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JONATHAN YOVEL & IDO SHACHAM

GOOD FAITH AND INTERPRETATION IN INTERNATIONAL SALES LAW: NORMATIVE AND EMPIRICAL CONSIDERATIONS

This article deals with two related topics that are central to the jurisprudence and application of the United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG): its internal theory of interpretation, and its approach to good faith obligations in international commercial relations. In the latter context, the article analyzes, reorganizes, and offers a solution to the controversy over whether the CISG contains a performative obligation of good faith (addressed to the parties) as opposed to a merely interpretative one (addressed mainly to judicial and arbitral forums), and whether this purported difference is theoretically or practically significant (we conclude that it is). The article suggests an approach to good faith that is not identical, nor a reduction, to either of the established positions, and determines that the general obligation to act in good faith in international sales (in negotiation and performance) is broader than implied by either a literal reading of the CISG or an exclusive interpretative reliance on *travaux préparatoires*. The article's approach is legal-realistic and empirical, while being hermeneutically inventive in applying the CISG's own interpretative doctrine to the question of good faith. Methodologically, we argue for the normative primacy of an empirically-based multilogue among the relevant members of an emerging hermeneutic global civil society, over the traditional recourse to analysis of *travaux préparatoires*. The study avoids over-coherentist assumptions regarding the CISG's jurisprudence and seeks to acknowledge its internal tensions and a certain measure of pluralism in application while avoiding a collapse into interpretative forum-dependence.

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OMRI BEN-ZVI

PRECEDENT AS A PHILOSOPHICAL INSTITUTE

The purpose of the article is to offer another point of view, in addition to the analytic perspective, through which one can review the concept of precedent. The article's main argument is that the analytic point of view cannot offer a complete and coherent account of the precedent concept, and thus a different paradigm is needed. The article, therefore, posits Nietzsche's philosophy - specifically his article "On the Use and Abuse of History to Life" - as this new paradigm. Nietzsche's account of history offers a different reading of the institution of precedent as a solution for the problem that arises in the context of both the individual and larger communities – the problem of the proper relation one should have to one's past; in other words, the need to balance memory and forgetfulness. This article reviews the different ways one can treat history, and through them examines §20 of Israel's Basic Law: The Judiciary, which is the core of the Israeli precedent doctrine.

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YEHUDA ADAR & MOSHE GELBARD

RESTITUTION, COMPENSATION, ACCUMULATION OF REMEDIES AND FREEDOM OF CONTRACT: AN INTELLECTUAL EXERCISE IN REMEDIES

This article examines a number of key issues in the law of remedies in light of the Supreme Court ruling in the case of Kanyonin Nechasim uVinyan Ltd. v. Beney Ya'acov Real Estate Ltd.(2006). The case involved a contract for the sale of real property. The contract empowered the seller, in case of termination following a fundamental breach by the buyer, to keep certain amounts of money paid under the contract and, in addition, to sue for liquidated damages for the same breach. The main issue in the case concerned the right of the seller, who terminated the contract and regained possession of the property, to simultaneously apply these two remedial mechanisms (the first of which was described in the judgment as 'agreed restitution'). Answering this question called for an investigation of two basic remedial problems. The first issue concerned the question of whether and to what extent an aggrieved party should be allowed to accumulate different remedies for a single violation of his rights (in this case, a breach of contract). The second issue involved the scope and limits of the power of contracting parties to modify the rules governing the first question. Are the rules of accumulation mandatory, or can the parties opt out of the rules and create their own accumulation regime? In spite of their obvious practical importance, these basic questions have so far eluded close scrutiny. Unfortunately, though vital for the ruling, they were not systematically examined by the Supreme Court in the Kanyonim judgment.

This article attempts to bridge the gap. Following a brief summary of the factual and legal background, it first outlines a general model for resolving questions concerning the accumulation of remedies. The model includes a three-stage examination: First, the plaintiff's entitlement to each of the relevant remedies should be carefully examined. Second, the question of

the compatibility of the remedies with each other should be looked at. Finally, assuming no inconsistency is identified between the remedies, one should look at the issue of double recovery. Discussing these questions, the article offers a number of guiding tests which may be helpful in their resolution. In addition, the article proposes a new legal technique, namely, partial accumulation, to overcome problems presented by the existing rules on double recovery.

The authors then move on to discuss the power of individuals to modify the rules governing accumulation. They conclude that while a provision limiting a party's remedial rights will generally be enforceable, a court should not, and probably will not, uphold neither a provision allowing a party to join together incompatible remedies, nor a term providing for double recovery.

Finally, the article applies the theoretical models discussed in the previous parts to the concrete facts of the Kanyonim case. Contrary to the Court's propositions, it is submitted that the seller was not entitled to enforce, as against the buyer, the two contractual remedies at the same time. The Court in this case had no other choice but to totally disallow the accumulation or, at the most, to allow only partial accumulation, thus reducing the extent of one of the remedies so as to avoid double recovery. Indeed, the authors argue that, though not explicitly, this latter solution was tacitly adopted by the Court. This interpretation of the judgment may help elucidate the Supreme Court's subtle reasoning, and may provide a more solid theoretical basis for the decision reached by the Court.

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SHAHAR LIFSHITZ

POLITICAL-LIBERAL MULTICULTURALISM AS A REMEDY FOR THE RELIGION AND STATE RELATIONS IN ISRAEL

In his treatise, "Law and Culture in Israel in the Beginning of the Twenty-First Century", Professor Mautner analyzes the legal and cultural struggle waged in Israel today between groups that emphasize liberalism and Israel's affinity with the West and groups that advocate its affinity with Judaism and Jewish law. He offers political-liberal multiculturalism as the leading model for the relations among the various groups in Israel.

Discussing the treatise, this article points at Professor Mautner's intellectual and conscious journey between his first treatise, THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW, in which he supported the Supreme Court's struggle to impose liberal values on the Israeli society, and his current treatise. This article argues that this journey reflects a broader collective process in which the main Jewish groups in Israel recognize Israel as a multicultural society and seek formulas to enhance their shared existence in Israel. The article further examines the treatise's main argument, according to which the political-liberal multicultural model is the most appropriate for Israel, since this is the only model that the various groups in Israel are likely to, and must accept. The discussion of the subject, which is based on a political-philosophical theory as well as on an examination of the unique characters of the groups in Israel, clarifies why one should not factually estimate or normatively expect the religious groups to adopt the political-liberal multicultural model as a leading model for the Israeli law and regime, as the treatise suggests. In view of this conclusion, the article examines the methods that are available to the liberal group, assuming the political-liberal multicultural model is not accepted. In this context, the article confronts the majority rule alternative, which holds that one should not impose

liberal values against the majority view, and the constitutional approach that advocates imposing liberalism unilaterally.

Following a constitutional discussion that demonstrates the problems of both approaches, the article concludes with a proposed outline for the attainment of an agreed-upon constitution. At the core of this outline lies a constitutional approach that protects the essential boundaries of the various groups, whereas other areas and issues are subject to the majority rule. According to this approach, one should distinguish between the essence of each group, which will be protected by a constitutional arrangement, and other issues, as important as they may be, which will be decided on through regular public and political dialogue. I believe that by holding honest and real negotiations, the parties discussed in the article will be able to create a chance for themselves to reach such constitutional settlement.

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ALON HAREL & YAIR LORBERBAUM

LAW AND CULTURE: A CRITIQUE

This article critically examines the theory of "law and culture" as understood by Professor Mautner in his book LAW AND CULTURE. The book makes a series of arguments concerning the nature of law, including the claim that the law is not extrinsic to the consciousness of judges and jurists, but is a product of the professional legal culture – the culture present in courts and legal communities – which shapes the consciousness of judges and jurists. Prof. Mautner characterizes the law as a "distinctive cultural system" or a "culture which is internalized in the consciousness of judges." In contrast, we maintain that it is impossible to understand the law without understanding the fact that the law is, in part, a mechanism designed to constrain the effects of the culture and the consciousness of judges and jurists on their legal decisions - i.e., to isolate the law and the legal norms from the judges' and jurists' cultural convictions.

As a matter of fact, the judges' and jurists' culture influences their legal decisions (and consequently, the law), but this does not make the judges' and jurists' culture a part of the law in the same way that the judges' spouses, the weather, and the acoustics of the courtroom influence legal decisions without being part of the law. One ought to sharply distinguish between the judicial decision (the ruling as written by the judge) that is influenced by the culture and the consciousness of the judge, and the legal norm (that ought to guide the judge). In fact, though the culture or consciousness of the judge (or the legal community) practically influences the law, it is never part of the law simply because it forms part of the legal culture. A principle that is part of the judge's (or the legal community's) culture should never be applied when making a legal decision simply by virtue of the fact that it is part of the legal culture.

We argue that the law is primarily a normative system with its own rules. These rules are designed to create a strict separation between legal and non-legal issues, and thus prevent any influence of the judges' or the

jurists' culture on the law, since such a culture is an extrinsic domain and not part of the law. Our investigation reveals that there is an inherent conflict between the law and the culture of the legal community, and the law is partly designed to maintain a separation between the two.
In addition, this article points at some difficulties in Maunter's presentation of classical jurisprudential theories and theories of interpretation (Gadamer). Lastly, the article offers an alternative understanding of the role of law and culture in legal theory and points at ways in which this alternative understanding could contribute to the critical evaluation of legal norms and to the development of legal theory.

MENACHEM MAUTNER

RESPONSE TO HAREL AND LORBERBAUM

In my book LAW AND CULTURE I juxtapose the "law as rules" approach and the "law as culture" approach. Dealing with the "law as rules" approach, I draw on the "the jurisprudence of norms." Alon Harel and Yair Lorberbaum disregard this. They do not judge my arguments in terms of the writings I drew on, but rather apply the jurisprudence of H.L.A. Hart (and Joseph Raz) to them. The inevitable outcome is that my arguments have no chance of success with Harel and Lorberbaum.

Harel and Lorberbaum argue that while Hans-Georg Gadamer's hermeneutics aims at describing the nature of any act of interpretation, I present Gadamer as offering a method of interpretation. Yet, nothing that I write goes against what is self-evident to any reader of Gadamer, even a novice – namely that Gadamer does not offer an interpretive method, but rather an analysis of any act of meaning-creation. Harel and Lorberbaum also argue that while Gadamer's hermeneutics deals with the interpretation of texts of the past, I apply it to the interpretation of materials of the present. Harel and Lorberbaum's argument undermines the universal nature of Gadamer's hermeneutics. Moreover, this hermeneutics has been applied by Gadamer himself, as well as by a series of renowned scholars, to dialogues taking place in the present, such as dialogues between two individuals, and cross-cultural dialogues.

According to Harel and Lorberbaum's main criticism of my book, I hold that judges need to resolve cases on the basis of their personal culture, as opposed to the legal culture and the materials of the law. My approach, however, is just the reverse. Harel and Lorbrbaum pick up a descriptive argument of mine, namely that the common-sense knowledge of judges plays an important role in the way they apply the doctrine of the law, and treat it as if it were a normative argument of mine, namely that judges should resolve cases on the basis of their personal culture.

Harel and Lorberbaum argue that my methodology draws on readings of court opinions, but Harel and Lorberbaum actually pick one local argument of mine (on the role of common sense in the law, as this is reflected in court opinions) and present it as if it were the sum total of my understanding of the nature of decision-making in the law.
Harel and Lorberbaum are ready to give room to the law and culture approach only to the extent that it corresponds with the jurisprudence of H.L.A. Hart.