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BARAK MEDINA & HAGAR SEGEV

A CONFLICT OF RIGHTS: AN ANATOMY OF THE VERTICAL AND HORIZONTAL BALANCING TESTS IN THE JURISPRUDENCE OF THE ISRAELI SUPREME COURT

The Article, written in honor of President Asher Grunis, on the occasion of his retirement from the bench, joins President Grunis' critique of the lack of accepted doctrine in the jurisprudence of the Israeli Supreme Court regarding the distinction between the "vertical" and "horizontal" balancing tests. Unlike the use of these terms in other legal systems, denoting the distinction between infringement of a human right by a state act (vertical application) and by a private act (horizontal application), the Israeli Court applies both tests when evaluating the validity of state acts. The Article explores the differences between the two tests and the circumstances in which each should be used.

The Article suggests that the vertical balancing test is primarily rule-based. According to this test all infringements are *prima facie* wrong, a presumption that is refuted only if a set of stringent requirements is met, including: legality, probability-threshold and more. The horizontal balancing test should be employed only when the state act should not be classified as *prima facie* wrong. Accordingly, we suggest that the decision regarding when to apply each test should be based neither on establishing a ranking of interests or rights nor on the decision whether the interest that the state act aims to enhance is categorized as a human right or a public interest. The existence of a conflict between human rights is insufficient to justify employing the less demanding horizontal balancing test. This test should apply only in exceptional circumstances, in which the state act infringes a right of one person to fulfill the government's positive obligation to protect another person's right.

We suggest that the Court's current tendency to apply the horizontal balancing test, which provides less protection of rights, and is

standard-based, in unjustified. The argument is demonstrated by discussing, inter alia, the evaluation of the permissibility of various anti-terror measures, defamation suits and the government's duty to reveal information that infringes the right to privacy.

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ARIEL L. BENDOR & TAL SELA

JUDICIAL DISCRETION: THE THIRD AGE

Normative judicial discretion is a power judges have to choose from among a number of lawful alternatives. Normative judicial discretion may exist with respect to substantive law, and may also exist with respect to adjudication – whether or not to decide about petitions on their merits. The Article argues that the focus of judicial discretion in Israel, especially in the areas of constitutional and administrative law, has changed over the years. In the first age – until the end of the 1970s – the Supreme Court adopted a restrictive approach to judicial discretion in substantive constitutional and administrative decisions, but made extensive exercise of adjudicative discretion. In the second age – the next three decades, and especially during Justice Aharon Barak's tenure – substantive judicial discretion expanded, and at the same time adjudicative discretion was greatly reduced. At that time the Court developed a series of structuring methodologies, such as proportionality and reasonableness. After the retirement of President Barak and especially during the period in which Justice Asher Grunis served as President of the Supreme Court, a third age emerged: while broad substantive discretion remains in place and in some respects has even expanded, the exercise of adjudicative discretion is also increasing. The Article points to a kind of tradeoff between the scope of substantive judicial discretion and the scope of adjudicative judicial discretion in the first two ages and the development of legal methodologies that structure the exercise of substantive discretion as an intermediate category that seeks to bridge between discretion and rules. At the same time, the Article indicates how difficult it is for structuring methodologies to significantly regulate governmental and judicial decisions. Against this background the Article explains the broadening of substantive and adjudicative judicial discretion in the third age, alongside a reduction in the need for structuring, and proposes an initial normative discussion of these developments suggesting the possibility of the birth of a fourth age.

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RONEN POLLIACK

THE DUTY TO LEGISLATE AS A PROPORTIONAL CONSTITUTIONAL REMEDY

The article discusses the possibility of implementing a constitutional remedy following a judicial finding of "legislative omission". This remedy, as proposed herein, will require the Knesset to enact laws that will ensure proper protection of constitutional rights, either directly or indirectly, through the executive branch. The author traces the principle of separation of powers, which guided President Asher Grunis' ruling on this subject, and shows how a different interpretation of this principle actually supports the proposed remedy of a duty to legislate. Moreover, the article argues that the dialogic interpretation of the principle of separation of powers is more appropriate to the prevailing mindset in Israeli law, and even in comparative law, and so reflects a more realistic division of functions among the various branches of government in modern times. The article also argues that the proposed remedy is appropriate for situations in which the legislative omission violates the duty to respect positive constitutional rights. These two principles: the separation of powers and the duty to respect positive rights serve as a basis for the article's conclusion, namely, that the proposed constitutional remedy does not contradict the constitutional tradition in Israel. The second part of the article outlines a scheme for gradual implementation of the proposed remedy, which includes three stages: requiring the executive branch to initiate a legislative proposal; in the event of refusal or disregard of the order, ordering the legislator to determine the legislative arrangement; as a last resort, issuing temporary or provisional judicial rules to be applied pending the enactment of legislation. A precondition for the implementation of this outline is the court's determination of "legislative omission". Finally, the author highlights possible criticisms of the proposed remedy and presents his response thereto.

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ISSACHAR ROSEN-ZVI

THE DECENTRALIZATION OF THE ISRAELI JUDICIAL SYSTEM: THE HIDDEN ROLE OF PROCEDURE

The Israeli judicial system is characterized by a hierarchical institutional structure and centralist ideology. The institutional design of the judiciary is based on a three-instance pyramid – at the bottom the Magistrate Court, in the middle the District Court and at the top the Supreme Court – in which the lower judicial instances are subject to supervision and appellate review by a superior instance. The centrist ideology is manifested, among other things, in the principle of *stare decisis* which is a central characteristic of all common law legal systems. This article argues that although the hierarchical institutional structure of the Israeli court system has not changed, and its centrist ideology has also remained intact, in fact in the last three decades the judicial system has been undergoing a rapid process of decentralization, in which power has been transferred to lower judicial instances to make decisions unreviewable by higher instances. This process has dramatically changed the power structure within the judicial system, with lower instances gaining more power at the expense of appellate courts.

The article further argues that this decentralization of the judicial system, whose normative consequences are debatable but whose importance is undeniable, was not the result of a deliberative process in which the advantages and disadvantages of decentralization were deliberated by legislators and the court administration. Rather, it is the unintended consequence of a long line of seemingly technical and administrative procedural legislation and rules and of court decisions that interpreted them. These procedural changes are in turn the result of far-reaching material and ideological transformations undergone by the Israeli judicial system, originating in both global trends and developments unique to the Israeli legal system. These transformations have drastically changed the way in which civil proceedings are handled and the role judges play in them.

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KEREN WEINSHALL & IFAT TARABOULOS

LITIGATION COSTS AND COST SHIFTING PRACTICES

Recovery of litigation costs in Israeli civil cases is left entirely to judicial discretion. Such a fee regime can potentially serve to promote and to maintain a delicate balance between a range of rationales, such as those related to indemnification, access to justice, litigant behavior and distributive justice.

This study examines the manner in which judges exercise their discretion and provides a comprehensive empirical depiction of the de-facto fee regime in Israel, addressing cost-shifting rates, amounts, and their influencing factors. Determination of these trends allows for an informed discussion regarding the actual role of the fee regime in Israeli civil litigation. The research methodology is based on statistical analysis of a representative sample of 2,000 civil cases, combined with interviews of 23 judges and 122 attorneys specializing in civil litigation.

The findings show that costs are awarded in 66.4% of all cases adjudicated on the merits, mostly in favor of the prevailing party, in amounts that do not represent those actually expended by the litigant. However, cases adjudicated on the merits comprise only 18% of all civil cases and most are resolved short of full-fledged adjudication, by way of settlements, lack of prosecution, voluntary withdrawals and so forth. Though the underlying rationales of fee regimes can be especially relevant in these cases, we find that costs are allocated in only 30.5% of all civil cases.

In cases adjudicated on the merits, cost rates and amounts are found to be predicted primarily by the sums of the claim, the recovery, and the difference between them, and by a few variables relating to case complexity and invested resources. These findings indicate a partial realization of the indemnification rationale and a slight realization of the molding litigant behavior rationale. In all other cases, however, we identify very few predicting factors on the judicial cost-shifting decision, such that the cost-shifting rationales are only vaguely and inconsistently reflected.

Findings show that the most consistently influential factor on the judicial cost-shifting decision is the request for costs by the prevailing litigant. An adversarial system of costs becomes apparent, in which judges are bystanders and "approvers" rather than initiators, thus reducing the ability of the Israeli fee regime to promote cost-shifting rationales.

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BINYAMIN BLUM, YORAM RABIN & BARAK ARIEL

THE ADMISSIBILITY OF CONFESSIONS UNDER ISRAELI LAW: PROCEDURAL AND SUBSTANTIVE DIFFERENCES BETWEEN THE "FREE AND VOLUNTARY" STANDARD AND THE JUDICIAL EXCLUSIONARY RULE FOR UNLAWFULLY OBTAINED EVIDENCE

The Article examines the admissibility of confessions in criminal proceedings in Israel, which is currently governed by two distinct doctrines: Article 12 of the Evidence Ordinance requirement that confessions be "free and voluntary", and the judicially established *Issacharov* doctrine that grants courts discretion to exclude unlawfully obtained evidence. The Article examines the theoretical and practical, substantive and procedural differences between these partially overlapping doctrines, in order to illustrate the differences between them. Though some, including Chief Justice Grunis in *Issacharov*, have argued that Article 12 has essentially been subsumed by the *Issacharov* doctrine, we argue that this is not, and *should* not, be the case. The Article highlights the remedial nature of Article 12, as compared with the *Issacharov* doctrine's focus on due process and judicial integrity. Similarly, the Article contrasts the absolute nature of Article 12 with the balancing characteristic of the *Issacharov* doctrine. On the procedural side, the Article compares the *voir dire* procedure mandated under Article 12 with the less rigid procedures required by *Issacharov*. Emphasizing the importance of *voir dire* in adequately protecting defendants' rights, we call for the retention of the procedure under Article 12 and advocate its extension to all unlawfully obtained evidence when practicable.

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OMER KIMHI

THE GOOD FAITH REQUIREMENT IN CONSUMER BANKRUPTCY

The good faith principle is central to consumer bankruptcy proceedings in Israel, especially when the proceedings are initiated by the debtor. The demand for good faith appears several times in the Bankruptcy Ordinance, and debtors must exhibit good faith from the start of the proceedings until they are granted discharge – a process that in Israel often takes several years. The article analyzes the case law on the requirement of good faith in bankruptcy, and examines the extent to which it corresponds with the rationales of consumer bankruptcy.

The main argument presented in the article is that consumer bankruptcy proceedings are not just a "favor" or a "charity" granted to debtors, as they are often viewed by courts. The bankruptcy discharge has socio-economic benefits, because it incentivizes debtors to become more productive and it decreases welfare payments borne by society as a whole. Thus, when courts view the good faith requirement as a tool to set standards of conduct to debtors who are already bankrupt, and when they deny discharge to debtors who do not meet those standards, they are liable to miss the benefits that the discharge can bring about. They fail to grant discharges to debtors who, if given a chance, might successfully be rehabilitated, and thereby they deny potential benefits not only to the debtors but to society at large.

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ELAD MAN & BARAK YARKONI

CLASS PROOF OF CLAIMS IN INSOLVENCY PROCEEDINGS

In this paper we seek to address and resolve, possibly for the first time in Israel, a current iniquitous legal reality: unsecured creditors are in practice unable to participate in insolvency proceedings, mainly due to issues related to costs. To remedy this iniquity, we propose a novel mechanism of class proof of claims in insolvency proceedings.

The proposal envisages that a lead plaintiff will be appointed to be a formal representative of a group of unsecured creditors, all of whom share similar characteristics. The lead plaintiff would have the power to act as a representative of all group members, to file a class proof of claims on behalf of all group members; to negotiate on behalf of the class; to participate as class representative in creditors' meetings; and to vote upon proposals for debt settlements.

This proposed mechanism for class proof of claims will enable groups of unsecured creditors to participate in insolvency proceedings; will provide groups of creditors with professional representation and a mechanism for collective voting and decision-making; will deter potential defendants from wrong-doing against such creditors; and will correct the current distortion in the distribution of insolvency proceedings funds.