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ASSAF JACOB

DAAKA'S ACHE AND THE EVOLUTION OF "HARM TO THE PLAINTIFF'S AUTONOMY"

"Harm to the plaintiff's autonomy" as a head of damage is an original creation of Israeli common law. As such, it presented the legal system with a number of challenges, primarily the need to adapt this new type of damage to the "orthodox" law of torts. Courts had no real guidelines for developing this new type of damage; they could not refer to other legal systems since there was no available precedent. This sometimes led courts in the wrong direction.

In this article, I analyze this new head of damage and consider its boundaries. While doing so, I discuss policy considerations that justify its existence, but that also require limiting its application. The analysis is necessary because of the extensive use of this new head of damage in private and class actions and because of the vagueness of many of the judicial opinions in which it has been discussed.

The article opens with a general definition of the term "autonomy" and an explanation of what should be viewed as compromising autonomy. "Autonomy" is then distinguished from the constitutional right to dignity, on the basis of their respective protected interests. The article argues that this new head of damage is pursued in too many cases and that the amount of compensation awarded under it is too high. The article then describes some paradigmatic situations in which a breach of autonomy might be claimed, and explains when and why such a claim might be justified. Through these examples, the article explores the differences between the right to autonomy and the constitutional right to dignity. In conclusion, the article suggests a number of ways in which the use of this new head of damage can be restricted, on the basis of policy considerations that affect the scope of the duty of care owed by defendants, establishment of a causal link between the breach and the damage, remoteness of the damage, etc. The article also tries to cut the Gordian knot that ties the

severity of the tortious act to the severity of harm to one's autonomy, suggesting that the latter should be assessed from the plaintiffs', not the defendants' perspective, as in the case of any other kind of damage.

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AVIHAY DORFMAN

DUTY OF CARE

The article seeks to construct a new understanding of the 'duty' element of the tort of negligence. The argument proceeds along two lines. Negatively, the article critically analyzes the Supreme Court's recent approach to the duty element, exposing certain shortcomings in this approach. Affirmatively, the article sets out to develop an alternative approach, the centerpiece of which is the ideal of *caring relations* that underlie the moral center of the duty element. On this approach, the duty of care provides risk-creators with reasons to open up to, and therefore respectfully recognize, the point of view of certain risk-takers. The article then demonstrates the important extent to which this reconstruction particularly helps to dissolve some daunting doctrinal puzzles, such as the doctrine requiring plaintiff's foreseeability, that are key to any successful account of that duty.

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SHACHAR ELDAR

ON THE INTERPRETATION OF THE TERM "CRIMINAL ORGANIZATION" IN THE COMBATING CRIMINAL ORGANIZATION ACT 2003

Israeli courts have recently given contradictory interpretations to the term" criminal organization" that appears in the Combating Criminal Organizations Act of 2003. Some rulings gave the term a very expansive meaning, thus confirming the concern already expressed in legal literature that this newly enacted, draconian legislation might be used as a crude substitute for the law of complicity. This paper offers an in-depth reading of the statute, showing that the vast criminological literature concerning the criminal organization phenomenon justifies a narrow interpretation of the statutory term. This mode of interpretation provides the basis for a critical examination of the ways in which the Israeli judiciary has utilized the statute in the formative stages of its existence.

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ASAF HARDUF

THE CRIMINALIZATION CLAUSE: A CONSTITUTIONAL CLAIM AGAINST CRIMINALIZATION, THE LIMITS OF CRIMINAL LAW AND THE LIMITATION CLAUSE

May legislators criminalize any kind of conduct without any limitations? Most criminal law scholars provide no clear answer to this question. This article analyzes the question by focusing on the concept of criminalization, one of the most crucial yet neglected components of criminal law, which impacts on freedom, justice, equality, legitimacy, and monetary resources.

The analysis focuses on the Limitation Clause found in Israel's Basic Law: Human Dignity and Liberty, which currently provides the main, if not the only, formal instrument that can be used to limit and evaluate criminalization in Israel. The article argues that the framework offered by the Limitation Clause for analyzing criminalization is inadequate. Instead of the Limitation Clause's abstractions, a special "Criminalization Clause" is proposed, namely a concretization of the Limitation Clause which will adapt it for the specific evaluation of criminalization issues.

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IDO BAUM

VACATIONING IN TURKEY, SUING IN ISRAEL: PUBLIC FACTORS IN THE *FORUM NON CONVENIENS* DOCTRINE

A defendant facing a civil lawsuit may assert that the Israeli forum is not the appropriate venue to adjudicate his case, using the *forum non conveniens* doctrine. To ascertain whether a more appropriate forum exists the court requires the defendant to show that there is another forum with jurisdiction to adjudicate the case with which the dispute has the most real and substantial connection.

The Supreme Court's case law tends towards increasing the burden on the defendant who raises a *forum non conveniens* argument, thereby limiting the cases in which the argument is accepted. This paper demonstrates that the application of the *forum non conveniens* doctrine in Israel is characterized by a structured preference for local parties at the expense of foreign parties.

Traditionally, the court focused its discretion on factors related to private interests of the parties. However, a decade ago, the Court ruled that, in view of the modernization of international transportation and communications, considerations such as the private convenience of the parties should be given little weight in this context. In an attempt to prevent arbitrary exercise of jurisdiction, public interests were taken into account as significant factors in the *forum non conveniens* claim, following the U.S. example.

The use of public factors is characterized by vague and often contradicting criteria which broaden the court's discretion and increase uncertainty. Public interests enable the court to dismiss cases on grounds of "procedural efficiency" and to keep them in local courts on the basis of "values".

This paper addresses practical difficulties arising from the court's policy with regard to efficiency of the court system; difficulties associated with the structured preference for local parties; the effect of this policy on the type of litigation that will take place in Israel and its effect on the state's foreign relations.

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IZHAK ENGLARD

THE VIRTUE OF PRIVATE EQUITY THAT IS THE VIRTUE OF SUPRA-LEGAL PIETY (HASIDUT)

HEBREW SOURCES IN A MASTER'S THESIS OF 1678 AT THE UNIVERSITY OF LEIPZIG

The article deals with the interesting phenomenon of a student of theology and philosophy whose thesis relied on a considerable amount of Jewish sources, which he cited in their original language. These sources (in addition to a great number of citations from the Bible) were: The Jerusalem Talmud, The Babylonian Talmud, *Pirke Avot*, *Mivkhar Peninim*, and *Orhot Hayim*. The phenomenon of relying on Jewish sources (the "Hebrew Revival") was an integral part of the intellectual atmosphere that prevailed in Protestant universities at the time, including in the University of Leipzig.

Private equity is a personal virtue of an individual in relation to others. It differs from the "public equity" that refers to judges exercising their judicial function.

The thesis focuses on four general principles that are at the basis of private equity: Private equity interprets ambiguous statements and deeds in a positive way; it tolerates the frailties and minor offences of close associates and covers them up; it corrects severe errors; and it conceals small and hidden errors. To illustrate these principles, the author relied on numerous classical and Christian sources as well.

It is likely that that there are provisions similar to these principles of private equity in the Israeli legal system. However, unlike Jewish law, where these principles are intended to guide the individual towards moral perfection, in Israeli law they are intended to prevent him from injuring others.