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TALLY KRITZMAN-AMIR

PARENTS, CHILDREN AND MIXED-NATIONALITY FAMILIES

The paper examines the socio-legal concept of the family in Israel, by looking at families consisting of a parent who has no legal status and a child who has legal status. These families are regulated at the junction between family law and immigration law but, as I will demonstrate, quite often immigration law considerations outweigh family law considerations. The peripheral location of these mixed-nationality families at the margins of society sheds light on questions such as: when do we encourage, protect and support families? Are all nuclear families equal? Do ethno-demographic political considerations influence our perceptions of family and family-related rights? Are we able consistently to defend the rights of parents and their children's best interests? Do we consider the different members of those families to be bearers of rights and, where applicable, status?

The article begins with a discussion of transnational migration and its impact on family life. I then analyze the normative framework – the legal rules which apply to mixed-nationality families in Israel. These rules serve as background rules regarding mixed-nationality families, and since they almost never allow parents to gain a status that will allow them to stay in Israel with their children, they pose significant risks to family life. I will compare these background rules with the rules that apply to "traditional", non-mixed-nationality families, and critique them. Following the critical analysis, the article examines the connection between the legal rule and the narrative, rhetoric and terminology used by the Courts to determine the rights of the family members in mixed-nationality families. The narrative refers to the parent as lacking affiliations, rather than as someone whose presence will serve the interests and rights of another (i.e., his / her child) or as a bearer of rights. I will explain how the parents are placed outside the rights discourse and within the interest discourse, and suggest

applying a relational approach to their matter. I will conclude with suggestions which seek to mitigate the tensions between the fundamental societal values in the perception of the family and the Israeli immigration regime of mixed-nationality families.

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TALI MARCUS

IT TAKES (ONLY) TWO TO TANGO? RECOGNIZING MORE THAN TWO PARENTS FOR ONE CHILD

Developments in reproductive technology, the rise in divorce rates, and social changes have all led to diversification in family structures and in the perception of the family in society. The nuclear family, consisting of two opposite-sex parents and their biological or adoptive children, is no longer the only common family unit. Nevertheless, the law continues to regard the nuclear family as the preferred and normative family unit, thus overlooking relationships formed within alternative families and depriving them of constitutional protection. In this manner, the law in Israel generally recognizes only two parents for each child – a father and a mother, despite a social reality in which a parent-child relationship may exist between a child and more than two parents. The article initiates discussion of the legal recognition of multiple parents in Israel. I argue that the law in Israel has already acknowledged the possibility, under some circumstances, of deviating from the two opposite-sex parent model. Thus, formal legal recognition of more than two parents is not as revolutionary an idea as it might seem at first glance, but rather a necessary step towards legal recognition of relationships that already exist in society. The existing exceptions to the two parents rule are applicable only in very specific circumstances and hence do not fully regulate all the various parental relationships which exist in Israeli society. Thus, legal recognition of the life experience of families that do not conform to the definition of the nuclear family is required. The aim of the article is twofold: First, the article promotes discussion of the recognition of multiple parents by Israeli law. Second, the article defines two models for the recognition of multiple parents, based on academic literature and comparative law, which I call the "Egalitarian Model" and the "Hierarchical Model". The article then suggests an alternative and improved theoretical model for dealing with the

recognition of multiple parents – the "Integrated Model". Finally, the article demonstrates the implementation of the proposed model on family units that do not conform to the definition of the nuclear family.

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IDO BAUM

IN PRAISE OF THE PROBABILITY / MAGNITUDE TEST: THE PRINCIPLE OF MATERIALITY AND FACING UNCERTAINTY IN SECURITIES LAW

The principle of materiality is a cornerstone of securities law, which is founded on the duty of the public corporation to disclose all information deemed to be material by a reasonable investor. The criminal and administrative prohibitions against insider trading also apply only when the information that underlies insider trading is material information.

The need to assess the materiality of information about an uncertain future event in the life of a corporation is part of the daily routine of such organizations. One common example is information concerning negotiations in furtherance of a deal that has not yet fully matured.

Two tests were developed in the United States case law, and later discussed in Israel, for the classification of information regarding uncertain future events as material or immaterial. According to the U.S. test currently in force, the materiality of a future event depends upon balancing the probability that the event will occur and the anticipated magnitude of the event ("the probability / magnitude test"). Another test, which was rejected by the U.S. Supreme Court, calls for delineating a "bright line" in the negotiations, after which point information about the future deal becomes material ("the agreement-in-principle test").

The case law of the district courts in Israel displays confusion both with regard to the prevailing test in this matter and with regard to the situations in which the test is applicable. Some judges adopt the probability / magnitude test as a single test while others adopt the agreement-in-principle test. Another possible interpretation of the case law points to a dichotomy in which the agreement-in-principle test is applied in order to assess the materiality of information concerning future events in insider trading cases whereas the probability / magnitude test is

applied in order to assess materiality for the purpose of fulfilling the duty to disclose the information.

This essay advocates the adoption of a uniform test for both situations. The application of different materiality tests to insider trading and to the duty to disclose information is not only disharmonious; it creates incentives for manipulation in the securities market, particularly by insiders who wield the power to influence corporate decision-making.

Analysis of the pros and cons of both tests indicates that when comparing the two, the probability / magnitude test should be preferred.

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OSNAT JACOBI

GAME ON – ON THE EFFECTIVENESS OF ASTREINTE PROCEEDINGS

This article considers Astreinte proceedings ("Tzav Martia" in Hebrew). The Astreinte is a new remedy under the Civil Code Project in Israel. It entails a daily fine which courts can impose on a breaching party who does not perform a specific performance order issued against her. The article examines the effectiveness of this remedy in preventing breach of specific performance injunctions. The bottom line is that, while the required fine can be arithmetically calculated, it is unlikely that the courts have sufficient information to verify the components required to carry out such a calculation. In the case of an inefficient contract, the gain to a breaching party from not complying with an injunction lies in the value gained from pushing off payment to the promisee in order to attain her agreement to terminate the contract. In the case of an efficient contract, the promisor gains from pushing off performance to a later period, allowing her to improve her financial situation and / or lower performance costs. In either case, the gain includes private information regarding the size of the payment being deferred and the value of the time gained by the deferment, information unverifiable in court. If the court errs and sets an insufficient fine, the breaching party will still gain by not performing. I suggest an alternative mechanism that does not suffer from the deficiencies of the existing mechanisms, in which the court declares that the breaching party shall be required to deposit funds in the court's coffers. The nominal value of the deposit will be returned to the breaching party (without interest) once the breaching party provides proof that it has complied with the injunction and after the court retains the deposit for an additional period equal to the time that elapsed between the issuance of the injunction and the deposit of the funds. In addition, if the injured party informs the court that the order has not been complied within 60 days of its issuance, the court will order the deposit to be

forfeited. This mechanism completely erases the breaching party's profit from breaching the injunction without the court having to verify any private information that cannot be verified in court.

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ZEMER BLONDHEIM & NADIV MORDECHAY

TOWARDS A CUMULATIVE EFFECT DOCTRINE: AGGREGATION IN CONSTITUTIONAL JUDICIAL REVIEW

This article presents and analyzes the 'aggregative effect doctrine', a new doctrine in constitutional judicial review of legislation. According to this doctrine, when a legislative enactment infringes upon more than one constitutional right, or when it infringes upon the same right in two different ways, courts should determine its constitutionality not only by evaluating each individual infringement, but also by evaluating its aggregative effect. As a result, in cases where each individual infringement survives traditional constitutional review, applying the new doctrine may lead to the legislation being struck down on constitutional grounds. This doctrine was first used in an Israeli Supreme Court case handed down in 2010, which struck down a section of the Criminal Procedure Act that allowed Israeli authorities to conduct a court hearing seeking to extend the detention of a person suspected of committing crimes against national security without the suspect being present at the hearing. The court's analysis gave weight to the aggregative effect created by the combination of the possibility of having the hearing in the absence of the suspect (the 1st infringement) and the possibility of preventing the suspect from meeting with a lawyer (the 2nd infringement). We begin by focusing on the innovative use the court made of the aggregative effect doctrine, and analyze the doctrine based on the reasoning of the justices on the panel as well as the legislative history of the Act and previous case law (Section I). We then present the relevant theoretical background, based on general, and relatively new, literature on Aggregation in law (Section II). This section points out the doctrinal deficit that exists in relation to aggregating constitutional infringements and discusses the possible ramifications of adopting an aggregative approach in Israeli constitutional law, given its unique characteristics. We believe that adopting this doctrine would contribute to constitutional discourse in

Israel and that the doctrine's application should be considered. However, as the use of the doctrine by the Supreme Court was somewhat brief, we point out that implementing the doctrine requires resolving complex theoretical and normative constitutional difficulties, and thus should be accompanied by various adjustments to the procedure of constitutional judicial review.

Taking this into consideration, we set out to distinguish specific areas in which the doctrine may be adopted relatively easily, with minimal difficulty (Section III). Firstly, we argue that it is particularly justified to apply the doctrine in situations where the *'amplifying combination'* test is fulfilled, i.e. when the aggregated infringement created by the combination of several constitutional infringements is greater than the sum of the infringements that would have been caused if each were experienced alone. Secondly, we argue that a distinction should be made between the aggregation of infringements which occur simultaneously and the aggregation of infringements which occur sequentially, the latter of which raises many difficulties that the former does not. Thirdly, we argue that in the initial stages of the development of the doctrine in Israeli law, courts should favor applying it in cases where the aggregated infringements are all related to the same constitutional right, as opposed to the aggregation of infringements of different constitutional rights, which is substantially more complex and raises numerous practical and theoretical difficulties. Fourthly, we argue that in order for legislation to survive constitutional review as well as the new doctrine, the legislature must have provided explicit authorization to apply the infringing powers in combination or simultaneously, especially when the combined use is implemented intentionally, in order to create the aggregated effect. Finally, concerning the constitutional remedy, we argue that declaring an article to be void due to an aggregative effect – after judicial review has held the article to be constitutional in and of itself – raises great theoretical difficulty. We therefore suggest a new constitutional remedy that prohibits the simultaneous use of powers that create an unconstitutional aggregative effect, rather than nullifying one of the pieces of legislation.

Analysis of the aggregative effect doctrine is extremely important because of its innovative nature and its potential ramifications for existing

constitutional doctrine. The adoption of such a doctrine would, essentially, imply the creation of a new realm for human rights constitutional judicial review. Besides transforming the doctrine that guides the judiciary, implementing this doctrine would also substantially affect the Executive Branch's approach to applying powers it is granted by law. The Legislature would also be affected, and would be required to consider the implications of the doctrine during the legislative process. Despite the advantages of the proposed doctrine, several difficulties and disadvantages must be considered, primarily the danger of fragmentation of constitutional rights and the danger of over-enhancement of judicial review. Therefore, we recommend developing this doctrine through a cautious and balanced process, while using various deceleration devices to ensure that the implementation is not overreaching. Our recommendation to implement the doctrine is followed by a recommendation to continue developing the theory surrounding it.

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SHIRA GARTENBERG

"COGS IN THE MACHINE?" THE IMPORTANCE OF IMPOSING CRIMINAL LIABILITY ON CORPORATE MANAGERS

In a recent decision, the High Court of Justice of Israel approved a plea bargain in which Israel Railways was held solely liable for causing death by negligence in a train accident, whereas the original charges against its managers were dropped. This article attempts to shed light on the possible consequences of situations in which criminal liability is imposed on a corporation while its managers evade trial, whether as a result of a plea bargain or following an initial decision not to press charges against the corporation's top management.

The first argument points out the importance of holding managers or directors responsible as human offenders when they indeed commit an offence, in order to uphold criminal law. Furthermore, corporate managers or directors might use the corporation's legal entity to avoid the consequences of their own criminal actions by shifting responsibility to the corporation. As a result, these cases create a potential anti-deterrent effect. It is further argued that, in addition to impeding the fulfillment of criminal law goals, the corporation's consent to the plea bargain involves a severe agency problem. What is often at stake in these situations is the managers' clear personal interest in removing criminal charges against themselves. In these cases, not only might the benefit of the corporation not be the sole consideration guiding the managers, but they may even be willing to "sacrifice" the interest of the corporation for the sake of protecting themselves. This problem is exacerbated when the corporations in question are government or public companies, where the capability of stockholders to supervise mangers is limited. Thus, it is suggested that when authorizing plea bargains of this type or when criminal charges are pressed only against corporations, the courts should apply more stringent judicial review.