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BENYAMIN PORAT

"GOOD FAITH" IN THE INTERPRETATION OF CONTRACTS – A TALMUDIC STUDY IN COMPARISON WITH ISRAELI LAW

Many contemporary legal systems adopted an approach whereby courts are instructed to interpret even private contracts in accordance with the doctrine of "good faith"; that is to say, in a way that avoids unfair contractual results. Promoting the principle of good faith through the interpretation of contracts has a several relative advantages, but at the same time suffers from significant disadvantages. This paper deals with the relationship between contract interpretation and the principle of good faith as it appears in several Talmudic discussions, and compares them with the customary judicial practice under Israeli law.

It would seem that the Sages of the Talmud espoused an approach toward contract interpretation that refused to invoke good faith or other similar moral considerations. The analysis of several Talmudic texts demonstrates that the Sages indeed advocated adhering to the more formal rules of interpretation, even if doing so leads to a contractual result that may be considered essentially unfair in substantive terms, in that it grants one party to the contract significant advantage over the other party. This phenomenon requires an explanation, particularly in view of the fact that Talmudic law is renowned for imposing moral and legal obligations whose expressed purpose is to create a proper and fair balance between conflicting parties. Such obligations include: "*ve'asita ha-yashar ve-hatov*" ("and you shall do what is right and good"), "*kofin al midat sedom*" ("we compel [not to act] in the manner of Sodom") and the precept of returning "lost" property (in the wider meaning of the term as understood by the Sages).

This paper argues that according to a wide range of moral and legal independent obligations that exist in Talmudic law, as mentioned above,

that can be classified as equivalent to the modern concept of good faith, the need to enlist the rules of interpretation and artificially read "good faith" into the contract becomes unnecessary. The courts are thereby free to interpret contracts in a manner that is more authentic and attuned to their original purpose and design. Nonetheless, the fairness of the contract's implementation is achieved by invoking the supplementary set of cogent duties that are imposed upon the parties in order to guarantee their responsible behavior towards the legitimate interests of the other party. This careful balance between good faith considerations and the rules of contract interpretation, which the Jewish law thoughtfully crafted, is offered in this paper as a challenging model for Israeli contract law.

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URI WEISS

THE REGRESSIVE EFFECT ON LOWER COURTS

Legal uncertainty has a regressive effect on settlements. This paper will show that legal uncertainty also has a regressive effect on appealable court rulings. Namely, when litigants can appeal to a higher court, legal uncertainty leads to regressive decisions. I will show that, assuming the judge's goal is to minimize appeals, legal uncertainty makes lower court judges rule regressively when compared with the rulings that the higher instance would hand down. This means, that the greater the legal uncertainty, the greater the regressive bias. We tend to think that poor people and women are more risk-averse, and if we take that as a given, it follows that poor people and women gain less in a regime of legal uncertainty where one is allowed to appeal.

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MORDEHAI (MOTI) MIRONI

ARBITRATION IN EMPLOYMENT DISPUTES – REVISITED

This article revisits a governing and well established doctrine of labor law and arbitration. This article refers to it as "the restricting doctrine". According to this doctrine, protective labor legislation issues (statutory rights) may not be subject to arbitration and should be litigated only before the Labor Courts.

Since the vast majority of employment-related disputes involve inter alia statutory rights of one sort or another, arbitration is rarely used in labor and employment law. The restricting doctrine prevents the use of arbitration even in appropriate cases, for example: when arbitration can promote the mutual interests of the disputing parties, or when it serves the public's interest by alleviating the unreasonable caseload and backlog of the Labor Courts. The extreme under-utilization of arbitration caused by the restricting doctrine is in direct contradiction with the legislator's explicit intention to promote the use of arbitration as an alternative to court litigation.

The jurisprudence of the Israeli Supreme Court and the National Labor Court is full of rhetoric praising and glorifying of the arbitration process as an efficient and convenient way for settling disputes. At the same time, case law keeps strengthening the restricting doctrine and expanding its scope and influence.

While highlighting the widening gap between the exalting judicial rhetoric and reality, in which the scope of arbitrable issues is being constantly narrowed, this article also criticizes the restricting doctrine using a three-pronged argument. First, the restricting doctrine is not supported by the legislative history of the Arbitration Act. Second, the restricting doctrine lost its theoretical and empirical justification. The basic premise underlying the restricting doctrine is that statutory rights may not be waived or compromised by the individual employee, while arbitration is a form of waiver. Nonetheless, as a matter of routine, Labor Courts are referring litigating parties in cases that involve statutory rights to various

case settlement processes, both within and outside the courts, where statutory rights are subject to compromise. Third, the restrictive precedent is inherently flawed, due to the fact that submitting a claim to arbitration does not mean the relinquishment of statutory rights, but merely a change in forum.

This article suggests that the restricting doctrine be abandoned or toned down so as to enable parties to employment relations to bring issues concerning protective labor legislation and other norms that are considered *ius cogen* to arbitration. Such a policy change in favor of arbitration may be brought about either through legislation or by case law, accompanied by institutional safeguards that address legitimate concerns that have been voiced against using arbitration in settling employment disputes. The author asserts that such concerns – which stem from information asymmetry, power and resource imbalances, and the fact that the employers are more likely to be "repeat players" – can be adequately addressed by procedural and substantive safeguards since they do not represent inherent failures embodied in the arbitration process. More concretely, this article suggests drawing upon several innovative ideas for procedural and substantive safeguards that have been implemented in the United Kingdom and the United States, for example, the "Due Process Protocol".

A system of labor and employment relations where a highly developed, sophisticated, and well balanced arbitration system prospers alongside Labor Courts is more likely to provide a sense of better and more accessible justice than a system in which Labor Courts operate alone.

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NOYA RIMALT

GOOD MOTHER, BAD MOTHER, IRRELEVANT MOTHER: PARENTHOOD IN LAW;

BETWEEN THE IDEAL OF EQUALITY AND THE REALITY OF MOTHERHOOD

Until the 1970's, legal discourse in Israel openly expressed an ideology of motherhood that explicitly assigned women with the role of mothering. This ideology was highly criticized by feminist scholars and activists, who initiated several legal reforms designed to promote a more egalitarian legal regime. Consequently, over the past three decades, we witnessed a gradual change in the apparent rhetoric of the law. Instead of emphasizing motherhood and women's distinct role in society, legal discourse now engages in an equality-based and gender-neutral rhetoric that highlights the shared roles of parents - men and women alike – in the family.

This article investigates the present role of motherhood and its meaning within this new egalitarian legal discourse. It explores issues such as whether the old ideology of motherhood was actually defeated and whether the new emphasis on 'parents' rather than on 'mothers' provides the courts with a better legal tool for resolving specific dilemmas relating to mothers and fathers. Discussing these questions, the article focuses on several recent Israeli court cases that dealt with issues relating to parental responsibilities. It argues that a careful analysis of these cases reveals what appears to be a mere rhetorical shift. While explicit stereotypical references to women as mothers are rare, implicit references that entail different expectations are prevalent. Moreover, the egalitarian and gender-neutral rhetoric that currently dominates cases that deal with parental responsibilities disguises a reality of gender inequality that still persists, making the new discourse irrelevant in confronting and resolving real-life dilemmas relating to women and motherhood. Finally, this article

highlights the role of feminist legal struggles in shaping the relevant case law and calls for a more critical analysis of these struggles and their contribution to the current gender-neutral discourse concerning parenthood and its problematic consequences for women.