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DANI ATTAS

THE WELFARE STATE AND BEYOND: A MORAL-PHILOSOPHICAL DISCUSSION

This paper presents a general outline of an alternative regime to that of welfare state capitalism – one that would embody a fitting accommodation of non-material considerations and values that are arguably the central concern of any proper concept of justice. First an account of the capitalist welfare state and the concept of justice that lies at its foundation are presented, and the materialist mindset to which they are captive is exposed. Second, the post-materialist challenge to philosophical discourse on social justice is put forward. Empirical studies have established the declining importance of material wealth for human wellbeing; even if such findings and their interpretation remain controversial, it appears that the very possibility that such circumstances exist calls for a re-evaluation of the philosophical idea of social justice and its implicit assumptions. In an attempt to meet this challenge, a non-materialist conception of the good is proposed as well as an appropriate conception of justice. This discussion should reveal the foundational values not only of justice in a post-materialist age, but also of justice in a thoroughly materialist age. Finally an institutional alternative to the capitalist welfare state is proposed, on the basis of a more adequate understanding of justice – one that eschews the focus on material aspects of human wellbeing.

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DAVID GLIKSBERG

ON A NORMATIVE REGIME OF DISTRIBUTIVE JUSTICE'S PRESENCE

Intense public discourse currently taking place over issues of distributive justice has presented an extremely challenging picture to the Israeli public. This includes, the distributive consequences of the prevalent economic-social order, but also, and perhaps primarily, a clear image of the key issues related to the processes leading to these consequences. These issues may be analyzed from different perspectives, such as social, economic, legal and cultural perspectives. Each perspective focuses on identifying specific developments and factors connected with the process and its outcomes. However, it is also possible to engage in an infrastructural-institutional inquiry into the various arenas in which the public discourse on issues of distributive justice is, or should be, conducted.

This article focuses on this infrastructural-institutional aspect, which is extremely important for the management of effective distributive discourse. The article calls for the broadening of distributive discourse in the public sphere through the creation of a new infrastructure that would enhance such discourse, whatever its content. This article, therefore, is characterized by "distributive neutrality".

The article calls for the adoption of a "parliamentary regime of distributive justice's presence" that will require that (almost) all legislation be accompanied, from its initial stages, by a presentation of distributive consequences, thus making distributive discourse an integral part of legislation, whether actively or as a background factor. The article prefers a universal regime that will support the presentation of the distributive consequences of every piece of legislation, rather than a more limited regime. The proposed model argues that almost every piece of legislation has a distributive impact. Therefore, a limited model focusing on budgetary legislation or tax legislation is insufficient. The paper also

discusses the manner in which distributive effects should be presented and supports adopting measures and concepts found in economic and social discourse both in Israel and internationally, most notably in this context, the Gini coefficient. The proposed regime includes institutional aspects related to the preparation of data regarding distributive effects. This task must be imposed on the Knesset rather than the executive branch, which has a clear political bias.

The proposed regime is also connected to the increasingly influential discourse that constitutes part of the "legisprudence" approach, which reviews the quality of legislation from various different perspectives, *inter alia*, on the basis of the proceedings that took place prior to legislation. The proposed enhancement regime has the potential to create a new infrastructural dialogue arena that can empower and enrich public discourse on distributive issues in the parliamentary realm. Although structuring and implementing the regime may face difficulties, the proposed parliamentary regime will provide the basic infrastructure needed in order to make a significant contribution to expanding and deepening the discourse on distributive justice.

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YOSSI DAHAN

LAW IN THE SERVICE OF PRIVATIZATION: ON PARENTAL AUTONOMY AND EQUAL OPPORTUNITIES

The article examines one of the key manifestations of the privatization process that has been taking place in the Israeli education system over the last three decades: the establishment of publicly-funded private magnet schools.

Magnet schools employ selection mechanisms and include at least a component of compulsory private tuition fees. Some of these schools are officially recognized publicly-funded state schools, while some are unofficial schools with private school characteristics which nonetheless enjoy public funding. One of the main factors responsible for the increasing number of private magnet schools in Israel in recent years is the judicial system, specifically, administrative courts, as well as appeals committees that operate as semi-judicial bodies concealed from the public eye. Recently, these institutions have been granting licenses to publicly–funded private schools, despite the Ministry of Education's explicit objection. Paradoxically, the legal status granted to these newly founded schools is then used by the Ministry of Education as the main rationale for further privatization of the State's education system. This is achieved through the introduction of additional, unique and selective learning programs, which are tuition-fee-based; therefore, students' participation in them is contingent – first and foremost– upon the parents' ability to bear the added expense. According to the Minister of Education, the main reason for the introduction of such selective programs is to prevent middle – and upper-class parents from leaving the public education system altogether, in favor of private schools.

The article examines the two main arguments used by the judicial system: normative and legal arguments. The normative argument emphasizes the right of parental autonomy in education. The article criticizes this use of the principle of parental autonomy in education by the appeals

committees and the administrative courts, and highlights the nature of education as a positional good. It examines the scope and weightedness of the right to parental autonomy in education by comparing it with other values, such as equal opportunity, social integration and solidarity.

The legal argument, which was also presented recently in a decision of the Israeli Supreme Court, distinguishes between two stages in considering the establishment and funding of private schools: the licensing stage and the recognition stage. The current article argues that this narrow legal distinction pays insufficient regard to the privileged status of state public schools in Israeli educational legislation.

Judicial activism dedicated to the promotion of educational privatization policies has significant social, economic and cultural implications; its potential impact raises fundamental questions regarding not only the democratic legitimacy of such privatization-promoting decisions, but also the appropriate designation of boundaries among the three branches of a democratic government.

The article emphasizes that such judicial activism is made possible by deficient and anachronistic legislation, which fails to take into account the emerging changes in cultural, economic and social circumstances. As a result of this analysis, one of the main contributions of the article is in recognizing the need for new legislation in the field of education based on an inclusive public debate, in an attempt to address common goals and realize shared ideals.

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YAAD ROTEM

GOVERNMENT CONCESSIONS FOR FINANCIALLY DISTRESSED BUSINESSES: RE-CONCEPTUALIZING THE GOVERNMENT'S DUTY TO PROTECT THE PUBLIC'S INTERESTS

Financially distressed businesses occasionally apply for concessions with regard to their financial obligations toward government agencies such as the Antitrust Authority, the Ministry of Communications, the Ministry of Environmental Protection, the Israel Securities Authority, etc. While a governmental concession may benefit a financially distressed business and its claimholders (e.g., creditors, employees, shareholders), it also encroaches upon the interests of the general public. A painful recent example concerns the case of the retail chain ClubMarket which became insolvent and petitioned the Israeli Antitrust Authority to approve an anticompetitive merger between ClubMarket and Shufersal Ltd., a retail chain that already held considerable market power. In subsequent years, as the food retailing market became more centralized and competition in this market decreased, the effects of this merger have been strongly felt by the general public. The current paper points to a way to minimize the infringement upon the public interest, even in cases in which the government decides that extending a governmental concession is inevitable. As part of its duties, and as a matter of administrative law, the government should consider making the grant of governmental concession depend on the financially distressed business allocating part of its equity to the government in return. This proposal aims to accomplish one or more of four goals. First, to enable the general public to enjoy a direct return on its "investment" in the financially distressed business; This goal is particularly important in cases where the expected indirect return from the governmental concession is small. Second, to deter potential businesses from petitioning the

government for a concession in the first place. Third, to maintain equality among businesses which were able to obtain concessions and those that were able to manage without such concessions. Fourth, to compensate the general public for the "residual" harm it is expected to incur as the governmental concession undermines attempts to regulate the industry in question. Indeed, in certain cases, the mere granting of a governmental concession may produce irreparable harm that even the most zealous regulator cannot prevent.

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RONIT DONYETS-KEDAR

NEITHER PUBLIC NOR PRIVATE: TOWARD A NEW CONCEPT OF RESPONSIBILITY

The past few decades have seen the emergence of a new paradigm of the Western polity. This new paradigm is the result of two significant processes that, together, erode familiar social and political frameworks. The first process entails the multi-faceted empowerment of transnational corporations; the second entails the retreat of the state as the primary provider of social goods, and a significant drop in its dominance as the source of social justice. These two parallel processes, which feed off one another, create a new reality, one of the results of which is the weakening of the public's ability to engage in consistent and effective shaping of the common good.

Current legal doctrine is not adapted to these changes. A primary drawback is the private-public divide, which assigns responsibility for the general public interest to public law, while allowing private law to be guided primarily by concepts of autonomy, individual will and efficiency. Accordingly, the legal norms applied to private businesses focus on liberty and competition, while the more demanding norms, primarily concerned with questions of equality and the general public interest, are applied solely to state-actors.

The paper seeks to rethink the private–public divide. It argues that in order to guarantee that individuals have a real and consistent opportunity to shape their lives effectively, the boundaries of legal categories need to be redrawn, and new categories must be developed. The main argument is, first, that the traditional distinction between private and public law, inasmuch as it is used for the a priori fending-off of potential claims against private bodies, is damaging; and second, that a new idea of legal responsibility should be introduced into private law.

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RONEN MANDELKERN & AMIR PAZ-FUCHS

UNREGULATED, AND UNSURPRISINGLY SO: THE INHERENT FAILURE OF REGULATION IN OUTSOURCED SERVICES

In recent decades, non-governmental bodies, both for-profit and non-profit bodies, have been increasingly involved in the provision of public services in Israel. Underlying this policy, known as contracting out or partial privatization, is a model which may be referred to as the "state management model", according to which privatization does not limit administrative discretion and managerial state authority with regard to privatized services. However, structural failures in the regulation and supervision of privatized services point to an erosion of state authority.

In this paper we note two interwoven forces that drive this erosion. First, the legal structure poses obstacles and offers incentives and disincentives that lead the state to distance itself from the close regulation of privatized services. Secondly, the characteristics of public services and the structure of the supply market may lead to the actual transfer of managerial power to private contractors and to the erosion of state discretion or of state responsibility, insofar as the public services are concerned.

This situation merits reassessment of the current model and consideration of alternative, more collaborative, models of governance.