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DAPHNE BARAK-EREZ

JUDICIAL REASONING: OLD AND NEW DILEMMAS

This essay analyzes the functions fulfilled by judicial reasoning – from a traditional perspective as well as taking into account more recent developments, including the new ways of publicizing judgments. The essay focuses on the complex relationship between this reasoning and the new public arena, characterized among other things by the exposure of judicial decisions via the internet. In this context, it is argued that for the reasoning of judicial decisions to achieve its purpose, it is necessary to respect the process. Respecting the process does not mean agreeing with the result or even with the court's reasoning. Rather, respecting the process requires that the reaction to the decision should be based on reading the reasons of the court.

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EHUD GUTTEL, YUVAL PROCACCIA & GALIA SCHNEEBAUM

LIABILITY CREATING FAULT AND CONTRIBUTORY FAULT: THEORY AND DOCTRINE

In a number of recent decisions, the Israeli Supreme Court has considered the application of the negligence standard for injurers ("liability-creating fault") and for victims ("contributory fault"). In view of these decisions, this Essay addresses two issues, which despite their importance, have not yet received significant attention. The first pertains to two-sided accidents – cases in which each party is both an injurer and a victim. We argue that the Court's approach to the relationship between the two forms of negligence raises a number of difficulties and is in contention with traditional tort principles. The second issue pertains to cases in which the parties act sequentially – a negligent injurer initially creates an undue risk and then the victim fails to take precautions that could counter that risk. The case law reveals two competing approaches toward victims' liability in such circumstances. We contend that the desirable approach is non-uniform, and we analyze its underlying principles.

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DAVID HAHN & GIDEON PARCHOMOVSKY

A NEW CORPORATE GOVERNANCE FOR FINANCIALLY DISTRESSED CORPORATIONS

The state of financially distressed corporations draws special attention to their corporate governance. The board of a financially distressed corporation must be balanced and composed effectively in order to address the various economic interests of the actors involved – the shareholders, on the one hand, and the debtholders, on the other. Existing corporate law and insolvency law do not allow for efficient and just decision-making by the boards of financially distressed corporations. Prior to formal insolvency proceedings, the board is comprised exclusively of directors appointed by shareholders. Once insolvency proceedings have begun, however, the board is replaced by a court-appointed trustee who does not necessarily possess business managerial skills. Moreover, current law enables any single creditor to initiate enforcement actions against the debtor corporation and its property prior to formal insolvency proceedings, which, in turn, may thwart attempts to stabilize the corporate business and reorganize its debt structure. In this article, we propose a structural reform of the composition of the board of a financially distressed corporation, prior to insolvency proceedings, by empowering creditors to appoint directors to the board of such firms. The addition of debtor-appointed directors to the board will balance and enrich the perspective of the board and improve its discussions and decision-making. Another advantage of our proposal is that it will temper the zeal and fear of creditors, as well as their drive to push corporations into insolvency proceedings. The implementation of our proposal will not only enable financially distressed companies to better navigate the raging waters of economic crises, but also has the potential to save businesses and jobs from the abyss of bankruptcy.

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AMNON LEHAVI

BETWEEN CULTURAL PROPERTY AND TEMPORARY TAKEOVER OF ASSETS: THE NEED FOR GENERAL-PURPOSE LAW ON EMINENT DOMAIN

This Article identifies a significant gap in current Israeli law: the absence of general-purpose legislation that authorizes government agencies to expropriate various types of assets, whether tangible or intangible, permanently or temporarily, against payment of just compensation. Such legislative acts, and accompanying case law, exist in the case of land, but not for most other types of assets and this situation can produce various failings and distortions. The lack of such a general power of eminent domain can cause government agencies to abstain from taking otherwise justified and socially efficient measures, whether in times of emergency or under ordinary circumstances. At the same time, because of the absence of any such general-purpose power, government agencies may find themselves engaged in a stubborn fight to recognize their rights in specific assets *ex post facto* under an "all or nothing" approach, even when their claims are debatable, as is often the case with cultural property disputes.

In addition, the current situation may incentivize government agencies to practically take over assets in an allegedly regulative manner, with courts then finding themselves constrained in the choice of remedies when asked to review such actions: either invalidating the governmental regulatory action altogether or, alternatively, dismissing the case. Courts do not currently have a third option, by which the regulatory action would be declared as practically equivalent to eminent domain while requiring the government agency to pay just compensation for the taking. This current deficiency highlights the need for the creation of a general-purpose law on eminent domain, through authorizing legislation and judicial interpretation, which would give more substance to the currently vague provision in Article 3 of the Basic Law: Human Dignity and Liberty.

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ADIEL ZIMRAN & NETANEL DAGAN

JUDICIAL REVIEW IN CRIMINAL PROCEEDINGS

The purpose of this article is to propose a theoretical, normative and positive analysis of judicial review in criminal proceedings and the relief given in the context thereof. The article includes five main sections: in the *first* section two basic approaches to judicial review in criminal proceedings are presented: (a) a *mixed approach*, according to which the essence of the review of the authority's conduct in a criminal proceeding is administrative; and (b) an *organic approach*, whereby the judicial review of the authority's conduct is subject to the principles of criminal law. In the *second* section, three rationales are presented for preserving the separation between criminal law and administrative law, all of which support the organic approach: (a) maintaining proportionality and equality; (b) preserving the quality of penal censure; and (c) avoiding the doctrine of probabilities in criminal proceedings. In accordance with this conclusion, the *third* section proposes a three-fold classification of administrative remedies that promote principles of criminal law according to the organic approach: (a) an epistemic remedy; (b) a legitimacy-conferring remedy; and (c) a compensatory remedy. The article then analyzes the question of whether the remedy constitutes a condition for conducting the criminal proceeding and whether it does not hit at the heart of the proceeding (an epistemic remedy and a legitimacy conferring remedy) or whether it hits at the heart of the proceeding and also constitutes a consideration in determining the sentence and even guilt (a compensatory remedy). The *fourth* section of the article points to two parallel developments in the Supreme Court's rulings: (a) a broadening of the scope of judicial review in criminal proceedings; and (b) a shifting of the geometrical position of the administrative remedy from the gateway to the criminal proceeding to the heart of the proceeding and to the determination of guilt and sentencing. The article analyzes these trends in view of current legal trends. In the *final* section of the article, an outline is proposed for contending with the challenges that arise in implementing judicial review in criminal proceedings and in granting

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administrative relief: (a) a distinction between the doctrine of abuse of process and the doctrine of administrative review; and (b) restricting the compensatory remedy solely to the limits of the deserved sentencing range.

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AVISHALOM WESTREICH

THREE CROSSROADS IN THE RELATIONSHIP BETWEEN RABBINICAL AND CIVIL COURTS IN ISRAEL: CHILD SUPPORT, PROPERTY DISTRIBUTION, AND THE LITIGATION ARRANGEMENT LAW

Rabbinical court rulings in the realm of family law have undergone dramatic transformations – silently, "under cover of darkness" (and at times, unacknowledged) – in recent years. These changes pertain to the very core of family law: the law of divorce that is applied in the rabbinical courts as well as monetary matters accompanying divorce proceedings. This paper argues that these changes have exerted a crucial influence in moderating the traditionally tense relationship between the rabbinical and civil courts.

The paper analyzes current trends in the rulings of the rabbinical courts on two main issues: the mother's obligation to provide child support, and monetary relations between spouses, especially regarding equal division of assets which belonged to one spouse before the marriage and the tension between civil financial rights and the financial obligations set forth in the *ketubbah* (religious wedding contract). This analysis enables us to show a pattern of rapprochement between the rabbinical courts and their civil counterparts. At the same time, however, the paper locates points that still generate tension, and at times, open conflict. The paper attempts to explain the complex picture that ensues, as I argue, from a broad acceptance of civil law (by means of well-known Jewish law doctrines), while maintaining principles and values that originate in religious law. The paper offers a current picture, more complex and, in my opinion, more accurate than what is commonly assumed, of the attitude of the rabbinical courts to civil law, and, in consequence, of the relationship between rabbinical and civil courts. The last section of the paper supports this argument with an analysis of the rabbinical courts' attitude to one of the most important developments in civil family law in recent years: the Litigation Arrangement Law.

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Presenting the relationship between the two judicial systems solely as tense and competitive, as is often done, falls short of the situation: the relationship between the two is more complex. Competition, criticism and rejection of the other system's principles are all present, but we have also witnessed an increasing degree of acceptance and cooperation in recent years.

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JOSHUA SHYE

CORPORATE GOVERNANCE OF ISRAELI BANKS: THE PRINCIPAL-AGENT PROBLEM IN BANKS WITH NO CONTROLLING CORE

The article deals with the dramatic change that has taken place in recent years in the structure of control in the Israeli banking system, in which the three largest banks in Israel have moved from a model of "bank with a controlling core" to a model of "bank with no controlling core".

This change was preceded by two legislative amendments, from 2004 and 2012 respectively, which were intended to adjust the regulation to the existence of banks with no controlling core. In addition to these legislative amendments, a new law was passed in 2016 limiting the remuneration of senior managers in financial corporations.

The significance of these changes is enormous, since going forward the stability, soundness and functioning of the banking system in Israel depend on the unique regulation and the unique corporate governance that apply to banks with no controlling core. The article critically examines the unique regulation of banks with no controlling core by analyzing the effectiveness of this regulation with respect to Principal-Agent problems between the managers and the other stakeholders in the banks.

The conclusion of the article is that the existing regulation does not provide a balanced solution to the various Principal-Agent problems. On the one hand, the regulation provides a comprehensive solution to the Principal-Agent problem between managers and depositors and the general-public, through broad regulation of the Banking Supervision Department of the Bank of Israel. However, on the other hand, the regulation has almost completely neutralized the effectiveness of the mechanisms that might have coped with the Principal-Agent problem between managers and shareholders. In addition, the conclusion is that the State of Israel, through the Bank of Israel, has nationalized the actual control of the three largest banks in Israel (i.e., most of the banking system in Israel).

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At the end of the article are some proposals to change the regulation of banks with no controlling core, the adoption of which will be an intermediate way to protect the interest of depositors and the general-public, while also allowing shareholders to express their interest in the bank.

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