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EYAL ZAMIR

FURTHER THOUGHTS ON CONTRACT INTERPRETATION AND SUPPLEMENTATION

There is an ongoing debate in Israeli law concerning contract interpretation. This debate revolves around the legitimacy of considering external circumstances when the wording of a contract appears to be unambiguous, the weight to be attributed to values of fairness and reasonableness in the interpretative process and the appropriate role of the Court. The Article analyzes two recent developments in this regard: a series of judgments delivered by Supreme Court Justice Yoram Danziger and a recent legislative amendment to the Contract (General Part) Law. Contrary to common wisdom, the article argues that the gap between Justice Danziger's position and Chief Justice Aharon Barak's theory of purposive interpretation is not as wide as it appears, and that the differences between them largely reflect disagreement about judicial rhetoric in the field of contract law, rather than about judicial practice. The article also argues that the recent legislative amendment is unlikely to bring about a real change in the law, as the wording of the amendment as approved differs markedly from the originally proposed text. The final version actually incorporates the current disagreements rather than resolving them. The article also discusses and criticizes one of the central arguments made by opponents of the purposive interpretation theory, namely that it adversely affects legal certainty and the predictability of judicial decisions. Time-honored insights by the American realists and new experimental and empirical findings jointly show that this argument is largely unfounded. A postscript discusses the recent Supreme Court judgment in the *Sahar* case.

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SHACHAR LIFSHITZ & ELAD FINKELSTEIN

A HERMENEUTIC PERSPECTIVE ON CONTRACT INTERPRETATION

In recent years, the rules regarding contract interpretation have been the focus of a turbulent debate in Israeli law, involving judges, attorneys, legal scholars, and most recently, legislators. When the smoke clears, however, the reality that is revealed is surprising: disputants' attitudes and the differences between them are unclear and sometimes the very existence of an interpretive dispute is debated among the alleged disputants.

This paper seeks to contribute to the Israeli debate on contract interpretation based on two bodies of knowledge. The first is hermeneutics and the second is contract law theory. The paper discusses three major types of tension addressed by hermeneutics: (1) tension between the creator and the created work, (2) tension between language/semantic understanding and the substantive meaning and (3) tension between classical hermeneutic approaches that sharply distinguish interpretation from creation and the hermeneutic theory known as the "interpreter as creator". An integration of these three hermeneutic tensions and their application to contract law establishes a conceptual-analytical framework in which various possible approaches to contract interpretation may be positioned. This hermeneutical analysis is then integrated into the normative debate that has centered in recent years around two theoretical approaches: the neo-formalist approach and relational contract theory. Mapping the normative positions of these approaches in the conceptual framework suggested reveals that the first approach supports a textual approach that is restricted to the work itself and a semantic understanding of its words while the second approach combines a creator-meaning approach that supports consideration of extra-textual information and extends beyond a semantic understanding of the words of the text with the "interpreter as creator" approach. This paper offers a critical analysis of

these two approaches and presents a novel third approach that supports the creator-semantic approach, subject to several exceptions described in the paper, and reflects a complex position on the interpreter as creator.
After proposing the proper model for contract interpretation, the paper proceeds to offer an informed analysis of Israeli law. The paper positions and assesses the various attitudes existing in this sphere on the basis of the suggested hermeneutic and theoretical analysis. Finally, the paper addresses the Amendment to the Contract Law and its impact on contract interpretation in Israeli law.

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GUY DAVIDOV & EDO ESHET

JOB SECURITY: TOWARDS BALANCED INTERMEDIATE SOLUTIONS

Job security arrangements have obvious advantages, as well as some clear disadvantages. Employees should be protected from arbitrary dismissals, yet at the same time, when there is good cause for dismissal, employers should be able to do so swiftly and efficiently. We are therefore in need of innovative intermediate solutions, between the extremes of overly binding job security and employers' unlimited power of dismissal. Following a brief discussion of justifications and critiques of a rule prohibiting dismissal without "just cause", the article considers some intermediate solutions on the theoretical level, including "flexicurity"; a default "just cause" rule; a "just cause" rule coupled with a derogation clause; prohibition of "bad faith" dismissals; and finally, the idea of a quick dismissal process, alongside a strong substantive rule. We then turn to discuss some recent developments which create a spectrum of options – varying degrees of job security – all of which focus on the procedural aspect. We discuss the 2005 collective agreement at Israel's National Roads Company; a new arrangement adopted in 2008 by the legislature concerning public servants; new rules concerning the dismissal of teachers; and some new collective agreements in the private sector which continue the same trend. The article tries to assess whether these new models offer a balanced intermediate solution.

The article presents two main arguments. Descriptively, we seek to reveal the recent changes in the job security sphere and to situate the new arrangements relative to one another and to the two "extremes" of the job security spectrum. Normatively, we examine the new models in light of the theoretical discussion (justifications and critiques) of job security and compare them with alternative intermediate solutions. At the end of the day, we believe that the new arrangements have positive potential, but their success depends on the way in which the courts will review dismissals based on them.

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HAIM SANDBERG

RESTRICTIONS ON THE POLITICAL ACTIVITIES OF NON-PROFIT ORGANIZATIONS AND THEIR FUNDING

In recent years, the Israeli Parliament (Knesset) has produced a wave of parliamentary initiatives aimed at limiting the political activities of Israeli organizations which operate as non-profit organizations. The first purpose of this paper is to examine the justifications for restricting either the political activities of such organizations or their funding from a theoretical, comparative and historical perspective. The article compares Israeli law with the legal situation in England and the United States. It also analyses the issue from a further comparative and historical perspective – with respect to the conduct and financing of political activities of both Zionist and Palestinian organizations.

The theoretical and comparative analysis indicates that while there are weighty reasons that support the right of organizations to engage in political activity, there are also good reasons to restrict their political activities and the funding of such activities. The article suggests a new model, a *scales model*, as an analytical tool for examining the correct balance between these clashing considerations. The model suggests four scales of intensity that may be applied to political activity: a scale that measures the importance of the *interest that is harmed* by the political activity; an *external intensity* scale that measures the intensity of the organization's political involvement in the realm of political parties; an *internal intensity* scale that measures the relative intensity of the organization's political activities within its overall philanthropic activities; and a *restriction intensity* scale measuring the relative intensity of a variety of restrictions that may be imposed on the political activities of organizations. There should be a direct correlation between the intensity of restriction and the intensity of the political activity on one or all of the other scales. The proposed model provides a neutral tool that can present all the relevant considerations and facilitate comparison of alternative solutions.

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YUVAL PROCACCIA

REMEDIES FOR MISREPRESENTATION: AN ECONOMIC ANALYSIS

A contract is formed on the basis of a misrepresentation or a breach of the duty to disclose. What is the remedy to which the aggrieved party ought to be entitled? This Article develops an economic analysis seeking to characterize the properties of a desirable remedy. Formally, existing law recognizes two protected interests: the "expectation interest" and the "reliance interest." In actual fact, three interests are protected, although the definitional distinction between them has so far not been well articulated. The term "reliance interest" sometimes refers to the representee's *"reliance on the contract"*: her interest to be placed in her precontractual position. In other instances, it refers to her *"reliance on the representation"*: her interest to be placed in the position she would occupy if the duty to represent truthfully had been observed. Both interests are distinct from the *"expectation interest"*: her interest to be placed in the position she would occupy if reality was in fact as represented. Each of the three measures bears a distinct impact on the parties' incentives, on the level of deterrence and on the social cost of misrepresentations.

In its first part, the Article develops a simple model, examining the impact of each of the three measures on deterrence. Under the model, two alternative rules emerge as optimal: one is a rule protecting the representee's interest of reliance on the representation; and the other allows a choice between the measure of reliance on the representation and the expectation measure. The measure of reliance on the contract is found to be generally inefficient.

In actual reality, however, various disruptions may undermine the optimal operation of the rules stated above and may consequently generate either over-deterrence or under-deterrence. The second part of the Article compares the relative sensitivity of the two rules to such

disruptions and identifies conditions under which each of them carries a relative advantage.

The Article's third part discusses several extensions: whether damages ought to be restricted by the contractual rule of foreseeability; whether the representee ought to be bound by risks allocated to her in the contract; and finally, under what conditions should a misrepresentation be deemed a breach of contract, as opposed to a tort or the breach of a precontractual duty.

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ITSHAK COHEN

THE PRINCIPLE OF GOOD FAITH IN FAMILY LAW PROCEEDINGS

This article proposes a normative model for coherent application of the principle of good faith in legal proceedings in Family Courts. The first part of the article deals with the normative or principled aspect of this issue and proposes an approach for adapting the application of the principle to the substantive and procedural purposes for which the Family Court was established. The model may be divided into three levels. The central component is an intermediary standard which is higher than the standard of procedural good faith but lower than that of contractual good faith. In most instances, the behavior of a party involved in a Family Court case would be examined on the basis of this standard, because the parties to family disputes are somewhere on the continuum between adversarial parties and parties who are partners to a contract. The second standard is the higher standard of contractual good faith. The third standard is lower, that of procedural good faith. The latter two standards would be applied when appropriate to the purpose of a particular proceeding. This flexible model would shape the level of appropriate behavior in each proceeding and also assist in determining the appropriate remedy in the event that the standard of good faith has been violated.

Analysis of court decisions in the second portion of the article demonstrates that good faith norms are currently applied in family law on an entirely intuitive basis, without following any clear model. Furthermore, the remedies awarded are inconsistent with the nature of a family dispute. It would seem that if the principle were applied consistently and in accordance with a model based on the purpose of the Family Court, different decisions might have been reached. The article examines several issues in family law in the light of the proposed model.

This article is the first attempt to suggest a coherent model for applying this principle to legal proceedings in Family Courts. As such, it is also the

first attempt to reconcile the tension created when the principle of good faith is applied on the procedural level.

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AMIR WEIZENBLUTH

ADEQUATE REPRESENTATION IN CLASS SETTLEMENTS

Class actions have become increasingly common in Israeli law and as a result, the significance of class settlements is growing. This article will consider whether the court should require a condition not explicitly mentioned in the Israeli class action statute when deciding whether to approve a class settlement, namely – whether the class was "adequately represented" by the class representative and his legal counsel. Adequate representation is of central importance in class settlement approval and despite the absence of explicit requirement in the law, the court should nonetheless insist on it. The article suggests that the issue of adequate representation is not only an additional and separate requirement to be examined by the court prior to approval of the settlement, but rather a main justification for binding a member of the class to the settlement to which all the statutory provisions in this matter point and in the light of which they should be interpreted and applied. The article will explore several further issues relating to class settlement approval in view of the requirement of adequate representation: the need for common substantive questions of fact or law; determination of the remuneration and fee due to the class representative and his legal counsel; "coupon settlements"; and the role of the court-appointed examiner and other external bodies in evaluating the settlement.

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ELENA CHACHKO

ON RIPENESS AND CONSTITUTIONALITY

In two recent decisions the Supreme Court of Israel dismissed petitions challenging the constitutionality of laws that had not yet been implemented on grounds of ripeness. The Court held that judicial decisions must relate to concrete facts and that it would generally withhold judicial review of laws that have not yet been applied. This note discusses some of the implications of the ripeness doctrine in Israeli constitutional law and criticizes the way in which it was applied in these decisions. The vague distinction between facial and as-applied constitutional challenges to laws will serve as the analytical framework for this discussion.

The note presents two key arguments. First, linking the constitutionality of a law to its implementation deviates from established practice in Israeli judicial review, which generally discusses the constitutionality of laws in the abstract, irrespective of the concrete circumstances. As such, in the constitutional context the ripeness doctrine should be understood as a new requirement of justiciability introducing an element of time and subject to judicial discretion. Second, it is suggested that the doctrine of ripeness should be understood as a substantive, rather than a technical requirement - one that seeks to examine the substance of the law rather than simply requiring that it has already been implemented. This argument is based on an analysis of the doctrine of ripeness in American constitutional law, from where it was taken. The paper concludes that the appropriateness of conducting judicial review is not determined solely by the ripeness referred to in the two cases discussed and that a different view of ripeness might well have produced different results.