MISHPATIM 47 2018

AMIHAI RADZYNER

GITTIN: MITZVOT HA'TELUYOT BA'ARETZ ? PRENUPTIAL AGREEMENTS FOR THE PREVENTION OF DIVORCE REFUSAL

In recent years, great efforts have been made, with considerable success, to persuade American Orthodox couples, especially the modern orthodox, to sign a standard prenuptial agreement that ensures that the woman will receive a *get* in case of separation. The most common form of agreement is that of the Beth Din of America, which will be discussed in the article. This form of agreement has won support from important halakhic decisors and judges (*Dayanim*), especially in Israel.

Efforts are under way to motivate couples in Israel to sign a similar prenuptial agreement in order to prevent *get* refusal. However, unlike the U.S., no rabbinical judge in Israel has published an article or made a public statement in support of the agreement. On the contrary, rabbinical judges have been harshly critical of such agreements. In addition, there are halakhic authorities who are opposed to the signing of the Israeli form of agreement, but openly or tacitly support the American one, or do not express outright opposition to it. The present article will try to understand their position.

The article offers reasons for the distinction between the American and Israeli situations. It appears that social and legal reality affects halakhic considerations. Firstly, the existence of a legal obligation in Israel to divorce only through the rabbinical courts allows those courts to be more stringent than their American counterparts. Secondly, the existence of a civil divorce system in the United States necessarily affects the perception of the grounds for divorce and the ability to force a spouse to divorce.

The article uses examples from other contexts to suggest the possibility that social change in Israel might affect the rulings of rabbinical courts on this issue. It also critically examines the common argument that for a Jew

committed to the Halakha, and in particular for a Jewish woman who wants to divorce her husband, a state-sponsored halakhic system is preferable to a voluntary one.

MISHPATIM 47 2018

GUY BEN DAVID

"RESIDUAL EXCEPTION" TO THE HEARSAY RULE

The Hearsay Rule is a fundamental principle in the Israeli law of evidence. According to this rule, derived from English common law, hearsay is inadmissible evidence in court proceedings, insofar as its purpose is to prove the authenticity of the content of a statement. However, the rule has some exceptions. The exceptions allow the courts to accept hearsay as admissible evidence of the content of a statement, and as a result, to determine findings based on hearsay evidence. In cases where there is no exception that allows the court to accept specific hearsay evidence or when the evidence does not comply with the strict conditions of an existing exception, the evidence will be deemed inadmissible, unless both parties agree that the evidence is admissible. This has been the status quo for many years in the Israeli law of evidence, which reflects the tension between the hearsay rule's justifications on one hand, and the criticism against the rule, on the other hand. This pioneering article calls to introduce a 'residual exception' to the hearsay rule in the Israeli law of evidence. The criticism against the hearsay rule, i.e. that its justifications are not free of doubt, the difficulties that the existing exceptions raise and the trend from exclusionary rules to assessing the weight of the evidence, all support the creation of a 'residual exception', which will enable the courts to admit hearsay evidence, subject to judicial discretion. The 'residual exception' will apply both in criminal and civil proceedings and it will coexist alongside the existing exceptions. The article also offers an original model of this 'residual exception'. The model is designed specifically to address each of three types of statements: a statement whose status is not governed by an existing exception; a statement whose status is governed by an existing exception; and a statement that does not meet the strict conditions of an existing exception, in circumstances in which there is a need for such a statement and it has guarantees of authenticity.

MISHPATIM 47 2018

YEHEZKEL MARGALIT

LEGAL PARENTHOOD – LAW AND JUSTICE

One of the most well-known dicta in the Israeli judiciary system regarding the parent-child relationship is that legal parenthood can be established exclusively in one of three ways: on the basis of a biological bond, either genetic or physiological; by receiving an adoption order; or through a parenthood decree issued by the family court at the end of a surrogacy process. However, there are increasing numbers of rulings that cannot be reconciled with this comprehensive and monolithic working premise and which, practically speaking, undermine this accepted conception. There is no doubt that the vehicle for this new tendency is a legal parenthood decree from the family court. This method was first used by the Israeli courts in early 2012 when legal motherhood was assigned to an "egg donor" in a lesbian couple who conceived their child via "egg sharing", i.e. when one spouse donates her egg and the other female partner carries and gives birth to the child. Since then this route has become more and more prevalent in a variety of scenarios, including both heterosexual and homosexual overseas surrogacy. In this article I will, first and foremost, explore the scientific-sociological roots of the acute need for determining legal parenthood and the expanding legal methods to achieve it. I will discuss the legal parenthood decree as it exists in Israeli surrogacy law and the various scenarios in which the new decree has been applied. Afterwards, I will evaluate the advantages and disadvantages of this new practice and address the fundamental normative question whether it is appropriate to use this legal method at all, under which circumstances it should be used and whether a report drawn up by a social worker should be a prerequisite for issuing it. Finally, the article recommends that the legislator regulate all the various ways of determining legal parenthood.

MISHPATIM 47 2018

RONEN POLLIACK

HUMAN DIGNITY'S REMEDY

The main argument in the article is that in certain circumstances there are good reasons to recognize a common law remedy in the course of judicial review of the constitutionality of a statue authorizing governmental action that violates constitutional rights. The absence of a cause of action in private law for such governmental harm does not negate the fact that an infringement of a constitutional right has occurred, making constitutional relief necessary. The argument is based on the idea of a constitutional right to a remedy under Basic Law: Human Dignity and Liberty. It is proposed that the realization of such a constitutional right should take place in the third stage of the constitutional judicial review, within there is a margin of appreciation in awarding constitutional remedies. When the legal system's response to an infringement of a constitutional right falls outside this margin and the normative infrastructure reflects a legislative omission in providing a necessary response, there is good reason to recognize a new common law cause of action as a constitutional remedy. While other constitutional remedies available in the third stage of constitutional judicial review are directed towards the legislative or the executive branch, this additional remedy would be directed towards the individual.

MISHPATIM 47 2018

ASSAF JACOB

THE DOMINANCE OF NEGLIGENCE

The article discusses the "Dominance of Negligence" in Israeli law. It examines the phenomenon in conjunction with various tort theories, and assesses its effects on the rights of tort victims. The paper's main argument is that in Israel, not only does the wrong of negligence play a central role in the law of torts, but it has become a substitute for tort law itself. As a consequence, the legal system ignores basic rights and interests of tort victims - interests that were traditionally protected by the common law of torts. The article further examines the reduction of tort law to negligence law from a historical and a theoretical perspective, while tracking the reasons and justifications for the prevalence of negligence law. To this end, the paper discusses leading court decisions that initiated the trend described and evaluates the reasons for the judicial expansion of the wrong of negligence at the expense of other wrongs. It further points out a relatively recent phenomenon, in which negligence not only incorporates other wrongs, but also reshapes other wrongs in its own image, changing their traditional nature. At the same time, however, the article demonstrates that the judicial system has realized that negligence does not always provide a suitable substitute for the statutorily protected rights and interests of tort victims. Creation of a new head of damage "compromising a person's autonomy" serves, at least to some extent, to compensate victims for the loss of their protected rights and interests.

MISHPATIM 47 2018

ALON HAREL & ASSAF SHARON

RADICAL PRIVATIZATION

The conventional view concerning privatization of public services rests on the perception that there are legal limits to privatization and that there are administrative and constitutional legal constraints on the power to privatize. In most cases in which privatization was discussed, the fundamental premise was that, even if privatization is an illegal means (due to the concern for accountability), it is designed to achieve legitimate social goals.

The article challenges this premise by exploring an additional type of privatization that we label 'radical privatization'. Sometimes privatization is designed not to provide a public service but to overcome constitutional, administrative or political constraints. We use the term 'radical privatization' to describe *the transfer of substantive powers to a private entity in a way that facilitates the realization of controversial ends which the government cannot perform or finds it difficult to perform because of principled normative disagreements, political opposition or constitutional constraints.* In such circumstances privatization is not a (legitimate or illegitimate) mean for the realization of public ends but rather a mean to frustrate public ends and to promote the realization of private ends. In other words, radical privatization is a non-violent putsch: public bodies promote private ends which are incompatible with the public interest as identified by the democratic process.

The transfer of powers concerning land settlement from the government to the World Zionist Organization (WZO) Settlement Division is a clear case of radical privatization. According to the available data, the Division promotes a controversial political agenda and consistently evades the constraints of the democratic political process, fails to respect basic principles of administrative governance and transparency and often violates Israeli law itself.

The privatization of land settlement is a major political issue. Only recently the Knesset legislated Amendment No. 2 of the World Zionist

Organization – Jewish Agency (Status) Law – 1952, concerning the formal status of the WZO's Settlement Division and its relations with the Israeli government. This law purports to remedy the illegality by empowering the government to delegate its power to the World Zionist Organization. We argue that this law is void.