MISHPATIM 51 2021

NIR BAR-ON & EYAL ZAMIR

ILLEGALITY, CONTRACTS FOR THE SAKE OF APPEARANCES OR CONTRACTS MEANT TO CREATE A SECURITY INTEREST?

In *Top Be'merhavei HaSharon v. Kaplan,* the Israeli Supreme Court held that contracts that purported to be for the sale of land were actually contracts for the sale of apartments to be built on that land. Thus, they were determined to be contracts for the sake of appearances and illegal. Consequently, the contracts were void, and the purchasers were entitled to restitution.

In this case-note, the authors argue that the contracts were not made for the sake of appearances, but rather they were meant to create a security interest in the land. While the behavior of the parties was problematic, it should not have rendered the transaction illegal and void. Furthermore, the authors contend that the outcome of the judgment is incompatible with policy considerations regarding illegal contracts. Beyond the circumstances of the specific case, the authors discuss the criteria for the resolution of cases that lie in the intersection of the three doctrines: illegality, contracts for the sake of appearances, and contracts that are meant to create a security interest.

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BENJAMIN PORAT

THE RIGHT TO LIFE IN DIGNITY IN LIGHT OF JEWISH LAW: ITS CONSTITUTIONAL STATUS

The Supreme Court ruling in the *Commitment to Peace and Social Justice Society v. Minister of Finance* was a milestone in recognizing the constitutional status of the right to life in dignity. The Supreme Court established that the responsibility for ensuring the social security of the poor is part of the constitutional structure of the State of Israel and binds the Legislature and the Executive. How would this Supreme Court ruling have differed if Jewish Law sources had been among those that inspired the judges? This article is devoted to outlining the contribution Jewish Law could have made to the legal discussion of this issue. The article suggests four complementary conclusions. First, in recognizing the legal responsibility of the State for the social security of its citizens as part of its constitutional structure, the justices of the Supreme Court could have found a historical anchor and conceptual roots in the Jewish legal tradition. Second, the holding that the right to life in dignity is a constitutional right, superior to other legal norms, is an achievement of Israeli law that could have contributed significantly to the development of the Jewish tradition in this field had the decision been made through dialogue with Jewish sources. Third, in the context of legal language, the duty-based discourse of Jewish law has advantages over the rights-based discourse of the Supreme Court ("The Right to Life in Dignity"). Fourth, while the Supreme Court justices derived the right to social security from the right to dignity, Jewish Law points to the opposite connection between the two – assisting the poor is particularly prone to injuring dignity, and therefore particular sensitivity is required in identifying appropriate means of assistance. Jewish Law can therefore reinforce some of the conclusions of the Supreme Court; it can be enriched by others; and it can challenge yet others. This is an invitation to construct a Jewish-Israeli discourse in the realm of welfare law by merging the horizons of the worlds of Jewish Law and Israeli Law.

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MORAN OFIR & IDO SADEH

ARE SECURITIES ISSUED IN ICOS? ON THE REGULATION OF DIGITAL TOKENS ISSUED BY COMPANIES

Initial Coin Offerings (ICOs) are a new fundraising mechanism whereby ventures can raise public capital through the use of Distributed Ledger Technology and without the involvement of traditional intermediaries. This new mechanism has quickly emerged as a popular fundraising tool, by means of which thousands of ventures have already raised billions of dollars. Despite the rapid growth of this mechanism and its considerable impact on the financial industry, there is currently no Israeli literature studying ICOs. The present Article aims to fill this gap.

The Article descriptively analyzes the ICO model, the ICO market and its characteristics, and the regulation of ICOs in Israel and other leading jurisdictions. In light of this descriptive analysis, the Article then proceeds to develop a normative framework for discussing the regulation of ICOs in Israel. This framework covers three main areas. First, it outlines the options available for regulators – regulating ICOs under existing securities law amending existing legislation, or establishing a bespoke regulatory framework – and discusses the challenges involved in each. Second, it analyzes the existing tests for determining when digital tokens are securities and proposes guidelines for clarifying this assessment. Third, it analyzes the informational asymmetries associated with ICOs and proposes tailored disclosure requirements to mitigate those asymmetries effectively.

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CHAGAI SCHLESINGER

PRESUMPTIONS AS MULTI-LAYERED NORMATIVE ARRANGEMENTS

Our legal world is filled with presumptions, and legal theory has explored various aspects of such presumptions. In this article I seek to show how the use of presumptions establishes multi-layered normative arrangements, that is, legal arrangements in which different (and perhaps contradictory) normative decisions co-exist simultaneously. Legal presumptions focus on the factual question of what happened, but they are often based on normative considerations. This multiplicity enables presumptions to proclaim one normative position, while at the same time establishing a norm based on another normative position. This possibility assists legal players in situations where the normative dilemma is "tragic", that is, in situations where they wish to avoid making a binary decision.

I will illustrate this argument through the legal presumption that determines the danger to life posed by an intruder to a dwelling, as formulated in the Talmud. First, I will show how the contradictory normative considerations regarding the scope of self-defense in a dwelling make it difficult to design the legal rule, and how modern legislators deal with this difficulty, including by use of a presumption. I will then discuss the Talmudic presumption and show how it is designed - on the normative and literary levels – as a multi-layered normative solution. In the third part of the article, I will discuss the connections between presumptions and another legal mechanism that creates multi-layered normative arrangements - the acoustic separation mechanism. Finally, I will address possible gaps between the Talmudic presumption and modern legal presumptions in order to examine critically our ability to apply what we can learn from the phenomenon exemplified in the article to our modern legal world.

MISHPATIM 51 2021

IDO BAUM, EHUD (UDI) GINDES & DALIT GAFNI

RESTRUCTURING OR LIQUIDATION? THE CHARACTERISTICS OF CORPORATE BANKRUPTCY IN ISRAEL

This study, the first of its kind in Israel, examines the characteristics that enable us to evaluate the likelihood of a successful restructuring process in corporate bankruptcy cases. The findings of this paper are based on a quantitative empirical study of all corporations that filed for stay of bankruptcy proceedings between the years 2015 and 2018, with the intention of restructuring and resuming their activities as a going concern.

The findings show that only 50% of the corporations that filed for stay of proceedings reached an agreement with their creditors that resulted in a successful restructuring (defined as either resuming economic activity or being sold to an external investor as a going concern). The overall share of corporations that managed to restructure after corporate bankruptcy is extremely low, consisting of no more than 2.5% of the total number of corporate bankruptcies.

Statistical analysis of data collected manually from corporate bankruptcy files shows that the most prominent determinants of a successful restructuring process are a low ratio of debt to revenue; a ratio of secured debt below 55% of the total debt; location of corporate headquarters at the geographical and economic centers of the country; and an intermediate range of annual revenue. One of the statistically significant findings is that the probability of a successful restructuring process is extremely low when the court rules in favor of restructuring without having detailed reports on the corporation's financial status at its disposal. The data also corroborate the argument that restructuring rather than liquidation significantly increases the creditors' return, especially that of unsecured creditors.

As of 2019, the Bankruptcy Law reform in Israel requires courts to rule whether corporations filing for bankruptcy should be liquidated or directed to a restructuring process. The purpose of this article is to provide tools for the court in making these complex decisions.

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UDI NEUMAN

"HIS HAND WILL BE UPON ALL, AND EVERYONE'S HAND UPON HIM": LEGAL ADVISERS IN GOVERNMENT MINISTRIES IN ISRAEL'S FIRST DECADE

In this article, I will examine the institution of legal advisers in government ministries in Israel's first decade. The main argument of the article is that a number of institutional tensions, especially with respect to the Attorney-General and the Ministry of Justice, characterized the work of the legal advisers during this decade. Although such tensions are the lot of every ministerial legal adviser, they were intensified in the first ten years of Israel's existence, which included the construction, contradiction, and design of state institutions. These tensions, I would argue, sometimes led to bureaucratic resistance by legal advisers to many government officials. This resistance shaped the institution of ministerial legal advisers and their relations with the Ministry of Justice and the Attorney-General for years to come.

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HADAS FIRER-ESH

LIABILITY FOR PROPERTY DAMAGE CAUSED BY DEFECTIVE IMPORTED PRODUCTS

The development of a global market poses various challenges for the Israeli legislature. Inter alia, ever-expanding importation raises various questions regarding the scope of importers' liability for the products they import, particularly the liability of unofficial importers. While the liability of importers for bodily injuries caused by defective products is regulated in the Liability for Defective Products Law, their liability for property damage is not expressly regulated. In this paper, I examine how the courts have dealt with such cases, and I argue that the standard of liability for property damage should be expanded. I suggest that this need emerges from the courts' rulings, which demonstrate a lack of coherence in negligence-based liability, and I propose two possible models for expanding this liability. One of these models would help to construct an appropriate framework of liability, formulate legal rules necessary for its implementation, and eventually, develop proper standards of care and conduct for importers.