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AHARON BARAK

ON CONSTITUTIONAL IMPLICATIONS

Constitutional interpretation extracts constitutional norms from the express meaning of the text and from the meaning implied thereby. While the express meaning is obtained directly from reading the constitutional language, the implied meaning is obtained rather from an understanding of the constitutional text in the relevant context. This context is determined according to the method of interpretation employed by the interpreter. The implied meaning is part of the constitutional text, and it is treated the same way as the express meaning. Examples of constitutional implication are the implication of constitutional values, the implication of constitutional rights, an implied limitation clause, implied judicial review and implied eternity clause. Every method of interpretation recognizes constitutional implication. Although the concept of implication may be learned from the theory of pragmatics in language, we know little about constitutional implication. Research is required for understanding the relevant context, as well as the relationship between the theory of constitutional implication and the various theories that deal with the "unwritten constitution". So, too, it is necessary to develop the relationship between the theory of pragmatics in language and the theory of constitutional implication.

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BENJAMIN PORAT

GOOD FAITH: A COMPARATIVE CONCEPTUAL STUDY

The duty to act in good faith is considered one of the central and most influential topics of our times, in private law in general and in contract law in particular. Nevertheless, the quantity of legal research on this duty appears to bear an inverse proportion to the degree of clarity that has been achieved with respect to its meaning; thousands of pages have piled up, yet they have not succeeded in dispersing the fog obscuring the question, what is good faith? This article is devoted to a study of the conceptual and terminological aspects of good faith, namely, the meaning of the concept and its connection to the linguistic coinage that has been selected to represent it. It focuses on a comparison of the terminological routes taken by two systems of law that share a common language—Israeli law and Jewish law; it does so by examining them in the light of the central conceptual dilemmas that have fed discussions of the principle of good faith. As will be shown in the article, each system makes its own linguistic choices regarding the way in which it expresses the principle of good faith; a comparison of these choices sheds light on various aspects of the concept itself. The terminological and conceptual aspects which will be discussed in the first part of the article will serve as a basis for the discussion of various questions of implementation in the second part.

This is therefore an invitation to rethink terms that are so commonplace in our vocabulary that we sometimes lose sight of their original meaning. Examination of the internal relationship and the "division of labor" between the two terms invoked by Jewish law ("You shall do that which is right and good"; "We coerce [people] against [emulating] the behavior of Sodom") vis-à-vis each other, and vis-à-vis the old-new term created by Israeli law ("*tom lev*" ["good faith"]) will create a comprehensive picture of the complex conceptual-terminological contexture that Hebrew offers, which is currently far from being fully exploited.

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SHULAMIT ALMOG & KARIN CARMIT YEFET

SEXUALITY, GENDER AND THE LAW – PART II: TOWARD A RECONCEPTUALIZATION OF FEMALE SEXUALITY IN ISRAELI LAW

The article offers a contemporary conceptualization of sexuality in law. Its first part exposes the manner in which the law constrains the perception of female sexuality as a source of pleasure and empowerment and contributes to the transformation of the sexual economy into a sexual dysonomy. Identifying an additional "strategic totality", operating as part of the deployment of sexuality beyond the strategic totalities identified by Foucault, the article argues that the 'sexual dysonomy' is mediated by this strategic totality, which we term "the humiliation scale". The humiliation scale is a modern tool for policing female sexuality structured around the ascription of a social price of shame to any female sexual activity perceived as exceeding certain pre-determined gender bounds. It does so by "fining" diverse enactments of female sexuality, from seemingly "legitimate" utilizations entailing a low degree of humiliation, to prostitution, the point of "no return" at the bottom end of the humiliation scale.

Against this backdrop, the article delineates a map of legal norms which sustain and reinforce the humiliation scale and offers an initial outline for the conversion of the existing legal order, which preserves female inferiority, into a new order heralding women's empowerment. In particular, the research project develops a new paradigm for regulating sexuality in Israeli law in lieu of the problematic consent paradigm that currently misshapes female sexuality as a site of danger, inferiority and weakness. Under the new paradigm, women would be allowed to enjoy sex freely without being "fined" with shame and humiliation, in a legal regime that would reconceptualize female sexuality as a source of pleasure, self-actualization and empowerment.

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KEREN WEINSHALL-MARGEL & ALON KLEMENT

CLASS ACTIONS IN ISRAEL: AN EMPIRICAL PERSPECTIVE

This paper examines the implications of the Israeli Class Action Law since its enactment in 2006 through 2013. We propose a new analytical framework for evaluating the effectiveness of class actions in realizing their goals, and apply this framework empirically to Israeli class actions. The approach taken in the paper suggests that the costs of class actions should be assessed against the benefits they produce with respect to four main objectives: deterrence and prevention of violations of law; access to courts; compensation for injured parties; and procedural efficiency in resolving similar disputes. We outline the parameters for measuring the social costs and benefits relevant to these four objectives and evaluate them in relation to Israeli class actions.

We analyze data from an original database which includes all class actions filed in Israel during the research period (n = 2,056 cases). Our findings indicate that due to partial implementation of the law, its social benefits have been limited mainly to the regulatory aspects of law enforcement. Israeli class actions did not substantially facilitate access to courts, increase procedural efficiency or provide compensation for the injured. Initial findings also suggest only limited attainment of the deterrence objective, although we identified structural difficulties in empirical-observational assessment of realizing this objective.

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DAVID GILO

EXCESSIVE PRICING AS AN ABUSE OF DOMINANCE

This Article explains why excessive pricing by dominant firms is prohibited in Israel and why this prohibition is warranted. It shows that the language of the prohibition of abuse of dominance in the Israeli Antitrust Statute, its contextual background and the statutory intent, all lead to the conclusion that excessive prices by dominant firms in Israel are considered an antitrust violation. It also shows that the competitive price should be the benchmark for examining whether a dominant firm's price is excessive, as supported by most of the literature and case law on excessive pricing. After explaining the differences between the antitrust prohibition of excessive pricing and price controls, the Article shows that the antitrust prohibition of excessive pricing does not impose more uncertainty on the dominant firm than many other antitrust prohibitions, such as, for example, exclusive dealing or exclusive distribution, and that many other antitrust prohibitions are as difficult to enforce as is that of excessive pricing. The Article then explains why excessive prices are not self-correcting and shows that the social cost of non-enforcement of the prohibition is substantially greater than the social cost of possible errors involved in over-deterrence. It also shows that the claim that excessive pricing should be permitted, due to the need to stimulate investment, is misguided. Finally, it discusses the opinion published in April 2014 by the Israeli Antitrust Authority, announcing enforcement of the prohibition, and analyses the safe-harbor included in the opinion, according to which if the difference between the dominant firm's price and its accounting costs, as specified in the opinion, is less than 20% of these costs, the Antitrust Authority will not challenge the dominant firm's price as excessive.

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MICHAL S. GAL & HILA NEVO

TROJAN HORSE: EXCESSIVE PRICES AS AN ABUSE OF A DOMINANT POSITION

In his article, "Excessive Prices as an Abuse of Dominance", David Gilo argues that high prices should come under the prohibition of abuse of monopoly power included in Section 29A of the Restrictive Trade Practices Act. This article responds to Gilo's arguments. We show that although there is no dispute that high prices can harm social welfare, abuse of dominance is not the appropriate regulatory tool. Not only does the use of this tool fail to create the certainty needed for enforcement, but its application can harm social welfare through the creation of a chilling effect on dynamic and productive efficiency. We also show that other regulatory tools are much better suited to the task.

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SHIR WISENBERG

THE CHANGING FACE OF THE "HARM TO THE PLAINTIFF'S AUTONOMY" PRINCIPLE IN THE LAW OF TORT

Slightly more than 15 years after "harm to the plaintiff's autonomy" was first created as a head of damage in the Israeli common law, and after many years of expanding its boundaries, the Israeli Supreme Court has recently begun to limit this expansion. The article will trace the evolution of this head of damage in the Israeli law of torts. It will analyze the stages of expansion and of contraction employed by the courts with respect both to imposition of liability and compensation for harm to the plaintiff's autonomy, and to the nature and extent of this compensation.

Moreover, this article offers a comparative perspective on the evolution of the principle of harm to the plaintiff's autonomy as a head of damage in Israeli tort law, on the one hand, and that of the principle of good faith in Israeli contract law. This comparison, resting on the feature shared by these two principles – that they import into the law normative standards of behavior – focuses on the way in which each principle was developed in its own legal realm, the similarities between the two and the similar criticisms to which each has been exposed. The article then points out distinctive characteristics of the principle of harm to the plaintiff's autonomy as a head of damage, and argues that these lie at the heart of the judicial disputes that accompanied the development of this head of damage in Israeli tort law.