MISHPATIM 51 2022

YOAV DOTAN

TWO CONCEPTS OF DEFERENCE – AND REASONABLENESS

Despite its prominent status in administrative law, the meaning of reasonableness remains unclear and the concept suffers from much vagueness and indeterminacy. I argue that in order to understand reasonableness we need to focus on the concept of deference. Deference is a central concept in judicial review but it tends to be neglected in contemporary literature. I argue that we need to study deference by examining the extent to which the deferrer (i.e. the court) agrees, or disagrees, with the position of the deferree (i.e. the agency) on the merits. In this respect, I suggest a distinction between two modes of deference. The first is *deference of disagreement* by which the Court examines the views of the agency on the merits, and balances its disagreement with them and the content-independent (second-order) considerations that call for deference. The other mode is *deference of avoidance* by which the Court first examines the power of the content-independent considerations that call for deference, and only then looks to the merits of the decision, while the extent of this examination is influenced by the power of those second-order considerations.

In Israeli administrative law, one can identify two models of unreasonableness. The first is unreasonableness of lack of minimal foundations. Under this model, the court interferes with an administrative decision only if it is extremely unreasonable, in the sense that it lacks minimal foundations on the face of the matter. This model was prominent in court decisions during the 1960's and 1970's and it fits well in the model of deference of avoidance. In the early 1980's, however, a new model of reasonableness was introduced. Under this model, the agency is required to balance all relevant considerations, and the court will interfere if it finds that agency's balancing to be unreasonable. I call this model balancing-unreasonableness, and argue that it fits well in the deference of disagreement model.

Since its introduction, balancing unreasonableness has become the dominant model in judicial rhetoric. Nevertheless, I argue that we can often find court decisions that actually espouse the earlier model of unreasonableness, even when using balancing rhetoric. I use this conceptual framework to analyze various prominent court decisions and then offer some guidelines for choosing between the two models for different types of administrative decisions.

MISHPATIM 51 2022

RUTH PLATO-SHINAR & SOL AZUELOS-ATIAS

SIMPLIFYING THE INTERACTION BETWEEN BANKS AND THEIR CUSTOMERS: TOWARDS MODERNIZATION OF THE BANKING CONTRACT LANGUAGE

The article discusses the linguistic and conceptual-informative features that make the language of the interactions between banks and their retail customers impenetrable for the average customer.

We argue that the linguistic and conceptual-informative gaps between the parties are the main reasons that make the banking contract incomprehensible for the average customer. We show that these gaps derive not only from the complex grammar and convoluted wording of the contract, but also – and mainly – from the complexity of meanings and ideas implicitly conveyed throughout the contract, based on knowledge that is obvious to lawyers and bankers, but not to the average customer.

We argue that these gaps are rooted in three types of failures of communication between the bank and the customer: failures in decoding the grammar; failures in the interpretation of archaic words from the general Hebrew and professional terms; and failures in completing implicit information contained in inter-textual links. These failures refer not only to the explicit layers of the text, but also to the conceptual information (both legal and financial) that is implicitly delivered. The article makes a first attempt to provide a scientific elucidation of the abovementioned failures, based on systematic linguistic analysis.

The test case chosen for this analysis is the contract for managing a bank account, which is the basic contract that regulates the relationship between the bank and its customers and serves as a basis for the variety of activities and transactions that customers perform with the bank.

The article calls for streamlining the communication between banks and their customers by rephrasing the banking contract in plain language, according to the innovative linguistic-conceptual-informative model detailed in it.

In light of technological developments and the growing trend of online banking, the article offers an innovative way of fulfilling the aforementioned obligations in the digital age, increasing information accessibility and transparency.

MISHPATIM 51 2022

EYLON BLUM, REVITAL YOSEF, SHARON HANNES
& BENI LAUTERBACH

THE VALUE OF CONTROL FOLLOWING EXTENSIVE CORPORATE GOVERNANCE REFORMS IN ISRAEL

Does Israeli law restrain controlling shareholders? We examine the impact of the Israeli corporate governance reforms of the past twenty years – starting with the enactment of the Companies Law in 1999 – on the private benefits of control in publicly traded companies. We use the premium paid in control-transfer transactions to estimate the value of control for controlling shareholders. In a relatively large sample of 60 full-control-transfer transactions we find that during the sample period (2001-2019) the average value of control of an Israeli public company is about 10% and has decreased by about two-thirds relative to its value in earlier periods. The erosion of control value is evident even within our sample period: the estimated median value of control in the early decade of our sample period (2001-2010) is 9.9% of the company's market value of equity, but only 5.5% in the later decade (2011-2019). It appears that currently, following all the reforms, the Israeli market does not exhibit high or excessive private benefits of control. Lastly, we also observe and document a significant negative correlation between the size of the company and the value of control, when control is measured as a percentage of the company's market value.

MISHPATIM 51 2022

YEHONATAN GIVATI & ISRAEL ROSENBERG

HOW DO JUSTICES ON THE SUPREME COURT OF ISRAEL COMPOSE JUDICIAL PANELS?

Until recently, a procedure in the Supreme Court of Israel allowed each justice to compose three-justice panels. This unique ability of justices to compose panels allows us to test three theories of panel composition by justices: random selection, professional selection, and strategic selection. We assembled an original database of decisions made under this procedure during a two-year period in which the composition of the court remained stable (around 800 court decisions, from January 2015 to April 2017). The data reveal a strong bias in justices' panel composition. A Gini coefficient measuring the extent of inequality in each justice's panel composition, which ranges from 0 (total equality) to 1 (total inequality), is 0.82 on average, which contradicts the random composition theory. The high variance in the choice of panel members contradicts the professional composition theory. The data support the idea that justices compose panels strategically, and this theory is also supported by several case studies. Accordingly, the data uncover justices' revealed preferences for panel members. We use the data to depict relationships within the Supreme Court of Israel, and identify three groups of justices. We also show that justices who were selected by the current Chief Justice under the above procedure before she became Chief Justice are more likely to sit on a panel with her in ordinary hearings after she became Chief Justice. Since the Chief Justice has the legal authority to compose ordinary panels, this is also consistent with strategic panel composition. In light of our findings, we conclude by recommending a change in the manner in which panels are composed on the Supreme Court of Israel. We recommend the use of computer software to compose all judicial panels randomly, and to determine the identity of the justice on duty who deals with each petition.

MISHPATIM 51 2022

HAIM WISMONSKY & AMOS EYTAN

THE PRIVILEGE AGAINST SELF-INCRIMINATION: RE-EXAMINATION IN LIGHT OF RECENT TECHNOLOGICAL DEVELOPMENTS

In recent years, law enforcement agencies around the world have faced increasing difficulties with the need to search password-protected and encrypted computers, cellular phones, specific apps or online services. These difficulties received significant public attention following the terrorist attack in San Bernardino in 2015. After this attack, the FBI approached Apple and asked for its assistance in overriding the encryption on the phone belonging to one of the terrorists, because it had no technical ability to override the encryption on its own within a reasonable amount of time.

This and many other cases indicate the collision between the need of law enforcement and security agencies to lawfully search the computers and cellular phones of suspects and witnesses, and the devices owners' right to privacy and their privilege against self-incrimination.

The article examines the main technologies used today to prevent unauthorized access to material stored on computers and cellular phones, including face-recognition, fingerprints, and vocal identification. The article also reviews the privilege against self-incrimination from a historical point of view and by presenting its traditional justifications. Furthermore, we present a legal model that allows balancing the need of law enforcement agencies and the owners' rights to privacy and the privilege against self-incrimination, while examining different global approaches to this issue, and different legal models. Then we present the argument that while the privilege against self-incrimination is usually considered an absolute privilege, its justifications may equally lead to its interpretation as relative, meaning that it may be balanced with other interests. The model does so using a few guidelines, consisting of both strict rules and parameters that will be examined on a case-by-case basis.

MISHPATIM 51 2022

SHAI FARBER

THE STANDBY COUNSEL – BETWEEN THE RIGHT TO LEGAL REPRESENTATION AND THE RIGHT TO SELF-REPRESENTATION

The right to legal representation in criminal proceedings is a fundamental right in Israeli law. However, in cases where a defendant is not interested in legal representation, the fairness and efficiency of criminal procedure are violated. Until now, Israeli law has not provided any way of preventing these violations in cases where defendants and suspects have insisted on representing themselves. This article proposes a new legal model for such cases that will significantly reduce the violations discussed: the "standby counsel".

A standby counsel is an attorney appointed to assist a client who has invoked his/her right to self-representation. The standby counsel will provide guidance and advice to such a client during self-representation. As such, he/she will help to guarantee a fair and expeditious trial. Unlike a regular defense attorney, the standby counsel does not represent the defendant in court, but rather serves as an aide in his/her defense. He/she accompanies the defendant throughout the proceedings, assisting and advising on legal issues as they arise during the trial. The proposed standby counsel is therefore an attempt to establish a legal practice that balances two conflicting interests: the defendant's right to legal representation in a criminal trial and the right to choose self-representation. Despite the theoretical and practical importance of the standby counsel, it has not yet been adopted in Israeli criminal procedure.

The article discusses the question of whether it is appropriate to adopt the standby counsel in Israeli law and argues that the answer to this is affirmative. The use of standby counsel does, however, have disadvantages and it can raise complex dilemmas. The article seeks to address these difficulties, and to propose a balanced and innovative model that makes it possible to adopt the standby counsel in Israeli law. Finally, based in part on experience gained in foreign systems, the article outlines preliminary guidelines for establishing an appropriate model for the standby counsel in Israel.

MISHPATIM 51 2022

YEHUDA ADAR

FROM CHAOS TO COHERENCE IN CONTRACT FORMATION: CAN DEFINITENESS AND SUBSTANTIVE COMPLETION CO-EXIST?

The formation of a contract under Israeli law necessitates two cumulative elements: "Gmirat-Da'at", i.e., a resolute intention to create an obligation, and "Mesuyamut", i.e., definiteness of the agreed upon transaction. According to statute and entrenched case law both elements are essential. However, an examination of the case law casts doubt on the necessity of the definiteness requirement. The Article exposes a long-recognized judge-made rule under which courts are authorized to complete or supplement a void in the parties' agreement *even if the void touches upon a substantive or fundamental issue*. The article provides a critical analysis of this judge-made rule on two levels. On the descriptive level, it is argued that the "substantive completion" rule is starkly inconsistent with the definiteness requirement. This is because under this requirement the contracting parties themselves must agree upon every material aspect of their deal. Thus, an "analytical dissonance" has been created whereby two contradictory norms co-exist at the heart of the law of formation. Having exposed this dissonance, the Article moves on to speculate on the reasons for its creation and for its persistence over time – with almost no judicial or academic disapproval or critique. On the normative level, the article claims that the rule undermines the important rationales of the definiteness requirement, thus thwarting important social values. In addition, it obstructs the proper development of the definiteness doctrine which, to date, suffers from serious stagnation. Hence, the courts would do best to abolish the substantive completion rule. By so doing, they will have reaffirmed their commitment to the definiteness requirement, and will have removed a time-honored, harmful, and unnecessary incoherence from the law of contract formation.

MISHPATIM 51 2022

EDEN MALESA-MALKA

ON THE "BASIC ATTRIBUTION ERROR" IN WRONGFUL BIRTH CLAIMS – REFLECTIONS ON ע"א 7416/12 קופת חולים מאוחדת נ' פלוני

The wrongful birth cause of action allows the parents of a child with a disability to sue a doctor for neglecting to provide details of the risks and chances of such a birth, thus leading to the birth of a child with a congenital disorder; if the doctor had not been negligent the parents would have chosen to abort. Judges hearing such suits filed by religious parents whose religion prohibits abortion have raised concerns about raising the standard of proof of the causal connection component. As a solution, a rebuttable presumption was proposed in the *Hemmer* case, according to which if the abortion committee approved an abortion the couple will be presumed to have opted to abort, despite their religious beliefs that forbid abortion. The burden of rebutting the presumption would lie on the defendant.

This article seeks to show why this presumption may not achieve its goal, in light of the cognitive bias known as the "basic attribution error". According to this bias, when attributing reasons for behavior there is a human tendency to give greater weight to a person's internal circumstances, such as religion, than to external circumstances. Through an analysis of the judgement in *Meuhedet*, I will argue that a judge implementing this presumption in the case of a religious parent might "nullify" it because of the tendency to attribute greater weight to the parents' religious convictions, as if they were the main circumstance influencing the decision to abort or not, and less weight to external circumstances, such as explanations given by the doctor to the couple.

At the end of the article, I will discuss the problematic implications of the bias described, show that research suggests that raising awareness of the possibility of this bias is helpful in dealing with it, and present ways to reduce its negative effects. Following Ruth Bader Ginsburg's remark above, the purpose of this article is to raise awareness of the possibility of bias, in a way that will make it easier to deal with until a more appropriate solution is reached.