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LEON YEHUDA ANIDJAR, ORI KATZ & EYAL ZAMIR

THE REVOLUTION IN THE STATUS OF ENFORCED PERFORMANCE: LAW, THEORY AND EMPIRICAL FINDINGS

According to conventional wisdom, the Contracts (Remedies for Breach of Contracts) Law of 1970 has revolutionized the status of enforced performance in Israeli law. Following the common law, until 1970 the primary remedy for breach of contract was damages, whereas specific performance was an equitable relief available in exceptional cases only. According to the 1970 Law, which follows the civil law tradition, enforced performance is the primary remedy for breach of contract, and is denied only in exceptional cases. However, there are reasons to doubt this conventional wisdom. First, given the complex arguments for and against the remedy of enforcement, it is implausible that legal systems would adopt truly opposite arrangements in this regard. Second, comparative law experts claim that legal systems that adopt conflicting points of departure in this regard largely converge in their practical solutions. Third, several taxonomic and terminological differences reflected in Israeli law narrow the gap between common law and civil law systems in this regard. Finally, various pragmatic considerations regarding the choice between remedies have a similar effect. Contrary to the extensive theoretical and comparative discussions only a few studies, in Israel or elsewhere, have examined the issues involved empirically. None of these studies has quantitatively analyzed actual court judgments.

This Article revisits the theoretical and comparative debates and describes the findings of a quantitative analysis of Israeli Supreme Court judgments concerning remedies for breach of contract during a 69-year period (1948–2016) as well as a large sample of District Court judgments of the past two decades. We hypothesized that, contrary to the prevailing belief among legislators, judges and scholars, no revolution has actually

occurred regarding the resort to the remedy of enforced performance. We were surprised to find that after 1970 the resort to enforced performance has actually *decreased* considerably. The article examines several explanations for this result, using empirical and analytical tools, as well as the possible impact of changes in Israeli society throughout the years. We find no evidence that the Remedies Law influenced the resort to the remedy of enforced performance. However, a significant link has been found between the length of legal proceedings and the resort to enforcement remedies: the longer the proceedings, the less the tendency to claim and to award enforcement remedies. The Article discusses the limitation of the empirical investigation and the implications of the surprising findings.

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RONIT LEVINE-SCHNUR & YUVAL PROCACCIA

LANDLORD-TENANT REGULATION IN THE AGE OF PROTEST: FOLLOWING THE "FAIR RENTAL LAW"

The Israeli Lease and Borrowing Law (Amendment), 2017, also known as the "Fair Rental Law", seeks to ease tenant hardship caused by the dramatic increase in rental prices in recent years. However, by extending the scope of landlords' contractual obligations and by rendering those obligations immutable, the Law is likely to raise prices further. Moreover, the added cost to tenants is likely to outweigh the benefits from improved rental conditions. Based on conventional insights from economic analysis, we demonstrate that the reform is likely to undermine the welfare of tenants in general, and especially of those who are most vulnerable among them. The Article further discusses a number of market failures that may afflict the rental market—including the concern for landlord market power, inefficient signaling and the possibility of latent defects in the leased property—and examines whether the newly-adopted Law may be interpreted as means of correcting them. Although this possibility cannot be ruled out in principle, it is highly unlikely. Hence, it is doubtful that the mere possibility can justify the Law, given its shortcomings.

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SHAY ZILBERBERG & AMIHAI RADZYNER

THE REVIVAL OF THE "DEATH OF MARRIAGE" CAUSE: R. YERUCHAM'S OPINION IN THE RABBINICAL COURTS

One of the most important developments in the Israeli halakhic (Jewish Law) divorce laws is the frequent use of the opinion of Rabbenu Yeruham (Rabbi Yeruham ben Meshullam) by rabbinical courts. Rabbeinu Yeruham, a 14th-century halakhic decisor, ruled that in the case of a "rebellious" couple, that is to say, a couple in which both husband and wife are reluctant to continue living together, the husband is required to give his wife a divorce and without delay. The article discusses this position and its revival from the 1970's onward. 'Revival' - because it was actually never cited in the halakhic literature until rulings by the Israeli rabbinical courts at the end of the twentieth century. The article deals with the significance of this fact which somewhat paradoxically is what enabled the revival itself.

The article follows the first cases in which Rabbeinu Yeruham's position was used, and shows how this position has become a central method for requiring a reluctant spouse to grant a divorce and imposing sanctions on a partner who refuses to comply with the ruling, especially in cases where the spouse does not have a classic ground for divorce, based on fault. Through a systematic examination of the opinions of all the dayanim (rabbinical judges) who currently serve in the High Rabbinical Court, the article attempts to identify the extent of the use of Rabbeinu Yeruham's opinion.

The enormous significance of this development is clear. The use of this opinion makes it significantly easier to get a divorce in Israel. Naturally, there have been dayanim who identified this approach with the modern divorce ground of "death of marriage" or "irretrievable breakdown". The article suggests that these grounds developed in the western world very

close to the time of the revival of Rabbeinu Yerucham's opinion and that the two developments are linked.

In view of the dramatic effect of this approach on the classic halakhic divorce laws, it is not surprising that it has aroused significant opposition. The article points to various interpretive ways in which different dayanim have tried to reduce the impact of Rabbeinu Yeruham's approach, as well as to dayanim who ignore it altogether. These suggest that we have a major dispute about the nature of halakhic divorce grounds and about the question of whether divorce should be made "easy", i.e. simply because there is no hope of the marriage persisting.

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EDO ESHET

WHY ONE THIRD? ON REPRESENTATION, FREEDOM AND STABILITY IN COLLECTIVE LABOUR LAW

In order to obtain legal recognition as a representative employee organization for the purpose of signing a special collective agreement under the Israeli Collective Agreements Law, a trade union need only acquire membership of one third of the employees included in the bargaining unit it seeks to represent, although any collective agreement signed would impose mandatory obligations on all the employees included in the bargaining unit, regardless of their membership.

One may wonder how this requirement is consistent with the basic principles of democracy and the principle of majority rule. Without justifying the requirement, the article attempts to deal with this question by providing a theoretical framework for the threshold of one third which is consistent with the principles of the democratic regime. Based on Philip Pettit's writing, the article argues that in the context of labor relations we should replace the tenet of Liberty as Non-Interference with Petitt's concept of Liberty as Non-Domination. By doing so, the article seeks to conceptualize employees' organizations that comply with certain conditions as an antidote to the power of the employer to control the workplace – an antidote that strengthens the freedom of workers. Therefore, according to the article, the threshold of one third should not be regarded as a failure to achieve majority support, but rather as a demand for stability of collective action in the workplace.

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ASSAF TABEKA

SMALL CLAIMS COURTS IN ISRAEL: THEORETICAL, PROCEDURAL AND NORMATIVE ANALYSIS CONCERNING THE POOR

Small Claims Courts are a judicial tribunal with substantial progressive potential. The access to this court is easy, the legal process is fast and inexpensive and the opportunity to receive remedy does not depend on in-depth legal knowledge or skills, but rather on a simple delivery of the facts of the case. Hence, people lacking significant means can use this tribunal as a vehicle for bringing their voices into the legal arena, a site that grants the less-privileged the opportunity to stand up for their rights and influence the social order. This article analyzes the question of whether this court, based on its structure and substantive and procedural rules can be a valid platform for achieving this goal.

The article's main argument is that the very absence of a coherent legal procedure following uniform procedural rules may actually harm poor people in this unique court. A court that treats procedural rules as a nuisance and not as an opportunity to fulfil the progressive potential that lies at its core – and that therefore does not distinguish between rules that create difficulties for poor people and rules that empower them – preserves the power gap between "haves" and "have nots".

In this sense, the article suggests a new way of thinking about the connection between Small Claims Courts and poor people. It shatters the common assumption that a legal arena lacking procedural rules is an effective instrument that helps poor people and empowers them. As the article shows, this well-intentioned assumption often harms rather than helps poor people.

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ILAN BENSHALOM

THE TAXATION OF CORPORATE ENTITIES IN ISRAEL

This article critically reviews the rules governing the taxation of corporate entities in Israel. It begins by reviewing the current legal arrangements and relevant academic literature. It then argues that taxpayers' ability to elect whether to be taxed as a pass-through entity or as a separate corporate entity which is subject to corporate tax creates many revenue and distributional costs. It suggests that the current set of rules should be replaced with a system in which all private corporations are taxed as pass-through entities. The analysis that follows makes certain innovative suggestions with respect to how the proposal could deal with the challenges of pass-through taxation so that compliance and administrative costs, as well as tax planning potential, remain low. The article ends by identifying a few important incremental policy steps that policymakers should adopt to improve the rules governing the taxation of corporate entities even in the absence of a major tax reform.

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EHUD GUTTEL & RAM WINOGRAD

CRIMINAL LAW AND TORTS: ON THE CHOICE BETWEEN BALANCING AND CONSISTENCY

What are the legal implications of litigants' criminal liability in tort-related disputes? In this essay, we point to an emerging (yet largely overlooked) pattern in the Supreme Court's recent adjudication, whereby the Court consistently erodes the long-established linkage between criminal and tort liability. While no explanation has been offered for this change, we claim it stems from the Court's increasing need to maintain a balance between the two legal branches. The essay further suggests the potential drawback of the Court's recent approach: its failure to provide normatively coherent decisions.