MISHPATIM 42 2012

NOYA RIMALT

LAW AS AN AGENT OF MULTICULTURALISM: GENDER SEGREGATION IN PUBLIC TRANSPORTATION BETWEEN UTOPIA AND REALITY

This article examines the case of gender-segregated buses mostly serving the Ultra Orthodox community and analyzes the role of government agencies including the Ministry of Transportation, the Supreme Court and the Knesset in facilitating this development over the past decade. The article argues that it is impossible to explain the current situation, in which dozens of bus lines throughout the country are segregated, without recognizing the contribution of the various branches of government, and especially the judicial system to this situation.

To clarify this argument, the article focuses on the latest Supreme Court decision dealing with this issue (the *Regan* Decision) and reveals how this judgment is based on a false and misleading story as to the reasons leading to the swift spread of gender segregation in public transportation. Along with the official story, the article presents an alternative narrative which provides a more complex explanation for the recent rise of gender segregation in public buses. This alternative account of events highlights three factors that played a crucial role in the establishment of gender segregation in public transportation: power struggles within the Ultra Orthodox community between opponents and proponents of gender segregation, economic interests of the public bus companies, and legal and institutional decision-making that enabled advocates of segregation to enforce their vision of gender segregation. By not taking this complex array of factors into account, the Court failed to provide sufficient protection for Ultra Orthodox men and women who oppose segregation.

In conclusion, the article links the legal treatment of gender segregation to the emergence of multiculturalism. It argues that contemporary legal discourse has been greatly influenced by concepts of liberal

multiculturalism and that the *Regan* decision provides a typical illustration of this influence, Moreover, this decision highlights two significant weaknesses of liberal multiculturalism. First, the *Regan* decision reveals the difficulty entailed in promoting a liberal vision of multiculturalism when the relevant minority group adheres to an illiberal culture. Second, the decision exposes the limitations of the one dimensional concept of culture upon which multiculturalism is based. This concept views minority cultures as monolithic and ignores the dynamic realities of change, conflict and controversy that exist in practice within any minority group, including the Ultra Orthodox minority. This monolithic approach to Ultra Orthodox culture that was employed by the Court in Regan obscured the existing controversy within that community with respect to gender segregation in the public sphere. Consequently it led the court to grant a monopoly in deciding on the proper scope of gender segregation to those within the community who advocate segregation at the expense of those who oppose it.

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YEHEZKEL MARGALIT

TOWARDS DETERMINING LEGAL PARENTAGE BY AGREEMENT IN ISRAEL

In Israel as in other parts of the world, families, parenthood, and relations between parents and children have changed dramatically over the past few decades. So, too, developments in modern medicine have enhanced the ability to separate sexuality from fertility and parenthood. Many researchers feel that the legal system has not kept pace with these changes, and that traditional models of familial relationships no longer provide adequate tools for dealing with them. In order to bridge the gap between a desired social status and current law, a growing number of parents seek to regulate the status, rights, and obligations of parenthood by means of agreements and contracts. This study surveys the process of defining and determining legal parenthood in Israeli law, focusing on dominant trends in family law in general, an in the law of prents and children in particular.

The article identifies a clear if slow trend to abandon Jewish law in favour of civil law. One expression of this trend is a change in the definition of legal parenthood: the idea of natural parenthood, influenced by Jewish *Halaka*h, is being replaced by socio-psychological parentage that is, by nature, civil and secular. This article seeks to contribute a further element to this normative, civil arrangement: determining legal parenthood by agreement. After establishing the theoretical foundation and examining the main practical aspects of the normative model, we briefly review its potential advantages and attempt to deal with objections that might arise. We then examine its application in determining the legal parenthood of children born as a result of fertility treatments. We then examine the current judicial and administrative mechanisms, and the changes that need to be made to apply the model in Israel. Finally, we discuss the more complex idea of appplying this model to the definition of legal parenthood of all children.

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LIRAN HAIM

BANKING LIABILITY IN PAYMENT CARD RELATIONSHIP IN GENERAL AND IN THE CASE OF COUNTERMANDING A PAYMENT IN PARTICULAR (FOLLOWS ISRAELI DEBIT CARD LAW 4TH AMENDMENT)

This paper introduces a new thesis as to the juridical nature of payment card relationship. It is my view that a payment card relationship is a *sui generis* arrangement that consists of three elements: a means of payment, a special commercial banking transaction, and an agency relationship.

Following a brief presentation of the thesis, I will discuss one of its consequences –banking liability when a payment order by payment card is countermanded. Analysis of this situation in accordance with the thesis proposed leads to the conclusion that it is the duty of the issuer to review the transaction between the customer and the supplier in detail and determine if it was flawed. Subsequently, the issuer should decide on countermanding the payment.

The discussion critically analyses the 4th amendment to the Debit Cards Law which was designed to regulate this situation and suggests that the amendment does not adequately balance the liability of the parties in situations where payment is countermanded. It then makes a number of suggestions for interpretation of the amendment that should help to achieve such balance.

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NETTA BARAK-CORREN

LABOR RIGHTS, PROPERTY RIGHTS AND WHAT LIES IN BETWEEN: PROTECTING THE WAGES OF SELF-EMPLOYED WORKERS

Israeli labor law is devoted almost exclusively to the status and rights of employees; in contrast, it barely addresses the status and rights of self-employed workers. This article argues against the dichotomous distinction between these two classes of workers. First, it calls for the development of legal mechanisms that will confer labor-law or quasi labor-law rights on the self-employed. Second, it argues that developing such mechanisms need not be limited to labor law and that self-employed workers can be significantly protected through private law.

The first section explores possible justifications for providing protection to self-employed workers and continues to define the circumstances in which such protection is necessary. The following sections demonstrate and substantiate the analysis by focusing on the (labor) right to the protection of wages and explore the differences between the protection of employees (under labor law) and that of the self-employed (under private law). The analysis focuses on the ability of private law instruments (mainly the possessory lien) to successfully protect labor or quasi-labor rights in the context of the self-employed. Several gaps and shortcomings are identified and possible solutions are suggested and discussed.

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NOAM ZAMIR

ON THE JURISDICTION TO GRANT PROVISIONAL RELIEF IN SUPPORT OF FOREIGN PROCEEDINGS - RECONSIDERING THE ROTH CASE

This article discusses the question whether Israeli courts should have jurisdiction to grant provisional relief in support of a lawsuit being heard in a foreign court. The article opens with a discussion of the existing law laid down by the Supreme Court, according to which Israeli courts have no power to accede to a motion for provisional relief, unless it is filed within the framework of a lawsuit conducted in Israel. The article addresses the difficulties caused by this case law which requires the courts to disregard the existence of foreign proceedings.

In the absence of any detailed judicial discussion regarding this issue, this article discusses the normative, theoretical and policy considerations for and against this sort of jurisdiction. It concludes that the current approach should be reconsidered. The article then suggests a three-stage model for exercising the court's jurisdiction and discretion as a means of addressing some of the difficulties that arise from the power to grant provisional relief in support of lawsuits conducted abroad. It considers some of the practical and theoretical issues that accompany motions for such provisional relief and offers a number of alternative interpretations that would enable Israeli courts to acknowledge such jurisdiction without any need for legislative action.

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ARIEL L. BENDOR & TAL SELA

ON THE PROPORTIONALITY OF PROPORTIONALITY

Aharon Barak's monumental book, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, constructs and develops the proportionality rule, required by the limitation clause in Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. The first part of the review provides a survey of Barak's primary innovations in the interpretation he proposes for proportionality. The second part of the review questions the significance of Barak's interpretative proposal for the constitutional process. We argue that Barak's model provides only limited guidance for the legislature and for the executive branch. It adds little content to the first and second, essentially factual, tests of proportionality (rational connection and necessity), and rather emphasizes the indeterminable and vague third test of proportionality *stricto sensu*. The next part of the review provides a critical examination of the broad scope of constitutional rights proposed by Barak in both his scholarly and his judicial writing. It is suggested that Barak's broad interpretation has increased the importance of this third test of proportionality *stricto sensu*. An extensive interpretation of the scope of human rights makes it extremely difficult to impose significant requirements on government in every case in which human rights are infringed. Hence, the moral aspects of the proportionality *stricto sensu* sub-test are preferred to the more factual aspects of the rational connection and the necessity sub-tests. The fourth part of the review argues that Barak's broad interpretation of the scope of constitutional rights and the emphasis he places on the test of proportionality *stricto sensu* give rise to a problem of incommensurability in almost every constitutional case. The final part focuses on the use of the limitation clause in the context of positive rights and suggests a number of interpretative difficulties it raises.