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HADAR DANCIG-ROSENBERG

JUSTIFICATIONS FOR INCRIMINATING SECONDARY PARTIES: TOWARD A RATIONALE-BASED DOCTRINE

Although secondary parties, namely aiders and abettors to a crime and inciters, do not participate in commission of an offense but only indirectly contribute to its commission, Anglo-American law adopts a collectivist approach that recognizes the criminal liability of one party for an offense committed by another. This raises difficulties from philosophical, ethical and legal perspectives. The article addresses the question whether and why a secondary party deserves to be held criminally liable for a crime committed by another. It distinguishes between several retributive rationales that might be used as a theoretical basis for the imposition of such liability. These rationales are the causal rationale; the increased chance rationale; and the identification rationale. The study seeks to analyze and discuss, for the first time, the various approaches reflected in Anglo-American law regarding these rationales. On a normative level, I argue that analysis of the justifications for incriminating secondary parties according to the rationales underlying the various types of complicities has twofold significance. *First*, such an analysis contributes to the development of the theoretical basis of complicity law. *Second*, it has doctrinal importance in the design of complicity laws. Revealing the justifications for the incrimination of secondary parties affects the appropriate characteristics of categories of complicity, the relationship between them and the coherence of the doctrines that apply to secondary parties in various contexts. The article concludes with a preliminary implementation of this rationale-based theory in Israeli complicity doctrines.

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DAVID MINTZ

A PARTNER AND A BANKRUPT PARTNER IN A BANKRUPT PARTNERSHIP

The Israeli law of partnerships determines when a partnership dissolves: in principle, since partnerships are established by agreement, an agreement between the partners also dissolves the partnership. However, in the 1975 Partnership Ordinance [New Version], there are no provisions with respect to the dissolution of partnerships as a result of insolvency. These provisions are located in the 1980 Bankruptcy Ordinance [New Version]. This article reviews the unique character of partnerships, the laws that apply to them, techniques for dissolving them, the law relating to bankrupt partnerships and the reciprocal relations between dissolving partnerships and the bankrupt members of the partnership. The article then discusses the conflict between the law of partnerships and the law of bankruptcy, and the conflict of interest between all the relevant parties in the bankruptcy proceedings of the partnership or the bankruptcy of one of its members, namely: the solvent partners; the insolvent partners; the trustee of the bankrupt partners; the creditors of the insolvent partnership and the creditors of the insolvent partners.

In Israeli bankruptcy law, which requires an act of bankruptcy as a condition of opening proceedings, it is hard to justify the renunciation of an act of bankruptcy when a partner is declared bankrupt for the sole reason that the partnership of which he was a member is declared bankrupt. We claim therefore that the transformation of the contractual alignment between partners in the event of the bankruptcy of one of them is incorrect. Thus, the automatic bankruptcy declaration of a partner who is solvent, for the sole reason that the partnership in which he is a member was declared bankrupt is wrong and the law should be adjusted accordingly.

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MAAYAN MENASHE

THE PRINCIPAL-AGENT PROBLEM IN PUBLIC PROCUREMENT – ON THE NEED TO REGULATE THE WORK OF PROFESSIONAL CONSULTANTS

Contractual engagements of public agencies are conducted, inevitably, through various office holders as representatives of the public. The existence of these representatives evokes the classic principal-agent problem. It is commonly assumed that one of the primary goals of tender law is to deal with the principal-agent problem in public procurement. This article claims that tender law, as it is currently designed, is flawed because it addresses the principal-agent problem in public procurement almost exclusively through regulation of the work of the tender committee. This approach is based on the misconception that the members of the tender committee are the primary, or even the only agents who need to be regulated. The findings of this research reveal that the tender committee is assisted by various professional consultants who possess relevant knowledge and professional expertise. The empirical evidence supports the notion that these professional consultants play a significant role in the competitive bidding process in public procurement. The professional consultants' dominance in this process can be seen in the extent to which they are used and in their actual impact on the competitive bidding process. In practice, the professional consultants exercise discretion, while the members of the tender committee constitute in these instances, to a large extent, a supervisory body. In this situation, there are representatives whose work is difficult to monitor, but which significantly affects the results of the competitive bidding process, and their appointment and work are not sufficiently regulated. This article seeks to demonstrate that there is a need for proper regulation of the appointment and functioning of professional consultants. Only in this way can the huge gap in the current response to the principal-agent problem be closed. The article suggests that the

procedure leading to the appointment of professional consultants be regulated; that greater duties of transparency be applied to their work; and that measures be taken to reduce their authority. However, these are only preliminary proposals, offered in the hope that awareness of the problem will be raised and broader discussion initiated pertaining to the role of professional consultants in the competitive bidding process in public procurement.

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ELI GILBAI

PROVISIONS IN ACCOUNTING PRACTICE AND TAX LAW

This article discusses the implications of adopting international financial reporting standards (IFRS) on the tax laws of Israel. As a test case, the article focuses on the fiscal implications of IAS 37- Provisions, Contingent Liabilities and Contingent Assets. The article examines the positive tax laws pertaining to Provisions and Contingent Liabilities in Israel, and corresponding issues. It also examines the expected tax consequences and the desired tax consequences of the adoption of IFRS, in light of the basic principles of the "Good Tax". Examination of the fiscal implications of IAS 37 is particularly interesting and important with regard to the tax implications of adopting international standards, in part because of the gap between the different goals of accounting rules and tax rules. In addition, the article presents a comparative study concerning the fiscal implications of IAS 37 in several foreign countries.

After discussing the relationship between the principles of IAS 37, the principles of Good Tax and the purposes of IAS 37, and after discussing the current situation and the possible impact of IAS 37 on financial performance of the firm and its tax liability, the article presents the desirable fiscal law. The desirable fiscal law in our opinion allows certain approximation of tax laws to IFRS, in which the principle of true tax will be integrated with climate, reflected in the adoption of the new accounting rules.

In this respect, our conclusion is that there are four rules that should be formulated, and may determine the manner of recognition of provisions for tax purposes.

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SINAI DEUTCH

THE RIGHT OF THE CONSUMER TO WITHDRAW FROM A TRANSACTION: EMPIRICAL ANALYSIS OF THE REGULATIONS OF "WITHDRAWAL OF A TRANSACTION"

The right of consumers to withdraw from a transaction is based on Israeli law and regulations. It is an Israeli innovation which does not exist elsewhere. There are no similar laws in any other country. This right was recognized in an amendment to the 1981 Consumer Protection Law, made in 2005, and it became operative with the adoption of the 'Withdrawal from Transactions Regulations' 2010. These regulations enable consumers to withdraw from many consumer contracts within a "cooling off period". There rules are a revolution in consumer law and they symbolize the transition from a regime that simply provides protection against dishonest traders, to one that establishes standards of fair trade.

This regime met with criticism from traders' organizations as well as from legal academics who support the economic approach to law. Nonetheless, empirical analysis of data from a survey of four hundred traders indicates that the fears of small traders prior to the legislation were baseless. The survey is unique because surveys in the consumer field are usually based on consumers' responses rather than those of traders. The results of the survey confirm that the fears that preceded the enactment of the regulations were exaggerated. The findings of the survey indicate that the 2010 Regulations led to a change in market behavior. Traders now agree to consumer withdrawal from transactions even beyond the requirements of the Regulations. In many cases, they do not require cancellation fees, although they are entitled to do so according to the Regulations. The conclusion is that the Regulations do not cause damage to traders and have a good influence on market behavior. Additional field research is required in order to evaluate the need for further legislative action.

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IZHAK ENGLARD

BOOK REVIEW: DANIEL STATMAN & GIDEON SAPIR: STATE AND RELIGION IN ISRAEL – A PHILOSOPHICAL-LEGAL INQUIRY

The book is an impressive work on the relationship between state and religion in Israel. The review is divided into two parts: the first part describes the content of the book; the second one concentrates on the critique of a number of the authors' ideas. The latters' starting point is the existence of a liberal democracy. The book is divided into three parts. The *first part* contains a general critique of the liberal thesis demanding a complete separation between state and religion. In the authors' view, a state may, in principle, support religion, and in certain circumstances even prefer it to other views on the good of society. A special chapter is dedicated to the religious arguments in favor of the separation between state and religion. The authors maintain that the advantages of financial state support outweigh the possible loss of religious autonomy. The *second part* deals with the protection of religious freedom which is based, in the authors' view, upon freedom of conscience and the right to culture. Their general inclination is to limit the protection granted to religion. The state's orders have to recede only before positive, explicit religious duties. The *third part* is dedicated to the specific system of state and religion in Israel. The first chapter analyzes the violation of fundamental human rights by the Jewish religious law applicable to marriage and divorce. The authors propose the introduction of civil marriage side by side with religious marriage. The second chapter deals with the Jewish religious education system. Here the authors call for making state financial support depend on the efficient incorporation of democratic values in religious education. The third chapter deals with the religious services offered by state institutions. The authors demand an equal distribution of financial support to all religions according to the

relative size of the different communities. The last chapter concerns the problem of military service of yeshiva students.

The second, critical, part of the book review starts with the general observation that the authors' optimism with respect to the possibility of overcoming existing negative political tendencies in Israel that threaten liberal-democratic values, is based upon a rather naïve vision of social reality. More specifically, the authors' limiting approach towards religious freedom is problematic, since it overlooks the religious obligation in Judaism to actively prevent another person from violating a religious prohibition. In the eyes of a religious Jew, omitting to fulfill this obligation may entail, divine punishment of the entire people, for example, exile. The authors' insistence that freedom of religion from state interference depends upon an explicit religious duty produces an unjustified limitation of that freedom. As a result of this approach, the authors' treatment of the problems of the Holy Places and of conversion to Judaism lack depth and are not convincing. Contrary to the authors' assumption, religion is not losing, but is rather gaining strength in Israel. With respect to the introduction of civil marriage alongside religious marriage, there is no reference to the resulting grave problems of competing jurisdictions between secular and religious courts.