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YEHUDA ADAR

DETERMINATION (*GMIRAT-DA'AT*) AND DEFINITENESS (*MESUYAMUT*) – INDEPENDENT REQUIREMENTS?

Every Israeli lawyer (and law student) knows that under Israeli law an agreement is legally enforceable only if it complies with two cumulative requirements: First, the agreement must be definite, i.e., sufficiently detailed (the *mesuyamut* requirement); second, it has to reflect the parties' *gmirat da'at* (literally:"[de]termination of mind"). Since 1973, when these prerequisites were first incorporated in the Israeli Contract Law, it has become almost an axiom that, notwithstanding some interrelations between them, these are two independent requirements. This article argues that, contrary to this conventional assumption, the two requirements are theoretically inseparable. More conspicuously, it is argued that in Hebrew the term *Gmirat Da'at* contains, at its very core, an element requiring that a person's mind be not only determined (i.e., strong and decisive) but sufficiently concrete (i.e., detailed). This creates an inevitable semantic overlap between this particular element of the *gmirat da'at* requirement and the definiteness requirement (*mesuyamut*). Thus, as a formal legal requirement, definiteness (*mesuyamut*) becomes superfluous – as it is already implicit in the former requirement. A comprehensive empirical study of the case law on contract formation reveals that the actual practice of the courts clearly supports this analytical-interpretive theory. By shedding new light on the complex relationship between these two fundamental legal concepts, the Article hopes to improve our understanding of the basic elements of every contract. While doing so, it highlights the power of language and illustrates the deep (and often hidden and unexplored) links between language, culture, and law.

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EYAL ZAMIR

CONTRACTS INTERPRETATION: THEORY, LAW, FACTS AND VALUES

The Article revisits the debate over contract interpretation, which has long preoccupied the Supreme Court, the legislature, and legal academia in Israel. The debate revolves around the legitimacy of considering external circumstances when the contract's text appears to be unambiguous, the weight attributed to values of fairness and reasonableness in the interpretative process, and the appropriate role of the court. The Article analyzes a recent development in this regard: the Supreme Court ruling in Bibi Roads Earthmoving & Development Ltd. v. Israel Railways Ltd. It critically analyzes the three different opinions written by Justices Uzi Vogelman, Ofer Grosskopf, and Alex Stein, focusing on Justice Stein's neo-formalistic approach. The Article points to difficulties in Justice Stein's theoretical analysis and description of extant law; indicates a discrepancy between the theoretical analysis and its implementation; questions the proposition that it is possible to interpret contracts while disregarding normative considerations; and criticizes the Supreme Court for the confusion it has created.

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EFI ZEMACH & OMRI BEN-ZVI

CONTRACT INTERPRETATION: THEORY AND PRACTICE

Contract theory aims to explain and to justify contract law using different normative principles. This article argues that, at least within contract law, theory is not only intellectually stimulating but it is also important from a practical point of view. This is because contract theory can be used as a method for producing a coherent interpretation of contract doctrine, which contributes to a deeper understanding of case law and rulings in this field.

To demonstrate this approach, the article analyses the recent Supreme Court decision in the case of *Bibi Kvishim*, in which several justices offered contrasting approaches to the interpretation of contracts, thus causing confusion as to whether this decision deviates from the famous *Aprofim* ruling. The article first introduces *Bibi Kvishim* and examines its theoretical basis vis-à-vis other recent rulings in contract law. The theoretical analysis of the decision in *Bibi Kvishim* is based upon diverse theories, e.g. will theory, economic efficiency, neo-formalism, theories based on perceptions of fairness and reasonableness, and pluralistic theories.

The article argues that it is a mistake to view the *Bibi Kvishim* ruling solely from a doctrinal perspective, and completely disregard its theoretical aspects. In order to reach a deeper understanding of this decision and its importance, it should be viewed through the lens of contract theories.

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OFER TUR-SINAI & MICHAL SHUR-OFRY

A.SH.I.R. CELEBRATES TWENTY – AN EMPIRICAL STUDY

In 1998, in the landmark case of A.SH.I.R., the Israeli Supreme Court ruled that the law of unjust enrichment applies alongside intellectual property law. Thus, a plaintiff can seek recovery against an imitator based on unjust enrichment even in the absence of a valid intellectual property claim. The judgement was described as a dramatic development in Israeli private law and triggered much controversy. One of the major concerns was that the ruling would result in an unjustified, indirect expansion of intellectual property rights, beyond their recognized statutory limitations, and would yield a chilling effect in the field of innovation. Accordingly, there were numerous proposals to overrule the decision, including in a recent Attorney General opinion submitted to the Supreme Court.

This study seeks to evaluate the implications of A.SH.I.R. empirically, twenty years after the original decision. We first perform a quantitative analysis, examining all Supreme Court and District Court decisions rendered during the twenty-year period that included an unjust enrichment claim, which was raised in regard with imitation of intellectual products. We then proceed to a qualitative analysis, focusing on "A.SH.I.R.-like" cases, where the unjust enrichment claim was upheld despite the absence of intellectual property protection. We find that, contrary to the gloomy predictions, the A.SH.I.R. case, as applied by the courts, did not cause an upheaval in the field of intellectual property. Out of more than four hundred decisions concerning intellectual property and unjust enrichment, the number of decisions where the unjust enrichment claim was upheld despite the absence of a specific IP right is very small. Moreover, these cases can be classified into several distinct categories, in each of which there was a noticeable shortcoming in the Israeli intellectual property landscape. The major concern voiced by the critics, that courts

would unduly expand the boundaries of intellectual property protection through unjust enrichment, materialized in no more than two or three cases. On the other hand, the law of unjust enrichment was recently used in one case in a "reverse" manner, as a means to restrict intellectual property rights and promote competition. We discuss these findings vis-à-vis the notions of certainty, flexibility, and unintended consequences, and conclude that they necessitate a re-evaluation of the calls to overrule the A.SH.I.R. decision.

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AVI WEINROTH & ARIK MEGIDISH

BUILDING RIGHTS: A RE-EXAMINATION

Building rights are essential to determining the economic value of real estate, and are crucial in its utilization. However, difficulties have been encountered when attempting to define them legally. A gap has emerged between practice and legal conceptualization, and this has raised two serious problems: one legal and the other practical. On the legal level, the courts have found it difficult to define "building rights" as a property right that can be appropriately expressed in the Land Registry, and to which it is possible to apply the law concerning dissolution of partnership laws. This has produced a practical difficulty, since in the absence of registration in the Land Registry it is not possible to register a warning note regarding a transaction with respect to building rights, thus making it likely that conflicting transactions might take place. Furthermore, such building rights can neither be pledged nor foreclosed. This normative situation is intolerable, since on the practical level building rights transactions take place on a daily basis. It is necessary to find a legal definition that will permit parties to register a transaction in building rights in a way that will be binding on third parties.

The purpose of this article is to re-examine this issue based on Amendment No. 33 of the Real Estate Law, which introduced a new concept of three-dimensional plots. We suggest conceptualizing building rights as quasi-proprietary rights in real estate that will mature into full ownership at the height dimension of the real estate. This new definition is consistent with the "property as institutions" approach, which perceives property as a right that binds individuals to respect and take into account the needs and requirements of the public - and in this instance, the needs of environmental planning. Finding the right legal definition paves the way for a number of practical solutions, which are then discussed.

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SHAHAR LIFSHITZ

CONSENSUAL PATERNITY DENIAL

This article deals with three situations in which a man and a woman who are the genetic parents of a child, agree that the father's genetic parenthood will have no practical and legal significance and that the mother will serve as the sole parent, for the purpose of all rights, responsibilities and obligations. (1) An agreement to deny parenthood made at the stage when the mother is pregnant, or shortly after birth; (2) a sperm donation from an anonymous donor; and (3) a sperm donation from a known donor.

The first part of the article presents three lines of thought that relate to different aspects of the situation. One line of thought is based on *the contractual point of view*. The second focuses on *the best interests of the child and the distinction between the best interests of the hypothetical future child and those of the specific child.* The third is focused on *the right to parenthood*. The article shows that none of the explanations proposed is sufficient to provide a coherent explanation for the existing position of Israeli law and/or to provide a satisfactory policy for regulating these three situations.

The second part of the article presents an alternative approach. This approach seeks to replace the private aspect reflected in each of the views discussed above with a broad network of thinking about parenting known as the "institutional-public approach to parenting". The article explains that Israeli law rejects the "agreement to deny parenting" because it contradicts the need to shape parenthood as an institution that reflects irreversible, non-commercial responsibility, focused on the best interests of the child and the relationships between the children and parents. The article will further argue that because of their support for the right to parenthood of single mothers, Israeli law and Western law in general, seek to construct a social category of "donor", referring to the "right" person to help women or couples realize their desire to become parents. The article proposes some mechanisms and limitations that may permit the donation mechanism without undermining the institution of parenthood and the

ethos this represents. The position that rejects donation from a known donor is justified because this creates a category of "partial" parenting that may harm the well-being of the child. In addition, it also blurs the line between categories and opens the door for a person to act as a quasi-parent without taking full responsibility for his/her children, thus harming the concept of the "parenting institution".

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ETHAN ZRAHIA

REVISITING LIFE IMPRISONMENT OF JUVENILES IN VIEW OF NEW DEVELOPMENTS IN ADOLESCENT BRAIN RESEARCH

The special status of juvenile offenders in criminal law is widely recognized throughout the world, including in Israeli law. It is therefore customary to attribute diminished criminal responsibility to juveniles, compared to that attributed to adults. However, under Israeli law it is now possible to impose on minors the punishment that is in fact the most severe in the statute book - life imprisonment. This is not only a theoretical possibility; in recent years, this punishment has been imposed in a number of cases on a person who was a minor when the offense was committed. In this note, I shall contend that the arrangement in Israeli criminal law concerning the imposition of a life sentence on juveniles, as it currently stands, is at variance with the purposes of punishment in criminal law as recently entrenched in the Penal Law. Within this framework, I shall focus mainly on recent research in psychology and neuroscience, which indicates a significant difference between the brains of adolescents and the brains of adults. This difference has led to a certain perceptual change vis-à-vis the criminal responsibility of juveniles around the world, and in this note I shall endeavor to examine the significance of these differences for Israeli law. Finally, I shall propose a change in the criminal law in Israel that would curb the possibility of imposing a life sentence on a person who was a minor at the time the offense was committed. I shall also briefly discuss the general problems arising from the life sentence as practiced in Israel, problems which also manifest when the punishment is imposed on adults.