1996

Constitutional Human Rights and Private Law

Aharon Barak
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/3698

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
The question whether constitutional human rights merely define and delimit the relationship between citizen and state or whether such rights also apply to relations between citizens is fundamental to any constitutional democracy. The author examines the scope of the application of constitutional human rights to private law with a view to resolving the issue for the Israeli context. He sets out and analyses four models for defining the appropriate scope of the application of constitutional human rights and roots these models in the jurisprudence of various countries. The author goes on to make a case for the model in which constitutional human rights apply, albeit indirectly, to relations between private citizens. Such an approach, he argues, is the one most consistent with the guiding impulses that drive human rights: respect for equality, dignity and individual autonomy. In addition, the author argues, the tools for facilitating his model of choice already exist in private law, in the form of concepts like "good faith," "public policy" and "unconscionability."

La question visant à déterminer si les droits de la personne garantis par la Constitution définissent et régissent seulement les rapports entre le citoyen et l'État ou s'ils s'appliquent aussi aux relations entre citoyens est essentielle à toute démocratie constitutionnelle. L'auteur examine le champ d'application de ces droits constitutionnels au droit privé en vue de résoudre la question dans le contexte israélien. Il propose et analyse quatre modèles visant à établir la portée de ces droits en se référant à la jurisprudence de différents pays. L'auteur revendique ensuite le modèle où les droits en question s'appliquent, mais indirectement, aux relations entre simples citoyens. Il soutient que cette approche est la plus conforme aux principes qui motivent les droits de la personne : le respect de l'égalité, de la dignité et de l'autonomie individuelle. L'auteur ajoute que les instruments visant à faciliter l'adoption de ce modèle existent déjà en droit privé, dans les notions de « bonne foi », d'« ordre public » et de « conduite oppressive ».

I. PRIVATE LAW AND PUBLIC LAW ........................................... 220
   A. THE ESSENCE OF THE DISTINCTION .................................. 220
   B. COMMON LAW HUMAN RIGHTS ...................................... 222
       1. Human Rights Originating in the Common Law .............. 222
       2. Common Law Rights Have Also Been Applied in Private Law .... 222
       3. Human Rights in Private Law ................................ 224

II. MODELS FOR THE APPLICATION OF CONSTITUTIONAL HUMAN RIGHTS IN PRIVATE LAW ........................................... 224
   A. THE POTENTIAL MODELS ............................................ 224
   B. DIRECT APPLICATION MODEL: ARGUMENTS FOR AND AGAINST .... 227
       1. Textual Arguments for Direct Application .. ............... 227
       2. Substantive Arguments for Direct Application ............. 228
       3. Textual Arguments Against Direct Application .......... 229
       4. Substantive Arguments Against Direct Application ......... 230
   C. NON-APPLICATION MODEL: ARGUMENTS FOR AND AGAINST ...... 231
       1. Arguments For Non-Application ............................. 231

* President, Supreme Court of Israel.

1996
Revue d'études constitutionnelles
HeinOnline -- 3 Rev. Const. Stud. 218 1996
2. Arguments Against Non-Application .............................................. 233

D. INDIRECT APPLICATION MODEL: ARGUMENTS FOR AND AGAINST 236
   1. Arguments For Indirect Application ........................................ 236
   2. Arguments Against Indirect Application .............................. 238

E. APPLICATION TO THE JUDICIARY MODEL: ARGUMENTS FOR
   AND AGAINST ........................................................................ 238
   1. Arguments For Indirect Application ....................................... 238
   2. Arguments Against Indirect Application .............................. 240

III. COMPARATIVE LAW .................................................................... 241
   A. THE WEALTH OF COMPARATIVE LAW ........................................ 241
   B. DIRECT APPLICATION MODEL .................................................. 243
      1. Switzerland ........................................................................ 243
      2. Germany ........................................................................... 244
      3. Other Countries .................................................................. 246
   C. NON-APPLICATION MODEL ..................................................... 247
      1. Canada .............................................................................. 247
   D. INDIRECT APPLICATION MODEL ............................................... 249
      1. Germany ............................................................................ 249
      2. Italy .................................................................................. 252
      3. Spain ................................................................................ 253
      4. Japan ............................................................................... 253
   E. APPLICATION TO THE JUDICIARY MODEL ................................... 254
      1. United States ...................................................................... 254

IV. CONSIDERATIONS FOR THE PROPER SOLUTION ................. 257
   A. THE PROPER SOLUTION: NEGATION OF THE NON-APPLICATION
      MODEL .................................................................................. 257
   B. DIRECT OR INDIRECT APPLICATION ....................................... 258
      1. Strengthened and Augmented Indirect Application .............. 258
      2. The Essence of Strengthened Indirect Application ............. 259
      3. The Strengthened Indirect Application Model and the Direct
         Application Model ................................................................ 260
      4. Indirect Application Model and Strengthened Indirect Application
         Model .................................................................................. 261
      5. The Strengthened Indirect Application Model and the Creation of
         New Legal Tools ................................................................... 261
      6. Indirect Application Model And Breach of Statutory Duty ....... 262
      7. Strengthened Indirect Application Model and the Level of
         Protection Afforded to Human Rights ..................................... 262
      8. Private Law as a Balancing System ........................................ 265
      9. Adjustment of Private Law To The Application Of Basic Laws ... 266
   C. THE AUTONOMY OF INDIVIDUAL WILL AND BALANCING
      BETWEEN CONFLICTING PROTECTED HUMAN RIGHTS ....... 268
I. PRIVATE LAW AND PUBLIC LAW

A. THE ESSENCE OF THE DISTINCTION

Western legal culture is based on the distinction between public law and private law.¹ Public law determines the allocation of power among government authorities, and the relations between the government and private parties. Conflicts within the realm of public law are routinely decided in the High Court of Justice. Conflicts within the realm of private law are decided in civil courts. This distinction between public and private law and courts has never been pointed or sharp. Through the legislature, the government enacts laws which regulate private relationships, and through the executive it acts in the area of private law and makes contracts with private individuals and bodies. Conflicts between private parties and the government cross over the line between public and private law. Government bodies also have made “political agreements” amongst themselves.² Private bodies have filled public roles, and have been

¹ For this distinction, see B. Akzin, “On Public Law” Statements of The Israel National Academy for Sciences 72 (Volume C, 5730). See also J. Beatson, “‘Public’ and ‘Private’ in Administrative Law” (1987) 103 Law Q. Rev. 34.
² See H.C. 1601/90 Shalit v. Peres, P.D. 44 (3) 353; H.C. 1635/90 Gergovsy v. Prime Minister, P.D. 45 (1) 749; see also G. Shalev, “Political Agreements” lyunei Mishpat 16 215 (5752).
characterized as "quasi-public" bodies or as "hybrid creatures". Bodies have been recognized as "dual-nature" bodies, to which "both the principles of private law and the norms of public law" are applicable. The obligations of trustworthiness, fairness, and reasonableness — applicable to the government in its relations with private parties in the spheres of public law — have infiltrated private law, initially in private law relationships between the government and private parties, and subsequently in private law relationships between private parties. The "good faith" principle functioned as an instrument of influence from public law to private law, and from private law to public law. Fundamental concepts of public law, applicable between the government and private parties — such as the principles of natural justice and the prohibition on conflict of interests — have penetrated into relationships between private

3 Like the Jewish burial societies which operate in Israel: see Civ. App. 280/71 Gidon v. Burial Society GHS"E, P.D. 27 (1) 10, 18, in which Judge Etzioni titles the burial society a "quasi-public body".

4 Like the Electric Company, which has been titled a "hybrid creature": see H.C. 731/86 Micro Daf v. Electric Company, P.D. 41 (2) 449 at 461.


7 See H.C. 685/78 Umdi Machmood v. Minister of Education and Culture, P.D. 33 (1) 767.


9 Such as in negotiations towards making a contract between a government body and a private party: see H.C. 292/61 Rechovot Packing House Inc. v. Government of Israel, P.D. 16 20 (tender); H.C. 840/79 Contractors and Builders Center of Israel v. Government of Israel, P.D. 34 (3) 729 (negotiations without tender).


11 Ibid.

12 See H.C. 376/81 Logsi v. Minister of Transportation, P.D. 36 (2) 449.

13 See H.C. 3/58 Berman v. Minister of Interior, P.D. 12 1493.

party. The borderline between the jurisdiction of the Hight Court of Justice and that of the civil court is blurred, and the “twilight” zone is broad.

B. COMMON LAW HUMAN RIGHTS

1. Human Rights Originating in the Common Law

Fundamental human rights also are classified according to the distinction between public and private law. Public law includes among its obligations common law human rights which were developed by the High Court of Justice and are directed towards the government. These are the “fundamental rights ‘which are not inscribed in a book,’ but rather arise directly from our State’s nature as a freedom-loving democracy. In its decisions, this Court has looked to these fundamental rights as a guiding light for interpreting law and reviewing the acts of the State’s administrative bodies.” Recognized within the framework are, inter alia, the basic right to human dignity, freedom of occupation, freedom of expression, and freedom of movement. Alongside this development in public law, the civil courts have recognized human rights in private law. These rights are aimed at other private parties, and they include, inter alia, freedom of contract, the right to one’s good name, freedom of movement and personal liberty.

2. Common Law Rights Have Also Been Applied in Private Law

Common law human rights have been applied both to the government and to private parties. The High Court of Justice recognized their applicability

15 See H.C. 991/91 Pasternak Inc. v. Minister of Construction and Housing, P.D. 45 (5) 50.

1996
Revue d'études constitutionnelles
against the government, and the civil court recognized their applicability against other private parties. Take, for example, the right to property: it has been held that, "the property right is among the basic rights of the person in Israel."\(^\text{21}\) It is directed towards the government, which is not entitled to infringe it without legislative authorization.\(^\text{22}\) But the property right is not directed solely against the government, but towards "the entire world." Private parties are also not allowed to infringe it. It is protected, \textit{inter alia}, by property and tort law.

Even though the basic human rights apply both to relationships between private parties and the government and to relationships between private parties, a distinction between the public and private side of human rights has not been felt to be particularly important. The reason for this is tied, first and foremost, to the manner of development of traditional human rights; both those rights aimed at the government and those aimed at private parties developed in a similar manner. Their evolution begins as interpretation of legislation. Thus, for example, freedom of procession\(^\text{23}\) was recognized as a human right in public law in the course of interpreting the Police Ordinance, and the right to one’s good name\(^\text{24}\) was recognized as a human right in private law in the course of interpreting the Defamation Law. Indeed, administrative and private law created our constitutional law. The common interpretative technique for recognizing human rights created unity of human rights, which precluded the need for standing upon the difference between human rights in public law and human rights in private law. Second, the "regular" legislature was entitled to mould basic human rights at will. Even though human rights were "basic," they did not have constitutional super-legislative status. Regular legislation could change them, so long as it was expressed in an explicit, clear and unambiguous fashion.\(^\text{25}\)

\(^{21}\) See H.C. 377/79 Peyeetzer v. Ramat Gan Local Planning and Building Committee, P.D. 35 (3) 645, 656 (Justice Barak).

\(^{22}\) See H.C. 249/64 Baruch v. Director of Tax and Excise, P.D. 19 (1) 486, 489.

\(^{23}\) See H.C. 153/83 Levy v. Southern District Police Commander, P.D. 38 (2F) 393.


\(^{25}\) See H.C. 337/81, Mitrani v. Sar Hatahbera, P.D. 37 (3) 337.
3. Human Rights in Private Law

Against the background of this normative reality, the following question arises: whether legislative human rights, set forth in the basic laws regarding human rights, are directed towards the government only, or are they directed both towards the government and towards other private parties? Do the constitutional human rights set forth in the basic laws apply in private law? Is it possible to speak about “the privatization of human rights?” This question is of central importance. It arises in most legal systems and while at times it is given an explicit answer in legislation, most constitutional texts are ambiguous, and the determination is judicial.

II. MODELS FOR THE APPLICATION OF CONSTITUTIONAL HUMAN RIGHTS IN PRIVATE LAW

A. THE POTENTIAL MODELS

It is possible to build four principle theoretical models for the determination of the influence of constitutional human rights on relations between private

---

28 This section is based on A. Barak, “Protected Human Rights and Private Law” in I. Zamir, ed., Klinghoffer Book on Public Law (Jerusalem: The Hebrew University,

1996

Revue d’études constitutionnelles
parties. The first model designates that constitutional human rights — which were defined and determined in the constitution or in a basic law — apply directly in private law, and directly influence private relationships (direct application model). According to this model, human rights are "protected" not only against the government, but also against private parties. A violation of a protected human right by a private party is likely to beget particular results which would not occur in the absence of the constitutional character of the violated right. Thus, for example, if Reuven shouts and disturbs a meeting or proceeding, he thus infringes Shimon's right, a participant in the meeting or proceeding, and Shimon is granted a right against Reuven. Similarly, if Reuven is prepared to sell his product to Shimon but not to Leah, he harms Leah's right to equality, and she is entitled to relief against Shimon.

The second model states that constitutional human rights are applicable only in public law. They are directed against the government, and the government alone (non-application model). According to this model, constitutional human rights do not have any application — direct or indirect — in private law. A court is not entitled to enforce them in private law: the rights are protected as against the government, but not against private parties. In the realm of private law, the regular laws continue to apply as they did before human rights were granted constitutional status. Thus, for example, if Reuven disturbs a meeting or proceeding, the right against him is the government's — within the framework of penal or administrative law — or the owner's, the use of whose property was harmed. Reuven, who refuses to sell his products to Leah, is free to do so since Leah's right of equality is not aimed at him. If Reuven makes a contract with Shimon limiting Reuven's freedom of occupation and breaches this contract, Shimon has the usual contract remedies against Reuven, subject to the claim that the contract is against public policy. This claim was available to Reuven before human rights were granted constitutional status, and it is available to him in its original form also after the change in the status of human rights.

The third and fourth models are mid-points between the two extreme models. The third model states that protected human rights apply in private law. However, this application is not direct, but indirect (indirect application model).
Protected human rights do not directly permeate private law "in and of themselves," but rather by means of private law doctrines (either through existing doctrines or through new doctrines created for the purpose of public law "absorption"). Reuven who refuses to sell his products to Leah is likely to be responsible to her for conducting negotiations with a lack of good faith.

The fourth model states that constitutional human rights are protected only against the government. They have no application (direct or indirect) in relationships between private parties. Nonetheless, the "government" also includes the judiciary (application to judiciary model). Accordingly, the judiciary is prohibited from developing common law (in the general normative area) or granting relief in a specific case (in the particular normative area) that harms a constitutional human right. According to this model, if Reuven is obligated to Shimon not to sell his products to Leah, and Reuven breaches this obligation towards Shimon, Shimon will not be entitled to the remedy of specific performance or damages. The reason for this is: if the court orders Reuven to fulfil his obligations regarding Shimon, the court will harm Leah’s right to equality — a right against the State, and breached by the court’s action.

These are the four principle models. Occasionally there will be conflicts between the models. Thus, for example, the direct application model and the indirect application model contradict the non-application model. Other models may co-exist. Thus, for example, it is possible to follow the indirect application model, and only if this does not give an appropriate solution, one can move to the direct application model. It also is possible to blend the first three models with the fourth model. Indeed, the application to judiciary model can be used to complete all the other models. It is possible to describe, of course, additional models. I have focused on these four models because each of them exists in comparative law, and because each of them sheds light on the solution to the problem in Israel.
B. DIRECT APPLICATION MODEL: ARGUMENTS FOR AND AGAINST

1. Textual Arguments for Direct Application

The point of departure of the direct application model is the language of the constitutional provision. Israel’s Basic Law: Freedom of Occupation states that “every citizen or resident of the State is entitled to engage in every occupation, profession or business.”\(^{29}\) Similarly, Basic Law: Human Dignity and Liberty states that “no harm may be done to a person’s property,”\(^{30}\) and that “every man is entitled to defend his life, body and dignity.”\(^{31}\) These provisions and others are drafted in broad language. It cannot be deduced from them — not explicitly nor by inference — that they are only directed against the government. A substantive difference exists between this “open” formulation of human rights and the formula which occasionally appears in constitutions, in which human rights are only directed against the government.\(^{32}\) Accordingly, from a “textual” perspective, an interpretation of basic laws which recognizes the direct application of rights is possible.

Moreover, Basic Law: Human Dignity and Liberty states that the goal of the law is “to protect human dignity and liberty, to anchor in a basic law the State of Israel’s appreciation of them as a Jewish and democratic state.”\(^{33}\) This goal is not limited solely to protecting human dignity and liberty as against the government. This goal is general, and it is realized both in the protection of rights against the government and in protecting them in relationships between private parties. According to the fundamental principles clause,\(^{34}\) basic rights of people in Israel are based “on the recognition of the worth of man, the sanctity

\(^{29}\) Basic Law: Freedom of Occupation, para. 3.

\(^{30}\) Basic Law: Human Dignity and Liberty, para. 3.

\(^{31}\) Basic Law: Human Dignity and Liberty, para. 4.

\(^{32}\) An example is provided by the First Amendment to the U.S. Constitution, which states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

\(^{33}\) Basic Law: Human Dignity and Liberty, para. 1A.

\(^{34}\) Basic Law: Human Dignity and Liberty, para. 1.
of his life, and of his freedom.” The recognition of the worth of man, the sanctity of his life and of his freedom justifies recognition of the application of human rights in private law. The danger of harm to the worth of man, the sanctity of his life and his choices is liable to come not only from the government but also from violent private parties. It is true that *Basic Law: Freedom of Occupation* states in its “respect clause” that “every authority of the government authorities must respect the freedom of occupation of every person or resident,” and a similar provision exists in *Basic Law: Human Dignity and Liberty*. Nonetheless, respect clauses are not judicial “presumptions,” from which it must be inferred that basic laws apply exclusively to relationships with the government alone. The purpose of these provisions is to establish the normative super-legislative status of basic laws, and their existence as a source of judicial authority and not just political rights. The respect clause is an insufficient basis from which to deduce a negative rule regarding the application of human rights in private law.

2. Substantive Arguments for Direct Application

The textual arguments that arise from the text of the Israeli Basic Laws allow for the application of constitutional human rights to relationships between private actors, but they do not mandate this conclusion. To this end substantive arguments are available. The first — and the most important of them — is the argument that the danger to human rights does not only emanate from the government, and that it must be recognized that grave danger to human rights emanates from non-governmental bodies. Indeed, there are even those who claim that in democratic regimes, the danger of harm to human rights from private parties is greater at times than the danger of harm from the government. Appropriate protection of human rights requires, therefore, a general test, which extends across both the public and private sector. The second substantive

---

36 *Basic Law: Human Dignity and Liberty*, para. 11.
37 See R. A. MacDonald, “Postscript and Prelude - The Jurisprudence of the Charter: Eight Theses” (1982) 4 Sup. Ct. L. Rev. 321 at 347. (“In our day, the most grievous and most frequent abuses of civil liberties occur in the exercise of private power. The occasions for discriminatory state action are both comparatively few and subject to relatively formalized procedures for their exercise, when contrasted with an employer’s power to dismiss, a landlord’s power to exclude the needy, or an entrepreneur’s refusal to provide services”).

1996

*Revue d'études constitutionnelles*
argument, which is simply the flip side of the first argument, is that human rights are essentially "liberties" anchored in the autonomy of the individual will and in the unity of the person and his dignity. These are likely to be harmed not only by government actions but also by the acts of private parties. The third substantive argument, which is dogmatic, is that it is not appropriate to distinguish, in a given judicial system, between different normative gradations of the same human right. What point is there, on the one hand, in preventing the legislature from enacting a statute permitting one private party to infringe the human rights of another private party, but on the other hand permitting — in the absence of prohibiting legislation — one private party to infringe the same basic rights of another private party?

The fourth argument is pragmatic. The true alternative to the direct application model is only the non-application model. If this model is not found to be suitable, the judicial system is liable to find itself in the framework of the indirect application and application to judiciary models. These two models create difficult and undesirable distinctions, the fourth argument states; it is preferable to take the "clean" and clear path, and if the non-application model does not seem to be suitable, it is preferable to go "all the way" and recognize the direct application model as the preferable model.

3. Textual Arguments Against Direct Application

The departure points for the contrary textual argument are those same provisions in the Basic Laws which indicate that the Basic Laws are aimed solely at the government. First, there are human rights drafted such that only government acts can infringe them. Thus, for example, Basic Law: Human Dignity and Liberty states that "There is to be no burdening and no limiting of a person’s liberty by imprisonment, arrest and extradition or in any other manner."38 "Imprisonment," "arrest," and "extradition" are government acts. Second, alongside recognition of "open" human rights, the basic laws determine the "limitations" which may be placed on human rights. These are the "limitation clauses" in the basic laws. The Basic Laws do not have a "limitation clause" regarding relations between fellow citizens. It therefore appears that

---

38 Basic Law: Human Dignity and Liberty, para. 5.
Basic Laws only apply against the government, because it is impossible to recognize human rights between private parties without recognizing a limitation of one human right arising from the existence of a different human right. Third, if the Basic Laws apply also to relations between private parties, it means that they not only grant one private party a right against another private party, but they also impose obligations on one private party towards another private party. But the case law holds that a human right cannot be negated or limited except by legislation explicitly stating as much. In the absence of an explicit provision applying Basic Laws to relations between private parties, the Basic Laws should not be interpreted as applying to these relations. Fourth, Basic Laws include respect clauses, according to which "every authority of the government authorities is obligated to respect" the basic rights set forth in them. The implication is that Basic Laws are directed solely at the government and not at private parties.

4. Substantive Arguments Against Direct Application

The first substantive argument is that constitutional dealings in human rights are always vis-à-vis the government. The fear is that the government — either the legislature or the executive — will infringe human rights, and the sole way to overcome this is by giving "super-legislative" (i.e. constitutional) normative status to human rights. Indeed, guaranteed human rights in relations between private parties require no constitutional provision because regular legislation or common law is sufficient. Constitutional treatment of human rights is by its very essence treatment of human rights in relation to the government.

The second substantive argument is that Basic Laws were intended to grant private parties basic constitutional rights. If we apply the Basic Laws provisions also to relations between private parties, we will find that Basic Laws do not

---

39 See H.C. 252/77, Bevugnee v. City of Tel Aviv, P.D. 32 (1) 404, 415; H.C. 337/81, supra note 25.
40 Basic Law: Freedom of Occupation, para. 5; Basic Law: Human Dignity and Liberty, para. 11.
only grant rights, but they also negate rights — since the right of one private party is the obligation of another private party. We will find that the negation of basic rights is raised to a constitutional level. This result is untenable. Basic Laws were intended to grant private parties protected basic rights, not to take these rights away.

The third substantive argument is linked to and arises from the second argument. According to this third argument, the application of human rights set forth in the Basic Laws to relations between private parties requires, by the nature of matters, balancing between competing human rights, since one person’s right is likely to infringe another person’s right. Since the Basic Laws do not contain “limitation clauses” regarding the limitation of one person’s right arising from the right of another person, the obvious result is that judges will have to create judicial “limitation clauses.” Thus judges would acquire enormous constitutional power, without any constitutional guidance. Moreover, when the Knesset sought to limit human rights as against the government, it set forth “limitation clauses.” The absence of a “limitation clause” in relations between private parties militates against balancing between human rights set forth in the Basic Laws. In the absence of this balancing, there is no possibility of applying constitutional human rights to relations between private parties.

C. NON-APPLICATION MODEL: ARGUMENTS FOR AND AGAINST

1. Arguments For Non-Application

The textual arguments supporting the non-application model are the same textual arguments which argue against the direct application model. The same is true for the substantive arguments. Indeed, the non-application model is the complete opposite of the direct application model. At the base of this model stands the assumption that a formal constitution is intended — in everything related to human rights — to protect private parties against the government, and it is not at all interested in dealing with the rights of one private party against

---

42 See text associated with notes 38-40.
43 See text associated with note 41.
another private party. The latter relationship is regulated from time immemorial by private law.44

Moreover, the end result of application of constitutional provisions regarding human rights to relations between private parties is the infringement of human rights. If the prohibition on discrimination, for example, applies also to relations between private actors, does this mean that a testator is not entitled to discriminate between heirs, and a seller is not entitled to discriminate between buyers? And what will become of the autonomy of individual will — and particularly freedom of contract — if the constitutional provisions regarding human rights will apply also to relations between private parties? And if we say that the solution is balancing between the various human rights, how will this balancing be done? The constitution — which sets forth a balancing formula regarding relations between the government and private parties — does not set forth a balancing formula in relationships between private parties. Will the balancing formula regarding relations between private parties be identical to that applicable between the government and private parties? Will we say that everything that the government is not entitled to do, private parties are also not entitled to do? This answer is untenable, for many things that private parties are entitled to do (such as discriminate among heirs), the government is not entitled to do (to establish discrimination in legislation). And if we say that the balancing formula in conflicts between private parties' rights is different, what is its substance? It is not at all appropriate for supporters of the non-application model to argue that a court establish this balancing formula, whose end result is the infringement of human rights themselves.

Accordingly, in everything regarding relations between private parties, we must return to private law and the accepted scales therein, without any influence or permeation of constitutional provisions, which remain entirely in the public sphere. Of course, the borderline between public and private law is not clear and impenetrable. There are reciprocal relations between public law and private law. In consolidating common law private law doctrines, the judge will consider public law. This consideration solely reflects the need to survey the entire structure of society, law and opinion, and is not based on the application —

44 See Swinton, supra, note 41; Raday, supra, note 26.
direct or indirect — of constitutional provisions regarding human rights in private law. Justice McIntyre of the Supreme Court addressed this point in the Canadian case which decided that the provisions in the Canadian Charter regarding rights and liberties do not apply to private law:45

This is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences between individuals.

According to this approach, a decision which grants a remedy to a private party against another private party is not measured against the standards of constitutional provisions, and the government’s obligation to respect the rights of private parties does not impose on courts the obligation as well to respect the rights of private parties. The court decides private disputes — this and no more. Accordingly, the court is likely to decide that a contract which infringes human rights (such as freedom of occupation) is contrary to public policy and therefore void, but it will do this in the same manner as it did in the past, without constitutionalizing human rights.

2. Arguments Against Non-Application

The arguments in favor of the direct application model46 are the same as the arguments against the non-application model. The danger to human rights emanates not only from the government, but also from private parties, and primarily strong private parties, such as certain private corporations. If a small city is not entitled to discriminate — because it falls within the definition of “government” — why should a large corporation be entitled to do so? Moreover, if we say that human rights in a formal constitution are aimed at the government, what is the rule regarding a legislative enactment which sets forth rights and

---

46 See text associated with notes 30-37.
obligations in private law, such as the Sale Law, Guarantee Law or Agency Law? Is the legislature free to determine their contents at will without the constitutional limitations set forth in the limitations clause? It seems that the answer is that the law is a government act and, accordingly, constitutional limitations apply to it, even if the contents of the law relate solely to relations between private parties.

But if so, why does a similar rule not apply to the development by courts of the common law concerning relations between private parties? Is this not "judicial legislation" to which constitutional limitations must directly apply? In either case: if constitutional provisions regarding human rights are directed also against the judiciary, and it is restricted in the development of common law concerning relations between private parties and the government, why would this restriction not also apply — just as it applies to the legislature — to the development of common law concerning relations between private parties? And if we say that constitutional provisions regarding human rights are not at all directed against the judiciary, is it reasonable that a court will be able to develop the common law regarding the right of a private party against the government without constitutional limitations? Indeed, the conception of a court as a government body subject to constitutional provisions indicates that the non-application model cannot stand, since even if it prevents the infiltration of human rights constitutional provisions by means of the direct application model, in the end it will be "entangled" in constitutional provisions by means of the court as government authority and, if so, it is preferable to reach the appropriate result by the direct application model than by the application to the judiciary model.

If we say, however, that the non-application model stands up even against the judicial application model, the outcome is difficult and inappropriate; what the state does not accomplish "directly" (by means of legislation) it will accomplish "indirectly" (by means of the courts). Either way, private party rights are not suitably protected. Furthermore, if constitutional provisions on human rights do not apply in relations between private parties, what is the law regarding the government when it operates in the private law realm? Do constitutional

---

provisions on human rights apply to government in these instances? The non-application model is likely to provide contradictory responses, and give rise to undesirable results.

One possible answer is that constitutional provisions in fact only deal with human rights against the government, and when the government acts in the private law area it acts as a private party and not as the government. This response — the critics claim — is unsatisfactory.\(^4\) It is not reasonable that the state can discriminate, infringe the right of speech, right of movement and the other human rights, just because it has changed "cloaks." There has been no change of identity and it is appropriate that constitutional limitations apply. The obligations of the state towards private parties under the constitution are the "personal law" of the state, and it takes this law with it in all its endeavours.

To overcome these arguments, the non-application model is likely to also take the opposite position: that the constitutional provisions on human rights indeed apply also where the state acts in private law. This response opens the door to a variety of problems and questions: How will the "government" be defined for this matter? Is a government corporation the "government" for purposes of constitutional provisions? And how do we reconcile the application of constitutional human rights provisions to the government when it acts in private law with the various arguments against the application of constitutional human rights provisions in private law?

Take the argument that an application like this infringes the autonomy of individual will, because it places obligations on the individual. If constitutional human rights provisions apply to the state in private law, they surely are not limited solely to the imposition of obligations, but rather also grant rights. The state's right is the obligation of the private party. How, if so, do we reconcile this conclusion — which the non-application model is prepared to accept — with the claim that this result is disastrous for human rights?

Further, take the argument that constitutional human rights provisions should not be applied in private law because the constitution does not set forth a

\(^4\) See sources cited infra, note 95.
limitation clause restricting human rights. How can this argument be overcome when the state acts in the private law area? The limitation clause — which applies to the government's legislative activities — does not apply to the state in private law. What is, then, the limitation which will apply in the private law framework? And if we say that courts will formulate balancing formulas suitable for relationships in private law between the state (as a private party) and other private parties, why can the courts not develop these formulas — or similar ones — for relationships between private parties?

D. INDIRECT APPLICATION MODEL: ARGUMENTS FOR AND AGAINST

1. Arguments For Indirect Application

The indirect application model — like the direct application model — recognizes the application of human rights set forth in the constitution to relations between private parties. Most of the arguments supporting the direct application model also support the indirect application model. According to its supporters, the advantage of this model is that it has an answer to some of the criticism levelled against the direct application model. The departure point of the indirect application model is that private law — which deals with relations between private parties — has always considered human rights. At the base of private law rules stand the human rights of personhood, self-realization, and dignity. The specific private law rules — like protection of one's good name, property, and assets — reflect rights of the private party (as against the state and against other private parties). The "value" concepts — like "good faith," "reasonableness," "negligence" — reflect, inter alia, an appropriate balance between opposing human rights. The right of one private party to freedom of action confronts the right of another private party to bodily integrity.

The balance is found in various "institutions" of private law, such as negligence. Another private law institution which "absorbs" human rights

49 See text associated with notes 30-37.
50 See sources cited infra, note 95.
51 See, for example, Civ. App. 243/83, supra note 20.
originating in the constitution is "public policy." According to the claims of the proponents of the indirect application model, "public policy" reflects the position of constitutional human rights. The freedom to make a contract is a constitutional freedom and the freedom of occupation is a constitutional freedom. When Reuven makes a contract with Shimon to limit freedom of occupation, there is a confrontation between the various liberties. From time immemorial these confrontations have been solved within the framework of the "public policy" principle, which weighed conflicting rights according to their relative status in the constitutional system. Indeed, "public policy" is the channel through which constitutional values flow into private law.

When private law gives expression to human rights, it does not create a special system of human rights in private law; there are not two human rights systems, that of private law and that of public law. There is one human rights system. In the past, human rights were anchored in common law rules "which were not inscribed in a book"; today they are anchored in a "super-legislative" norm. In the past, common law human rights "infiltrated" private law by means of private law "value terms"; now constitutional human rights themselves have "infiltrated" private law by means of these terms. The difference in constitutional status is likely to bring about a difference in outcome.

Take, for example, a private employer who fires an employee because of a political opinion the employee expressed. This termination is likely to be illegal. When the status of the right of expression is not constitutional, the illegal termination is likely to carry with it the sanction of damages, but not of specific performance. In contrast, if the status of the right of expression is raised to a super-legislative level, the employee is likely to win the remedy of specific performance. Raising the normative status of the right of expression increases its power in private law, and enables the court to grant the remedy of specific

---

52 Contracts Law (General Part), 5733-1973, para. 30.
54 See Civ. App. 294/91, supra, note 5.
55 H.C. 243/62, supra note 17.
performance which it did not recognize in the past. Similarly, a restaurant owner who refuses to proffer services for discriminatory reasons is likely to be deemed to be conducting negotiations in “good faith” if the right to equality is only common law, because, as such, the right does not have the power to overcome the restaurant owner’s freedom of contract. The same restaurant owner is likely deemed to be conducting negotiations with a lack of “good faith” if the right to equality is constitutional. The advantage of the indirect application model over the direct application model is that it makes use of private law tools. These are likely to be old tools, imbued with new content, or new tools, created by the private law with private law techniques, for the purpose of giving expression to the new content.

2. Arguments Against Indirect Application

The arguments against the indirect application model are, in principle, identical to the arguments against the direct application model. Surely, if constitutional human rights are protected only as against the government, they are not applicable — either directly or indirectly — to relations between private parties. The indirect application model attempts to ease the “digestion” of application of rights from public law in private law, but this easing is misplaced, because at its base the idea is not worthwhile. If human dignity, liberty and property are constitutional rights against the government, how do they succeed in shaping public policy whose concern is relations between private parties? Why is a contract which limits freedom of occupation contrary to public policy, if freedom of occupation in principle is not directed against other private parties, but only against the government?

E. APPLICATION TO THE JUDICIARY MODEL: ARGUMENTS FOR AND AGAINST

1. Arguments For Indirect Application

The application to the judiciary model is different from the previous three models. Those are located on one continuum, while the fourth model (applica-
tion to the judiciary model) represents a separate category. Its primary importance is in situations where the text of the constitutional provision indicates that the human right is directed against the government, and the government alone. The constitutional provision on the human right in such a situation is directed also against the judiciary, and it obliges the courts to develop common law rules, to interpret legislation or to give specific relief which will give expression to the constitutional human right and not contradict it. Thus, for example, in a legal system where the constitutional right to freedom of expression is drafted in language which prohibits the government from infringing freedom of expression, the courts must develop the common law in which the rules of defamation will not infringe freedom of expression. On this basis it was decided in the United States that the common law on defamation must recognize the defense of negligence to defamation against a public personality.

Indeed, the court is an arm of the government. When the court speaks, the state speaks, and when the court acts, the state acts. The judiciary is a government authority, and human rights must receive protection from it as well. In a legal system in which the legislature’s enactments are limited in scope and must operate within the framework of the limitations clause, there is no reason for releasing the common law, the creation of the judiciary, from all limitation.

Moreover, if the common law is subject to constitutional basic rights, individual law must also be subject to them. There is no distinction, in this regard, between a general normative act of the judiciary, which develops common law, and an individual normative act of the judiciary, which grants relief in a dispute between private parties. When a court issues an order enforcing a discriminatory contract, it places the power of the state — which acts via various means, including the principles of contempt of court — at the disposal of one private party who is infringing another private party’s right to equality. Thus it violates the government’s duty not to discriminate. This result

should be prevented, because the principle of the rule of law or, more aptly, the rule of the constitution, also applies to the judiciary.\textsuperscript{60}

2. Arguments Against Indirect Application

The application to the judiciary model is open to much criticism. First, when the judiciary grants relief in a private dispute, it is not subject to constitutional human rights. It acts as a neutral body which determines rights and obligations. Indeed, if Reuven is entitled to discriminate against Shimon, and the court enforces this entitlement — by declaratory judgment, damages, enforcement or invalidation — the court does not infringe upon the government's obligation not to discriminate. All the court does is recognize the non-application of the equality principle in private law. Justice McIntyre addressed this when he stated:\textsuperscript{61}

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute.

Indeed, if we see a judicial order — the result of a decree in a dispute between private parties — as an order against which the constitutional prohibition is directed, then all the constitutional rights of private parties against the government will be transformed into rights applicable between private parties. Thus the goal of the constitutional order will be frustrated. To overcome this argument, the court is likely to create distinctions between instances in which it merely recognizes the freedom of action of private parties in private law (in which it is not subject to constitutional prohibitions), and instances in which it acts as the government (and in which it is subject to constitutional prohibitions).


\textsuperscript{61} The \textit{Dolphin Delivery}, supra, note 45 at 600.

\textit{1996}

\textit{Revue d'études constitutionnelles}

If indeed the court will seek to make these distinctions — and comparative law points to extensive attempts in this direction — then the application to the judiciary model will meet with a second critique. This critique states that distinctions between instances in which the court acts as a "neutral arbiter" outside the constitutional prohibition, and instances in which it acts as government, subject to constitutional prohibition, is artificial. Why is an order enforcing a discriminatory contract an act of government violating the state's duty not to discriminate, but an order decreeing that the bylaws of a discriminatory club are valid not violate the state's obligation not to discriminate? Let us assume the case of a restaurant owner who refuses to give service for racist reasons, and the discriminated-against person who refuses to leave the place. The restaurant owner turns to the court and requests an eviction order; does the court — acting as the government — violate its obligation not to discriminate by giving the eviction order?

Indeed, every attempt to draw reasonable distinctions between situations in which the court acts in disputes between private parties will ultimately fail. It is therefore necessary to select one of two conclusions: one conclusion is that every act of a court, resolving disputes between private parties, is a government action subject to constitutional human rights. This approach opposes the language of the constitution, and is not suitable. The other conclusion is that every act by a court which decides a dispute between private parties is not deemed to be a government action against which protected human rights are directed. Thus the fourth model reaches its demise.

III. COMPARATIVE LAW

A. THE WEALTH OF COMPARATIVE LAW

The application of constitutional human rights in private law is a problem that has arisen in many legal systems. It exists regarding all constitutional

---

62 As was decided in Shelley, supra, note 59.
human rights, and primarily regarding the right to equality. Comparative law is an important source of inspiration for the Israeli jurist: "By comparison with your counterpart you learn to know yourself better." With the assistance of comparative law we succeed in separating ourselves from thought patterns we have become accustomed to, and from distinctions that appear essential to us. In their stead comes a comprehensive view as to the essence of the order and its goals, and its place in the systematic and social structure. By means of comparative law, our horizons are broadened. We consider additional possibilities and new solutions, and understand better the normative potential concealed in the local order. Surely comparative law is a guide to finding the appropriate solution. It grants comfort to the judge and gives him the feeling that he is treading on safe ground, and it also gives legitimacy to the chosen solution.

Nonetheless, it is necessary to be careful of overreliance on comparative law. First, recourse to comparative law is merely permissive, and does not have any obligatory basis. Second, a fitting comparison is only possible if the foreign legal institution or arrangement to which the expositor turns fills a function similar to that filled by the parallel local institution or arrangement. I addressed this in one case, where I stated:

Frequently, before the judge decides on the content and scope of a legal institution found in his system, he will turn to other legal systems for the purposes of comparison. The purpose of this comparison is inspiration. An essential condition for this inspiration is that the legal institutions which are compared are fit for comparison, that is to say, that they are based on common fundamental assumptions and come to realize common goals.

Third, the comparison is intended to unsettle thoughts. It must not become a source of imitation and self-denial. The final decision is always "local," and

comparative law by its very nature can only fill a secondary position. With this caveat I turn to several systems in which one of the models I addressed is accepted.

B. DIRECT APPLICATION MODEL

1. Switzerland

The direct application model is accepted in Switzerland. In several cantons it is based on explicit language in the canton constitution; in the remaining cantons — and on the federal level — there is no explicit provision, and direct application was accepted by jurists and courts by means of interpretation. The direct application model is called *Drittwirkung der Grundrechte*. This is a phrase borrowed from German literature. *Drittwirkung* means “impact on a third party.” The private party possessing a constitutional right is one party, the government is the second party, and every other private party is the “third party.” According to the *Drittwirkung* doctrine, constitutional human rights act both vertically — between private parties and the state — as well as horizontally — between private parties. The need to recognize the relationship arises primarily from the recognition that the danger of infringement of human rights does not only come from the state, and that great danger to human rights is perceived to emanate from private power centers. This recognition is also based on the conception that constitutional human rights are super-principles which operate throughout the entire system. Accordingly, it was decided that freedom of religion exists not only as to the state, but also in relations between private citizens, and it was decided that anyone who participates in a meeting has a right against another person who infringes his freedom of association by vocal

---


73 See Constitution of the Canton of Jura, para. 14 (2), which states that each person must use his basic rights in a manner which respects the basic rights of others.

74 The 1977 Proposed Amendment to the Federal Constitution, para. 25, contains an explicit provision on the matter.

75 See text below associated with notes 79-82

76 See BGE 4, 434 FF and BGE 86 II 365 FF.
disturbances. Similarly, an agreement among car importers not to place advertisements in a newspaper is characterized as illegal because, *inter alia*, it infringes the newspaper’s freedom of expression.

2. Germany

The “impact on third parties” (*Drittwirkung*) theory was developed in Germany. The accepted opinion is that human rights set forth in a basic law (*Grundgesetz*) apply not only to relations between private parties and the government in public law, but also to relationships between private parties in private law. The constitutional basic rights have, therefore, “impact on a third party.” Opinions differ as to whether this application is direct (without an intermediary) or indirect (through an intermediary). Scholars and courts are divided on this issue. Nipperdey—one of the great German jurists—and the Supreme Court for Labor Law (which he headed) adopted the direct application model. Durig, and the Constitutional Supreme Court (the *Bundesverfassungsgericht*) adopted the indirect model.

According to the approach of direct application adherents, constitutional human rights influence the legal system in its entirety. Human rights came to grant the individual “breadth of action” and to protect him from extremist powers. This power in the past was primarily the State’s power, but it is not the only power likely to do harm in the protected area of private parties. This harm can come from non-state powers, and private parties must also be protected.

---

77 See BGE 101 IV 172 ES.
78 See Müller, *supra*, note 72 at 84.
81 See Lewan, *ibid.* at 576.
against them — by means of human rights granted by the constitution. These apply, therefore, not only against the government, but also against other private parties. In relations between private parties, various human rights may conflict. Thus, for example, the freedom of contract of one person is likely to conflict with the freedom of expression of another. This conflict must be resolved by balancing the conflicting values. This balancing is done on a constitutional level, and it is employed directly in private law.

This can be illustrated by several decisions handed down in Germany: Reuven had a report on Shimon’s health, and he gave the document to an insurance company. It was decided that this breached Shimon’s constitutional right to dignity and personal development — protected by paragraphs 1 and 2 of the Basic Law — and that he is entitled to relief from the insurance company.\(^4\) In its reasoning, the court stated that the human rights set forth in paragraphs 1 and 2 of the basic law come “to secure a basic right, which obtains not only regarding the state and its organizations, but also in private law relationships against every person.” In another instance, the plaintiff’s picture was published in connection with drugs, and for this he sued the distributor. According to German private law, in such circumstances the plaintiff is entitled to damages only if he can prove pecuniary harm. This type of harm was not proven, but nonetheless the Supreme Court (Bundesgerichtshof) held that the plaintiff was entitled to damages because the plaintiff’s constitutional right to dignity and personal development was breached.\(^5\)

An additional example is the case where in a collective agreement a lower salary was fixed for women than for men doing the same work. It was held that paragraph 3 of the Basic Law sets forth the equality principle, and that this principle applies directly to private law. Accordingly, the Supreme Court for Labor Law voided the provision of the collective agreement.\(^6\) In another instance an employer announced that it was giving its employees gifts for Christmas, and that women whose husbands also worked at the factory would receive two-thirds of the gift. The Supreme Court for Labor Law decided that this was prohibited discrimination, which directly led to the cancellation of the

\(^4\) See 24 BGHZ 72, 76.  
\(^5\) See 26 BGHZ 349.  
\(^6\) See 1 BAG 258.
gifts. An example from another area is the case in which resident doctors signed a contract with a hospital, and according to the contract their residency ended if they got married. The Supreme Court for Labor Law decided that this contract provision violated the protections the constitution gave to the family, and accordingly voided it. In another instance a women sued her husband because he brought his mistress into the family’s home. The Constitutional Supreme Court granted her an order enjoining the mistress to stay away from the home, and in its reasoning explained that its conclusion was based on the constitutional provisions regarding the special protections the Constitution grants to the family.

3. Other Countries

In India the direct application model is not developed. Constitutional human rights are interpreted as placing obligations on the government and not on private parties. Nonetheless, the equality provision in the Constitution (paragraph 15) has been interpreted as applying also to private parties, and its text is as follows:

(1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to —

(a) access to shops, public restaurants, hotels and places of public entertainment, or...

On this basis it was determined that subsection (1) imposes an obligation on the state, whereas subsection (2) imposes an obligation also on private parties. One

87 See 11 BAG 338.
88 See 4 BAG 274.
89 See BGH 360 6.

1996
Revue d'études constitutionnelles

HeinOnline -- 3 Rev. Const. Stud. 246 1996
private party can sue another private party for breaching the constitutional provision.  

In the United States the direct application model is generally not accepted. Human rights set forth in the Bill of Rights are directed — by the language of the provisions — against the state. This does not apply to one provision (the 13th Amendment) which, according to its terms, does not place an obligation on the state. This provision states:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

On the basis of this text it was held that the provision applies in private law, and grants rights and obligations in private law.  

C. NON-APPLICATION MODEL

1. Canada

The non-application model is accepted in Canada. In the *Dolphin Delivery* case, the Supreme Court of Canada determined that human rights set forth in the Canadian Charter are directed against the government, and it alone. The provisions do not apply in private law, not directly and not indirectly. The Canadian Supreme Court also does not accept the application to judiciary model. This resolved the argument between those siding with application

---

91 See M. Hidayatullah, ed., *Constitutional Law of India*, Vol. 1 (New Dehli: Bar Council of India Trust, 1984). The editor also proposes establishing that if a court issues a judgment that contains prohibited discrimination, the judgment will be voided as a government action. The editor proposes, therefore, that India adopt the fourth model regarding human rights in private law. See also Deshpande, *Supreme Court Review* [1981] All India Reports 1.


93 Supra note 45.

94 Ibid.
Constitutional Human Rights and Private Law

(direct or indirect) of constitutional provisions in private law\(^9^5\) and their opponents.\(^9^6\) This decision received both praise\(^9^7\) and fierce criticism,\(^9^8\) but so long as it remains unchanged, it reflects the accepted rule in Canada. The Court’s primary rationale was based on the Charter provision\(^9^9\) according to which the Charter provisions apply to the Parliament and Government of Canada, and to the Legislature and Government of each of the Canadian provinces. According to the Court, by virtue of this provision, the rights and liberties set forth in the Charter apply to the government whether it acts in public law (as ruler), or whether it acts in private law (as private party); whether it acts pursuant to legislation or pursuant to common law rules. In contrast, the Charter provisions do not apply to private parties in their relationships among themselves, whatever the source of their actions.

The Supreme Court of Canada has had occasion to deliberate on the application of the *Charter* in two recent cases. In *C.B.C. v. Dagenais*,\(^1^0^0\) in the context of a challenge to a court-ordered publication ban issued during criminal proceedings, the Court seemed to move in the direction of the indirect model of application. A majority of the Court held that the *Charter* applied indirectly to court-ordered publication bans issued under the common law in light of the

---


\(^9^9\) *Charter*, section 32 (1).

statement in *Dolphin Delivery* that judges ought to take into account Charter values in the development of common law rules. But in the subsequent case of *Hill v. Church of Scientology*, the Court made clear that it was not willing to apply the *Charter*, even indirectly, to matters that were "purely private," here an action for common law defamation. The approach in *Dagenais* was distinguishable because it arose in the "essentially public" criminal context. For cases classified as "purely private," such as *Hill*, the Court would invoke *Charter* values only to influence the development of the common law. The Court insisted that the judiciary should be cautious in changing the common law so as to conform with *Charter* values, leaving major changes to the legislature. Accordingly, in *Hill*, the Supreme Court of Canada left the common law of defamation intact, finding the existing common-law regime for the protection of reputation consistent with the *Charter* guarantee of freedom of expression.

**D. INDIRECT APPLICATION MODEL**

1. Germany

The indirect application model has won recognition and development in Germany. It is accepted by both constitutional and private law experts. Larenz and Flume point to this as the proper model for the application of constitutional human rights in relationships between private parties in private law. This model was adopted in the decisions of the Constitutional Court in Germany.

---

106 See Kommers, *supra* note 82 at 368.
The central decision is the Luth case. A film director named Harlan who, during the Nazi era, directed the "Jid Siss" film, returned after the war to his work and directed a new film. Luth, an activist in an association for mutual understanding between Christians and Jews, spoke before film-makers and called for a boycott of Harlan's new film. The film distributors turned to the civil court and received an order barring Luth from any urging of the general public not to see the film, and from requesting movie theatre owners and distributors not to show it. The civil court determined that by his behaviour, Luth violated the provisions of paragraph 826 to the Civil Code (B.G.B.), which states that "everyone who intentionally causes damage to his fellow-man in a manner that harms good morals must compensate for the damage."

Luth turned to the Constitutional Court, claiming harm to his constitutional right to free expression, a right protected in the Basic Law. The Constitutional Court adopted Luth's position. It stated that basic human rights constitute an objective value system, influencing all branches of law, whether private or public. This objective value system is a standard for assessment of every action, whether legislative, executive or judicial. Every private law arrangement must adjust itself to this value system. However, the impact of this objective system in private law is by the doctrinal means of the private law itself. The dispute remains, therefore, a private law dispute decided according to private law provisions, although those provisions operate and are interpreted in accordance with the Constitution. This is particularly apparent in the private law rules reflecting public policy. These rules are closely linked to public law, and they complete it. They are exposed to influence by constitutional law. On this basis it was held that Luth's behaviour was not behaviour harming good morals and, accordingly, did not constitute wrongdoing as per paragraph 826 of the Civil

---


108 The Basic Law, para. 5, states (in English translation): "(1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing, and pictures, and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship. (2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor."
In reaching this conclusion, the Constitutional Court weighed the distributor's right to distribute the product against Luth's right of speech.

A later German decision gave additional expression to the indirect application of the constitutional right to private law. It was determined, for example, that an unlawful infringement of freedom of expression constitutes wrongdoing according to paragraph 823 of the Civil Code, by being an act (intentionally or negligently) which infringes another's right in a manner violating the law. It was also held that the Constitution defends the right to privacy, and that infringement of this right — which constitutes wrongdoing according to paragraph 823 — gives rise to damages under private law. The Civil Code was interpreted as granting a right to damages only when the damage is pecuniary, but in light of the constitutional provisions — which protect non-pecuniary values such as privacy — it also was held that it should be interpreted in a way that recognizes the right to damages for non-pecuniary harm.

By the very same principle, according to which the constitutional principle radiates into private law by private law doctrines, it was decided that the right to privacy, derived from constitutional provisions, is recognized by the Civil

---

109 The Court needed this argument because, per Paragraph 5(2) of the Basic Law, Luth's right to expression was limited by the provisions of the general laws, including the laws concerning a distributor's right to distribute his product. The Court determined that the general laws which may potentially limit freedom of expression — including the Civil Law Book — must be interpreted on the basis of the constitutional principle of freedom of expression. The relationship between the basic law and the general law should not be interpreted as a one-way relationship, according to which the general law can restrict the basic law. The mutual influence between the two provisions must be appreciated. The general law does indeed set limits for the freedom of expression, but this same general law must be interpreted in light of the importance of the value in a democratic society set forth in the basic right. Therefore, each limiting effect of a basic right must itself be limited.

110 In the Blinkfier case; see 25 B. Verf. GE 256.

111 See the Syrian Princess case: A newspaper published an interview — which was completely fabricated — with the Princess of Syria (the ex-wife of the Persian Shah) including intimate details about her private life. Syria sued the newspaper for damages in civil court for the non-pecuniary harm caused to it. It was held that it was entitled to damages; the Constitutional Court affirmed this holding: see 34 B Verf. GE (1973) 269.

112 Basic Law, paras. 1 and 2.
Code which protects people in the face of unlawful intentional or negligent harm. Thus it was decided that where the validity of discharging a worker is limited by the existence of “good cause” or “proper basis,” this condition does not exist if the discharge was based on the fact that the worker exercised his constitutional right to free expression. In a different case, a contract was made between a cab driver and his employer, according to which the employee would not drive for another employer for three months from the termination of the employment contract, and if he breached this provision he would have to pay a one-hundred Deutschemark fine. It was held that this provision was void. The Labor Court held that the validity of the provision was determined according to the principle of public policy. In this framework it is necessary to weigh all the relevant facts, and among them it is necessary to give — as a result of the Basic Law — a heavier weight than would be given in the past to freedom of personhood and freedom of occupation. The provision does not advance any interest of the employer worth protecting and, accordingly, was void. In developing this model in German law, the courts did not hesitate to create new private law tools — as the non-pecuniary damage example demonstrates — so as to absorb the basic constitutional rights. Nevertheless, it should be noted that, generally, use is made of existing tools.

2. Italy

The indirect application model has been accepted in Italy. It has been held that, in light of the statutory provisions regarding the protection of health, the Civil Code provisions — that thus far had been interpreted as granting damages only where pecuniary harm was caused — should be interpreted as granting damages also for non-pecuniary harm such as pain and suffering. It was

113 B.G.B. para. 823.
114 See 1 BAG 185.
115 See BAG 22.11.65; (1966) VI Juristische Schulung.
116 See Sentenza 14 luglio 1986, 184 (Gazzella uffiale, 1a serie speciale, 23 luglio 1986, No. 35. For a review of the decision, see Foro Italiano, 1986, I, 1, 2053 ff.
117 The court pointed to paragraph 32 of the Italian Constitution, which states in English translation: “The Republic will protect and supervise health as a fundamental individual right and also as a public interest, and will guarantee free medical treatment to the poor”.
118 Civil Code, pare. 2043.
held that there is a connection between the constitutional provisions and the Civil Code provisions, in that the Civil Code is given a constitutional dimension. In order to give content to the Civil Code provisions it was found to be necessary to turn to a legal source on the highest normative level — the Constitution. As such, the constitutional provisions must be integrated into private law.

3. Spain

The accepted approach in Spain is that human rights indirectly influence private law. In one case, an employee was fired after being selected to represent the other employees against the employer. According to private law he was entitled to damages for unlawful termination. He turned to the Constitutional Court, and it held that, because the motivation for the termination infringed a constitutional provision which establishes worker representation, the appropriate remedy was not simply damages, but also reinstatement to his job. The civil court was requested, therefore, to create new remedies which would give expression to constitutional rights. If the civil court fails to do so, it is possible to appeal to the Constitutional Court, where the subject of the appeal is the claim that a constitutional right was violated.

4. Japan

In Japan, constitutional law applies indirectly to private law. Most problems have arisen in labor law, primarily regarding violations of the principle of equality and freedom of expression. The problem reached the Supreme Court of Japan in the following circumstances: the claimant was hired for work as a temporary employee. After a three-month trial period his contract was not renewed. The reason given by the respondent — the worker’s employer — was that, before he was hired and despite the fact that he was asked about it, the

---

121 See Moreno, El Proceso de Amparo Constitucional (1987).
122 See Horan, supra at 864.
123 In the case of Takano v. Mitsubishi Jushi K.K., 27 Minshu 1536. A summary of the decision in English appears in (1974) 7 Law in Japan 150.

Vol. III, No.2
Review of Constitutional Studies

HeinOnline -- 3 Rev. Const. Stud. 253 1996
claimant refrained from disclosing the fact that he was involved in radical political activity as a university student. The claimant turned to the Tokyo District Court seeking reinstatement to his job. The District Court held that he was entitled to return to his job, and based its opinion on the regular civil law. The Appellate Court — to which the employer appealed — dismissed the appeal. The Appellate Court’s reasoning differed from that of the District Court. It held that the employer’s questions regarding the worker’s activities were contrary to clauses 14 and 19 of the Japanese Constitution — which recognizes the principle of equality and freedom of expression — because they require the worker to reveal his political views. In light of the unlawful nature of the questions, the employee’s failure to reveal should not have been seen as an act justifying the termination of his employment, and accordingly he must be reinstated. The employer appealed to the Supreme Court, and the Supreme Court accepted the appeal. It was held that constitutional provisions do not apply directly to private law. Still, the Court held that indirect application is to be achieved by means of private law doctrines, such as the principle of public policy or specific labor laws. In this context it is necessary to consider, on the one hand, the principle of equality and freedom of expression and, on the other hand, the principle of freedom of occupation and the right to property. On balance, the employer’s actions should not be seen as unlawful actions.

E. APPLICATION TO THE JUDICIARY MODEL

1. United States

As noted, the fourth model for the relationship between constitutional human rights and private party relationships states that constitutional human rights are directed against the state and the state alone. Nevertheless, the judiciary is an organ of the state and, accordingly, constitutional provisions are directed against it as well. This model has been adopted in the United States. The Bill of Rights in the United States Constitution is drafted in language which places prohibitions or obligations on the State. Except for the 13th Amendment — which concerns the prohibition of slavery — the rest of the amendments are drafted in language from which the courts’ have deduced that the provisions are directed against the state and the state alone. But who is the “state” against whom the rights are directed, and when does “state action” violate a private party’s right? Extensive
scholarship has been developed on this matter. At the base of this scholarship stands the recognition that the judiciary is an arm of the state as well. When the judiciary acts, the state acts. Human rights are protected and entitled to protection not only against the legislature and executive, but also against the judiciary. Hence, two inferences are drawn: The first is that there is some “state action” in the creation and development of the common law. Accordingly, it was held in the case of *New York Times v. Sullivan* that common law rules regarding defamation must adjust themselves to the principle of freedom of expression established in the First Amendment to the United States Constitution. In addressing the claim that the First Amendment to the constitution is directed against the state, whereas the dispute before the Court was a civil matter between private parties, Justice Brennan stated:

That proposition has no application to this case. Although this is a civil law suit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that law has been applied in a civil action and that it is common law only. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

The second inference drawn by the Court was that, in granting relief within the framework of private law, the court is likely to find itself in a situation in which the relief it grants stands in contradiction to constitutional human rights. This is the rule of *Shelley v. Kraemer*. Suppose a contract was made between Reuven and Shimon, in which Reuven was obligated not to grant property rights in land to black people. Reuven sold land to Levy, a black person. Shimon turned to the Court with a claim against Levy, based on the restrictive covenant in the contract. Shimon asked the Court to issue an order enjoining Levy not to enter the land. Such a suit was dismissed in the U.S. Supreme Court. The Court noted that the Fourteenth Amendment to the constitution, which establishes the right to equality, is directed against the state and not to relationships between private parties, and that in the contractual relationship between Levy and Shimon, Levy’s constitutional rights were not breached. But here judicial

124 See Tribe, *supra* note 92 at 1688.
enforcement was requested, and the act of judicial enforcement is a "state action" violating Levy’s constitutional right to equality. Chief Justice Vinson noted:

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court [and] ... state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute.

The Court noted that without the active involvement of the Court, behind which stands the power of the state, Levy would be free to enter the land which he purchased without any restriction. On account of the Court’s involvement, Levy is prevented — because of his being black — from the enjoyment of a right he would have received as a willing buyer from a willing seller.

The scope of the Shelley rule is not at all clear. Fierce criticism has been levelled against it. If we take the case to its extreme, then every constitutional right directed against the state becomes, by virtue of the court’s action, a right directed against private parties. American courts refrained from drawing a conclusion of this sort; extensive case law narrowed the scope of application of

---

128 See Shelley, ibid. at 13 per Vinson, C.J.: “That Amendment erects no shield against merely private conduct, however discriminatory or wrongful ... the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated.”

129 Chief Justice Vinson wrote in Shelley, ibid. at 13: “These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements”. If Levy entered the property, and Shimon sued Reuven for breach of contract, his lawsuit would be dismissed because of the Shelley rule: see Barrows v. Jackson, 346 U.S. 249 (1953).

130 Shelley, ibid.

the *Shelley* rule. Thus, for example, it was held that a court will grant the remedy of eviction against trespasser defendants, who entered the claimant’s land over his objection, which was based on the fact that the defendants were black.\(^{132}\) Also, a will which discriminated against blacks was upheld by the Court.\(^{133}\)

IV. CONSIDERATIONS FOR THE PROPER SOLUTION

A. THE PROPER SOLUTION: NEGATION OF THE NON-APPLICATION MODEL

The approach, which appears to me to be proper, views basic human rights as a union of ideas. Uniting human rights which grant liberty to the private party and those which negate the rights of his fellow-man,\(^{134}\) whether *in rem* rights protected against the “entire world,” or whether rights directed against both the government and other private parties. There is no human rights “double-system” and “double-entry accounting” should not be established regarding them. There is one system of human rights, which in the past has been based on “regular” legislation and on the Israeli-style common law. Today these rights are on a higher normative level. By being anchored in Basic Laws they have constitutional super-legislative status.

Hence, I do not think that human rights protected in the Basic Laws apply only in public law. They have comprehensive application to both public and private law areas, and they are essentially the new basis for both public and private law. Indeed, if in the past basic human rights were derived from administrative and private law, now administrative and private law must be derived from constitutional human rights. This is the meaning of the constitutional revolution in the human rights area. From this perspective my approach


\(^{134}\) For the Hohfeldian study of human rights, see W.N. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1934); see also Crim. App. 95/51 *Pudmasky v. Attorney General*, P.D. 6 341.
clearly rejects the non-application model as the proper model. I addressed this point in the *Kestenbaum* case, when I noted:  

It is understood and clear that the basic principles of the system in general and basic human rights in particular are not limited solely to public law. The distinction between public law and private law is not that strong. The legal system is not a confederation of legal areas. It is a union of system and law. Indeed, the basic principles are the principles of the entire system, and not just of public law. Basic human rights are not directed solely against the government. They also extend to mutual relationships among private parties. Would anyone ever think that it is possible in Israel for two private parties to enter into a contract according to which one will become the other’s slave? Indeed, the true question is not whether the basic principles of public law apply to private law. The answer to this question is simple and clear — yes. The true questions are, how do the basic principles of public law flow into private law, and what are the channels by which these principles are transferred to private party behaviour in relations with other private parties.

The danger to human rights does indeed primarily emanate from the government, but it is not the only danger. Danger to human rights also lies in wait from the conduct of other private parties. Alongside the need to restrict the power of the state as to private parties, there is also a need to limit the power of private parties in their mutual relations. The non-application model is not appropriate because it draws too stark a line between public and private law. Indeed, basic human rights are not directed solely against the government. They apply also to mutual relationships among private parties.

B. DIRECT OR INDIRECT APPLICATION

1. Strengthened and Augmented Indirect Application

It seems to me, therefore, that basic human rights also apply in private law. Is their application direct or indirect? In my opinion the proper model is the indirect application model. However, this is not the regular indirect application model, but a strengthened and augmented indirect application model. The reason for my approach stems from the substance of human rights on the one hand, and of private law on the other. Human rights restrict each other; Reuven’s right is

---


1996

*Revue d'études constitutionnelles*
Shimon's "non-right." This "non-right" detracts from Shimon's human rights. Therefore, recognition of the human rights of one person against another necessarily requires limitation and narrowing, as a consequence of having regard for the other's rights. This limitation and narrowing must be evaluated within a particular normative framework. This framework concerns relationships between private parties. This is private law. Hence, recognition of human rights requires restrictions and limitations set forth in private law itself. Indirect application, therefore, is required.

This conclusion is decreed from the very essence of private law, which is nothing but the legal regime which regulates the cooperative existence of various human rights while considering the public interest. Indeed, at the base of private law stand the basic human rights directed against other private parties. Private law is, in a certain sense, the legal framework which determines the legal relationship between basic human rights and the proper balance between conflicting human rights, while considering the public interest. Private law is the expression of restrictions placed on human rights to realize human rights while safeguarding the public interest. Private law is the framework which translates constitutional human rights into a "give and take" way of life between private parties. Indeed, private law includes a complicated and expansive system of balances and arrangements which are intended to make collective life of various private parties possible, in which each individual enjoys basic human rights. The recognition of human rights against private parties must, therefore, "permeate" via private law "channels." This is the true meaning of indirect application.

2. The Essence of Strengthened Indirect Application

As mentioned, I believe that constitutional human rights apply (indirectly) in private law. This outlook is based on two assumptions. First, that constitutional human rights set forth in the Basic Laws are directed not only against the government but also against other private parties. The freedom of property is the freedom of a private party against both the government and against other private parties. Second, that remedies for breaching human rights in interpersonal relationships must find a place in private law. According to this concept, private law is the "geometric place" to formulate remedies for an infringement that one private party imposes on the constitutional right of another private party. According to this approach, when a constitutional right of one private party is
breached by another private party, the injured private party must find his relief within private law. To the extent that existing private law grants an appropriate remedy — i.e., a remedy consistent with the scope of the right and proper protection as demanded by the Basic Law — it fulfils its role, and does not give rise to any practical difficulty. To the extent that existing private law does not grant an appropriate remedy — i.e., despite breach of the constitutional right, no remedy is granted in private law — the strengthened indirect application model states that private law must change itself, such that it will find a remedy as needed. Thus, the uniqueness of the strengthened indirect application model is that it places a demand upon private law. It obligates it to prepare appropriate tools “for the absorption” of constitutional human rights. To the extent that these tools do not exist, it is upon private law to create tools such as these. These can be created by means of new interpretations of existing tools (such as giving a new interpretation to the principle of good faith) or by the creation of new tools, whether by filling lacunae, or by the general principle that where there is a right, there is a remedy.

3. The Strengthened Indirect Application Model and the Direct Application Model

In what way, then, does the strengthened indirect application model differ from the direct application model? The two models call for application of constitutional human rights in private law. Accordingly, breach of a constitutional human right is likely, according to both of them, to constitute a breach of a constitutional obligation. The difference between them is this: The direct application model ignores private law. It decrees relief directly from the constitutional right, by way of rules of relief which are outside the private law. It creates a type of “constitutional private law” which exists alongside regular private law. In contrast, the strengthened indirect application model sees within existing private law the appropriate normative system for giving relief for infringement of a constitutional right. According to this model, it is not necessary to ignore private law, and it is not necessary to create constitutional private law alongside regular private law. According to the strengthened indirect application model, the regular private law is constitutional private law, because private law is nothing but an expression of the constitutional human rights of private parties in relationships with other private parties.
4. Indirect Application Model and Strengthened Indirect Application Model

What is the difference between the classic indirect application model and the strengthened indirect application model? There is no difference between the two at all in situations where private law has developed appropriate tools to give expression to constitutional human rights. Therefore, when a contract is made, the general rules of public policy and good faith fill their appropriate role, and permit (indirect) application of constitutional human rights in private law. The substantive difference between the two models stands out in those cases where private law does not contain legal tools or institutions for the absorption of constitutional human rights. According to the classic indirect application model, there is no alternative in this case but to deny the injured private party a remedy. In contrast, the strengthened indirect application model states that in this situation it is upon the private law to change itself, and create the missing tools or institutions. Private law cannot remain indifferent to an infringement of a constitutional human right. The obligation is placed upon it to "absorb" this breach and grant a remedy for it. Between public law (the creator of the right) and private law (the grantor of the remedy for the right) there must be "integrated tools." Where the right is recognized (in public law), the remedy must also be recognized (in private law).

5. The Strengthened Indirect Application Model and the Creation of New Legal Tools

The strengthened indirect application model is based on the concept that private law must create tools to give relief for infringement of a constitutional human right. Where these tools do not exist, it is incumbent upon the legislature to create them. What can be done if the legislature refrains from action? It seems to me that it is possible to point to several lines of thought: first, at times a constitutional duty (status positivus) is placed upon the legislature to fix remedies for infringements of constitutional human rights, such as damage to human dignity; second, the absence of a legal arrangement is likely at times to be considered a lacunae, allowing it to be filled according to the applicable rules; third, sometimes it is possible to create new tools by renovating old tools,
for example, new understandings of concepts such as good faith, negligence, and public policy. Fourth, the general private law principle, according to which where there is a right, there is a remedy (ubi ius, ibi remedium), is likely to be a source for the creation of new tools which will be part of private law.

6. Indirect Application Model And Breach of Statutory Duty

An expression of the uniqueness of the strengthened indirect application model and the differences between it and the regular indirect application model can be seen in the positions of the two models towards the tort of breach of statutory duty. According to the strengthened indirect application model, the violation of a constitutional human right is likely to constitute the tort of breach of statutory duty, which grants a remedy to one private party against another. The regular indirect application model does not necessarily reach this result. In this regard there is great similarity, as we have seen, between the strengthened indirect application model and the direct application model. According to both of them, the violation of a constitutional human right is likely to be a breach of a statutory duty.

7. Strengthened Indirect Application Model and the Level of Protection Afforded to Human Rights

Examination of human rights requires a distinction between the scope of the right and the level of protection afforded to it. The scope of the right means the variety of actions captured within its framework. Examination of the scope of the right to expression requires an answer to the question of whether the right to expression extends to actions (and not just speech), such as the display of a wooden dummy, to the right to be silent, and to racist expression. The level of protection afforded to the right examines the full range of the right and determines which areas within the entire range will be protected and which areas will not be protected. Failure to protect is likely to arise from public interest alone (for the sake of protecting state secrets, speech exposing state secrets is not protected), or from the private interest alone (for the sake of protecting personal

---

137 See text associated with notes 179-185, infra.
138 See H.C. 953/89 Indor v. Mayor of Jerusalem, P.D. 45 (4) 83.

1996

Revue d'études constitutionnelles

HeinOnline -- 3 Rev. Const. Stud. 262 1996
privacy, speech exposing private details is not protected), or from a combined public-private interest (protection of one’s good name and privacy is both a public and private interest, and it negates protection of speech or action which is defamatory or infringes on privacy). Indeed, human rights are not protected by law to the fullest extent possible. Protection of Reuven’s human rights to the fullest extent possible necessarily infringes Shimon’s claim for similar recognition of his human rights. Hence, the concept that human rights are not absolute but relative.

The level of protection is determined through consideration of values, interests and principles worthy of protection. Some express a public interest (integrity of the State, its democratic nature, public order). The bulk of them combine public and private interests. Private law determines the level of protection afforded to human rights relative to other human rights. Contract, property, and tort law determine the extent to which a person is entitled to work to realize his human rights without his actions violating another’s human rights. In determining the level of protection afforded to human rights, private law considers the other’s human rights and public interest. Thus, for example, freedom to fashion a contract is recognized, but this freedom is limited by “public policy,” which reflects the public interest and the protected human rights of others.\(^\text{140}\) Private law recognizes freedom of action, but limits it within the framework of various wrongs in the Torts Ordinance.\(^\text{141}\)

In formulating the rules setting forth the limitations on the extent of human rights in private law, private law — which is largely statutory — must fulfil the limitation clause\(^\text{142}\) set forth in the Basic Laws.\(^\text{143}\) Thus, for example, to the extent that a new property law “infringes” on a person’s property — i.e., it does not protect the full range of a person’s property — it is necessary that it fulfil the requirements of the limitations clause. In determining the proper purpose, and in determining the “demand,” it is necessary to consider, of course, inter alia, the human rights of others. Legislation which has passed the limitations clause tests

\(^{140}\) See text associated with note 75, infra.
\(^{141}\) See Torts (Civil Wrong) Ordinance (New Version).
\(^{142}\) Basic Law: Human Dignity and Liberty, para.5.
\(^{143}\) The old legislation was entrenched: See Basic Law: Human Dignity and Liberty, para. 10.
weighs in an appropriate manner the human rights set forth in the Basic Laws. At times this balance is formulated by means of value terms, such as "good faith,"4 negligence,"145 "reasonableness,"146 "public policy."147 These terms reflect the basic values and concepts of the Israeli legal system. They are the expression of constitutional values. They are the expression of protected human rights themselves.

Accordingly, value phrases are one of the important channels through which constitutional basic rights and other legal values flow into private law: "Private law includes among its obligations a number of doctrines which serve as tools through which the basic principles of the system in general, and human rights in particular, flow into private laws."147 Justice Dov Levin addressed this when he stated:149

The provisions of Basic Law: Freedom of Occupation, directed against the government authorities, extend in practice also to mutual relationships between private parties. Private law includes among its obligations a number of doctrines, such as the principles of good faith and public policy, which serve as channels through which basic principles of the legal system in general, and human rights in particular, flow from public law into private law. [Thus] ... when the contents of a contract harm the freedom of occupation, balancing is required between the conflicting principles. When the contractual arrangement is based on an infringement which is greater than that arising from the proper societal balance between freedom of occupation and freedom of contract, it must be voided for being against public policy. Public policy is a value rule which permits flexibility in the workings of private law, and it is most sensitive to constitutional considerations. It permits expression of human rights and public interest as per their state at various times, without any need for a formal change in the private law balances. By means of the public policy principle, the court weighs the aforesaid freedom to fashion the content of a contract against other human rights to constitutional values, such as freedom of occupation.

144 See, for example, Contracts Law (General Part) 4733-1973, paras. 12, 39; Sales Law 5728-1968, para. 6.
145 See Torts (Civil Wrong) Ordinance (New Version), paras 35, 36.
146 See Contracts Law (General Part), 5733-1973 paras. 21, 41, 56; Contracts Law (Remedies for Breach of Contract) 5731-1971, paras. 6, 7, 8, 9, 14.
147 See Contracts Law (General Part), 5733-1973, para. 30.
148 Civ. App. 294/91, supra, note 5.
To be more precise: all of private law reflects balancing between conflicting values. Within the framework of private law it has been deemed appropriate to establish value rules, which permit flexibility in the workings of private law. These value provisions are particularly sensitive to constitutional considerations. They permit expression of human rights and public interests according to their state at various times, without any need to make a formal change in the private law balances. Thus, for example, the principle of “public policy” is a flexible principle, by means of which the court balances the constitutional freedom to fashion the content of a contract against human rights and different constitutional values. Similarly, the “good faith” principle is an objective principle which fixes a minimum level of appropriate conduct between private parties, which reflects that which is deemed appropriate in our society. This principle reflects a proper balance between conflicting human rights. The same applies as to the wrong of negligence, which reflects what the person in Israel “must” foresee, and expresses the basic principles of Israeli law, including the proper balance between human rights set forth in the Basic Laws.

8. Private Law as a Balancing System

Accordingly, private law reflects two systems of balancing. The first system determines the very content of private law itself, including the value provisos in it. Balancing is conducted according to the limitations clause set forth in the Basic Laws. This clause is addressed to the legislature, and sets forth how to determine the appropriate content of legislation. The second system of balancing is made within the framework of private law itself, after the balancing required in the limitations clause has taken place. This is a balancing demanded by the value terms themselves, which is designed to give them concrete content. This balancing is conducted by the judge, and occasionally constitutes an expression

---

150 See Civ. App. 294/91, supra note 5.
of judicial discretion. It also considers basic values and human rights set forth in the Basic Laws. It is the fruit of the judicial "limitation clause," which acts within the framework of private law itself.

This is the concretization of the constitutional "limitation clause" in the context of the value concepts. This is one of the important expressions of the idea of indirect application of human rights set forth in Basic Laws to private law. To be more precise: "value terms" are not the only means by which protected human rights infiltrate into private law. Thus, for example, every private law statute — like every public law statute — must be interpreted against the background of basic human rights. The assumption is that the object of every statute — including statutes concerning private law — is to realize basic human rights. Moreover, Basic Laws fall within the definition of "statutes" designed to benefit private parties and, accordingly, an infringement of a constitutional human right carries with it responsibility in tort for the wrong of violating a statutory duty.153 Finally, indirect application is likely to require the creation of new private law tools for the purpose of "absorbing" constitutional human rights.154 One of the important methods which makes use of existing tools in private law, is that which recognizes the (indirect) application of protected human rights in private law by means of the "value terms."

9. Adjustment of Private Law To The Application Of Basic Laws

Basic human rights apply in private law. The balancing between them, and between them and the public interest, is the framework of private law. To the extent that private law is legislated — and this is essentially the rule in Israel — this framework reflects the status of basic rights on the eve of enactment of the statute. Then a change in human rights occurs, they become constitutional rights with normative super-legislative force. What impact does this change have on private law? The answer is that the impact is upon various areas. First, regarding the content of private law itself, new legislation must adjust itself to basic human rights in general and to the limitations clause in the basic laws in particular. Thus

153 Torts (Civil Wrong) Ordinance (New Version), para. 63. The duty derived from basic rights is the fruit of balancing various human rights against each other, and of balancing them against the public interest.

154 See text associated with note 158, infra.

1996
Revue d'études constitutionnelles
Basic Law: Human Dignity and Liberty realigned an old statute because of this need. Second, the value terms must be imbued with concrete content by the basic rights and values at the time of their interpretation. Indeed, this is the role and power of value terms. They absorb social values, constitutional human rights and public interests according to their state at the time of their interpretation, and not according to their state at the time of legislation. Therefore, current “public policy” is considered in the new constitutional system, including the super-legislative nature of human rights.

To the extent that courts have formulated the content of value terms according to the non-constitutional nature of basic rights, it is now necessary to change the common law rule, and replace it with a new rule which reflects the new constitutional balance. Thus, for example, the good faith principle must reflect the proper balance between constitutional rights according to their state after the enactment of the Basic Laws, and on the basis of basic principles as per their state at the time of interpretation. Also, a contract to restrict freedom of occupation is contrary to public policy if the restriction in it is not “reasonable.” The reasonableness of the restriction balances the rights of the parties and the public interest. Within the framework of this balance, the parties’ rights have been strengthened. The right to fashion the content of a contract — directly derived from the constitutional right to the autonomy of the individual will, and in the absence of this type of explicit constitutional right, from the principle of human dignity and liberty — received constitutional status, and the right to freedom of occupation received constitutional status. Simultaneously, the power of public interest was decreased. These new relations require renewed examination regarding the proper balance between conflicting values. What was conceived of as “reasonable” in the past will likely not be conceived of as “reasonable” today.

Third, in the existing private law framework a need for the creation of new norms is likely to arise, which will give expression to the new constitutional structure and new human rights. The existing private law tools will probably not suffice for “the absorption” of the new rights. This task is placed, first and foremost, on the legislature. If the legislature is not up to the task, it is then

Regarding this, see Article 10 of the Basic Law.
placed upon the judge. The judiciary may do so first and foremost by filling gaps in existing legislation. Indeed, we have a “late lacuna”\textsuperscript{156} before us, which was created as a result of the enactment of the new Basic Laws. It is also possible for the judge to create new tools by developing private law.\textsuperscript{157} This development is likely to primarily be required in the area of remedies for infringement of constitutional human rights, to the extent that existing private law does not contain adequate remedies.

C. THE AUTONOMY OF INDIVIDUAL WILL AND BALANCING BETWEEN CONFLICTING PROTECTED HUMAN RIGHTS

1. The Autonomy of Individual Will as a Constitutional Right

The primary argument against the application of protected human rights in private law is that recognition of protected human rights in relations between private parties will deeply damage human rights themselves, primarily the autonomy of individual will.\textsuperscript{158} If a parent will be required to maintain a relationship of equality when distributing an inheritance among the children, and if a prospective party to a contract will be obligated to maintain equality in the selection of contract partners, the principle of freedom of connection will be harmed. If a person is prohibited from making a contract infringing freedom of occupation or freedom of property or freedom of speech and movement, freedom of contract will be seriously infringed. My answer to this claim is that among the totality of basic rights which must be considered are the basic rights of human dignity and personal development, and these contain the autonomy of the individual will. From these the principle of freedom of connection and the principle of freedom of contract are derived.\textsuperscript{159}

\textsuperscript{156} Late lacuna, means a lacuna (or gap) created not at the time of enactment of legislation but at some later time, due to other legislative developments. On the general theory of gaps, see C.W. Canaris, \textit{Die Festellung von Lücken in Gesetz} (1964).

\textsuperscript{157} For the development of the law, and for the distinction between it and filling lacunae, see A. Barak, “Judicial Creativity — Interpretation, the Filling of Gaps, and the Development of the Law” HaPraklit 29 (5750) 267; see, for example, Fur. Hrg. 29/84 Cassoy v. Feuchtwanger Bank, P.D. 38 (4) 505, 511.

\textsuperscript{158} See text following note 48, \textit{supra}.

\textsuperscript{159} For these principles and the distinctions between them, see Shalev, \textit{The Law of Contract} 23-35 (Jerusalem, 5750).

\textbf{1996}

\textit{Revue d’études constitutionnelles}
The principle of freedom of connection and the principle of freedom of contract, therefore, are themselves constitutional principles, and they themselves are protected constitutional human rights.\textsuperscript{160} When Reuven makes a contract with Shimon, according to which Shimon will abstain from his exercise of freedom of expression or movement, it cannot be said instantly that the contract is contrary to public policy because it violates Shimon's freedom of expression or freedom of movement. In answering the question of whether the contract is contrary to public policy, one must consider together Reuven and Shimon's freedom of contract, in addition to other liberties. The contract will be contrary to public policy only if, in the comprehensive balancing of the conflicting values, Shimon's freedom of expression and movement is more "prominent." Similarly, in contradistinction to Reuven's constitutional right not to be discriminated against by the contractual connection which Shimon seeks to enter into, stands Shimon's constitutional right to connect with whomever he chooses.

2. Balance Between the Autonomy of the Individual Will and Other Liberties

How are the protected human rights balanced against each other? Our basic laws include a limitation clause,\textsuperscript{161} which sets forth a balancing formula which limits the legislature. Does this formula apply in and of itself also in relations among private parties? My answer to this question, in the \textit{Kestenbaum} case, was negative:\textsuperscript{162}

In the transference of basic principles of the legal system in general, and basic human rights in particular, from public law to private law, a change takes place. The government's duty to observe human rights is not identical in content to the private party's obligation to observe human rights.

\textsuperscript{160} See Civ. App. 239/92, \textit{supra} note 149: "Contractual connection contains expression of the autonomy of the individual will, and therefore is anchored today in the principles of Basic Law: Human Dignity and Liberty" (Justice D. Levine). See also Lab. Ct. Hrg. 53/3-177-8-9 \textit{Sharam Inc. Spokesperson v. Globus Inc.}, P.D.E. 395 at 410: "Let us not forget, freedom of contract is a constitutional right" (Justice Goldberg).

\textsuperscript{161} See Basic Law: Human Dignity and Liberty, para.5.

\textsuperscript{162} Civ. App. 294/91, \textit{supra} note 5 at 531.
Indeed, the proper balance between human rights and the “pure” public interest in public peace, security and prosperity, is not like the proper balance among human rights themselves. It seems, therefore, that alongside the balancing formula set forth in the limitation clause, it is necessary to establish another formula for balancing the various human rights in their conflicts with each other. On the basis of this need for the creation of a judicial balancing formula for conflicts between protected human rights, an additional argument arises against the application of protected human rights in private law. This argument is that, as the application of protected human rights in private law requires the creation of a judicial balancing formula, and without being intended by the basic laws themselves, the matter is subject to judicial discretion. This is an enormous power, which it is not proper to give to the judiciary.

This argument is unsatisfactory. The need for judicial balancing formulae in conflicts between human rights is an ancient need. Courts have done this since time immemorial. Take the restraint of trade rules as an example. These are nothing but rules which balance between the constitutional right to freedom of contract and the constitutional right to freedom of occupation or trade. Just as the courts fulfilled this task in the past, they can fulfil it in the future, and just as the courts did not wrongfully exploit their power in the past, there is no reason to assume that they will fail in their task and wrongfully exploit this power in the future. Those who fear wrongful exploitation of judicial power must therefore be wary of constitutionalized legislation in general. By its very nature, the constitution — which is accompanied by judicial review — is based on recognition of broad judicial discretion.

As an example, take the limitation clause set forth in the Basic Laws. It does not provide a great deal of judicial guidance. The “majestic generalities” in the Basic Laws do not fill themselves with normative content. They require judicial consideration. Just as it is assumed and hoped — on the basis of past experience — that the judge will give expression to the basic conceptions of society and not his own personal views in giving content to the “limitation clauses,” it is assumed and hoped that the judicial balancing formulae in conflicts between protected human rights will reflect the “views accepted by the enlightened

---


1996

*Revue d'études constitutionnelles*

HeinOnline -- 3 Rev. Const. Stud. 270 1996
public,” and not the judge’s private views. Indeed, the skilled judge is expert in this activity, and there is no reason to assume that he will fail in this task.  

3. Freedom to Fashion Contractual Content and Protected Human Rights

The application of protected human rights in private law need not cause, in principle, conceptual difficulty where a contract is made and the question is the extent of its validity. This question was addressed routinely in the past, and great experience has been amassed in this area. Courts have dealt expansively with the question of the relationship between freedom of contract (in the sense of freedom to fashion a contract) and the right to freedom of occupation or trade. The same applies in other situations in which a contract is made which is claimed to be contrary to a human right. Thus, for example, courts have dealt with the relation between the freedom to fashion a contract and the freedom of expression, when a contract was made which contained a provision according to which a newspaper took upon itself an obligation not to publish certain items. Likewise there is case law regarding the relationship between freedom to fashion a contract and the right to personhood and human dignity. The courts have dedicated much attention to the relationship between freedom to fashion a contract and the principle of equality, where a contract has created discrimination.

---


170 See 33/3-25 Daily Air Staff Committee v. Chazin, P.D.E. 4 365; H.C. 410/76 Herut v. National Labor Court in Jerusalem, P.D. 31 (3) 124; H.C. 104/87 Nevo v. National Labour Court, P.D. 44 (4) 749: Paragraph 6 [to the Collective Arrangement] creates a discriminatory arrangement, which harms the women’s rights to participate equally in work affairs. Accordingly in my opinion, this paragraph is contrary to public policy, and by law, accordingly, this Court should involve itself and void its content” (Justice...
In all these cases a contract existed (an expression of the freedom of connection and the freedom to fashion), and the question is whether by its content it violates a human right (such as freedom of expression, freedom of occupation, and human dignity). The private law principle regarding “public policy” examines these questions, while reflecting in its very substance the totality of society’s basic conceptions, including the weight and status of human rights. In the past it was done regarding human rights “which were not inscribed in a book.” Now it is done regarding “rights inscribed in a book” entitled to constitutional protection. To be precise: just as the right to freedom of property and freedom of occupation were elevated in normative level — from a “common law” right to a “constitutional” right — so too the right to freedom to fashion a contract was elevated a level. This right is an expression of human dignity and liberty, and it too has constitutional status.

Just as courts dealt in the past with the appropriate balance between freedom to fashion a contract and the other unprotected human rights, so too they will deal in the future with the appropriate balance between freedom to fashion a contract and the other protected human rights. Of course, the content of the balance is likely to change. Indeed, the proper balance reflects the status and weight of the human right relative to other human rights. Perhaps in the past human rights (such as freedom of occupation) had lower status than today. If indeed a change takes place in the status of the right, the matter will find expression in the balance between it and other rights in the framework of the principle of “public policy.” To be precise: the balance between freedom to fashion a contract and the other human rights will be made according to “balancing formulae” which differ from those according to which these human rights will be balanced in their conflicts with the public interest. Indeed, it is necessary to distinguish between the conflict of values in public law (public order against human rights), and conflicts of values in private law (the right of

---

171 As per Justice Landau’s words in H.C. 243/62, supra, note 17 at 2415.
172 See Lab. Ct. Hrg. 53/3-177-8-9, supra, note 163: “Where an agreement restricts an employee’s freedom of occupation, and a period of time is fixed for the restriction, the court will assess the reasonableness of the restriction and weigh it as necessary, considering the basic laws and rights: Basic Law: Freedom of Occupation, Basic Law: Human Dignity and Liberty (particularly para. 3) and the constitutional basic right of freedom of contractual connection” (President Goldberg).

1996
Revue d'études constitutionnelles
one person against the right of another person). The difference in conflicting values brings with it a difference in balancing formulae, but this difference should not be exaggerated. The public interest is that which will preserve the proper balance of human rights in private law. The Contract Law, enacted by the legislature, is an expression of public law activity, which is subject to the limitation clause in the Basic Laws. Nonetheless, the subject of the law is primarily private law relations, which must reflect an appropriate balance between these values.

Indeed, the difference between public law, which also includes, inter alia, consideration of private interests, and private law, which protects public interests by means of “public policy,” is too blurred. There is no need to be sorry about this. We are dealing with, essentially, “integrated tools.” The public interest is not a value in itself. It is intended to protect human rights. Human rights are not “absolute,” and they are subject both to each other and to the public interest itself. Without order and regime, human rights do not exist. The principle of “public policy,” considered both in human rights in their internal conflicts and in the general public interest, gives expression to this composite.

4. Freedom to Make a Contract and the Principle of Equality

Freedom of contract has two aspects: the freedom to enter into a contract and the freedom to shape the content of a contract. Regarding the second aspect, there is substantial legal experience in fixing the balance between the freedom to fashion the content of a contract and other human rights. The law of restraint of trade deals with those problems. There is no legal experience, however, in fixing the balance between freedom to make a contract and other human rights. The principle problem arises where freedom to make or not to make a contract conflicts with the equality principle. Is a restaurant owner entitled to refuse to give service on the basis of gender, race or religion? Can a private party, seeking to rent out a room in his apartment, refuse to rent it out on the basis of gender, race or religion? On a practical level, the problem does not arise where there is legislation dealing with the topic (“civil rights legislation”). But

---

173 On the freedom to enter into a contract, and on the difference between it and the freedom to fashion a contract, see Shalev, supra, note 162 at 25.

174 The analysis is based on the assumption that equality is a constitutional human right.
what is the rule in the absence of specific legislation dealing with the matter? My intuition says that the restaurant owner has an obligation to give service — that is, to make a contract — without discriminating on the basis of gender, race or religion.

In contrast, the same intuition states that the private party, renting out a room in his apartment, is entitled to choose the renter as he sees fit. This intuition is based, primarily, on the proper balance between the freedom to make a contract of the restaurant or apartment owner and the right of the person seeking the service (food or dwelling) not to be discriminated against. In other words, I accept that the restaurant or apartment owner has constitutional freedom to decide with whom to contract. Similarly, I accept that the person wishing to eat in the restaurant or rent the room enjoys the right not to be discriminated against (whether by the state or by other private parties), and that if he is refused on the basis of gender, religion or race, it is discrimination.

In balancing between these rights when they conflict, the right of the person not to be discriminated against dominates in the restaurant example, and the freedom to enter or not to enter into a contract dominates in the incident of the owner of the room for rent. The rationale at the base of this balance is grounded on the concept that freedom to make a contract is much stronger when it is related to a person’s privacy, and it becomes weaker when it is directed against the public-at-large. Similarly, the right not to be discriminated against is strongest when service is given to the general public and a person is segregated from it on the basis of race, gender or religion. The right not to be discriminated against grows weaker where the service, by its very nature, is not “open” to all, and it is given on a personal basis. When a restaurant owner refuses to give service to a customer because of his race, religion or gender, the restaurant owner’s right to freedom to enter into a contract is a weaker force, whereas the right of the service recipient not to be discriminated against is at its strongest force. In these circumstances, the service recipient must get the advantage. In contrast, when an apartment owner refuses to rent a room in his apartment on the basis of race, gender or religion, his right to freedom of contract is at its greatest force, whereas the right of the potential renter not to be discriminated against is at its weakest force. In these circumstances, the landlord gets the advantage.

Let us now assume that my approach is the proper one. According to it, he who gives service to the public must not discriminate between service recipients on the basis of gender, race or religion. Does the private law include tools which permit this result? The “public policy” principle is not useful, because this principle applies when a contract is made which is allegedly contrary to “public policy.” What of the case where the contract at issue cannot be said to be contrary to “public policy.” It seems that the most appropriate principle for the solution of our problem is the good faith principle. Contract law places a duty on everyone who engages in negotiations towards making a contract to conduct the negotiations in good faith.\textsuperscript{175} “Good faith” is an objective value which reflects the proper balance between conflicting values which determine the minimum level for the proper conduct of contractual negotiations.\textsuperscript{176} It is possible to claim, therefore, that the provider of services is not conducting negotiations in good faith when he refuses to provide service because of discrimination on the basis of religion, race, and gender. The trouble is that the case law in Israel says, in all of these situations, that the good faith principle does not require equality and does not prohibit discrimination.\textsuperscript{177}

This question was dealt with in the \textit{Beit Yules} case.\textsuperscript{178} The majority opinion in that case was that the good faith principle does not require equality, whatever the circumstances may be. Deputy President Elon gave expression to this, when he stated:\textsuperscript{179}

Infusion of the equality obligation into the good faith principle, as if inequality is contrary to good faith, is supplying content to the good faith concept which never occurred to the legislature and which has no judicial or moral justification. Especially

\textsuperscript{175} Contracts Law (General Part), 5733-1973, para. 12.
\textsuperscript{176} This is the objective doctrine of \textit{culpa in contrahendo} which was developed in continental law. See N. Cohen, “Pre-contractual Duties: Two Freedoms and the Contract to Negotiate” in J. Beetsone and D. Friedmann, ed., \textit{Good Faith and Fault in Contract Law} (Oxford: Clarendon Press, 1995) at 25.
\textsuperscript{177} See Fur. Hrg. 22/82.
\textsuperscript{178} \textit{Ibid.}
\textsuperscript{179} \textit{Ibid.} at 471-472.
since the good faith principle is one of the important and special principles of the valued norms of our legal system, and it expresses the additional soul in this system — especially because of this we must be careful not to include anything in it that is far from its content and is not justified by its own terms.

According to this approach, the legal institution (tool) of private law, regarding the obligation to conduct negotiations in good faith, cannot give expression to the constitutional principle of equality.

The minority opinion took a different approach. President Meir Shamgar noted that there are likely to be situations in which good faith will require equality, and there are likely to be situations where good faith will not require equality, stating:  

It is not necessary for us to deal with the general and abstract question of what is the connection between good faith and equality in every situation and in every circumstance. That is to say, we do not deal with ascertaining a general test of truth, which will embrace every variety of possible relations between good faith and equality. An absolute abstraction of a type of model, describing a closed circuit, as it were, where interlocked good faith and obligation of equality constantly move, is not required and is not even exact. There can be circumstances in which a relationship of equality will be required, and there are circumstances in which there will not be an obligation as stated, as it could be that [an individual] will be deemed to have acted with a lack of good faith in given circumstances for acting unequally, and will not be deemed as such in other circumstances in which he also acted unequally.

And I expressed a similar view in that case, where I stated:  

I accept — and it seems to me that we all accept — that there is no identity between good faith and the equality principle. These two social principles are different from one another. Accordingly, a person is likely to act in good faith without acting equally. Thus, for example, if Reuven publishes a notice in a newspaper, according to which he seeks to rent out an apartment, he is obligated to act in good faith in conducting the negotiations with those who apply to him in response to the newspaper advertisement ... however, Reuven has no obligation to practice equality among the applicants. He is entitled, for example, to rent the apartment to Almoni simply because of the color of his hair and not to rent the apartment to Palmoni, who offers better terms. Nonetheless, the good faith principle and the equality principle are not contradictory principles. One

---

180 Ibid. at 461.
181 Ibid. at 479.

1996

Revue d'études constitutionnelles
does not exclude the other. Accordingly, the good faith principle is likely to be expressed as a requirement of equality, and a discriminatory act is likely to be considered an act which is not in good faith. The good faith principle and the equality principle are principles which differ from each other and they deal with human activities from different view points. Nonetheless, they are not contradictory principles. Accordingly, there will be circumstances where the good faith principle will require an action which is not equal. There will be circumstances where the good faith principle will require action which is equal. It all depends on the circumstances.

According to this approach, the private law legal institution concerned with good faith in negotiations is likely to be a framework for proper balance between the freedom of connection and the equality principle. Indeed, in my view, the majority opinion is based on error, but until it is changed, it is binding. Nonetheless, alongside the reasons for changing it which are anchored in the minority opinion, the following reason can now be added: the equality principle is a constitutional principle by virtue of its being anchored in Basic Laws. It must find expression in the private law. When inequality is expressed in negotiations towards making a contract, the principal framework which is likely to express the equality principle — in a balancing between it and other conflicting principles — is the tool of good faith in negotiations. To this end, it is necessary to acknowledge the possibility that, in appropriate circumstances — circumstances in which the value of equality has prominence relative to other values — the good faith principle requires equality.


Nonetheless, it should be acknowledged that it is necessary to develop other private law tools, by means of which it will be is possible to cause the equality principle to permeate into pre-contractual negotiations. I am primarily referring to the tort of negligence, to breach of constitutional duty, and abuse of right. It can be said that where, in balancing between the principle of freedom to make or not to make a contract and the equality principle, the equality principle is greater and a (notional) duty of care is imposed not to discriminate. Continental courts operate in this manner. From the general tort law rule prohibiting

182 See Larenz, supra note 104 at 53.
causing damage caused maliciously or in an immoral manner,\(^\text{183}\) responsibility for discriminatory negotiations was derived, in which framework it is possible to even obtain an injunction.\(^\text{184}\) Similarly, it is possible to view the constitutional provision on equality as a provision intended to protect a category of people and grant them a right, in a manner that breach of the duty constitutes a breach of a constitutional duty.

Finally, a legal system which recognizes the general application of the principle prohibiting abuse of right (abuse de droit),\(^\text{185}\) is likely to see this rule as a source for relief in private law for an unlawful harm — that is to say, beyond that which is permitted by the balancing formula — in the equality principle. The employment of this doctrine in Israel is problematic. The principle prohibiting abuse of right appears in Israel in connection with property law and it does not have, by virtue of its own power, general application.\(^\text{186}\) To the extent that these doctrines are insufficient, the indirect application principle must develop the “Israeli-style common law” which will give expression to constitutional rights at the pre-contractual stage. Indeed, this is the power and the impact of the indirect application principle, from whose spirit constitutional human rights “seethe” into private law, by means of the private law. This permeation into the private law is accomplished, first and foremost, by means of existing private law tools. Where these are insufficient, new tools must be created. If the pre-contractual stage has not yet witnessed a breach of the equality principle, and there is no application of the good faith principle, and the reach of other private law doctrines is too short to help, it is necessary to create new private law doctrines which will serve as channels for the permeation of constitutional

---

\(^{183}\) See B.G.B., para. 826.

\(^{184}\) See Larenz, *supra* note 104 at 53.


1996

*Revue d'études constitutionnelles*
human rights into private law. Thus the “integrated tools” principle and the
(indirect) transfer of constitutional human rights into private law is preserved.

7. Application In Private Law And The Application To The Judiciary
Model

Recognition of the application of protected human rights in private law to a
great extent relieves the need for taking a stand regarding the application to the
judiciary model. Indeed, the need for this model was created by the approach
that protected basic rights are directed solely against the government. The court
is characterized as an organ of the state, and thus (indirect) and partial applica-
tion of protected human rights to private law is made possible. All this is not
necessary if one takes the principal stand that human rights are protected not
only in relationships between man and the government, but also in relationships
between private parties. The court employs human rights, not because they are
directed against it as an organ of the state, but rather because they are directed
towards relations between private parties.

Nonetheless, it appears that there is no alternative to taking a stand regarding
the application to the judiciary model, for two reasons. First, it is necessary to
take a stand on the question whether “Israeli-style common law” is subject to
restrictions similar to those placed on legislation infringing protected basic
rights. In my opinion, the court is restricted in the creation of “Israeli-style
common law” by constitutional human rights. It is certainly so when the
common law deals with relationships between private parties and the govern-
ment. In my opinion, the restrictions apply to judge-made law also when it deals
with relationships between private parties. It is true that the “limitation formula”
is different, but in principle, constitutional human rights restrict judicial freedom
of action. Indeed, the court is an organ of the state, and it is appropriate that it
be subject to various restrictions arising from the constitutional protection given
human rights in constitutional provisions. The second reason suggests that if the
private law doctrines fail to fulfil their role, assistance can be garnered from the
creation of new tools in the application of human rights to the judiciary model.
Indeed, I myself do not view this model as competing with the other models, but

---

187 For this model, see text associated with notes 57-64, supra.
view it as a model that assists the other models, applying to them simultaneously and likely to complete them when they fail.

D. PROTECTED HUMAN RIGHTS AND PRIVATE LAW LEGISLATION

Basic Laws define human rights. The Basic Laws limit the protection given to human rights by means of the limitations clause. A Knesset law that infringes one private party’s right against another private party harms “rights according to this Basic Law” and, accordingly, must fulfill the conditions of the limitations paragraph. The application of the limitations clause is not to be restricted, therefore, to only those laws which harm private parties rights against the government. Surely “civil” legislation, for example the codification of the civil law or the new Companies Law, must fulfill the limitations clause. The legislature again is not free to legislate private law at will. It must remain cognizant of the limitations clause.

E. AN EXPLICIT CONSTITUTIONAL ARRANGEMENT FOR THE APPLICATION OF PROTECTED HUMAN RIGHTS IN PRIVATE LAW

Everyone agrees that constitutional human rights protect private parties against the government (the state). Lack of clarity exists as to the application of constitutional human rights in relationships between private parties. Are private parties protected only against the state, or perhaps are they also protected against other private parties. It seems to me that this lack of clarity is undesirable. The issue is central and substantive both for public and private law. It is appropriate to take a clear constitutional stance in this matter. It is also desirable that this stance be taken by the authority which enacts the constitution, and not be left to judicial discretion. This appears to be a lesson learned from study of comparative law. Surely if one wishes to prevent the application of constitutional rights in private law, it is desirable to state so explicitly. It is possible to say, for example, that “the rights set forth in this law are directed [only] against state authorities.”
In my opinion, the text of the respect clause in the Basic Laws does not express non-application clearly enough. This formula states that:

Every authority of the government authorities is obligated to respect the rights set forth in this basic law.

From this text it does not appear that only government authorities — they, and no other body — must honour the human rights set forth in the Basic Law. From this text it appears that government authorities — every government authority — must honour rights set forth in the basic law. At any rate, it appears to me that the problem is sufficiently important to clarify this matter in a stronger way.

Moreover, if we want to negate the application to the judiciary model, it is desirable to use explicit language in this regard. As we saw, the appropriate arrangement in my opinion is that which recognizes the application of human rights, set forth in the Basic Laws, to private law. It is desirable to establish an explicit arrangement in this matter. The proposed Basic Law: Basic Human Rights, contains a provision with the following language:

No use may be made of a right from among the basic human rights for the purpose of harming the existence of the State, the democratic regime or for oppressing human rights.

It seems to me that the end of this provision — "for the purpose of oppressing human rights" — is too narrow. It is necessary to consider the possibilities and expand its scope and set forth that no use may be made of a right from among the basic human rights, except in a manner which considers to an appropriate extent the human rights of one's fellow man. Indeed, Reuven's human right is limited by Shimon's human right, even if Shimon does not seek to oppress Reuven's right and his only desire is to advance his own interests. Thereby expression is given to the idea that human rights are directed not only against the government, but also against other private parties.

---

189 Proposed Law, para. 22.