תקצירים באנגלית

ARYE NAOR

BETWEEN JUSTICE AND CHARITY: ON SOCIAL RIGHTS

During Mira's first visit to the US, I have toured New York with her, which I knew from previous visits. She expressed admiration for the spirit of freedom floating above the huge metropolis, until we arrived at Brooklyn Bridge. There she saw the life miserable, houseless people who were sadly laying under the bridge in the freezing cold, covered in ragged coats, tattered blanket and cardboards, and told me: freedom to die under the bridge is not freedom.

In terms of charity, we donated in Israel to bodies handling the hungry and homeless. In terms of justice, her heart was with the notion of human rights, true to her method, though she believed it is a matter of preliminary arrangement, after all, the designation of state expenses and source allocation to that are the essence of budgeting process, subject to Knesset authority, reflecting the policy and ideology at its core.

This article was written prior to Mira's premature death, in sleep. The essence that was written in it was known to her and it is now dedicated to her memory. During all her life she did justice and loved grace, and modest; justice and charity were of utmost importance to her.

DAPHNE BARAK-EREZ

ADMINISTRATIVE EVIDENCE

The article discusses the duty to base every administrative decision on a factual basis, a duty which serves as the foundation for administrative evidence law. This duty applies to all administrative decisions – executive, legislative and judicial ones. The article analyses the two main aspects of this duty – the duty to collect evidence which would serve basis for decision-making and the duty to base the decision on satisfactory evidence. The analysis of the duty to collect evidence covers the various ways of doing so as part of the administrative process, including the role of oral evidence, testimonies and questioning procedures, the duty to provide up to date information, and the necessary correspondence

between the facts and the reasoning. The analysis presents the "administrative evidence test", which differs from general evidence law and focuses on the standard of reasonable evidence (subject to the application of stricter standards in adequate cases, such as vis-à-vis decisions which have the potential to infringe on human rights). Subsequently, the article addresses the importance of administrative evidence law for effective judicial review.

AHARON BARAK

THE CONSTITUTIONALIZATION OF CRIMINAL LAW (SUBSTANTIVE AND PROCEDURAL)

This article seeks to examine how the establishment of the two Basic Laws on Human Rights affected the constitutionalization of criminal law. The question posed in this article is twofold: first, in the field of substantive criminal law, do all the offenses outlined in substantive criminal law have the potential to provoke the triple constitutional examination of impairment, justification for impairment, and constitutional remedy? This question arose in full force in the Silgado case. Second, in the field of criminal procedure – has the lack of independent procedural rights in Basic Law: Human Dignity and Liberty violated the proper protection of a defendant's right in criminal proceedings?

The article stands on the general approach, which sees criminal law as the Magna Carta of society and every individual in it. Hence the notion that criminal law (substantive and procedural) has undergone constitutionalization with the establishment of the two Basic Laws on Human Rights. The article then examines whether any criminal offense violates a constitutional right, and therefore its constitutionality is contingent on a justification for the violation under the limitation clause. Next, it discusses the majority and minority positions in the Silgado case and the legal literature (in Israel and comparative law). The article then examines the constitutionalization of substantive criminal law and addresses the constitutional place of the basic principles of substantive criminal law, including legality, guilt, and adequacy of punishment. Finally, it discusses the constitutionalization of criminal procedure.

ITZHAK ZAMIR

THE ADMINISTRATIVE PROMISE: A PROMISE THAT FAILED

The decision of the Supreme Court of Israel in the Scie-Tex case of 1975 established a precedent by which a promise made by an administrative authority, though not a contract, may be binding upon the authority. Accordingly, the court may order the authority to fulfill the promise. This precedent was an important and promising innovation with regard to the relationship between the administrative authorities and the citizens.

However, this precedent enumerated several conditions: the promise must be explicit and clear; the promisor was authorized to make such a promise; it was made with the intent to be legally binding; and he is able to fulfill the promise. Furthermore, even if all these conditions are fulfilled, the promise will be binding only if there is no legal justification for the authority to be relieved from the promise.

These conditions have been strictly interpreted and applied by the courts in many cases. As a result, although many authorities tend to make promises and the courts were often asked to enforce such promises, there are only a few cases in which the court ordered an authority to fulfill its promise. Thus, the decision in Scie-Tex, which was a big promise, has become a promise that failed.

In my opinion, the case law that interpreted the decision in Scie-Tex in such a narrow manner should be modified, so that the administrative promise will be given the proper effect it deserves in light of the obligation imposed on all authorities to act fairly. This change is required in order to achieve the right balance between the public interest, which seeks to preserve the authorities' necessary freedom of action, and the private interest of the person who relied in good faith on the administrative promise. This article suggests several ways to alter the present situation to this effect.

SHIMON SHETREET

JOINTLY AND SEVERALLY :THE RELATIONSHIP BETWEEN THE CHIEF JUSTICE AND MINISTER OF JUSTICE: HISTORICAL PERSPECTIVE

This article discusses the protection of judicial independence in Israel, in the perspective of the relationship between the President of the Supreme Court of Israel, and the Minister of Justice, who is responsible on behalf of the executive branch for the judicial system in Israel. First, the article examines the accepted perception of the independence of the judiciary, and discusses four elements, that are essential for the existence of an independent judicial system: individual, substantive, internal and collective independence. The article places special emphasis on analyzing patterns of responsibility for the administration of the courts, and the model used in Israel, while comparing them with models accepted in other countries. Furthermore, the constitutional protection of the independence of the judiciary is also discussed. Second, the article analyzes the profile of the president of the court, and especially, of the president of the Supreme Court, who is in charge of the judiciary in general, and of the Supreme Court in particular. The article presents a distinction between the model of the president who sees the center of his role in the management of the court system – "the administrative president" – and a president who sees himself as "the leader president", who perceives the core of his role in leading the judiciary, in terms of substantive adjudication. In addition, the work of the President of the Supreme Court in normal times and in times of crisis in Israel is discussed, and a comparison is presented between the styles of presidencies that characterized the presidents of the Supreme Court in Israel. Third, the relationship between the President of the Supreme Court and the Minister of Justice in Israel is discussed, in different periods in the history of Israel. The typical patterns of cooperation are examined, including the joint effort in the establishment and the defense of the independence of the judiciary. The main focus of the relationship, as presented in the article, was cooperation in protecting the judiciary and defending its independence, but over the years many disputes have arisen on multiple issues, between presidents and ministers in different periods, including in recent times.

One of the basic foundations for ensuring the proper function of the judiciary is the protection of the principle of judicial independence. To allow the judiciary to fulfill its role faithfully, judges must be free of pressure and influence from other branches of government. Therefore, the judiciary must be as independent as possible – along with the

need to balance the principle of judicial independence with other fundamental values in democracy, such as efficiency, fairness, accessibility, public trust and responsibility of the authorities towards each other. Democracy cannot exist if the judiciary is not independent of the other branches of government, and this is due to both the need to defend the fairness of the trial and the just decision, and to ensure the appearance of justice in the eyes of the public. Despite the importance of the principle of judicial independence, Basic Law: Adjudication is not entrenched. Given that the Basic Law: Adjudication can be changed by a simple majority, this can be done easily. Hence, a constitutional anchoring of the principle of judicial independence, which is essential to a democratic state, is important, i.e., requiring special majority for amending this Basic Law.

JUDITH KARP

MATCHING HUMAN DIGNITY WITH THE UN CONVENTION ON THE RIGHTS OF THE CHILD

The concept of human dignity is highly complex. It cuts across a multitude of beliefs and various disciplines. Though world-views and attitudes concerning human dignity are not detachable from their historical, cultural, social, religious, and ethical contexts, the attempt here is to present a new agenda that reflects a universal and applicable approach to human dignity and its implications on the daily life of children as human beings. This is, in fact, a new culture that is slowly emerging and being applied to promote and reinforce children's rights and interests. The author's purpose is to open a door for a better understanding of this new agenda, which links the value of human dignity to the U.N Convention on the Rights of the Child. The author submits that when the Convention is viewed from new perspectives, it serves to build a new image of children as right holders and to identify children's rights and interests holistically. Thus the Convention gives a new meaning to the human dignity of the child and human dignity gives new dimensions to the Convention. The author believes that new perspectives on human dignity, when combined with the Convention and with the holistic interpretation of the U.N committee on the Rights of the Child, help to universalize the value of human dignity and thus transform cultural norms relating to children, their image and their life in a rather revolutionary manner. Modern discourse on human dignity should be channeled to turn the obscure notion of human dignity into the new insights of an applied theory and a practical universal point of reference and thus better promote children's human dignity as well as that of adults.

RONEN POLLIACK

CONSTITUTIONAL FACTS

The article analyzes the requirement to base a constitutional petition on a sufficient factual as a part of a unifying conception of constitutional evidence. The article argues that President Naor's approach, which undermined that "Ex facto jus oritur" (the law is derived from the facts) reflects not only a method of reasoning and judicial writing, but a deep conception of judicial discretion in the field of constitutional evidence, an approach that currently dominates the constitutional litigation in Israel. The article argues that this approach sees facts as a necessary part of the development of the substantive law. The paper seeks to support this claim by a constitutional law theory of the protection of constitutional rights, and proposes to incorporate this requirement as a mandatory component in the three-stage theory of constitutional judicial review. The article further suggests appropriate directions for development, by inference from the administrative evidence doctrine, as well as an initial typology for distinguishing between different types of constitutional evidence and examining them. Finally, the article addresses the limits of the facts as a tool for the development of substantive law.

DAVID CHESHIN

ELLENBOGEN CASE

Israel submitted to France request to extradite Lupo Ellenbogen in order to prosecute him for theft (larceny) of 6 coins from the Great Jewish Revolt against the Roman Empire (66–73 CE). Israel claimed that the offense was committed on certain dates, but Ellenbogen's alibi was irrefutable: on these dates, Ellenbogen was in custody in Israel. In Response to the French Court's request for clarification, Israel stated the alibi claim was true. The extradition request was thus rejected, but the French Justice allowed submission of an amended request. In the amended request, Israel claimed that Ellenbogen received stolen coins knowing that they were stolen, a claim that was not rejected by the French Justice who approved the extradition request for the offense of receiving stolen property only.

However, as soon as Ellenbogen boarded the plane to Israel, Israeli authorities handed him an arrest warrant for theft (larceny) as an indictment attributed to him said theft (larceny) – in clear contradiction to the extradition order and the Extradition Law. Later, following the defense counsel's comment, the prosecutor presented an amended

indictment for receiving assets obtained by misdemeanor. Ellenbogen pled Not Guilty, was arrested until the end of the proceedings (remended) and the case was set for evidence before Judge Miriam Naor. At the end of the prosecution's case, during which a Swiss antique dealer testified that he had purchased a number of coins from Ellenbogen, the defense counsel claimed there was "no case to answer", as the defendant's guilt had not been proven – not even allegedly. The claim was rejected based on the evidentiary rule regarding "Recent Possession" and due to the fact Ellenbogen had not yet testified. In his summary following the hearing of the evidence, the defendant's counsel claimed again there was "no case to answer". In her decision, Judge Naor ordered the cancellation of the indictment, and not the acquittal of the defendant, because of a lack of territorial authority due to two cumulative reasons. The first reason was it had not been proven that the receipt of the coins happened within the borders of the state of Israel; the second reason was the indictment had been filed by an ordinary prosecutor and not by the Attorney General, or (at least) with his written approval, amounting to a flaw or invalidity in the indictment. Judge Naor added "these two claims are [...] preliminary claims", the acceptance of which leads to cancellation of the indictment.

Both parties appealed the decision to the District Court in Jerusalem. In the end, the District Court dismissed the state's appeal and allowed Allenbogen's appeal, stating the following: "In view of Mr. Kirsch's [the Prosecutor] position, we are also exempt from discussing the question of whether it was possible to appeal the Justice's decision which ordered the cancellation of the indictment and the release of the respondent". Given that this acquittal was ordered with the district attorney's consent, the District Court refrained from discussing the question of whether the Magistrate's Court was right in its decision to cancel the indictment, or whether the defendant should have been acquitted.

MIRIAM GUR-ARYE

ON IMPOSSIBLE ATTEMPTS, INTUITIONS AND LEGALITY IN CRIMINAL LAW – FOLLOWING LEAVE FOR CRIMINAL APPEAL 2220/16 MOR-YOSEF V. THE STATE OF ISRAEL

In the Mor-Yosef case, the defendant was acquitted of the offence of attempting to consume a dangerous drug, on the ground that the drug he had consumed – "Nice Guy" – is not listed in the law prohibiting the personal use of dangerous drugs. The (then) President of the Supreme Court chose to remark in her ruling that "… intuition may lead

to the conclusion that the use of 'Nice Guy' for seven months, believing that the use of such a drug is prohibited, amounts to an attempt to commit the offence of consuming a dangerous drug. But a person is not criminally convicted on the basis of intuition". This paper reveals the reasons underlying the tension between the legal analysis, on the one hand, and intuition, on the other, with regard to impossible attempts in two different contexts. One context relates to legal impossibility. In cases where the defendant' s conduct falls outside the scope of the prohibition, although he/she mistakenly believes that the prohibition applies to such conduct (the case discussed in the Mor-Yosef case), the legal conclusion is that the attempt to commit a non-existent offence is not punishable, whereas intuition might lead to the conclusion that an attempt to commit what appears to the defendant as an offence should be punished. The intuition is based on the perception that criminal culpability relates to the willingness to violate the law, whereas according to the legal analysis, criminal culpability reflects the willingness to harm the social value protected by the law prohibiting the offence. The other context relates to factual impossibility relating to a mistaken belief with regard to the identity of the concrete victim of the offence. In this context, intuition may lead to the conclusion that the impossible attempt to commit an offense is not punishable, while the legal conclusion is that such an attempt is punished. Here, the intuition is based on the perception that criminal law deals with harming or endangering the concrete victim, while the legal analysis focuses on the harm to the social value protected by the prohibition of the offense.

MORDECHAI KREMNITZER & KHALID GHANAYIM

KILLING THE ABUSER – HOMICIDE IN MITIGATED CIRCUMSTANCES ACCORDING TO SEC. 301B(A) PENAL CODE

Section 301B (a) of Amendment No. 137 (2019) of the Penal Code provides: "(a) Notwithstanding the provisions of sections 300 [murder] and 301A [aggravated murder], who intentionally or indifferently causes the death of a person and the act was done when the accused was in a state of mental distress due to severe and ongoing abuse of him or his family member, by the person whose death caused – the defendant to be sentenced to 15 years imprisonment".

This is the mildest case of killing in mitigated liability, for which the maximum penalty is 15 years imprisonment instead of 20 years imprisonment for the other cases in

this category. This provision regulates the case of the killing the abuser by the victim of the abuse or a member of his family, and we focus on the case where the battered woman is the victim. Although the provision does not explicitly states, the act of killing is required to be done under the influence of the same mental distress of the woman, caused following the.

This essay examines the justification for this legal arrangement. We have chosen to discuss the more severe case of killing the abuser, where the killing caused with premeditation. This is a situation where the abusive husband has physical superiority over his battered wife and therefore she cannot defend herself during the abuse. For an attempt on her part to defend herself will lead to a harsh reaction and aggravate the abuse against her. In these circumstances, the wife nullifies the unfair advantage of her abusive husband, by "surprising" him, after the end of the last abuse event, for example in his sleep, while fulfilling the formal conditions of premeditation. This killing is done out of severe mental distress and under its influence, and it is done, for her, in a dilemma of choice, to prevent future abuse, and to rescue her, and sometimes her children, from humiliating and cruel and constant misery.

When the autonomy of the perpetrator is significantly reduced, as happens to a battered woman due to her severe and ongoing abuse, the premeditation does not express complete alienation from the value of human life, and it loses its meaning as an aggravated element of culpability. The case of killing the abuser illustrates the need to restrict the element of premeditation as a severe and aggravated element of murder offense, and to recognize cases that do not reflect a particularly serious degree of guilt despite the existence of premeditation.

However, in this case, it is not enough to reduce the degree of murder in aggravating circumstances to just murder. The severe and ongoing abuse of a woman and the mental distress it causes gives the deceased, due to this condition, a special and extraordinary character. The abuse is a crushing and deadly attack on the part of the abuser on the victim's personality, on her soul, on her dignity and on her freedom – on her personality. The act of killing is, at least in her view, the only and last resort of salvation from a constant state of bondage and of danger to body and life, and therefore of saving life and soul. This nature of the act significantly reduces the wrongdoing of the act of killing and the culpability of the battered women. As a result, it is a unique case even among the cases of killing with mitigated responsibility, which justifies special relief in punishment.

MOHAMMED S. WATTAD, ZAID FALAH

WHEN SOLICITOR AND WHEN PERPETRATOR BY MEANS OF ANOTHER?

How does Israeli criminal law distinguish between criminal accessories concerning perpetration by means of another, and solicitation? Our case study concerns criminal organization (Master criminal). Criminal commission involves the participation of multiple actors who hold different positions. The distinction between perpetration by means of another and solicitation can be clarified on three levels: First, as far as the other person cannot decide by himself or cannot make a choice, he shall be perceived as an instrument by which the criminal commission is being exerted. Second, a solicited person is a culpable person (who can be persuaded, encouraged, etc.); however, in perpetration by means of another, the "other" is either not a culpable person, or a culpable person of a less severe crime (negligence). Third, solicitation targets the mental level, whereas perpetration by means of another targets the physical level.

Regarding the case of Master criminals, the Court's principal position is that of treating him similar to the joint-perpetrator. The Court's principal position has been rejected in the legal literature; however, a considerable dispute remains regarding whether to classify the Master criminals as perpetrators by means of another or as solicitors. We propose to treat the case of Master criminals as a particular case that justifies special discussion of the fundamental law on criminal accessories, thus holding that the classic-conservative conditions of joint-perpetration are also met in the case of the Master criminals, yet through an alternative terminology, namely: "Mutual Consent" instead of "Joint Decision," and "Mutual Commission" instead of "Joint Commission". In any case, we also propose that in cases where Master criminals cannot be viewed as joint-perpetrators, they shall be treated as perpetrators by means of another but not as a solicitors.

DIKLA VAKI

EXTERNAL WITNESS STATEMENT ADMISSIBILITY UNDER A DOUBLE TEST

In 2018, Israel's Supreme Court rejected an external witness statement submitted by virtue of Article 10A of the Evidence Ordinance, due to its decision that the statement was not "freely and willingly" given – the acid test of Article 12(a), the incidence of which normally applies to the external statements provided by a defendant. As is wellknown, the admissibility of a defendant's external statement is ascertained according to a double test, comprised of two stages: first, an examination of the statement according to the criteria set down in Article 12 of the Evidence Ordinance, and second, an examination guided by the doctrine of disqualification of evidence as determined in the Yissacharov case.

This article deals with the question of the applicability of the double test to witness statements, an issue arising when the prosecution, during the defendant's trial, requests submission of an external statement incriminating the defendant, given by a witness who is an accomplice in the offense, that is to be submitted. This issue has been raised before the Supreme Court on several occasions. Nevertheless, regrettably, a comprehensive, in-depth discussion of the justifications for doing so – or of the reservations against adopting this position – has yet to be conducted.,

In this article, I describe the normative foundations for applying the double test to external witness statements while arguing that the test is a fitting and desirable interpretive move, abiding by the ideals and objectives of criminal proceedings in general, but also in keeping with the constitutional stance regarding the right to due process in particular. My position is supported by several essential reasons, among them realization of the aims detailed in Article 12; realization of the function of criminal proceedings in uncovering the truth and preventing false convictions; preservation of the purity of judicial proceedings and reinforcement of public trust in the legal system; advancement of fitting interpretations of the doctrine of abuse of process; realization of the aims of the rules of submissibility denoted in Evidence Law; and promotion of appropriate interpretations of Article 10A of the Evidence Ordinance.

Here I argue that a full, comprehensive review of the purity and fairness of proceedings should include an examination of how witness statements are obtained during trials: a witness's external statement, obtained by inappropriate and unfair means and submitted during a defendant's trial, violates the witness's protected human rights but also, and primarily, that of the defendant's right to due process. Extension of the two admissibility tests (statutory and rulings) to witnesses effectively realizes the objectives of

Evidence Law in general and those of the rules of inadmissibility in particular, but also enhances protection of the interrogatee's basic constitutional rights during criminal proceedings.

NETANEL DAGAN

REHABILITATION IN SENTENCING: TREATMENT, MORAL REFORM, OR WELFARE?

This paper aims to theorize and discuss the meaning of rehabilitation for sentencing jurisprudence. For doing so, the paper distinguishes between three normative models of penal rehabilitation: (a) clinical-based rehabilitation; (b) reform-based rehabilitation; and (c) welfare-based rehabilitation. Furthermore, the paper analyzes five positive-law issues based on the three normative models suggested: (a) the relations between punishment and rehabilitation; (b) the motivation for rehabilitation and its meaning; (c) rehabilitation as an aggravating factor; (d) rehabilitation as a mitigation factor for 'normative' offenders; and (e) discharge as rehabilitation. Theoretical and policy implications for Israeli law are discussed.

DAVID MINTZ

ON THE LIABILITY OF CORPORATE OFFICERS IN INSOLVENCY AND ITS JUSTIFICATIONS

In Israeli Law, corporate officers are not immune from personal liability for their personal actions and omissions while operating in the company. The Law also imposes on them liability beyond their tortuous, contractual, and personal liability, after the company enters insolvency proceedings. Such imposition of liability may over-deter the officers from properly performing their duties while taking calculated and reasonable business risks, in fear that someday, in case of insolvency, they will be held accountable. But beyond the practical problem of imposing excessive liability on officers, only due to the company's entering into insolvency proceedings – a liability that did not exist before – raises theoretical questions, mainly the question of justifying such a step.

This article attempts to address this issue. We will first argue that the interpretation of the Law on which the Court has based its ruling that it was indeed an extension of the officers' liability, is not necessary. Secondly, we will argue that the expansion of the liability is justified upon the company's entering into insolvency proceedings, based on two possible doctrines: First, the Contractual Theory, according to which the limited liability of the officers is based on an implied agreement between them and, among others, the creditors of the company. Such an agreement releases the officers from liability so they can run the company's business without fear of being held accountable. However, as an integral part of said contract, there is also an agreement that the officers will not be released from liability when the company enters insolvency proceedings. According to the second doctrine, that of Constructive Trust, the officers act as trustees over the creditors' money: whenever they unjustly lead the company into insolvency, there is room for them to redeem the injustice they have caused the beneficiaries as per the terms of their trust.

YORAM DANZIGER & LIAT BABLUKI-PILLERSDORF

DETERRENT RESTORING – WHEN? COMMENT ON SANOFI VS. UNIFARM

On July 7, 2021, the Supreme Court issued a decision in the Sanofi case that dismissed an appeal on the District Court decision. According to the decision, the appellant, Sanofi, misled the patent registrar and caused the patent application process to last much more than it should have been. This enabled Sanofi to profit from its status as a de-facto monopoly as regards the Plavix medicine to which the patent application was directed. The court ruled that Sanofi's profits was illegal, and the company should reimburse the plaintiff, Unifarm, for it .

In this article we review the Supreme Court decision in the Sanofi case. We compare the different case analysis offered by the majority and minority opinions, and discuss the implications of these differences on the decision of the court. We then offer a new approach, which in our view could have reached more just and balanced result, together with preserving deterrence.

MICHAL GAL & HILA NEVO

THE ESSENTIAL FACILITIES DOCTRINE: WHEN IS A MONOPOLIST MANDATED TO GRANT ACCESS TO HIS COMPETITORS?

The essential facility doctrine, which prohibits a monopolist from refusing access to an input it controls, which is essential for competition in a primary or secondary market, is one of the most controversial and interesting doctrines in competition law worldwide. Finding that a facility as "essential," inevitably implies that any market participant who is denied access, is excluded from the market. The doctrine is hence intended to deal with situations whereby the monopolist excludes competitors by means of refusing their access to a facility they require in order to operate. At the same time, an overly broad application of the doctrine might hinder incentives of both the monopolist and firms seeking access, to invest and develop competing or unique facilities.

The desired scope of application of the essential facility doctrine, applied in Israel for the first time by Honorable Judge Naor (as she was called then) in the Dubek case, remains highly relevant to date, with the creation of new essential facilities in digital markets. Such facilities raise barriers to actual and potential competitors, that merit an elaborate examination of the doctrine.

This article critically examines the conditions for the application of the doctrine by courts in Israel, EU, and U.S. It further assesses the application of the doctrine in digital markets, as well as in circumstances where monopolistic power stems from intellectual property rights.

ASSAF TABEKA

LEGAL AID SERVICES IN ISRAEL: THEORETICAL, STRUCTURAL AND CONTENT-RELATED ANALYSIS

Legal Aid is a social instrument founded in order to provide accessibility to courts for those characterized by their social and economic weakness. As such, it aims to empower individuals and groups who cannot meet the expense of private attorneys' rates, and hence needs a social mechanism in order to participate in the legal arena. Legal Aid, therefore, is

an opportunity to provide a voice for those who cannot afford to raise it, a prospect to enhance the poor's involvement in constructing our political and cultural values, an occasion for equal attendance.

The article wishes to analyze Legal Aid services in Israel. In order to do that thoroughly, it will examine and evaluate the Israeli system – regarding its historical and analytical roots and principles – in comparison to and with other Legal Aid systems in the western world. In that way, the article will methodically study the Israeli mechanism in accordance with the changing and evolving welfare system in the last decades. This prism will also direct the article to its final chapter, where suggestions to correct the current Israeli paradigm will be made.

URI NIR

NEW INTERMEDIARY REMEDIES IN CIVIL LAW AND THE GREAT CONTRIBUTION OF CHIEF JUSTICE NAOR TO THE FORMULATION OF THESE REMEDIES

Remedies in private law can be classified into two types: those that are by nature binary and those that are intermediary, for example, contributory negligence. This article seeks to point out the contribution of Chief Justice Naor to the development of intermediary remedies precisely on issues that on the face of it are binary. The article examines Justice Naor's rulings on causality in tort law, restitution in contract law, and compensation for violation of autonomy in consumer protection law. The article shows that although these are ostensibly binary remedies, which according to law may be granted or denied, Justice Naor has found a way to grant them only partially, in various ways and by exercising discretion. Next, the article examines the arguments that may be behind the ruling of an intermediary remedy, some having to do with a specific legal area and others related to private law in general. Noteworthy among the correct arguments for private law in general are the ability to guide behavior through intermediate remedies; the incentive to reach compromises; the ability of the courts to display creativity; increasing trust in the courts; and the transition to a balancing theory. Alongside these advantages, the article mentions the disadvantages inherent in intermediary remedies, which are also partly related to a particular area of law and partly to all rulings on intermediary remedies in private law. The latter include the uncertainty involved; the need for an additional judicial ruling; and the concern with the proliferation of litigation and its duration.

The article proceeds to point out that precisely when dealing with classic intermediary remedies available in tort law, Justice Naor at times refrained from acknowledging contributory negligence in connection with certain behaviors. The article examines the reasons behind these rulings, and points out that unlike in the various cases when Justice Naor created an intermediary remedy as a substitute for no compensation at all, in the case of contributory negligence, its recognition grants a remedy instead of providing full compensation for damages. Thus, to prevent harm to the injured party, Justice Naor refrained from recognizing this remedy, which may attest to the importance of remedial justice in Justice Naor's conception.

AVISHALOM WESTREICH, YEHEZKEL MARGALIT

KETUBBAH PAYMENT AND PROPERTY DISTRIBUTION: THE "NO DOUBLE DISCOUNT" PRACTICE IN ISRAELI RABBINICAL COURTS

The article analyzes the "no double discount" phenomenon within Israeli rabbinical courts. In recent years, rabbinical courts adopted the practice of reducing part of the amount which the wife receives according to Israeli civil family law from the ketubbah (Jewish marriage contract) payment that she is entitled to according to Jewish law. According to this practice, the wife should not receive double financial rights (as long as the right according to civil law is not recognized by Jewish law); or, as it is sometimes creatively called: no double discount. The article examines whether this practice complies with the Financial Relations between Spouses Law, 5733-1973, and compares it with a similar practice in inheritance law. We then analyze its Jewish law foundations, and discuss some aspects of the practical use of this practice, including its manipulative use in cases of marital fault. In addition, we examine, and criticize, some rabbinical court rulings which expanded this practice beyond what might, in our opinion, be justified. We will show, however, that the High Rabbinical Court rejected the expanded view and adopted a more moderated practice. We argue that the High Rabbinical Court approach is based on viewing the financial marital structure as equal partnership, close to the way Israeli civil law views it. Based on our analysis we argue that the relationships between rabbinical courts and state family courts are quite complex: they include respect and acceptance of civil principles by rabbinical courts, together with an attempt to preserve some substantial elements of Jewish spousal law.