HAMISHPAT

Volume 24

LAW REVIEW
A HAIM STRICKS SCHOOL OF LAW PUBLICATION,
THE COLLEGE OF MANAGEMENT, ACADEMIC STUDIES

March 2018

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Abstracts

Hadar Masury, *113th Amendment to the Criminal Law – A Success?*

Amendment 113 to the Israeli Penal Law has structured judicial discretion in such a way as to diminish disparities in sentencing. The legislature has established a list of sentencing considerations and their hierarchy. This article investigates the implementation of the Amendment through the eyes of the active participants in the criminal process: judges, prosecutors and defense attorneys. The findings reveal two parallel worlds: in the first, formal world, the Amendment is strictly implemented; however, in the second, informal world, it is rejected and ignored.

Asaf Harduf, *Judicial Passivism and Fictitious Criminal Law: Convictions and the Problem of the Legal Lie*

Despite the possibility of asserting both factual and legal claims that may bring about their acquittal, many defendants plead guilty in court. The court's immediate reaction is to convict, even if the indictment does not actually reflect all the elements of the crime. The article designates this widespread phenomenon as “fictitious criminal law”, and while it may be seen in all fields of criminal law – substantive, procedural and evidentiary – it is particularly troublesome in terms of substantive law. When a defendant pleads guilty and is convicted of an offense the elements of which are not reflected in the indictment, various problems occur: absence of substantive authority to convict, injustice to the defendant or to the public by false criminal labeling, and what the article designates a “criminal lie”, a legal product which defies the law. When many defendants subjected to similar indictments act as described, a law-shaping effect may transpire: the multiplicity of guilty pleas and automatic convictions could affect future defendants. Every guilty plea and every conviction significantly narrows the likelihood of a future legal acquittal on such indictments. The article identifies this phenomenon and offers diverse solutions: strategic defense, statutory reform, judicial awareness and academic attention. The justice system should construct the law in normative terms and not as a response to prosecution-defense dynamics and momentum.

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Suzie Navot, *Constitutional Reasoning*

To what extent is the language of judicial opinions responsive to the political and social context in which constitutional courts operate? How does this language affect the behavior of public and private litigants interacting with the courts? Courts are reason-giving institutions, with argumentation playing a central role in constitutional adjudication; however, even a cursory look at just a handful of constitutional systems suggests important differences in the practices of constitutional judges, whether in matters of form, style, or language. Over time, too, constitutional reasoning may seem to exhibit both elements of change and elements of continuity. In what measure is this really the case? What is common to constitutional reasoning everywhere? Housed by the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany, the CONREASON Project endeavors to answer these central questions of comparative constitutional scholarship by applying and developing a new set of tools and research methods. The results of this project were published in the book *Comparative Constitutional Reasoning*, (Cambridge Univ. Press 2017) edited by András Jakab, Arthur Dyevre and Giulio Itzcovich. Focusing on independently-verified leading cases globally, a combination of qualitative and quantitative analysis offers the most comprehensive and systematic account of constitutional reasoning to date. This analysis is supported by an examination of eighteen legal systems around the world including the European Court of Human Rights and the European Court of Justice. Universally common aspects of constitutional reasoning are identified in this book, and contributors also examine whether common law countries differ from civil law countries in this respect.
Initially, this article presents a summary of the introduction to the book, then focuses on the Israeli analysis, and lastly offers a translation of the conclusion of the analysis, written by the authors of the book.

Moshe Bar-Niv & Ran Lachman, *"The Pursue of Justice": The Motivation of Israeli Judges to be Nominated to the Bench*

This paper examines the motives that drive first and second instance judges to seek appointment to their positions. The paper presents empirical analyses of accounts given by Israeli judges collected by opinion surveys at two points in time, a decade apart.
The results of the surveys, reflecting a longitudinal perspective, revealed that "intrinsic" (non-materialistic) factors were of prime importance in driving judges to seek nomination, whereas factors which were "external" to the judicial job (materialistic)

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played only a minor role. It was found that these motives were consistent over time and remained unchanged over a decade (1999–2011) even though the legal and social environment had undergone significant change over the same period. Nonetheless, differences in the relative importance of motives were found between judges who, prior to their appointment, had worked in the public compared to the private sector. No differences were found by gender or tenure.

The main conclusion drawn by this study is that the prime motive for seeking a judicial job is “altruistic”. Such altruism is not total but neither are judges led by economic rationality in seeking to maximize the utility produced by the judicial position; a basic level of external motivation exists but the intrinsic motivation overshadows it. These motives are not temporary but consistent over time.

Avi Tennenbaum & Sivan Ratzon, *The Judicial Appointments Committee – Insights from Game Theory, the Wisdom of the Masses and Group Intelligence to Improve its Composition and Procedures*

Against the backdrop of the political debate, criticism and calls for reform of the Supreme Court and the Judicial Appointments Committee, this article examines the judicial appointments process in order to determine whether it requires improvement and if so, how that improvement should be carried out.

Previous articles and studies dealing with this subject revolved around legal and political arguments; however, looking at principles of game theory, group intelligence and crowd wisdom, this article explores the issues from a fresh perspective and focuses on behavioral rather than ideological and political justifications.

Based on insights in these areas, the article suggests that changes be made to the structure of the Judicial Appointments Committee and the process of choosing its members as well as a new technique for justifying such changes. In particular it is suggested that a voting process be established based on a priority scale that will lead to the greatest possible reduction in the number of candidates. This will be achieved by holding two rounds of voting, where the second round will face off the two candidates who received the highest number of points in the first round. Through this process, each member of the Judicial Appointments Committee will be able to give weight not only to his preferred candidate but also consider all other candidates and create a hierarchy between them.

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Idit Ronen, Nurit Zimmerman, Michal Rom, Michal Alberstein & Ronit Cohen, *Empirical Research on the Activities of Judges in Court: Methodological Dilemmas and Preliminary Insights*

The paper presents the process of developing a special methodology, geared towards understanding certain phenomena taking place in the court room. The research question arose from data on "the vanishing trial", a label reflecting the fact that a judgment is given in less than 10% of the cases submitted to the first judicial instance in Israel.
The goal of the research is to understand the place of settlements in and around the judicial process, and the role of the judge in producing settlements, that makes judicial decisions redundant.
The research, conducted over 5 years and funded by the ERC, was undertaken in Italy, England, and principally, Israel.
We present the one-year process of building an original observation tool, designed to fit the needs of the research project as well as the distinctive features of the court room. The team, made up of researchers from diverse disciplines, produced a study offering a hybrid of qualitative and quantitative methodologies.
The paper discusses the specific and unique aspects of studying courts in three countries, possessing diverse legal systems, institutions, and legislative procedures, and a vast array of agents. The paper aims at distilling multi-faceted insights from this rich arena.

Ronen Perry, Oren Gazal-Ayal & Chen Toubul, *Gender Biases in Perception of Judgments*

Many studies have explored the effect on judicial decisions of judges' membership in social categories, such as gender, ethnicity, religion, age, and political affiliation. None has investigated whether membership in social categories affects public perceptions of judicial decisions, especially when such membership is suspected to affect a person's perception of reality. This question is important, inter alia, because the argument that the judiciary must be representative or reflective of society is partly linked to the assumption that representation enhances public trust in the judiciary. Such an assumption holds to the extent that lack of representation is perceived by members of a particular group as an exclusion of their unique viewpoint. This may occur because members of different groups (1) truly have different beliefs, values, interests, motivations, and emotional and cognitive processes, or (2) perceive a difference even

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where none exists. The article focuses on the latter, or, more accurately, on group-based biases in the perception of judgments.

The study examines (1) whether male and female judges' decisions are perceived differently, and (2) whether men and women perceive judgments differently. Specifically, it examines whether *identical* judgments concerning gender-charged events are perceived differently due to the judge's gender, the evaluator's gender, or a combination thereof, indicating the existence of cognitive biases. For this purpose, we employ an experimental research design. Our two independent variables are the judge's gender (an active variable) and the evaluator's gender (an attribute variable). The dependent variables are evaluators' perceptions with respect to different features of the judgments. The study asks, for example, whether people deem sentences imposed by female judges on sex offenders to be more severe than identical sentences imposed by male judges, whether women and men perceive identical sentences differently regardless of the judge's gender, and whether men and women perceive identical sentences imposed on sex offenders as fairer when imposed by judges of their own gender.

Keren Yalin-Mor, *Judicial Racial Bias and Judicial Decision Support Systems*

The paper examines whether and to what extent judicial decision support systems can assist in ameliorating the effect of racial bias on judicial decisions. Despite the difficulty in proving the influence of racial bias on court rulings, many studies indicate that the race of litigants, victims in criminal trials, lawyers and judges affect the legal outcome. These racially biased rulings breach principles of equality before the law and justice. The paper introduces an innovative tool that could be seen as the perfect solution to the problem of judicial racial bias – the use of judicial decision support systems. These computerized systems, offering recommendations for judicial decisions, are not by themselves affected by racial biases, and therefore could be considered to reach unbiased determinations. However, as the paper shows, there is a valid concern that even when using decision support systems, the decisions will be biased. Racial biases could potentially be embedded in the systems themselves, introduced through the judge-system interface, or shifted to other stages of the legal proceedings. Therefore, the paper proposes a number of measures for reducing the effect of racial bias when using judicial decision support systems, and suggests including an affirmative action tool within the system, to correct the effect of racial bias.

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Ami Kobo, *Criminal Mediation*

Criminal Mediation is a procedure that takes place with the assistance of the judge, working with the parties to try to reach a plea bargain, rather than the judge hearing the case and making a ruling. The practice of criminal mediation began to develop in Israel's courts more than a dozen years ago, and has significantly gained recognition in recent years, often receiving approval from the Israel's Supreme Court.
The author, who during his role as a judge served as a mediator in many cases in recent years, has brought his experience and understanding of this program, including its benefits and disadvantages. Mediation proceedings reveal the importance of open discussion between the parties, which expose the real interests and positions of the parties, setting aside the adversarial attitude.
A review of the academic literature shows that contrary to mediation procedures in civil cases, and opposed to other alternative dispute resolutions in criminal cases, the issue of criminal mediation is relatively unknown. Therefore, there is not significant information available regarding application and procedure. Hence, the need to write this article, to describe the criminal mediation process, characteristics, benefits, disadvantages, and recommendations for improving the system in the future.
This paper provides information and recommendations on managing the mediation process. For example, the mediator may review any relevant material, and offer suggestions for a plea bargain, including punishment; or demand full separation between the evidence judge and the mediator judge. From the administrative perspective, the court needs to allocate sufficient time for each mediation meeting. The judge must protect the integrity of the process to avoid putting pressure on the parties in a manner that could lead to false guilty plea or harm to the public interest. The legal system must ensure the creation of appropriate training for judges to perform in a mediation role. Looking ahead to the next stage, the criminal mediation should be enacted, and standardization and construction of the mediation procedure should be created. On an academic level, it seems necessary to have empirical research.
Criminal mediation, which has received legitimacy and recognition in the Israel's Supreme Court, has gained momentum over the years in the courts, and is a familiar and significant element in criminal proceedings. Intelligent management of mediation, according to clear rules, may contribute to the efficiency, integrity and due process of justice.

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Karni Perlman, *Problem-Solving Adjudication and its Application to Disputes Arising from Military Service in Israel*

Problem-solving adjudication, a form of therapeutic judging, regards the judicial process as one which influences and shapes the emotional perceptions and behavior of the parties to the conflict. This adjudication refers to the emotional well-being of the litigant and seeks to achieve positive, healing and rehabilitative outcomes. Such adjudication has relevance in both civil and criminal disputes.

Therapeutic judging is conducted within the framework of Problem-Solving Courts, including the Veterans Courts set up for ex US Armed Forces personnel. The format in which these courts operate has led to much thought regarding the possibility of applying this type of adjudication in various disputes involving military service issues. The use of therapeutic adjudication is not limited to special courts and those wishing to expand its compass can easily point to its advantages, as well as the challenges and concerns associated with its application. In accordance with the evolving trend in the Anglo-American legal system and in Israel to examine the increasing assimilation of therapeutic adjudication in the legal system, the article proposes its implementation when investigating claims arising from military service in Israel.

The article proposes the application of therapeutic adjudication and other elements learned from the Problem-Solving Court's mode of operation when dealing with disputes arising out of absence without leave from military service. This proposal outlines a new, qualitative and effective way in which the military authorities can cope with these disputes. In another context, it is proposed that therapeutic adjudication be applied to disability claims submitted by soldiers under the Invalids (Benefits and Rehabilitation) Law. Such adjudication would be apt when designing a thoughtful process that shows respect for those injured during their military service.

Michal Alberstein, Amos Gavrieli & Nurit Zimmerman, *Authority-Based Mediation*

This paper describes and defines a unique mediation procedure for the first time, namely, authority-based mediation. This procedure was developed by one of the authors of this paper and is characterized by the handling of highly complex conflicts in multi-party disputes, most often referred to mediation by the courts. Authority-based mediation is conducted in an evaluative manner, combining in-depth legal discussion with a soft dialogue that relates to emotions and interests and results in a settlement, usually following one extended mediation meeting.

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Based on a combination of observations collected in the mediation room and the author/ mediator's reflections regarding the development of the method and its components, the paper discusses two new aspects which may increase our understanding of the unique role of authority within this process: first, the importance of bringing the parties to a certain level of agreement and a high level of commitment to ending the proceedings with a settlement. Second, the formulation of a new concept of "relational authority", which is connected to the interpersonal interactions between the mediator and the parties, and between the parties themselves, as a derivative of the mediator's impact on the process.
Authority-based mediation is examined in light of two central current legal phenomena: one is, the institutionalization of existing mediation methods and their failure to bring about the resolution of many of the cases referred to them. The other is the vanishing trial phenomenon, and increased involvement of judges in settling cases. We argue that the unique characteristics of authority-based mediation create a new outlook regarding the relationship between mediation and adjudication; one which differs both from standard mediation and from the manner in which judges conduct settlement-oriented procedures under the shadow of their judicial authority.

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