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MENACHEM MAUTNER

INSTITUTIONAL, DEMOCRATIC AND SOCIOLOGICAL COMPONENTS IN RUTH GAVISON'S THOUGHT

Ruth Gavison's thought was rested on three pillars: of institutional, democratic and sociological. Each of these three supports the other two.

Gavison's institutional thought was premised on the notion that the two main functions of courts are the resolution of disputes and protection of the liberal rights of citizens, as well as on skepticism as to the power of courts to effect social change. According to Gavison, social change should be achieved through political action (accompanied by educational activity in the realm of civil society). Additionally, Gavison attached much weight to the consideration of preserving the legitimacy of the courts. Therefore, Gavison opposed judicial activism, and joined the criticism of "rights discourse" that emerged in American law in the early 1990s. Thus, Gavison's institutional thought was based on conferring a modest role to the courts in determining the values that apply in the state's citizens' lives. She entrusted the political system with a primary role in determining values.

Gavison's democratic thought went hand-in-hand with her institutional thought, and was premised on a view of democracy in which the political institutions of a state must reflect the will of the citizens and play a decisive role in determining the values applied to citizens' lives. She endorsed a formal, narrow understanding of democracy that decoupled it from liberal political theory. This article criticizes Gavison's democratic thought and suggests a broad, substantive understanding of democracy.

Gavison's sociological thought assumed that Israel is a "divided society", torn between secular and religious Jews, and between Jews and Arabs. Gavison saw Israel as constantly on the brink of losing its social cohesion. In line with her institutional and democratic positions, Gavison's sociological thought led her to adopt a formal, narrow understanding of democracy, as well as to object to the allocation of a role to law in determining the cultural traits of the state.

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NETTA BARAK-CORREN

GENDER-BASED SEPARATION IN THE ISRAELI PUBLIC SPHERE: A DESCRIPTIVE ACCOUNT AND PRELIMINARY NORMATIVE MODEL

Gender separation in the Israeli public sphere is subject to deep empirical and normative controversy: its proponents argue that gender separation is voluntary, generally equal, and limited to the ultra-Orthodox society, thus there is no normative justification for limiting it. Opponents of gender separation oppose both the empirical description of gender separation and the normative conclusions that are drawn on the basis thereof. Instead, they argue that the separation is generally involuntary and unequal, and that it extends beyond ultra-Orthodox spheres to impact the general public. Despite the importance of this debate, there is currently no comprehensive description of the phenomenon or a clear normative model that allows for a consistent resolution of the complex questions it raises.

This Article tackles this dual omission by proposing a descriptive account of gender separation in the Israeli public sphere and a preliminary normative model for analyzing claims associated with it. The descriptive account is based on an original database that encompasses 446 unique cases of gender separation documented in the media and the case law over 20 years (2001–2020). The findings indicate that gender separation is implemented over a wide range of public resources and services, is not limited to the ultra-Orthodox or religious sectors, and in many cases is unequal and involuntary. At the same time, gender separation also has private, egalitarian and voluntary manifestations that should not be neglected in the analysis.

With a comprehensive description of gender separation in place, the paper develops a preliminary normative model for analyzing claims for gender separation in the public space. The model analyzes the issue using three main axes: (a) the public/private nature of the separation; (b) the equal/unequal nature of the separation; (c) the voluntariness of the

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separation. This three-dimensional system first helps to separate simple from difficult cases, and secondly helps to define the gaps that must be addressed in order to decide the difficult cases. I argue that the simple cases – in which gender separation is clearly permissible or clearly prohibited – are found at the extreme of the axes. Thus, when an instance of gender separation is public, discriminatory and coercive, it must be prohibited; and when it is clearly private, egalitarian and voluntary, it can be allowed. In contrast, the difficult cases are near the origins of the axes, e.g. where the separation is neither clearly coercive nor clearly voluntary. I show that much of the difficulty in deciding the difficult cases stems from a lack of sufficient empirical evidence. A complete normative model of the issue can only be developed once we have a more comprehensive empirical understanding of the characteristics and implications of gender separation. For now, the preliminary model provides a concise and empirically-based roadmap for addressing various forms of gender separation in a uniform and consistent manner.

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EITAN LEVONTIN

A CRITICAL INTRODUCTION TO THE REPRESENTATION OF THE STATE IN COURT

The Government, or any subordinate ministry or agency thereof, embodies the "State" both within and outside judicial tribunals, and when it is a party to legal proceedings it is entitled to its day in court. Yet however obvious this assertion may be in comparable jurisdictions, in Israeli law it is rejected. Under non-statutory law, and as demonstrated mainly in the High Court of Justice (a court of both first and final instance), if the Government Legal Adviser (akin to the Anglo-American Attorney General) disagrees on legal grounds with the Government's position, she may deprive it of its day in court and may even advocate her own position in the Government's name. While “representing” the Government she may ask the court to rule against it, in effect joining the petitioner, and at the same time she may silence the Government and bar other counsel from defending it. The HCJ on its part is willing to conduct proceedings featuring an attack but no defense, in which the respondent is not allowed to respond and is assailed equally by its opponent and by its own counsel.

Contrary to a narrative of sorts that has taken hold, this current legal position is entrenched neither in constitutional convention nor in judicial precedent worthy of its name. In fact it is new law that came into existence approximately three decades ago, that ignores *inter alia* sharp criticism from Government Legal Advisers who held office under the old law, and that finds expression only in short *dicta* which have yet to benefit from full judicial consideration. In substance it is mired in deep conceptual confusion and is entirely divorced from universal principles of law, governance and democracy. The law has completely lost its way, as I attempt to show, and inflicts the most damage not on the Executive but on the public interest, the courts and the very essence of judicial proceedings.

The article introduces the distinction that is required between representation of the State on the one hand and of the public on the other, especially when they collide; clarifies fundamental concepts including

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"representation" and "State"; explains how the law has lost its way and illustrates its distortions; describes for purposes of comparison the statutory monopoly on federal litigation in the United States (entrusted to the Department of Justice); and reviews in depth the meager statutory provisions of Israeli law, which trace their origins to Mandatory Palestine and have long ceased to be understood. It concludes by suggesting some principles for reform.

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RONEN AVRAHAM & DANIEL STATMAN

POSTERS AND WEDDING CAKES – WHEN REFUSING TO SERVE MEMBERS OF SUSPECT GROUPS IS NOT WRONGFUL DISCRIMINATION

May providers refuse to serve a client based on the claim that the service conflicts with their religious or moral beliefs? The paper proposes to lay the burden of proof on providers to show that a client was denied service due to specific aspects of the service that contradict the providers' conscience, and not due to specific characteristics of the customer, for instance, being Hispanic, Muslim, or gay. In particular, the providers will have to show that they would have refused to provide the service in question to anyone who asked them for it, and that they would not have refused to provide other services to this specific client. If providers are successful in showing this, that will demonstrate that their refusal to serve a client has nothing to do with the client's race, religion, sexual orientation, and so on, but stems from their own difficulty in acting against their deeply-held principles regarding the service itself. We argue that if this is indeed what motivates the providers' refusal, it is not a case of wrongful discrimination.

Based on this proposal, the paper drafts an amendment to the Israeli Anti-Discrimination Law that determines when providers would be allowed to refuse to be involved in projects that are incompatible with the dictates of their conscience. The paper also highlights the advantages of this proposal as compared with another legislative proposal that is under discussion in the Knesset.

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LEORA BILSKY & OFRA BLOCH

RESISTANCE IN LANGUAGE: THE NATION-STATE BASIC LAW, LANGUAGE AND DEMOCRACY

This article addresses the issue of democratic decline in the Israeli context of the new Basic Law*: Israel - Nation State of the Jewish People*. This law redefines Hebrew as Israel's only official language, relegating Arabic to a 'special status'. Against this backdrop, we identify the emergence of a counter-movement, creating new sites that we call "resistance in language". These initiatives rely on law but subvert the view that the Supreme Court is the principal protector of democracy.

The article analyses these processes in light of the growing literature on the role of law in democratic retrogression. Thus far, this body of literature has focused on criticizing the assumption that the rule of law is an efficient barrier to democratic decline, and has pointed to ways in which populist rulers use legalistic reforms, constitutional amendments and legal rhetoric to entrench their regimes. This article examines the dilemma these processes pose for civil society and organizations, which traditionally turn to the courts to safeguard democracy. Targeted by legal devices, these organizations feel compelled to turn to the courts for help, but this very move marks them as non-democratic, as they rely on the court and legal experts instead of on popular mobilization. In Israel, this double bind has led to the emergence of an alternative course of action - "resistance in language" - that includes multiple initiatives for studying spoken Arabic, theatrical performances, creating alternative archives, and offering new sites for exploring the relationship between language, law and justice.

This article focuses on three sites of "resistance in language" that grow from and operate within the legal sphere. The first is a transcript-theater performance based on the criminal trial against the Palestinian poet Darin Tatur. The second site is a petition to declare the Nation-State Basic Law invalid, filed by a group of prominent Israeli Jews of Mizrahi origin. The petition offers an alternative historical narrative and aspires to shift the discourse surrounding Arabic in Israel. The third site, which developed in

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Tel-Aviv University's Faculty of Law, is an alternative space for Israeli – Jews and Arabs – to explore the relationship between Arabic and justice and offer a critique of legal education in Israel through joint study and deliberation. The article argues that this form of resistance is based on a new understanding of law as a performative-linguistic phenomenon, offering opportunities for participation and subversion for excluded groups. The article aims to show how the different initiatives of "resistance in language" can also be considered expressions of critical approaches to transitional justice.

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AMNON REICHMAN

THE CONSTITUTIONAL REVOLUTION – A QUARTER CENTURY ON: EXPERIMENTAL AND PIECEMEAL CONSTITUTION-BUILDING

On the 25th anniversary of the Bank Hamizrachi case, this paper positions the judicial move undertaken there as part of a larger project, which is evolutionary rather than revolutionary, although it contains quasi-revolutionary milestones: "test-driving" constitutional segments as they are built (or experimental constitution building, one segment at a time, on the fly). The paper outlines the main characteristics of this project, which displays Israeli constitutional history in a new light. This evolutionary design allows systems such as law, politics, the market, morality, bureaucracy and religion to experiment, adapt, and sometimes modify the legal constitutive arrangements of each segment. Consequently, up until the Bank Hamizrachi decision the status of Israel's basic laws was neither one of ordinary legislation nor one of constitutional primacy, but rather an interim status – statutes with constitutional potential that would become fully constitutional only upon the adoption of Basic-Law: Legislation. This conceptualization offers a better understanding of the difficulties involved in the various judicial reasonings in the decision, as well as of the path the Supreme Court decided not to follow. This framework also provides a structure for analyzing the legal significance of elevating all basic laws to constitutional level. On the one hand, a leap whose basis is dubious , as shown by Prof. Ruth Gavison, but on the other hand it is a move which allows the various social systems to test judicial review over primary legislation in the absence of a notwithstanding clause. The paper also addresses the implications of this development on the sub-statutory level, and on the question of abuse of constitutional power and unconstitutional constitutional amendment.

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