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TRENDS IN ISRAELI CONSTITUTIONAL-CRIMINAL LAW
IN LIGHT OF A CONCEPTUAL ANALYSIS OF “HUMAN
DIGNITY”

Following the adoption of the constitutional law of human dignity, two parallel discussions have developed within Israeli legal discourse. One concerns the constitutional value of “human dignity”, while the other relates to the impact of constitutional law on positive law in Israel, and on criminal law in particular. In the present study I wish to integrate these two discussions, to offer three alternative interpretations of the constitutional value of “human dignity”, and to demonstrate how they may influence procedural and substantive criminal law in Israel. As I seek to show, shortly after the human dignity law was adopted significant changes occurred in the realm of criminal procedure, especially with regard to the rights of suspects and defendants. However, the impact of the constitutional law did not extend beyond the threshold of substantive criminal law, where it was directed almost exclusively toward examination of the limitation clause. The study shows that lately seeds of change can be discerned in the impact of the constitutional law on different areas of substantive criminal law. These changes are expressed in the fact that the court has begun to endow the principle of culpability with constitutional status, to reinterpret norms connected to substantive criminal law, and to shape substantive criminal law in the light of constitutional law. The study suggests that these changes are anchored in a new interpretation of the constitutional value of “human dignity” in constitutional law.

MICHAL LAVI

SHAMING FOREVER?

Shaming is not a new phenomenon. It existed for centuries in intimate societies yet Google, Facebook and Twitter have turned the globe into a village, where anyone can write a post, snap a photo, or share an event and shame a person for everyone to see.

A post on the internet can travel around the world and be shared by millions of users within seconds. As the information circulates, the audience is more likely to believe it. In addition, the more times a post is shared, the higher it appears in Google search results, thus increasing its exposure. The change in scope and utility of shaming invites a legal response, and that is where this article steps in.

The article does not disparage shaming, but rather demonstrates both its uses and its flaws. Shaming has many virtues. It makes it harder for people to get away with wrongful behavior. It can promote freedom of expression and efficient deterrence. By spreading information on individuals' behavior, it encourages them to maintain their reputation. Finally, it helps the public to avoid inefficient transactions.

Yet shaming also raises many problems. Anyone can shame a person based on individual values and offend certain segments of society just because they are different. Shaming can also insult human dignity disproportionately. When the initiators of shaming are private citizens, as opposed to courts, it is committed without fact checking or due process and can promote the dissemination of falsehoods. In the digital age it is hard to keep shaming under control. Remarks can be taken out of context and develop into defamation, or become an "online lynch". Thus, an action that started with an aspiration to promote social order may actually lead to social turmoil.

Digital shaming raises a variety of questions and challenges that policy makers must address, yet it remains under-explored. The Article focuses on one particular aspect: non-ephemeral online shaming. Today, forgetting is the exception and remembering the rule. Online shaming can

be exposed through a simple Google search, leaving a trail that follows the individual everywhere. How should the law react to these changes? Should the law establish a right to be forgotten for shaming? And if so – when and how?

The Article address these questions, focusing on the shaming of ordinary people who are not public figures. It then proposes a taxonomy of three types of shaming: A) “Good shaming” – shaming that is initiated by the court and carried out according to a judicial decision or recommendation; B) “Bad shaming” – shaming by spreading false rumors, shaming that aims to cause harm without other legitimate purpose, or shaming that spins out of control and evolves into defamation, harassment or violence; C) “Shaming the ugly behavior” – shaming by private individuals for violating the law or norms.

The Article focuses on the characteristics of digital dissemination that amplify harm to an individual’s dignity. It explains that the characteristics of the internet and its influence on online expression justify new remedies for dissemination of shaming, even if the harm was not a result of a civil tort or a criminal offence.

The Article examines whether and when the law should require search engines to remove links to search results that contain shaming, considering the benefits and shortcomings of the right to be forgotten. It demonstrates that these benefits and shortcomings are not equally valid in all circumstances. Following this analysis, the Article argues that a dichotomous perspective that chooses between oblivion and permanent memory is inappropriate. Instead, it makes the case for a nuanced right to be forgotten that takes into account different types of shaming.

ASSAF JACOB

ON BOYCOTTS AND TORTS: IN THE AFTERMATH OF AVNERY V. THE KNESSET

Section 2 (a) of the Prevention of Harm to the State of Israel by Boycott Law, which survived constitutional challenge in the *Avnery v. The Knesset* decision, created a new tort of publishing a public call to boycott the State of Israel. This tort is now part of the fabric of existing tort legislation in Israeli law and as such, courts will have to interpret and implement it within the framework of the prevailing law. The purpose of this article is to provide guidelines for the interpretation of this new tort by juxtaposing it with other torts and with conventional legal reasoning in tort. It criticizes the interpretation given to the new tort in the *Avnery* case and points out the risks involved in such an interpretation, both in the context of the Boycott Law and in the more general context of other torts and the tort law environment. The article demonstrates that the Supreme Court could have achieved similar results to those it reached by using time-honored legal interpretation of the law of torts as shaped over the years in the common law. In addition, the article indicates that the court's dogmatic approach in the *Avnery* case regarding the issuing of warrants under the Boycott Law, which has its roots in old defamation case-law, is too strict and unnecessarily harsh toward the plaintiff. This timeworn case-law should not have been applied mechanically to the boycott tort not only because of the great differences between boycott and defamation law but also because of major technological developments and changes in the media that have occurred since these defamation cases were originally decided.

BOAZ SEGAL

DETERRENCE OF REGULATORS BY THE LAW OF TORTS: THE DISTINCTION BETWEEN COMPENSATION LAW AND LIABILITY LAW

This Article analyzes the impact of tort law on regulators and regulatory authorities and argues that a distinction should be drawn between two separate issues: the imposition of liability and the imposition of an obligation to pay compensation. This distinction leads to the conclusion that it is enough to impose liability – and to declare the regulator and the regulatory authority negligent – in order to direct their behavior efficiently. This adds an important perspective to the discourse regarding the deterrent power of the law of torts. In this discourse, the paradigm of the economic analysis of the law has dominated, and so this discourse focuses on monetary sanctions, at the expense of discourse relating to the importance of imposing liability on the authority.

At the beginning of the discussion the Article argues that the proposal to use tort law to direct regulatory behavior is appealing, given the inefficient behavior of the regulatory systems. Therefore, an analysis of the efficiency of the regulatory action is carried out in order to present the “public interest approach” on the one hand, and the “theory of public choice” on the other. The conclusion of the article, according to the theory of public choice, is that regulators do not (always) operate efficiently, which leads us to recognize the need to direct their behavior. At this stage, the Article analyzes the main difficulties inherent in the approach that views tort law as an effective deterrent in the world of public tortfeasors. These difficulties include the fact that public tortfeasors do not personally pay compensation and they respond less to market incentives and more to political incentives. Therefore, the law of compensation is not suitable for a court whose actors are public tortfeasors, and is unlikely to deter those actors and efficiently target their behavior.

Despite this, the Article shows that deterrence can still be used to guide the actions of regulators. The reason for this lies in the heavy price imposed by the legal process on the private regulator and the authority as social actors. In other words, when the deterrent power attributed to tort law is located only at the stage of imposing an obligation to pay compensation, tort law may have difficulty in directing the behavior of public offenders. However, the deterrent power of tort law at the stage of imposing liability may be greater.

This conclusion is derived from the recognition that regulators attach great importance to their public reputation and therefore are likely to be deterred from standing at the center of tort proceedings. In addition, this conclusion stems from the recognition that public authorities function as social actors, and therefore “external attribution” and “intention” can be attributed to them. These two characteristics subject their authority to the external assessment of the public and direct its behavior accordingly. Thus, public authorities are deterred from being negligent by attaching liability to them; their desire to avoid this branding directs their behavior and leads them to internalize the public costs of their negligent actions. Moreover, the authorities’ desire to avoid negative branding and their ability to act precisely and efficiently, remedy the failures of the private regulator, who tend to act inefficiently. Therefore, imposing liability in a world of “regulatory accidents” is an important tool in directing regulatory behavior and producing effective deterrence.

The fundamental conclusion of the Article is therefore that the sword of tort liability – in contrast to that of liability to pay – places the authority and its employees on guard and encourages them to act efficiently.

ADI YOUCHT

ETTI-GONE'S CLAIM:

GENDER PERSPECTIVES ON ETTI ALON'S

EMBEZZLEMENT FROM THE ISRAEL TRADE BANK

Inspired by interpretations of Sophocles' Antigone, this study offers three contesting feminist readings of the trial of one of the gravest embezzlement cases Israel has ever known. It tells the story of Etti Alon and her encounter with the Israeli criminal system. Critically examining this encounter, the study shows that the Etti Alon case deserves more sophisticated treatment than simply categorizing her as a typical thief. Each one of the three readings explains Alon's acts differently and studies them from a distinct critical feminist perspective. This critical examination explores to what extent the ways in which Alon was portrayed and understood in court actually reflects who she is. Due to the great gap that was found between the ways Alon was perceived by the court, and who she really is, this study proposes to make changes in determining criminal accountability and sentencing that will be relevant for women such as Alon.

According to the first reading, Alon is a victim of a patriarchal family and therefore, perceived her freedom of choice and autonomy differently than the criminal legal system expected of her. The second reading constructs Alon as a bad and manipulative woman who used all means to achieve her goals. Both the first and second readings support the victim/free agent classic liberal structure and undermine the categorization of Alon as a free agent. The first reading points out the court's ignorance of a gender perspective in order to understand female delinquency in general, and Alon's crime in particular. The second reading sheds light on the stereotypical gender perspective adopted by the court that led to Alon's harsh punishment. Though the first and second readings undermine the categorization of Alon as a free agent, they do not reject the dichotomous liberal structure itself. The third reading, however, subverts the

victim/free agent liberal structure and undermines the attempt to position Alon in familiar socio-cultural-legal categories.

The three readings suggest that the binary victim/free agent framework of thought did not work for Alon, leading the court to create irrational stories and false subjectivity in relation to Alon. The study additionally criticizes the court's unfamiliarity with the Alon family's politics. As a result, the study aspires to turn Etti Alon's embezzlement story into part of the Israeli feminist legal discourse.

NETTA BARAK CORREN

THE ULTRA-ORTHODOX SOCIETY AND ISRAELI ACADEMIA: RE-EXAMINING THE EVIDENCE ON ULTRA-ORTHODOX ATTITUDES TOWARD ACADEMIC STUDIES AND GENDER SEPARATION

This paper criticizes the main factual basis for the Council for Higher Education (CHE) policy of gender segregation in academic programs for the ultra-Orthodox society. First, the paper re-examines the survey conducted by CHE to formulate its policy. The analysis finds that the CHE study—which argued that 80% of the ultra-Orthodox are not willing to study in co-ed frameworks—suffers from severe methodological flaws, including the framing of the central question, the analysis of the data, the interpretation of the results, and the conclusions drawn from the results. In addition, the raw CHE data reveals internal contradictions and unreported results that unsettle the conclusions drawn from the CHE study.

The far-reaching implications of the critique are illustrated in the second part of the paper that discusses an alternative survey I conducted in early 2018, using an instrument free of the methodological shortcomings of the CHE study. This survey distinguished, for the first time, between three forms of segregation that differ both analytically and practically: separate campuses, separate classes and excluding opposite-sex professors. The results are substantially different from those presented in the CHE study, but are consistent with unreported findings from that study. Briefly, the new survey finds that 44% of ultra-Orthodox interested in academic studies view separate classes as an important factor in their choice of program, only 23% view separate campuses as important, and only 16% view the gender of the professors as important.

The conclusion that emerges from both parts of the paper strongly undermines the factual basis for the CHE policy on gender segregation in

academia. The implications for the petitions against the policy (currently pending in the High Court of Justice) are far-reaching and require an overhaul in the design of the policy plan to integrate ultra-Orthodox into Israeli academia. More generally, the findings highlight the need to form “best practices” for administrative agencies seeking to establish reliable factual bases for their decisions, especially in the realm of cultural norms. In such cases, policymakers should acknowledge the potential gap between the alleged norm and reality on the ground. Without a solid factual basis, state authorities are likely to entrench contested, un-consensual practices that conceal substantial social variance and differences of opinion.

EDO ESHET

THE EMPLOYERS' ORGANIZATION AND THE DOMINANT EMPLOYERS' ORGANIZATION IN ISRAEL'S COLLECTIVE LABOR LAW

This article seeks to trace a neglected legal institution in the field of collective labor law – the Employers' Organization, and another institution whose existence is questionable (and in my opinion mistaken) – the Representative Employers' Organization. Recent developments in this field require clarifying the legal status of these institutions. In essence, the article seeks to clarify the representational model on which these organizations are based. The legal status of the Employers' Organization as party to a general collective agreement whose provisions have been expanded by means of an extension order is also discussed and the article labels organizations in this unique position as "Dominant Employers' Organizations". The article argued that Employers' Organizations owe a duty of fair representation to their members, and that Dominant Employers' Organizations owe a duty to act in good faith toward employers to whom the extension order applies, a duty which stems from their leadership role. Furthermore, the article argues that Dominant Employers' Organizations should share responsibility for enforcing provisions of an extension order and it then calls for developing the law of competition among Employers' Organizations.