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A PROPOSAL FOR A NEW MIXED-PLURALISTIC THEORY FOR THE GOALS OF MODERN TORT LAW

For nearly four decades, two unified-monistic theories – corrective justice ensuing from a moral deontological approach; and optimal deterrence as an outcome of an economic consequentialist approach to a cost-benefit analysis – have governed the analyses of tort law. Unlike the approach of the unified-monistic theories, mixed-pluralistic theories of analyzing the theory of tort law do not focus on a single goal, and are not confined to a narrow picture of the social and legal tortious situation. Pluralistic approaches identify deficiencies in each of these theories (as well as in other monistic theories – such as distributive justice), and attempt to produce a balance created by the integration of various goals which are implemented in varying measures. This article critiques the mixed-pluralistic approaches to tort law which appeared in the American, Canadian, British, and Israeli literature over the past six decades and proposes a new mixed-pluralistic theory; all based on an Israeli reality in which there is no clear and unified theory. Even the newly suggested Israeli Civil Code, that suggests a pluralist theory, does not supply tools for the implementation of that theory and thus remains somewhat declarative.

Some of the current pluralistic approaches seek to examine the entire range of tortious issues as a single complex, that is to say, they seek to analyze all the goals, give preference to one goal, and then assert its greater dominance within the framework of considerations and balances; they follow this path regardless of the tort issue being examined. Different pluralistic approaches attempt to examine each tort issue separately, without a guiding hand pointing at a preference for one goal over another in cases of a clash between competing goals. Other intermediate pluralistic approaches exist too. Some of those approaches are not universal but local, and are particularly suitable for common law.

Starting from a position of support for the mixed-pluralistic thesis, the advantages offered by current approaches are collected and a new mixed-pluralistic approach is proposed. This approach is adapted to the multitude of significant changes that have affected modern tort laws in recent years. The suggested approach will attempt to divide tort issues into two major categories, determine the dominance of certain goals in relation to the first category, and the dominance of the other goals in relation to the second category; and concurrently draw a certain balance with the less dominant goals in those situations where the underlying principles are significantly infringed.

Tort issues are classified into two categories according to the profile of the defendant and the nature of his tortious activity, which is either private and spontaneous, or sophisticated, calculated and commercial.

Following in this path, the proposal draws a fine line between efficacy and legal certainty on one hand, and compatibility with the changing and very diverse social and legal reality, as reflected in modern tort law, on the other hand. This approach will be demonstrated through an examination of the compatibility of a number of tort issues – both traditional and classic, and modern and novel – to a developing reality, through the prism of the proposed approach. The proposed approach tries to guide the Israeli (and comparative) case law, inter alia, by giving some practical meaning to the relevant sections in the proposed Civil Code.

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YIGAL MERSEL

THE PARLIAMENT'S STATUS IN CONSTITUTIONAL LITIGATION

This paper discuses the question of whether parliaments should be party to constitutional litigation, mainly in cases of the constitutionality of parliament laws. A 1997 Supreme Court ruling stated that the Israeli parliament (the Knesset) is not party to this kind of litigation, but that the attorney general should be asked to intervene in the proceedings. Yet, in 2008, the Knesset enacted a law that explicitly stated that, under certain circumstances, the parliament may be party to litigations involving the constitutionality of laws. The main argument in this paper is that, for theoretical and practical reasons, a parliament may indeed be party to constitutional litigation. These reasons include arguments of separation of powers, constitutional interpretation, the status of the legal advisor to the parliament, and so on. The paper argues, however, that it is doubtful that the 2008 legislation was really needed, that a different interpretation of the 1997 Court ruling could suffice and, furthermore, that the current 2008 law created some theoretical and practical problems that are yet to be resolved.

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HAYA SANDBERG

INFERENCE FROM SILENCE AND THE RIGHT OF AN ACCUSED NOT TO BE QUESTIONED ABOUT PREVIOUS CONVICTIONS

This is an attempt to substantiate the following claim: The readiness of legal systems to recognize the defendant's right to remain silent as evidence against him is influenced by that legal system's position regarding the defendant's right ***not*** to be investigated about his criminal past when testifying in his defense. I will elaborate on this claim below with reference to several systems in comparative law.

In legal systems such as those of the United States and Canada, an accused who chooses to testify opens the door for the prosecution to investigate him about his criminal record. Therefore, it shall not be appropriate to use his silence as evidence against him, for it might be a way for him to avoid exposing his previous convictions. However, in Israel (and to some extent, also in the United Kingdom), accused in criminal procedures are more protected from such scenario, and therefore it is understandable why, in turn, the legal system will be willing to use his silence as evidence against him.