by the "limitation clause."

As a rule, parliamentary immunity should be broad, protecting the Knesset members' right to freedom of expression as far as possible. The thesis presented in this paper limits the right somewhat, but the limitation is unavoidable. The Knesset members' freedom of expression should not be absolute, and there is no justification for permitting the abuse of this freedom. Freedom of expression is essential in a democratic regime but is not an absolute right. In establishing the limits and character of political debate, particular attention should be paid to establishing the appropriate balance between the MKs' freedom of expression and libel and slander cases where another person's good name may be damaged as a result of that freedom. The discourse of MKs' serves as a model for overall public discourse.

The claim of immunity was made as a defense against liability for harming a person's good name. This paper proposes that this defense should be examined in accordance with the limitation clause, focusing on the proportionality rule, as applied to the test of the "range of natural risk." Both the balancing test proposed and the principles for its implementation are based on the change in the status of the "right to a good name," and refer to trends in comparative law over the past few years. These changes should also be implemented in the determination of the scope of the defense granted in Israel to MKs' freedom of expression.

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YAAD ROTEM

THE JURISDICTION OF BANKRUPTCY COURTS TO GRANT REGULATORY CONCESSIONS

Financially distressed debtors often apply for regulatory concessions—i.e., to be relieved from an obligation or duty dictated by regulation. For example, in the 2005 case of ClubMarket, the Israeli Antitrust Authority was asked to approve a non-competitive merger, because one of the merging parties was financially distressed and faced liquidation. But what happens when the relevant Regulator (e.g., the Israeli Antitrust Authority) denies the petition for a regulatory concession? Is the bankruptcy court entrusted with jurisdiction to overturn the Regulator's decision? A petition for a regulatory concession for a debtor under liquidation, reorganization, or personal bankruptcy proceeding raises two problems: The first concerns the identity of the regulator with which the jurisdiction is entrusted. The second problem concerns the manner in which the balance of interests is to be struck. Indeed, two interests collide: the interest of the public in denying the debtor's petition and the interest of other communities whose fate is associated with the debtor's, and who naturally would like the debtor to be accorded the concession. Solving the last problem mandates a decision that is, for the most part, a matter of value judgment (for example, whose interest should prevail — that of the general public or that of the ClubMarket employees?). Thus, solving the problem of jurisdiction becomes all the more important. The current Article introduces the various contexts in which regulatory concessions are sought, in Israel and abroad, and offers a theoretical framework to solve the problem of jurisdiction.

The Article puts forward two arguments. First, the Israeli Supreme Court ruled in 2003, in the *Torgeman* case, that bankruptcy courts are not entrusted with jurisdiction to stay criminal proceedings against a company under liquidation. Although the methodology adopted by the Court in the *Torgeman* case is also applicable in other contexts where regulatory

concessions are sought (e.g., in the context of taxation, securities regulation, environmental protection, etc.), Israeli bankruptcy courts have not turned to the *Torgeman* ruling, which was issued in the particular context of staying a criminal action, in order to define their jurisdiction with regard to other regulatory concessions (e.g., in the context of taxation). Secondly, the *Torgeman* ruling itself raises several difficulties. A detailed analysis of the relevant goals of the law leads to the conclusion that the rule set in the *Torgeman* case is rather simplistic, and that exceptions to this ruling ought to be formed. One such exception concerns the interpretation of "general jurisdiction rules," such as Section 267 or 268 to the Companies Ordinance.

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DAVID ELKINS AND MOSHE GELBARD

THE NONCONFORMITY OF PRICE REDUCTION: THE LIMITED UTILITY OF THE REMEDY IN ISRAELI LAW

Reduction of price is a monetary remedy for the nonconformity of goods or services. Under Israeli law, the remedy can be found in specific statutory provisions: in the Sale Law, 1968, the Rental and Borrowing Law, 1971, the Contract for Services Law, 1974 and in the appendix to the International Sale of Goods Law, 1999. Use of this remedy – at least as far as is reflected in published court decisions – has been extraordinarily sparse.

Section 498 of the New Israeli Civil Code measure proposes to combine the disparate price reduction provisions and replace them with a uniform and comprehensive legal framework. An attempt was also made to upgrade the status of price reduction in several respects: First, the broad language of the proposed section may allow the remedy to be used in situations not covered by present legislation. Second, reduction of price is moved from its present position in various specific statutes to the general section of remedies. Third, the details of the remedy are more fully fleshed out in section 498 than in the existing provisions. The assumption underlying these proposed changes was that the provision would familiarize users of the new Code with the remedy of price reduction and foster its increased use. The Article challenges this assumption and argues that the limited use of price reduction in Israel results from the fact that, in most cases, the aggrieved party can achieve a better monetary result by seeking a different remedy. Accordingly, the Article concludes that even if the remedy becomes better known (due to its central location in the remedies section of the Code) and better understood (due to its more detailed language), it is reasonable to assume that the use of price reduction will not increase even after the adoption of the new legislation.

Part II of the Article briefly surveys the history of price reduction and describes the remedy and its relevant computations. These subjects form the background for understanding the discussion in Part III.

In Part III of the Article, we compare three alternative remedies from which the aggrieved party may choose: price reduction, damages, and restitution following rescission. The comparison is not normative. The Article does not consider the possible justification for price reduction and does not discuss the (important) question of whether it is more or less valid than other remedies. Furthermore, the Article does not examine the empirical question of the extent to which potential users are familiar with the remedy. The argument considered in the Article is theoretical: We assume that if price reduction is not monetarily advantageous when compared with other remedies, then a rational aggrieved party would usually not use it. Accordingly, the Article compares the three remedies from a monetary perspective.

In the first phase, we examine the relevant mathematical parameters in order to determine the ranking of each pair of remedies: price reduction vs. damages, price reduction vs. restitution, and damages vs. restitution. This examination demonstrates that the choice between the remedies in each pair depends upon a different variable. In the second phase, we rank the three remedies. To do so, we draw a three-dimensional chart comparing the different variables (due to the technical difficultly of presenting a three-dimensional chart in a two-dimensional space, we break the chart into three two-dimensional sub-charts). The rest of Part III systematically explains and analyzes the chart. Our conclusion is that there exist only a very limited number of cases in which price reduction is the optimal remedy. Furthermore, these cases require the relatively rare simultaneous occurrence of a number of factors. In other situations, when price reduction is not the optimal remedy, it would be preferred by an aggrieved party only if the higher ranked remedy or remedies are unavailable. However, under Israeli law, the limitations on recovering damages for direct loss (for our purposes: lower value due to nonconformity) are relatively few. In particular, Israeli law, as opposed to the law of some countries that follow the civil law tradition, does not require that the aggrieved party prove fault by the party in breach as a

precondition to recovering damages. Significant also are the Israeli law's liberal rescission and restitution provisions, according to which (a) rescission is available even after the passage of a significant period of time (by means of granting an extension) and (b) the aggrieved party is free to choose restitution of value instead of actual restitution. Accordingly, it is extremely rare to encounter a situation in which the aggrieved party is forced to choose price reduction due to the unavailability of the other remedies. Hence it follows that in most cases, price reduction is an unattractive option from a monetary perspective when compared with the other remedies available under Israeli law. It may therefore be presumed that an upsurge in the use of price reduction is not in the offing.

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ALON HAREL

THE RIGHT TO JUDICIAL REVIEW: A LIBERAL DEFENSE

This article examines the arguments for and against the judicial review of legislation. Its conclusion is bound to be dismissed by both advocates and opponents of judicial review. The second chapter of this article examines the traditional defense of judicial review. Under this defense, granting courts an authority to review statutes improves the protection of important constitutional values. Usually (though not always) this claim is based on the alleged superior ability of judges or courts to rule on matters concerning basic rights. This defense, I argue, is factually dubious, dangerous, and gives rise to resentment on the part of the public as it does not seem right that the mere fact that courts are better in making decisions (of a certain type) justifies granting them this power.

The third chapter develops a new argument in favor of judicial review based on the right to a hearing. Justifying judicial review does not presuppose that judicial decisions are better or that judges are more likely to render the right decisions. Judicial review is designed to assure individuals, who (justifiably or unjustifiably) maintain that their rights were violated, an opportunity to be heard. A right to a hearing consists of three components: It offers a person the opportunity to raise his grievance, to be provided with a reasoned response and to benefit from a reconsideration of the decision in light of the arguments raised in this process. This process does not guarantee (or even increase the probability of) better decisions or more successful ones than the ones that are made by the legislature. This process only guarantees the right to be heard, and this right has an intrinsic value independently of the question of whether courts are better or more successful than legislatures.

Furthermore I argue that a court is the only institution that can (as a conceptual matter) protect the right to a hearing. The right to a hearing enables a person who believes that he was wronged to raise his grievance, to be provided with an explanation, and to benefit from a reconsideration

of the original decision. This is precisely what the judicial process consists of. The more an institution is effective in protecting the right to a hearing, the more it resembles a court.

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AVIHAY DORFMAN

THE RIGHT TO VOICE A GRIEVANCE: INTERPERSONAL VERSUS POLITICAL MORALITY

In these pages, I critically review a highly ambitious justification of judicial review cast in terms of the right to voice a grievance against the infringements of basic-rights. According to this justification, judicial review is not merely compatible with sustaining this right, but rather a necessary, and therefore a non-instrumental upshot of the right. I argue, however, that a person's right to voice a grievance falls short of explaining the legitimacy of judicial review in a non-instrumental fashion. I show that the argument *that follows from* the right to voice a grievance, cannot get off the ground without smuggling in a set of normative and political judgments that are, importantly, instrumental from beginning to end. Instead of grounding the practice of judicial review in this right, I outline a more promising theory of a *democratic* judicial review. I argue that democratic politics – viz., a common framework of collective decision-making – represents an institutionalized embodiment of the right to be respectfully recognized by one's compatriots. To this extent, democracy is precisely the personal right to voice a grievance *writ large*. I further discuss some of the implications of this characterization of democracy for an adequate account of legitimate judicial review.