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## ABSTRACTS

Eyal Zamir, *Procedural Justice and Substantive Fairness in Contract Law: Duress and Extortion as Test Cases*

There is fundamental tension in contract law between procedural and substantive fairness, between the requirement that the content of the contract be fair and the requirement that the contracting process be adequate and free of defects. According to a position that prioritizes substantive fairness, the adequacy of the contracting process is merely a means to ensure that the content of the contract is fair. According to a view that highlights procedural fairness, the fairness of the content of the contract is merely possible evidence of the existence or absence of defects in the contracting process. One of the contexts in which this tension is particularly salient is defects in the contracting process, specifically duress and extortion.

This paper provides a brief historical account of the development of contracts and contract law during the past 250 years or so, emphasizing the said tension. It speculates about the possibility that following the rise (in the 19<sup>th</sup> century), fall (during most of the 20<sup>th</sup> century), and new rise (during the 1980s and 1990s, primarily in the United States) of freedom of contract, we are witnessing the beginning of a new decline of freedom of contract over the past few years. Against this background, the paper examines how the tension between procedural and substantive fairness is manifest in the Israeli law of duress and extortion. It discusses issues such as the relevance of equality of exchange in duress cases, extortion in gratuitous contracts, and the treatment of economic hardship in extortion cases.

Orit Kamir, *Human Dignity and Respect-Based Human Rights in Israel's Basic Law: Human Dignity and Liberty (Kevod ha-Adam ve-Heruto)*

This article reads Israel's *Basic Law: Human Dignity and Liberty* while making a conceptual distinction between "human dignity" and "respect"; one term denotes the value of humanness *per se* and the other addresses the unique value of each person's

singular individuality. Each of these distinct basic values is shown to correspond with a distinct set of human rights. The article's interpretation links both these sets of human rights with Israel's Basic Law. Methodologically, the suggested interpretation relies on the distinction between two Hebrew terms used in the Basic Law to imply and protect human rights. Both terms use the Hebrew word *kavod*, but whereas one specifically speaks of "a person's *kavod* as a human being", the other merely refers to "a person's *kavod*". The article suggests that the two Hebrew phrases – one appears in Section 2 and the other in Section 4 of Israel's Basic Law – can be interpreted as indicating "human dignity" and "respect" respectively. Such a reading of the Basic Law constructs one of its sections (Section 2) as fully protecting the set of human rights that follow from the core value of humanness as our common denominator. This reading presents another section of the Basic Law (Section 4) as offering tentative protection to the distinct set of human rights that follow from the values ascribed to every individual's unique personality, traits, and skills. This article is part of a larger project that explores the distinctions between "human dignity", "respect", "honor," and "glory" – conceptually and in the Israeli context, as denoted by the Hebrew word *kavod* and derivative terms and phrases.

### *Asaf Harduf, Rape Goes Cyber: the Rationales and Limits of the Rape Offense*

In December 2011, a new prosecutorial thesis was revealed in Israel: rape may be perpetrated from afar, mainly online, by making a woman self-penetrate through fraud or the exploitation of her young age. Unprecedentedly, the prosecution maintained that mere communication might constitute "rape".

This thesis has reoccurred by 2016, but has mostly gone judicially unnoticed as defendants made plea bargains, admitting lesser offences. However, in two cases at least, the plea included an admission of guilt of rape. The admission produced an immediate conviction, without a debate of whether the actual deed was actually rape. This thesis is based on a triad of laws: a broad definition of "intercourse"; two uncommon definitions of rape: statutory rape and rape by fraud; and a law whereby it is immaterial whether a person performed the act or caused an act to be performed on his or another's person. Combining these laws, the prosecution claims it is possible to rape a woman from afar, using her consent and own limbs. Yet, is it justified to apply the current law of rape to remote sexual communication?

The article focuses first on “communication rape” and discusses issues of the law of rape, its purpose and boundaries, as well as the relationship between law and technology. Linguistically speaking, the prosecutorial interpretive move is complex but valid. Historically, it is unfounded. As for matters of doctrine, it is quite problematic since a new rape paradigm should not be created by the prosecution and in court. The second and main part of the article normatively analyzes the prosecutorial move. The article points at inconsistencies in the law of rape and calls for its revision. It rejects prosecutorial and judicial activism, while reminding the legislator that it is time to provide the public with protection against dangerous acts by defining new and suitable offences.

Yitshak Cohen & Amal Jabareen, *Judicial Legislation on the Procedural Level – A Claim Against Anonymous Defendants Following the More Case*

This article considers the implications, advantages and disadvantages of establishing a procedure for filing suits against anonymous defendants. In the More case, the Israeli Supreme Court determined that such a procedure should not be created through judicial legislation, but should more appropriately be established by the legislator. The Court has thus sealed the discussion of whether a person harmed by defamatory speech on the Internet has a substantive cause of action against the individual who expressed the offensive speech. The article examines whether the existing law enables the establishment of such a procedure either by interpreting the law or by inferring from similar legal institutions, and it concludes that it may be done.

In the second section, the article investigates the normative level and considers whether it is appropriate to establish procedures through judicial legislation. The article presents the advantages and disadvantages of establishing procedural norms by the judiciary and not by the legislature. This question is also examined in light of values presently applied to civil procedures including procedural fairness, good faith, discretion, and the right to access the courts. It appears preferable to establish this procedural norm through judicial legislation rather than by the legislature.

The third section of the article analyzes requirements that the procedure might encounter such as subject-matter, territorial jurisdiction, and the time limit for litigation. The fourth section studies the matter from the perspective of comparative law. While the Supreme Court ostensibly refers to the issue as a procedural matter,

the decision in the More case is significant and fundamental for the freedom of expression and speech. It gives total immunity to anonymous web surfers and shapes the boundaries and nature of Internet discussions in Israel. The determination that there is no procedure for filing such suits is actually a decision for the right of anonymous free expression that grants immunity to all anonymous web surfers.

Adi Niv-Yagoda, *The Principle of Mutuality – Caregivers’ Disclosure Duty, Patients’ Responsibilities, and the ‘Duty to Inform’*

Much has been written about the disclosure duty in the professional literature and court verdicts. That duty is imposed on caregivers under the law of patients’ rights, but also acknowledges that the ethical and legal obligations of patients have been increasing in recent years. As discussions of all aspects of patients’ rights become increasingly elaborate, as well as the changing generations, this seems like the right time to examine the boundaries of patients’ responsibility for themselves as well as for their caregivers.

For the first time in the Israeli legal discourse, this article wishes to address the various aspects of communicating information during, and examine the boundaries of patients’ responsibility in medical consultations. That responsibility seems to emerge from the recognition of the principle of mutuality in medical consultations. On the patients’ end, the responsibility to deliver relevant, comprehensive, and reliable information about themselves is known as “the duty to inform”. This primarily relates to the patients’ health benefits when diagnosis and treatment are solidly based on relevant and reliable information. Conversely, procedures that pose undesired risks to patients during medical treatment are tantamount to exposing caregivers to health or legal risks.

This article intends to explore the potential effects and consequences of communicating information, or the lack of it, for caregivers and patients, while considering the importance of examining the communication infrastructure in the context of the medical consultation. The article suggests a formula for examining the relevance and breadth of information that patients are expected to communicate to their caregivers. If implemented, this formula would balance the patients’ rights to protect their autonomy, discretion, and privacy with the need to protect the legitimate interests of caregivers. Furthermore, the suggested formula particularly emphasizes situations where there is a concern that disclosed information (medical or other)

might create stigma or prejudice. In such cases, before holding the failure to communicate information against patients, we should more closely examine the relevance of the information, the degree of its influence on the chosen medical procedures, the conduct of caregivers, and potential risks to patients and caregivers.

Israel (Issi) Doron, Tova Band-Winterstein & Michal Kornfield,  
*Elder Self Neglect – the Legal Perspective*

Elder self-neglect is commonly associated with neglecting one's essential needs and the refusal to receive appropriate medical treatment. Self-neglect is also associated with the neglect of one's physical appearance and living conditions, which often amounts to public nuisance. Despite its relative high prevalence rate in old age, little legal research has been conducted in this field. This paper attempts to contribute to the existing body of knowledge in this field, while examining the interaction between the law and elder self-neglect. Specifically, this study looks into how courts in Israel handle such cases.

Methodologically, this study quantitatively and qualitatively analysed a convenience sample of 43 cases of elder self-neglect. The analysis of these cases yielded two key findings: First, older persons are generally “invisible” to the legal process: they are misrepresented, fail to appear for hearings, and are rarely heard. Second, judicial discourse is usually ageist, framing old age in negative terms, and focusing on elders' inability to care for themselves.

In light of these findings, this study recommends a legal reform that would focus on (1) establishing a specific legal regime for self-neglect cases that assumes an anti-ageist approach, and (2) changing existing procedural rules to ensure due process and make sure that older persons are heard in the courts. Finally, the article describes a basket of optional, publicly-funded social services that should be created and provided as part of court rulings in such cases.

Aaron Kirschenbaum, *Criminal Punishment “When Not Warranted by the Torah”*: A Talmudic Dictum That Fashioned a Legal Approach

Halakhic literature relies on a dictum by Rabbi Eliezer ben Jacob – “I have heard that the court may [when necessary] impose lashes and pronounce punishments even

when not warranted by the Torah, which do not intend to disregard the Torah, but rather to safeguard it” (Babylonian Talmud, Sanhedrin 46a) – to allow Rabbinical Courts to impose emergency measures (*hora’ot sha’ah*). The article analyzes this dictum, its variants, the meaning of the terms it uses, and the practical significance and framework of the said emergency measures. The article deals with classical, hermeneutic Jewish Law (that is, *din Torah*, according to the accepted interpretation of the Oral Law) that serves as an educational program for the Jewish people, and not the pragmatic, practical Jewish Law that is not always subject to the rules of Torah law (such as “the law of the king” and the verdicts of courts that impose lashes and punishments “not warranted by the Torah”), which is the subject of the author’s book, *JEWISH PENOLOGY: THE THEORY AND DEVELOPMENT OF CRIMINAL PUNISHMENT AMONG THE JEWS THROUGHOUT THE AGES* (2013).

The plain meaning of this dictum is that Rabbinical Courts are authorized to diverge from the penal code of the Torah. Examples of this can be found in the divergence from classic halakhah in evidentiary law, criminal procedure, and substantive penal laws (the definition of the transgressions and the methods of punishment). The court is additionally authorized to use discretion when imposing punishments that are not specified in the Torah and are not accepted by the Oral Law, such as various forms of execution, rabbinically-imposed *makkot mardut* (punishment for disobedience), Rabbinically-imposed fines or prescribed by communal regulations, as well as ordering the corporal punishment, humiliation, disgracing, expulsion, and so on, of convicted individuals. Most importantly, these instructions must be *le-sha’ah*, temporary (emergency) measures that are not viewed as permanent laws.

The article begins by examining the textual variants of the dictum of Rabbi Eliezer ben Jacob. A study of these variants has led to a thorough investigation of the question of the courts’ authority to act not in accordance with Torah law. This research aids in understanding the possible interpretations of the dictum and its components (e.g., the concept of “emergency measure”), while analyzing a broad range of texts by classical commentators, and opening the door for an examination of the relationships between practical Jewish Law and classical-hermeneutic Jewish Law.