MISHPATIM 42 2012

YOAV DOTAN

NON DELEGATION AND THE RESHAPED PRINCIPLE OF LEGALITY

The purpose of this article is to discuss the status of the 'Non-Delegation' doctrine in Israeli case law. The article distinguishes between two meanings of non-delegation. According to the *first* meaning the Knesset (Israeli Parliament) is banned – as a *constitutional* matter – from delegating the power to regulate questions of extreme social importance to the executive. According to the *second* meaning the Knesset is entitled to delegate such powers, provided that the delegation is explicit. Accordingly, when interpreting statutes, courts should assume that no such delegation took place, unless the Knesset explicitly provided otherwise. The article argues that the first meaning of the non-delegation principle is not part of Israeli constitutional law. The second meaning, on the other hand, has become a key tool for enabling Israeli law to re-shape the doctrine of legality in administrative law.

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BARAK MEDINA

THE NON-DELEGATION DOCTRINE IN ISRAELI CONSTITUTIONAL LAW: A REPLY TO YOAV DOTAN AND GIDEON SAPIR

This article addresses arguments offered in two recent articles, criticizing the Israeli version of the Non-Delegation doctrine. The current article argues that the Non-Delegation doctrine should be interpreted as limiting the *Knesset*'s power, since authorizing the Government to infringe constitutional rights is valid only if the central aspects of the infringement are determined in the legislative authorization. This doctrine is justified in the article by reference to the right to equal participation in decision-making and the essence of constitutional rights in general.

MISHPATIM 42 2012

BARAK ATIRAM AND URI WEISS

ON TAXATION AND EXCLUSION

Anti-discrimination law and tax law are commonly perceived as distinct and separate legal fields with no special ties connecting them. This article, however, claims that income and company taxes do impact on ethnic- and gender-based discrimination in the labor market. This paper raises a question: How can we reduce ethnic, racial, and gender discrimination in the marketplace? It then explores potential answers: strict regulation, and reliance on the "invisible hand" of the free market, and ultimately provides a counterintuitive reply. Surprisingly, we can reduce ethnic and gender discrimination by lowering income and company tax rates.

The current discourse on tax law portrays the tax system as a heavy burden that is mainly shouldered by the affluent. This article unravels a contradicting hypothesis according to which, tax lowers market competition over individuals' production, and therefore sharply increases the significance of social and familial relations. By doing so, tax law increases the discrimination against those who are commonly beyond the scope of the social world of the marketplace, mainly women and weak ethnic and racial groups. This paper extends the critical, social, and cultural discourse about the impact of the tax system, and highlights the impact of tax law on ethnic and gender discrimination in the marketplace.

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GUY SAGI

THE "INFANT DEFENSE" WHICH LIMITS THE ABILITY OF DOMINANT FIRMS TO COMPETE – IS THIS THE CHILD WE PRAYED FOR?

In recent decades the Israeli market has undergone a rapid process of privatization, including the sale of dominant state-owned firms to private owners as well as the granting of permits to incorporate in new heavily regulated fields. This process is often accompanied by attempts to create and promote competition in the market by lowering regulated entry barriers and in some instances by implementing an "infant defense" aimed at helping new entrants compete successfully with incumbent dominant firms. This article focuses on the infant defense and the limits it imposes on the ability of dominant firms to compete in response to new entries, either by lowering prices or by improving products for a specified period of time. By implementing this defense the regulator hopes to increase the incentive of new firms to enter the markets and to enable them to establish their position in the markets before having to face the full competitive capabilities of incumbent dominant firms. However, close analysis reveals that in most cases implementation of the above defense is unnecessary and costly; if there is long-term profit to be made, firms will enter the markets with or without the infant defense, while if there is no such anticipated profit, firms are likely not to enter the market in any case. Therefore, due to its high costs and the difficulty involved in identifying the few cases in which it might be beneficial, this defense should not be widely implemented, but rather only in the rare cases in which its contribution to competition and to the consumer is significant and verifiable.

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DAFNA LAVI

NOT ONLY ARBITRATION AND NOT ONLY MEDIATION – A PROPOSAL TO ADOPT "MED-ARB" AS A RESPONSE TO THE WEAKNESSES OF THE INSTITUTION OF ARBITRATION IN ISRAEL

This paper criticizes Amendment No. 2 – 2008 of the Arbitration Act, and proposes an alternative remedy for the weaknesses of the Israeli arbitration system – both those that predate the amendment and and those that followed it.

Attempting to address the shortcomings of the Israeli arbitration system prior to the introduction of the amendment, legislators enacted internal, procedural changes, including the establishment of *two* routes for appealing arbitration verdicts, and a requirement that arbitrators explain and justify their verdicts. This paper proposes adding one of the best-known mediation proceedings in the world – Med-Arb – as a default procedure to supplement Israel's arbitration law.

Med-Arb, an Alternative Dispute Resolution (ADR) method for settling disputes outside the courtroom, begins with the mediation proceeding, which by its very nature preserves the autonomy of the parties in dispute. Assessing the need for change in the Israeli arbitration system, this paper focuses on two of its weaknesses: the frequent failure of arbitration due the parties' lack of autonomy; and the need for an outside force to intervene occasionally and strengthen a failing institution. This paper will try to demonstrate that Med-Arb can remedy the weaknesses of Israeli arbitration institution, by addressing its two major failings.

This paper addresses practical difficulties arising from the court's policy with regard to efficiency of the court system; difficulties associated with the structured preference for local parties; the effect of this policy on the type of litigation that will take place in Israel and its effect on the state's foreign relations.

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BENJAMIN BEKKERMAN

BRINGING ABOUT SOCIAL CHANGE WITHIN THE ULTRA-ORTHODOX COMMUNITY BY MEANS OF THE SUPREME COURT – THE ISRAELI VERSION OF HOLLOW HOPE

The trend of increasing power of the Supreme Court of Israel over the last two decades as a result of the constitutional revolution as well as the Supreme Court's willingness to intervene in public disputes, has turned the Supreme Court into an attractive tool in the eyes of liberal activists who are interested in bringing about social change within the ultra-orthodox community, which is becoming stronger both demographically and politically.

The article examines the efficacy of a legal route to bring about social change within the ultra-orthodox community from the perspective of efficiency, namely whether the Supreme Court is able to bring about social change in this community. The article's response to this question is based on the well-known claim made by American scholar Gerald Rosenberg, who concluded that a judicial system's ability to instigate social change derives from a number of conditions related to the level of support given by non-judicial actors. The article demonstrates how empirical analysis of the chain of events in a number of cases that touch upon the heart of ultra-orthodox autonomy – the separate ultra-orthodox educational system and the existence of a scholarly community – illustrates a lack of collaboration and even resistance on the part of non-judicial actors toward social reform within this community, as well as the inability of the Supreme Court to effect such change. The article further claims that the inability of the Court to instigate social reform is independent of the current political environment and is rather due to the unique characteristics of the ultra-orthodox community and its relationship with the Supreme Court.

The article concludes by deriving a normative conclusion from the descriptive claim, namely, that the choice of the liberal activists to utilize the Supreme Court as a tool to bring about social reform in the ultra-orthodox community, as well as judicial support for this choice as evidenced in the Court's rulings, are improper and severely harm the goals of the supporters of this change. This conclusion arises from a comparison between the high cost of judicial intervention in the autonomy of the ultra-orthodox community and the extremely low expectation of judicial success in effecting any real change along with the cost of a policy of judicial restraint regarding these issues.