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CHALED KABUB, REUT ABRAHAM-GEDALIA &
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THE CORPORATE OPPORTUNITY DOCTRINE: DIRECTORS' AND OFFICERS' LIABILITY IN PUBLICLY TRADED COMPANIES

Section 254(a)(3) of the Israeli Companies Law prohibits directors and officers from usurping corporate opportunities for their personal benefit. This prohibition represents a view that corporate opportunities are an asset of the company. The meaning of the phrase "corporate opportunity" has been discussed only in a few court opinions – and the Supreme Court has not addressed the issue.

In fact, up until a decade ago (when the Economic Division of the Tel-Aviv District Court was established), claims of breach of this prohibition were rarely brought before the courts. So, too, any discussion of this issue, including the few judicial decisions, focused mainly on private companies. Thus, no guidelines have yet emerged for the application of the prohibition to publicly traded companies.

From our perspective, the unique attributes of public companies require a different approach. Therefore, the objective of this article is to propose a legal framework for the application of the prohibition under Israeli law in the context of public companies. In doing so, we will turn to comparable legal systems – of the United States and the United Kingdom – for inspiration and suggest guidelines for applying the prohibition in Israel. To this end, we will present a two-stage model for examining the key question whether a certain transaction is a corporate opportunity. Our model is based on two cumulative pillars – a transaction in the company's "Line of Business"; and a determination that the transaction "belongs" to the company.

As part of this analysis, we will attempt to distinguish between the prohibition against usurping corporate opportunities and other aspects of the duty of loyalty, as well as address sub-questions arising from the application of the doctrine.

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YUVAL SINAI & MICHAL ALBERSTEIN

REGULATING DISCRETION IN COMPROMISE UNDER SECTION 79A: BETWEEN CONFLICT RESOLUTION AND LAW

This paper discusses a unique legal creature – "judgment by way of compromise" under section 79a of The Israeli Courts Law (1984). This section authorizes the judge to intervene in the content of a legal settlement. Nevertheless, it relies on the litigants' advance agreement to accept any decision imposed on them, even if it is not based on legal argumentation. The special tensions that this section poses between compromise and arbitration, judgment and consent, conflict resolution and adjudication – raise important questions, which this paper examines by using empirical data and theoretical inquiry. The paper presents empirical data on the use of section 79a and examines judicial perceptions of this provision, including written judgments and precedents, and points to the common use of this section as an approximation of the judicial decision. The limitations and difficulties of this approach are also examined. Following presentation of the data, judgment by way of compromise is discussed from jurisprudential and procedural perspectives. Perspectives from conflict resolution and expanded judicial discretion in preliminary proceedings are examined as well. Based on this theoretical complex, new forms of regulating judicial discretion are proposed, among which litigants may choose according to their preferences and needs, while balancing between law and conflict resolution. Proper regulation of "judgment by way of compromise" will promote legal pluralism and will increase choice and transparency for litigants.

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YIFAT ARAN

THE START-UP LAW OF THE START-UP NATION

Israel is known as the "start-up nation". Israeli start-ups raise billions of dollars in venture capital each year and form the lifeblood of Israel's high-tech economy. However, the ever-growing importance of start-ups in the global and Israeli economies still awaits appropriate academic attention. In Israel, as elsewhere, the corporate law literature focuses almost exclusively on public companies. This article takes a first step towards addressing this omission. The article (1) discusses the unique characteristics of venture capital-backed companies as organizations that enable collaboration between venture capitalists and human capital providers; (2) explains how these characteristics are reflected in the corporate governance of start-ups; and (3) illustrates the argument by commentating on decisions by Israeli courts concerning start-up shareholder disputes.

The article presents two main contributions. First, it argues that start-ups do not fit either the classic principal-agent theory of corporate law or the team production theory of corporate law as sole explanations. Instead, it proposes a synthesis of these two dominant models of corporate governance, namely "team production by joint ownership". Several implications of the theory are discussed, including the content of fiduciary duties and corporate purpose. I also argue that this refined view of start-up governance explains the Delaware courts' approach to corporate governance of start-ups more eloquently than other theories.

Second, the article illustrates that Israeli courts tend to apply assumptions and precedents that arise from mature companies to start-ups without discussing the need to distinguish the circumstances. Consequently, there are discrepancies between common norms and culture in venture capital-backed companies and the development of Israeli case law. The article warns that if this trend continues, it may cause a rift between law in books and law in action with regard to start-ups and venture capital. The article concludes with recommendations for improving the situation, including the use of court-appointed experts with specific expertise in venture capital finance and strengthening legal education in start-up law.

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OMER KIMHI

DIRECT DEMOCRACY IN RURAL LOCAL GOVERNMENTS IN ISRAEL – LOCAL COUNCILS, COOPERATIVE ASSOCIATIONS AND A PROPOSAL FOR A DIRECT LOCAL COUNCIL

This article deals with rural local governments in Israel (kibbutzim, villages, moshavim and more). In many of these communities, two types of bodies engage in municipal governmental activities: the local council, which is the formal municipal governmental body, and private cooperative associations (in particular, the agricultural cooperative association and the community cooperative association) which incorporate some of the local residents. In some of these communities the members of the governing committee of the agriculture cooperative association are also the members of the local council.

The article identifies three legal difficulties in this situation. First, in those communities where the uniformity of committees' principle applies (the nature of this principle will be explained in the article), residents who are not members of the agriculture cooperative association do not have the right to vote for the local government's council. Second, even in cases where the uniformity of committees' principle does not apply, there is often an institutional conflict of interest between the agricultural association and the local council, and disputes between these two governmental bodies arise. Third, there is a problem inherent in the fact that private cooperatives, which are largely unregulated, and which do not include all residents as their members, engage in local governmental activities.

To address these problems, while still preserving the distinct nature of rural communities, I propose an alternative governmental model - a "direct local council". Under this model, the local council will serve as the sole governmental body, but it will function as a direct democracy. A town hall assembly, comprised of all local residents, will convene twice a year to debate and decide the major affairs of the community.

ASAF HARDUF

TIME TO CHANGE: REVISED DOCTRINES, THE RULE OF LAW AND THE RULE OF MORALS

Laws can be changed. Minor changes may go unnoticed, unlike major changes, such as a new criminalization, a new legalization, or a substantive reform to prominent offenses.

What implications does the revision of substantive criminal law bear for those who have perpetrated the offense prior to the change? The Israeli Penal Code answers this in its opening chapters. Like in any democracy, Section 3 maintains that extending the criminal law applies only after the new law is set. However, the next three sections set a regime that is unlike many democratic regimes. Section 4 maintains that the annulment of an offense applies even retroactively. Section 5 maintains that any leniency to substantive law shall apply to those whose trial is not yet final, whereas those whose trial is finalized may enjoy only certain leniency in punishment. Section 6 excludes the former two sections, blocking defense pleas regarding offenses that are set to limited periods and regarding offenses that are inherently changeable.

This legal regime is extremely intricate, regarding both its doctrine and its rationale. It connects and splits old and new laws, old and new rationales. It sends implied messages about the rapport between our past, present and future, about the power of change and its limit, about arbitrariness, effectiveness, stability, certainty, fairness and equity.

This article argues that the Israeli regime is vague in doctrine and normatively incohesive. It explores three alternatives. The first would be to annul sections 4–6, thus setting a clear rule that every person shall be judged in accordance to the law that existed at the time of the offense. The second would allow defense pleas about applying a lenient new law in every case, including trials that have been finalized. The third and most favorable option would allow such pleas, based upon the facts of the finalized trial, while denying the hearing of new evidence.

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AHARON GARBER & YEHOATAN GIVATI

HOW DID THE CONSTITUTIONAL REVOLUTION AFFECT PUBLIC CONFIDENCE IN THE COURTS

Israel's constitutional revolution took place about 25 years ago. Before and during the revolution, two different theories were raised about its impact on public confidence in Israel's courts. Moshe Landau argued that the revolution would undermine public confidence in the courts. Aharon Barak argued that the revolution would not harm public confidence in the courts. To date, these theories have not been empirically tested. Three challenges arise when empirically testing these two competing theories. First, a credible database is required that includes data on public confidence in the courts before and after the constitutional revolution. Second, when analyzing trends in public confidence in the courts it is important to control for confidence in state institutions in general, because changes in confidence in courts may reflect more general trends in public confidence in institutions. Third, the analysis must control for global trends in confidence in the courts, because changes in confidence in Israeli courts may reflect global trends. In this article, we use a unique database that has not been utilized by researchers to date. This database includes data on public confidence in courts and in other institutions, both in Israel and in other countries, from 1991–2018. Using this database, we show for the first time that Israel's constitutional revolution was associated with a dramatic decline in public confidence in the courts. Controlling for general trends in confidence in institutions in Israel, and for general trends in confidence in courts in other countries, the proportion of Israeli residents with high confidence in the courts decreased by about 30 percent following Israel's constitutional revolution (about two standard deviations in global comparison). No court system in the world and no institution in Israel saw such a dramatic decline in public confidence during that period. The findings of the article are consistent with Landau's theory, and contradict Barak's theory. We use the data to rule out alternative explanations for the decline in confidence in the courts,

such as demographic changes, populism, the impact of social media, or the onset of commercial television broadcasting in Israel, and present additional qualitative evidence for Landau's theory. Finally, we discuss the implications of the decline in confidence in the courts on the method of judicial appointments, disobedience, and the political question doctrine.

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RON HARRIS

BOOK REVIEW: DIGNITY, LIBERTY AND HONEST TOIL: DRAFTING THE ISRAELI DECLARATION OF INDEPENDENCE, BY YORAM SHACHAR

Declarations of Independence are formative and constitutive texts in the lives of every nation. Yoram Shachar takes us on a journey that follows the drafting of Israel's Declaration. Shachar selected an approach that examines how contemporary ideological debates and political frictions within the Zionist movement played against each other in the process of drafting the various drafts and the ultimate text of the Declaration. The book is organized in two parts: the first follows the chronology from draft to draft, and the second scrutinizes the thematic genealogy of each sentence and paragraph of the ultimate Declaration. In writing the book, Shachar combines a rare historical detective's skills with those of a jurist, an intellectual historian and storyteller. The result is a once-in-a-lifetime book of Israel's Declaration of Independence.