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ISRAEL KLEIN

THE LEGAL USE OF ACCOUNTING PRINCIPLES: HOW NORMATIVE IS ITS NORMATIVE STATUS?

Despite their important role in the social order and use in a wide range of legal and non-legal arrangements, Israeli legal literature has not yet addressed how Israeli law relates to accounting principles, the degree of satisfaction with the existing arrangements, or the possibility of improvement.

This article argues that generally accepted accounting principles (GAAP) enjoy normative status in the Israeli legal system as demonstrated by the obligation of corporations to prepare reports in accordance with GAAP, the legal regime's treatment of financial parameters included in GAAP financial statements and judicial references to GAAP as binding norms.

However, accounting is not like mathematics or physics. Accounting is an applied science, developed to serve defined operational purposes. Therefore, accounting principles reveal structural preferences for certain interests over others. In other words, there is a non-neutral and political dimension to accounting.

In light of the disturbing gap between the normative legal status of accounting on the one hand, and the anomalous regulation of accounting rules and specifically, the way GAAP are set in the Israeli regime on the other, this paper calls for overturning the binding status of accounting as applied with respect to the GAAP.

This has far-reaching implications which include: turning accounting expressions into a source solely of indicators, one that does not necessarily establish distributive arrangements; allowing companies to apply rules other than GAAP; and the creation of a regime that will enable companies to be exempt from the obligation to prepare annual financial statements

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RAM RIVLIN

DIVORCE SETTLEMENT AGREEMENT: TOWARDS A MODEL OF SUPERVISED BARGAINING

Divorce settlement agreements aim to resolve several independent issues: the divorce itself, the distribution of marital property and the allocation of parental responsibility for both care and finances. This enables the parties to link and combine the separate issues in their bargaining. Yet, this characteristic makes the agreement particularly vulnerable to special defects, as well as making it difficult to protect it from ordinary defects. The paper claims that, all in all, the advantages of this integrated bargaining method do not justify its perils. Thus, it is advisable for the law to strive to separate the bargained issues from one another, creating a distinct bargain for each of the topics, or at least to separate the personal parts (such as separation and custody) from the financial ones. The paper analyzes the way in which various legal doctrines respond to the challenges of integrated bargaining, and demonstrates that the current legal response to these challenges is insufficient and unsatisfactory.

The paper then develops an argument for limiting the ability of the parties to contract around the default allocation of marital property upon divorce, i.e. to deviate from the distribution dictated by law (or prior agreements). This is because the main reasons for such deviation are rooted in either integrated bargaining (which it is better to avoid) or otherwise improper considerations. Detailed attention is devoted to justifying the limits that should be placed on the parties' freedom of contract; to the price of renouncing deviations that might have legitimate reasons; to the concern that such deviations are needed in order to secure religious divorce; and to dealing with various practical obstacles to the enforcement of the proposed arrangement.

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SHARON BAR-ZIV & NIVA ELKIN-KOREN

BETWEEN TWO ARENAS: ONLINE COPYRIGHT ENFORCEMENT

Copyright enforcement in the digital era takes place in two parallel arenas: one is the traditional arena of legal procedures in court; and the second is digital enforcement by online intermediaries. The large scale of infringement and the difficulties involved in identifying infringers and prosecuting them in court have led to an "enforcement failure". As a result, heavy pressure has been put on online intermediaries to actively remove infringing content made accessible through their services. The Notice and Takedown regime introduced in the United States and Europe offered immunity to online intermediaries from potential liability for copyright infringement, provided they acted to remove infringing content upon receiving a notice from rightholders. A similar legal doctrine has also been developed by Israeli courts. The existence of two enforcement arenas, operating in parallel, offers a rare opportunity to explore the difference between these two methods of enforcement - digital enforcement and enforcement via courts: Who are the players in each enforcement arena? To what extent do they fulfill the objectives of copyright law? Do they comply with fundamental principles of access to justice and due process?

Although digital enforcement has become robust over the past decades, little is known about the content-takedown operation. Digital copyright enforcement is dominated by a handful of online intermediaries, often multinational corporations, and is executed by opaque and proprietary algorithms. Similarly, our knowledge of copyright enforcement in courts is partial, and it is often limited to published judgments and decisions.

This paper presents the findings of a pioneering empirical study of the two copyright enforcement arenas in Israel. The findings reveal the limitations of each method of enforcement in ensuring access to justice, in guaranteeing due process, and in adequately fulfilling the objectives of

copyright law. Although each of the enforcement methods suffers from limitations, the advantages of the judicial process over the algorithmic removal are still prominent.

These findings highlight the dangers arising from the shift to algorithmic enforcement by online intermediaries. The paper further underscores the need to ensure access to justice, due process and adequate attention to the public interest, and thus may contribute to formulating legal policy for copyright enforcement and content moderation.

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OR SALOMON

COMPETITIVENESS IN THE ISRAELI BANKING SYSTEM: REEXAMINATION

The article offers a comprehensive analysis of the interaction between the banking system and institutional investors in Israel. Initially, the article argues that institutional investors have a common economic interest, influenced by their competition with the banking system, and the exposure of their asset portfolios to the banking system as a whole. Advancement of the institutional investors' common interest does not require any initiative, since it is sufficient that all the actors involved in corporate governance in a bank are aware of the institutional interest, for the bank's policy to be affected. The article then characterizes the weight given to institutional investors' interests in decision making processes in banks and argues that it is given great weight. The main reasons for this lie in the normative framework for the activity of institutional investors in public companies, banks in particular, and in economic characteristics specific to Israel. This state of affairs raises concern as to the existence of a gap between the extent of holdings of the institutional investors in the bank's equity, in their role as shareholders, and the extent of their control over the bank's business strategy. The existence of such a gap increases the likelihood of considerable weight being given, both directly and indirectly, to the institutional interest. From the perspective of the bank as a public corporation, this phenomenon is not necessarily improper, as long as the strategy is in the bank's best interest. However, from a public viewpoint it raises doubts as to the proper balance between competitiveness and financial stability. Furthermore, the article claims that the Israeli banking system is characterized by an increased risk of tacit cartelization. This argument is based on recent research showing a correlation between horizontal holdings of institutional actors in a centralized market and the appearance of anti-competitive features. The article argues: Firstly, in Israel, the institutional interest is influenced not

only by horizontal holdings, but also by the high financial exposure of the institutional investors' asset portfolios to the banking system's performance; Secondly, the normative framework regulating compensation of banks creates incentives for behavior that benefits the common interests of institutional investors. This argument fits both with the research arguing that horizontal holdings might, in and of themselves, undermine competition, and with the research arguing that horizontal holdings are not enough to undermine competition. The combination of circumstances suggests a new explanation to the low level of competition in the Israeli banking system in several financial services, such as in the non-business credit sector. Finally, the article proposes guidelines to deal with this phenomenon, aiming to provide normative and practical tools for policy makers that will help achieve a proper balance between financial stability and competitiveness in the Israeli banking system. The guidelines' aim is to diminish the gap between the extent of control that institutional investors have on a bank's business strategy and the extent of their holdings in a bank. In order to emphasize the need for these guidelines, alternative ways of approaching the matter are discussed. The proposal refrains from imposing more regulation on institutional investors, in line with the current tendency in Israel to strengthen their role as supervisory actors in corporate governance.

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KARIN CARMIT YEFET

IN THE NAME OF THE MOTHER: RETHINKING ISRAEL'S SEPARATIST PRO-NATALIST POLICY

The prevailing view in the research literature is that Israel promotes a brand of pan-Jewish pro-natalism, at the center of which lies the categorical imperative of compulsory motherhood. According to this view, Israel's fertility policies are based on an equation of motherhood-citizenship which holds that all Jewish women are equally obliged to procreate, without regard to intra-Jewish differences based on social, ethnic or personal status. This Article seeks to dismantle the national myth of pan-Jewish pro-natalism, which forces Jewish women into a binary choice between motherhood and marginality. The underlying thesis of this Article is that beneath the thin surface of pan-Jewish pro-natalism, which purports to view all Jewish wombs as equal, there is a hidden thick layer of separatist pro-natalism, which discriminates between different categories of Jewish women. In other words, this separatist pro-natalist ethos undermines the categorical imperative of compulsory motherhood, and instead creates for women a type of "pregnancy permit" which dictates: "worthy" mothers are subject to coerced pro-natalism, while "suspect" mothers are subject to covert anti-natalism.

This Article focuses on the law in two test cases, each of which takes place at a different juncture in the chronology of motherhood: pregnancy termination and child support. With respect to the first case, I argue that Israel's abortion law refines the qualities and capacities expected from the prototype of normal and worthy motherhood, and symbolically penalize "suspect" women through the provision of abortion permits. The second test case deals with the doctrine of coerced fatherhood in Israel's child support law. It shows how this emerging doctrine strays from two basic paradigms of parental gender roles in Israel — compulsory motherhood and bio-economic fatherhood — in order to support the "price/prize" equation: On the one hand, a woman who strays from the traditional

model of the patriarchal family and who exploits her procreative power without male supervision, will be forced to pay a legal "price" in the form of reduction of child support, sometimes to the extent of its complete denial. On the other hand, a fit, responsible and committed woman, who pledges allegiance to the traditional family structure is awarded the "prize" of generous child support payments.

These two sets of rules combine to police the manner in which women exercise their reproductive capital and to create an institutional hierarchy of Israeli motherhood.