

YAIR SAGY

SUPREME AUTHORITY: ON THE ESTABLISHMENT OF THE SUPREME COURT OF ISRAEL

This article provides the first comprehensive description of the re-establishment of the Supreme Court of Israel, based on hitherto unexposed archival sources. It challenges the idea that from an institutional standpoint, the Israeli Court was merely a continuation of its Mandatory predecessor. The article reveals that despite certain similarities between the Israeli Court and its Mandatory predecessor, the institutional position of the Court had to be won out by the first Israeli Justices who launched a campaign against attempts to reallocate their jurisdiction. The bulk of the article is dedicated to detailing these attempts and the (essentially successful) campaign to preserve their judicial powers. The article also shows that the Justices' intervention in legislation concerning the Court's jurisdiction established a precedent, accepted by politicians, lawyers, judges, and academics, that the Justices have the controlling voice in determining and allocating the jurisdiction of the Court.

SAGIT MOR, MAAYAN SUDAI & OR SHAY

FROM ABSENCE TO PRESENCE: A CRITIQUE OF INTERSEX SURGERIES

This is the first article in Israel to address the rights of intersex persons, those born with “a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male” (INSA). The practice in most Western countries today is to operate on intersex infants in order to assign them to one of the “conventional” sexes: either male or female. The article lays the foundation for an intersex critique of law, supporting the rights of intersex persons and suggests guidelines for an alternative legal regime. The article reviews the rise of the medical-surgical approach to intersexuality, its origins and the criticism it currently faces. This criticism questions the necessity and effectiveness of such procedures and the social motivations behind them. Intersex surgery in Israel is performed on the basis of a brief medical protocol that does not even begin to encompass the social, medical and legal complexities of the situation. The article critiques the language of the protocol, its insufficient attention to the complex issues of informed consent involved in this subject, including parental consent to surgery, and its inadequate attention to the ongoing relations between intersex people and the healthcare system. The article suggests the moratorium approach to intersexuality as an alternative to the prevailing medical-surgical approach. This would suspend the decision on surgical intervention until the intersex person is competent to make an independent decision regarding his/her own sexual and gender identity. The article offers a normative framework to support this alternative approach, based on the liberty to shape one’s own destiny, including one’s own (inter)sexual identity. The article goes on to examine the two main courses of legal action currently available for intersex people, namely regulation and litigation. The article criticizes the manner in which the law participates in processes that exclude and silence intersex people, thus effectively

denying their existence, and suggests that the law can play an active role in challenging these processes, condemning prevailing practices, and according intersex persons a presence in society. The article reflects on the law's potential to serve as an agent for social change that can support the transition of intersex people from absence to presence. This role will become more significant as more intersex persons choose to be open about being intersex, whether they underwent surgery or not.

OHAD GORDON

THE PROVOCATION DOCTRINE

The “provocation doctrine”, despite its importance and prevalence, has aroused fierce criticism throughout its prolonged existence. Continual attempts around the globe to achieve a widely accepted formulation have failed. Each attempt has provoked criticism, attempts to ‘bypass’ the formula and proposals for reform. A new and original formulation was recently proposed in Israel as part of an overall reform proposed for the law of homicide. The author, one of the authors of this proposal, discusses the ideas underlying it, arguing the importance of the ‘acoustic’ aspect of the formulation: flawed and insensitive phrasing might cause disruptions in the understanding and application of the formula. The article describes the unsuccessful search for a proper formula and dismisses the suggestion that conceptual differences prevent achieving an agreed formulation since there is general agreement as to the rationale of the doctrine. An alternative explanation is presented, suggesting that the difficulties involved in the doctrine of provocation are explained by a combination of two factors. The first is the fact that the doctrine is implemented in socially charged situations – it mitigates the responsibility of killers provoked by anger and injuries to their honor, and it is invoked in cases involving sensitive social struggles for equality and protection, such as the feminist struggle. This creates the potential for an erroneous understanding of the doctrine as one which justifies the killer and his motives while in fact, the rationale of the doctrine is not to justify the killer but rather to mitigate his/her fault when emotion led to decreased self-control and only when this is a result of human weakness that creates a sense of empathy. The second factor is connected with problems of formulation, and in particular, the use of the “reasonable person”, which again leads to the erroneous impression that the doctrine justifies the killing. This combination distorts the understanding, application and criticism of the doctrine of provocation.

Guidelines for an improved formulation are suggested, which will help avoid the 'acoustic' harm described and discussed.

SHACHAR ELДАР

MULTIPLE PARTICIPATION AND CHANGE IN THE OBJECT OF THE OFFENSE

For at least as long as 440 years, since the inception of the doctrine of transferred malice, criminal law has been grappling with the question of conceptualizing intent as object-specific (i.e., aimed at the targeted person or object) or type-oriented (aimed at any person or object). This question is particularly acute in cases where the defendant caused harm to an object other than the one he had in mind, by accident or as the result of mistaken identity. In such cases, an object-specific conceptualization would not permit conviction for harming the actual object, whereas a type-oriented conceptualization would permit conviction, as would the doctrine that transfers the defendant's intent from one object to another. The article seeks to demonstrate how crimes involving multiple participants shed light on this issue. Analysis of eight scenarios that involve multiple participation and situations in which the object of the offense changed reveals that multiple participation scenarios support the object-specific conceptualization of intent (as in German law, and unlike current Israeli law) and equal treatment of accident and mistaken identity (contrary to German law).

ROEY SASSON

CAUSAL UNCERTAINTY AND SUBSEQUENT DAMAGES

Under Israeli tort law, in order to find a defendant liable for subsequent damages, the plaintiff must prove a factual causal connection between the initial damage and the subsequent damage. However, in some cases, due to inherent causal uncertainty, the court is unable to determine whether the subsequent damage was caused by the defendant's wrongful acts or rather by another, non-wrongful cause.

The first part of this paper is devoted to the problem of causal uncertainty in relation to subsequent damages. The problem of causal uncertainty is a major issue in academic research and in courts. This paper adds to the current discussion by relating it to the problem of subsequent damages. Thus far, subsequent damages have been addressed only from a normative legal policy perspective, whereas the factual questions they raise have not been discussed. Hence, the first part of this article discusses these questions and demonstrates their relevance to Israeli law. The primary claim in this section is that the causal uncertainty problem can arise in subsequent damage cases and that it has in fact arisen in important cases in Israeli law, but was not considered by the courts or by scholars.

The second part of the article uses the insights and experience amassed in the discussions of the causal uncertainty problem on the one hand, and of subsequent damages on the other, in order to find an appropriate approach to adopt in cases of causal uncertainty in the context of subsequent damages. The main questions addressed is whether the traditional rules of tort law, and of civil law in general – the preponderance of evidence test and the “but for” test, which lead to “all or nothing” conclusions – are appropriate for the problem under discussion and what other possible solutions might be. At the same time, the article reviews the various solutions offered to deal with causal uncertainty, examines their advantages and disadvantages and discusses whether they can be useful in relation to the problem of causal uncertainty in the context of subsequent damages.

OR YAHALOM

NON-DEFINITE DEFINITENESS – TWO APPROACHES TO THE APPROPRIATE NATURE OF THE DEFINITENESS REQUIREMENT

Part of the judicial activism characterizing the Israeli High Court over the past several decades is the consistent easing of the fulfillment of the criteria required for the creation of a contract, so that the Court has readily declared that the definiteness and intention requirements were filled. The relaxation of the requirement of certainty may be inferred from the abandonment of the classic doctrine which demanded the parties' agreement at one specific point in time; the decreased number of details considered essential – agreement thereto is required in order for the contract to become effective; the Court's willingness to supplement details using statutory rules and other means. This trend intensified the Court's role in determining the content of contracts and it is in line with the expansion of the purposive interpretation doctrine, which at the time began dominating the law of contract interpretation.

However recent developments in the High Court's rulings express an argument regarding the desired judicial attitude toward this issue. This article examines and analyzes these recent developments. The main argument is that the approach expressed in the *Chevra Kaddisha* case – calling to fortify the requirement of certainty and to reduce the use of statutory supplementation rules – deviates from the general trend characterizing the Court's rulings in the last decades. Nonetheless, I shall explain that currently the apparent change of approach expressed in this decision has not been firmly established, considering a series of rulings, which are led by the *Rozenberg* case, maintaining the spirit of decisions given prior to *Chevra Kaddisha*. The article's final section suggests a critical examination of the approaches expressed in those cases. I shall claim that the reasoning listed in the *Chevra Kaddisha* decision regarding fortification

of the definiteness requirement – namely the increase in legal certainty regarding whether the contract was made – is not as obvious as it may seem; and that given the Court's broad latitude for discretion regarding the content of this requirement and the extent of judicial supplementation, other reasons should be taken into consideration while forming this matter.