

HUMAN RIGHTS IN THE PRIVATE SPHERE: CORPORATIONS FIRST

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ABSTRACT

The purpose of the article is to establish and theoretically justify a new “constitutional mindset” for a direct application of constitutional human rights in the private sector, based on moral arguments that are reinforced and illustrated by today’s democratic and social reality. Generally, constitutional human rights are viewed as part of public law and are to be applied in private law through the indirect application model; however, this doctrine has proven to be limited, implicit, and unsystematic. According to our view, moral ideals at the heart of a democratic regime hold the basis for individual direct reliance on constitutional human rights, regardless of whether the breaching entity is a government, corporation, or individual.

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Moreover, the necessity of implementing the direct application model is increasingly evident in light of today's reality, in which non-governmental bodies have acquired unprecedented economic and social power and influence. In light of this change, comparative and international discourse has increased the responsibility of the private sector to uphold constitutional human rights principles accordingly. The direct application model, as advocated in this article and that can be implied by the 2011 UN Guiding Principles on Business and Human Rights, suggests that states should expressly and actively address the governance gap of constitutional human rights in order to provide incentive for corporations to abide human rights obligations; this will provide tangible remedies for those injured by these violations and consequently uphold key democratic principles that define modern society.

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1. INTRODUCTION

“Where, after all, do universal rights begin? In small places, close to home . . . Yet they are the world of the individual person . . . Unless these rights have meaning there, they have little meaning anywhere.”

Eleanor Roosevelt (U.N., New York, March 27, 1958)

This article discusses the direct application of constitutional human rights in the realm of private law. Generally, constitutional rights are viewed as part of public law and are applied in private law through the indirect application model, which has proven to be limited, implicit, and unsystematic. According to our view, the basis for individual direct reliance on constitutional human rights is democratic ideals, regardless of whether the identity of the breaching entity is a government, corporation, or individual. For example, if three individuals, who were protesting in silence and bearing signs outside the President’s home were removed by civilians who effectively prevented the protesters from implementing their right to demonstrate. Were the demonstrators’ constitutional rights (including freedom of expression and freedom to demonstrate) infringed on by their fellow civilians? Or does the fact that they were civilians and not police officers or other government officials prevent them from making this claim?

Alternatively, what about an individual privately communicating with a friend through e-mail regarding recent relationship issues with their spouse and the next day an unrelated site provides an advertisement for a divorce attorney. Can this violation of privacy and human dignity throughout the Internet be ignored when committed by private corporations, which today can be larger and more powerful than some countries? Are the principles purportedly underlying arrangements for the protection of privacy and human dignity throughout the Internet in a democratic state meant to distinguish between corporations and the Ministry of Interior?

The approach that we present and defend negates the crucial role ascribed to the distinction between violations of citizens’ constitutional rights according to the identity of the infringing party—i.e., a police officer and a bystander or a government ministry and a private business enterprise. We hold that clinging to this traditional distinction has the potential to harm democracy’s

basic principles or violate an individual's rights. We argue that the basis of democracy is a uniform set of principles compelling effective protection from any violation of the elemental liberties at the foundation of citizens' constitutional rights, whether by authorities, another citizen, corporation, or entity. We argue for the direct application approach; that the constitutional set of rights and balancing principles at the core of the democratic regime should be applied directly in both public and private contexts. This claim gains significance in light of the increasing economic and social significance of corporations and an increasingly vocal international discourse supporting imposing human rights on business corporations.¹

Traditionally, the law has perceived constitutional human rights as a barrier protecting individuals from the state's "omnipotent" power—to somewhat ease the power imbalance between individuals and the government. In this sense, human rights were perceived as a part of public law. Due to this traditional starting point, discourse on human rights in private law has been lacking, and unsystematic, even though private law has also discussed human rights in one way or another, but without using the specific language of rights.² Accordingly, the basic question touching on what is the most effective way to implement human rights in individual relationships has remained unanswered and controversial.³

Comparative law shows that the usual way of implementing human rights in private law relies on an "indirect" application model, in which human rights fall below constitutional laws and are "equal" to ordinary legislation or common law. They apply in individual relationships, but indirectly, through legal techniques

¹ See generally Special Representative of the U.N. Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, U.N. Doc. A/HRC/17/31, annex (Jun. 16, 2011) [hereinafter UN Guiding Principles] (presenting the guiding principles of state duty and corporate responsibility to protect human rights and their access to a remedy).

² See generally DANIEL FRIEDMANN & DAPHNE BARAK-EREZ, HUMAN RIGHTS IN PRIVATE LAW (2001), (the introduction to human rights in private law).

³ See ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 354 (Julian Rivers tr., 2002), (discussing the construction of horizontal effect).

with roots in private law (such as the interpretation of private law – including its safety-valve concepts – and the filling of lacuna through the case law) that serve as channels to incorporate specific components of constitutional rights.⁴

The “direct” application of human rights in individual relationships, which is the familiar public law approach concerning government authorities, is not generally implemented – even though some constitutions (e.g., South Africa and Greece) formally enable it,⁵ and trends of judicial activism in Germany, Canada, and the United States have broadened it to include individual human rights.

The main purpose of the current article is to theoretically justify and establish the discourse on the direct application of human rights in the private sector, while challenging notable criticism. We hold, contrary to the prevalent view, that human rights must be applied directly and explicitly also in private law. We aim to provide an alternative “constitutional mindset” to the prevailing legal approach of the indirect application model, based on moral arguments that are reinforced and illustrated by today’s democratic and social reality in which corporations have acquired unprecedented economic and social power and influence.

Part One opens with a philosophical and theoretical discussion of the democratic regime’s fundamental principles and of the warranted conclusions concerning the general status of basic liberties and basic rights generally set in the constitution and considers the differences between the direct and indirect application models of human rights in private law. *Part Two* discusses normative justifications as well as developments in the legal and public discourse on corporate law and human rights, while emphasizing the importance and effectiveness of adapting the direct application model in private law specifically in today’s corporate

⁴ See Mattias Kumm & Víctor Ferreres Comella, *What Is So Special About Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 265 (András Sajó & Renáta Uitz eds., 2005) (a comparative analysis of the function of state action requirements and indirect horizontal effect); for a review of the various approaches, see AHARON BARAK, *ESSAYS IN HONOUR OF ELIKA BARAK-USSOSKIN* 363, 368–378 (Steven Adler et. al. eds., 2012) [Heb]; see also Aharon Barak, *Constitution Human Rights and Private Law*, 3698 *YALE L. SCHOOL FACULTY SCHOLARSHIP SERIES*, 218, 220 (1996), (presenting models for the application of constitutional human rights in private law).

⁵ See *HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY* 158–159 (Dawn Oliver et. al. eds., 2007) (analyzing Greek legal theory on interpersonal effect of constitutional rights).

reality and international discourse. Finally, the article explains how international initiatives, led by the UN 2011 Guiding Principles provide further support for the direct application model and the importance of its use in the modern corporate structure of society.

2. DIRECT APPLICATION MODEL

2.1. Democracy, Human Rights, and Law

As we claim, and is discussed herein, the direct application model rests on the essence of the democratic regime and views the basic principles of democracy as moral principles. We will therefore briefly describe the view of the democratic regime that underlies this article⁶ to provide a theoretical justification for the use of the direct application model in a modern democracy.⁷ We first present the central ideas of this view, which is within the philosophical tradition of the social contract, and then place it within the context of the philosophical theories dealing with just arrangements in a state's civil society.

A democratic regime is viewed as a solution to a specific problem, so that every important component of it is part of this solution. The understanding of the democratic regime's essence thus begins with an acknowledgement of the problem that this regime is meant to solve.

The human situation creates the problem of interpersonal conflicts. People have values and beliefs, wishes and ways of life suited to their tastes; however, the realization of all personal desires is impossible because they inherently clash with one another, causing interpersonal conflicts. These interpersonal conflicts between individuals challenge democratic regimes to provide

⁶ See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 23–26 (2006) (defining the concept of democracy and its essence); see also ASA KASHER, *A Jewish and Democratic State: A Philosophical Outline*, in *A MAN'S SPIRIT: FOUR GATES*, 12–17 (2000) [Heb].

⁷ A discussion in depth of the difference between formal and essential democracy has no place in the current context, and we will confine ourselves to the character of democratic regimes known to us. All known democratic regimes, without exception, depart from the formal characterization and take on essential features. A historical explanation for the character of a given democratic regime may be possible in terms of a formal democracy and its appendices, but the product of the historical developments, as it appears clearly before us, is a regime of essential democracy. Our approach here characterizes this essence.

arrangements that enable individuals to live side by side without strife. The democratic regime deals with this challenge by creating fair arrangements that guide citizen behavior when in conflict. Fair arrangements will always preserve human dignity while guiding citizens on how to live together despite their fundamental differences and conflicts. Therefore, the preservation of human dignity through fair arrangements lies at the core of the essential (as opposed to the formalistic) democratic regime. Fair arrangements that preserve human dignity compel society to respect everyone's dignity and refrain from violating it.

To fathom the essence of democracy, the following two ideas must be clearly understood: human dignity⁸ and fair arrangements for its protection. We use fairness as did John Rawls in his thought on justice as fairness; the requirements of fairness can be described in terms of the well-known "veil of ignorance,"⁹ and are considered moral requirements because they are justified in terms of demands about the protection of human dignity.

When coming to the conclusion that a democratic regime requires preserving human dignity in all circumstances, it will also make this demand when seeking to limit basic liberties that are mutually conflicting. A regime that is protective of human dignity will also impose limitations on basic liberties when *they* impede on human dignity. For example, both freedom of movement and freedom of property are basic liberties. Protecting them is part of protecting human dignity. Freedom of movement is limited insofar as it violates freedom of property, but democracies will not limit freedom of movement on the basis on one's desire to block "undesirables" from the public area that they live since no one has a basic freedom to exclude other people from the public realm.

The current conception of the democratic regime is part of the cluster of theories – beginning with Thomas Hobbes, John Locke,

⁸ See generally IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS CH 2., (1964) (discussing the notion of protecting the person's human dignity or, in its traditional formulation, protecting the dignity of the person created in God's image, which rests on four principles).

⁹ See, e.g., JOHN RAWLS, JUSTICE AS FAIRNESS, A RESTATEMENT 15, 18 (Erin Kelly ed., 2001) (defining the original position, where parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent).

Jean-Jacques Rousseau, Immanuel Kant, and up to John Rawls in the present¹⁰—who have endorsed the social contract approach.¹¹ Generally, a theory endorsing the social contract approach rests on the notion that social arrangements have compelling moral validity insofar as they can be justified as plausible results of a potential agreement. In the present context, we focus only on the agreement's contents.¹²

We follow Rawls: the theory's contents are supposed to include principles of justice to establish and review the "basic structure" that determines, *inter alia*, the manner the main social institutions ascribe

¹⁰ For a general, up-to-date and comprehensive review, including a broad bibliography and further comparison to traditional social contract principles, see Fred D'Agostino, Gerald Gaus & John Thrasher, *Contemporary Approaches to the Social Contract*, STANFORD ENCYCLOPEDIA OF PHIL. (May 30, 2017), <https://plato.stanford.edu/entries/contractarianism-contemporary/> [<https://perma.cc/EF8D-NJAC>], (showing that the social contract theories of Hobbes, Locke and Rousseau rely on the idea of consent).

¹¹ See THOMAS HOBBS, *LEVIATHAN* (Noel Malcolm ed., Clarendon Press, 2012) (1651); JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1988); Sharon A. Lloyd & Susanne Sreedhar, *Hobbes's Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHIL. (Apr. 30, 2018), <https://plato.stanford.edu/entries/hobbes-moral/#Bib> [<https://perma.cc/NN8W-R98W>]; JOHN LOCKE & PETER LASLETT, *TWO TREATISES OF GOVERNMENT* (Cambridge Univ. Press, 1967) (1689); Alex Tuckness, *Locke's Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHIL. (Jan. 11, 2016), <https://plato.stanford.edu/entries/locke-political/> [<https://perma.cc/WN9V-BRM5>]; Jean-Jacques Rousseau, *The Social Contract* (G.D.H. Cole trans., Prometheus 1988) (1762); DAVID LAY WILLIAMS, *ROUSSEAU'S SOCIAL CONTRACT: AN INTRODUCTION* (2014); Christopher Bertram, *Jean Jacques Rousseau*, STANFORD ENCYCLOPEDIA OF PHIL. (May 26, 2017), <https://plato.stanford.edu/entries/rousseau/> [<https://perma.cc/957E-YR7B>]; IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Lara Denis ed., Mary Gregor trans., Cambridge U. Press 2017) (1797); Frederick Rauscher, *Kant's Social and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHIL. (Sept. 1, 2016), <https://plato.stanford.edu/entries/kant-social-political/> [<https://perma.cc/C9HH-VBK4>].

¹² Authors of philosophical theories endorsing the social contract approach at times also endorse an elaborate position on the components of the democratic regime. In the present context, however, we will deal only with the moral principle underlying this regime rather than with all its components. On Rawls' conception of democracy, see, e.g., Joshua Cohen, *For a Democratic Society*, in *THE CAMBRIDGE COMPANION TO RAWLS*, 86–138 (Samuel Freeman ed., 2003); see also Amy Gutmann, *Rawls on the Relationship between Liberalism and Democracy*, in *THE CAMBRIDGE COMPANION TO RAWLS*, 168–199 (Samuel Freeman ed., 2003), (discussing the relationship between Liberalism and Democracy in theory).

basic rights and duties.¹³ Indeed, the agreement presented in Rawls' theory includes the first principle of justice, formulated as follows: "each person is to have an equal right to the most extensive scheme of basic liberties compatible with a similar scheme of liberties for others,"¹⁴ or in a later formulation: "[e]ach person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all."¹⁵

We believe that a prominent feature of each of these basic liberties is that people are meant to enjoy their liberties, as they are, without any disruption by authorities, corporations, or by any of its citizens or inhabitants. Our approach is compatible with Rawls' view concerning social contracts and does not derive from Rawls' views on the establishment and enforcement of the agreement.¹⁶ His positions on these issues do not necessarily derive from his stance on the principles of justice and, therefore, we do not deal with them in this article. The first principle of justice does not support an understanding of citizens' basic liberties as limited to the relationship between the citizen and government institutions. Insofar as a state is supposed to act according to the first principle of justice (among all others), it is expected to justify arrangements that entail deviations from the general character of the protection of basic liberties from all objections. Arrangements protecting these liberties only from objections by government authorities require a justification compatible with the first principle of justice. The position formulated in this article is meant to prevent deviations of this kind. Similarly, insofar as the constitution of a state is meant to convey the principles at the foundation of its regime, among them the first principle of justice, its constitution is meant to establish arrangements that do not significantly deviate from the general character of the protection of basic liberties from all objections.

¹³ See JOHN RAWLS, *POLITICAL LIBERALISM*, 258 (1996) (discussing why the basic structure is taken as the first subject of justice).

¹⁴ See JOHN RAWLS, *A THEORY OF JUSTICE*, 53 (1999) (arguing that "these principles apply . . . to the basic structure of society and govern the assignment of rights and duties and regulate the distribution of social and economic advantages.").

¹⁵ See RAWLS, *supra* note 9, at 42.

¹⁶ See generally RAWLS, *supra* note 14.

We are not negating a significant nor real difference between the state and each of its citizens; both must respect the human dignity of every citizen and both must refrain from any violation of citizens' basic liberties, which is unjustifiable. Nevertheless, as noted, whereas the state has duties touching on the foundation of these basic liberties and on the enforcement of the arrangements involving them, the individual citizen has no such duty. Cautiously refraining from harming another is considerably different from institutionally enforcing this caution.

We have outlined the general fundamental conception of a democratic regime's essence¹⁷ and will now add several conclusions about the principle of direct application as well as some further clarifications.

First, let us return to the two examples that opened this article. According to the approach presented so far, both of them involve a violation of the basic rights of citizens—freedom of expression and freedom to demonstrate in one, and the breach of personal emails in the other. However, a similar violation could have been committed by a state agency or a local authority, for us, the violation is the same. Their grievance should not be altered due to the identification of the infringing party.

According to the conventional approach, an event involving police officers disturbing a legal demonstration will be handled in the context of public law, based on considerations of infringement of basic civil rights. By contrast, a disturbance to the same legal demonstration by citizens who do not hold a government position will be handled in a private law context, based on other considerations. According to our approach, even if we maintain the distinction between public and private law for general reasons unrelated to our concern here, we will still say that considerations regarding the infringement of basic civil rights must play a part, even when the event is handled in a private law context.

To simplify, let us consider a specific case of two people holding one of the demonstrators to prevent the event—a police officer pulling his right arm and a private citizen pulling his left arm. Both are inflicting the same injury on him and, according to our approach, it is unjustified to discuss the actions of the private citizen in terms different from those used to discuss the officer's action, insofar as

¹⁷ A discussion in depth of the difference between formal and essential democracy has no place in the current context, however this article relates to democracies with essential features; *see, e.g., BARAK, supra* note 6, at 23–26.

the actual disturbance of the demonstration is the same. We could discuss other aspects of the police officer's behavior, such as the breach of her duty to protect the demonstrator, incumbent on her by virtue of her role but not on the citizen who fulfills no such role. Our concern here is another aspect of the police officer's behavior—the very disturbance of the demonstration.

Our first systemic claim concerning private law, is that considerations touching on the infringement of basic civil rights should be allowed to emerge, even though the state and its authorities played no part in the infringement under discussion. Arguments resting on such considerations may be directed against an individual or a corporation and not only against an authority but also against the legislature, insofar as it seems to have failed in enacting effective sub-constitutional legislation to protect an individual from harm by an individual or a corporation. Such arguments may also be directed against the executive branch if it has failed to provide suitable protection to the individual against harm by an individual or a corporation, according to the relevant legislation.

Another systemic claim that emerges from the approach proposed here is one that also lowers the barriers between public and private law. A democratic state is not confined to pointing out civil liberties only in the basic realms of life, but can hold civil liberties in equal standing to basic rights. By its very nature, such a right enables two justified demands. First, the right to free expression within permitted borders makes room for one citizen's justified demand from another, whoever the other might be, to refrain from preventing free expression within permitted borders. This demand is justified by the very nature of the democratic regime. Second, the right to free expression within permitted borders makes room for a justified demand by citizens to protect their possibility of implementing this right against anyone seeking to prevent them from doing so as they see fit. This demand is justified so long as it is addressed to those whom, according to state arrangements, are entrusted with the responsibility and the required authority to protect citizens from others seeking to disrupt the implementation of their rights. In a democratic state, entrust state authorities are entrusted (such as the police) with this responsibility and the power required to exercise it.

According to the approach proposed, the state is intended to be involved in protecting citizens from any infringement of their liberties of implementing a basic right in the context of both public

and private law. *The state* should protect citizens demonstrating legally from anyone seeking to prevent them from doing so. There is indeed a difference between situations handled by public law and those handled by private law. In the former, the state is meant to refrain from disturbance, from using the power available to it to prevent citizens from implementing their basic right; in the latter, the state is supposed to intervene to protect citizens from anyone seeking to prevent them from realizing such a basic right. This is a significant difference, both conceptually and practically, but does it justify the accepted pattern of setting up a barrier separating public from private law with regard to the subjugation of private actors to constitutional human rights?

Arrangements protecting citizens are required conceptually, rather than on the basis of actual power differences or on other social grounds.¹⁸ Civil rights in a modern democratic state are no longer a defense mechanism for citizens from government authorities but have become a necessary component of the regime, without which the state may lose its characterization as an essential democracy because it no longer meets the ethical requirements of protecting human dignity, particularly in situations of conflict.

Civil rights are usually viewed as moral rights, with a pre-legal standing whose special role is to justify the imposition of duties on others.¹⁹ In a way, constitutional rights translate the moral duty to honor basic moral rights into a set of legal rules, relying on an agreed recognition of the duty to honor moral norms.²⁰ It merits noting that

¹⁸ See generally JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 1–2 (1990) (suggesting that we would have many of the rights provided by our current legal system even if that system did not assign them to us); Larry Alexander, *Judicial Review and Moral Rights*, 33 *QUEEN'S L. J.* 1, 3 (2007) (purporting that while both law and morality tell us what we are obligated, permitted, and forbidden to do, “[m]oral reasons are the highest authority in deciding what we should do.”).

¹⁹ See generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986) (offering a “liberal foundation for a political morality.”).

²⁰ See generally John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights*, 23 *L. & PHIL.* 325 (2004) (arguing against the “moral conception space of rights” and against incorporating the “infringing/violating distinction into a theory of rights”); John Oberdiek, *Specifying Rights Out of Necessity*, 28 *OXFORD J. LEGAL STUD.* 127 (2008) (arguing for a specified, rather than general, conception of rights); John Oberdiek, *What's Wrong with Infringements (Insofar as Infringements Are Not Wrong): A Reply*, 27 *L. & PHIL.* 293 (2008) (rebutting the argument that “the category of rights infringement is secure.”).

moral norms touching on basic human and civil rights do not differentiate between infringements by people, by a corporation, or by a government authority due to the classification of these moral norms as part of the individual's duty under the social contract not to infringe their fellow-man's fundamental civil rights.²¹

The approach here suggests constitutional expression of this basic principle, not only insofar as civil rights are at risk of violation by government authorities but also in all other circumstances, when the risk is posed by the acts of an individual, a corporation, or an entity that is not a government. Indirect application arrangements challenge the implementation of this principle, requiring special justification: why should the protection of citizens from infringement of their basic rights enjoy constitutional standing when they are endangered by government authorities, but sub-constitutional standing when endangered by citizens, corporations, or non-government entities?

However, we hold that rights are the same rights, the harm is the same harm, the protection must be equally effective and cannot be private. We return to these questions below by moving on to a broader and more detailed comparison between the direct and indirect application models, from several perspectives.

2.2. *Between the Direct Application Model and the Indirect Application Model*

Recent trends show that basic human rights are a factor not only to be considered in individuals and government relationships,²² but also in relationships between one another.²³ In several places in the

²¹ Supreme Court of Israel sitting as Court of Appeal: Civil Appeal 294/91, *Hevra Kadisha [Burial Society] of the Jerusalem Community v. Lionel Aryeh Kastenbaum* P.D. 46(2) 464 [30/4/1992, Heb.].

²² See, e.g., HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedman & Daphne Barak-Erez, eds., 2001) (explaining how human rights originated as rights and freedoms *vis-à-vis* the State and other public authorities).

²³ See, e.g., Kumm & Ferreres Comella, *supra* note 4, at 265 (suggesting that even though a constitution is addressed to public authorities rather than individuals' private law is not precluded from being subjected to substantive constitutional standards in private litigation).

world, the accepted view is that human rights law is indirectly applied to private law.²⁴ Similarly, according to the direct application model, a court must base its decision on constitutional rights. The reason is that the parties have rights and duties toward one another and not only toward courts.²⁵

But in a deep and fundamental sense, as is clarified below, the difference between the models is not merely semantics. In this context, it is worth differentiating between the models at two levels: one of principles and arguments and another of practical results. At the level of principles, the difference lies in the definition of the citizen's constitutional rights in terms of infringement of a specific liberty. In this instance, the infringing party's identity is irrelevant. At this level, arguments concerning infringements of a liberty will be based on the direct application of constitutional rights. Insofar as practical results are concerned, no differences between the models will be found in the vast majority of cases.

Differences between the models are also found at the declaratory-educational and implementation levels, particularly in the current constitutional situation when courts are less willing to grant human rights protection in private law in the absence of specific legislation or of a valve concept. The German legal system, for example, imposed a positive duty on the legislature to create protections for human rights in private law.²⁶ These moves stress the inaccessibility and inevitable difficulty in protecting human rights using the indirect application model, whereas the direct application model can offer legal systems a more lucid and seemingly simpler methodology. The indirect application model, as noted, also splits human rights into two sets within one single legal system, and thereby not dealing consistently with the general question concerning the dosage of human rights and the balance between them when they clash, a topic discussed in the next section.

Indeed, the Court is in no hurry to adapt the direct application model due to the traditional acceptance that the broad use of valve

²⁴ See *infra* Chapter I(4).

²⁵ See ALEXY, *supra* note 3, at xl-xli (proposing that the protective duties arising from constitutional rights give rise to new private right laws between individuals, through the interpretation of private law statutes and the development of the common law).

²⁶ See ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY 162 (2011) (noting that Germany has adopted the technique of issuing orders to the Legislator to impose terms or deadlines before which it must take the necessary legislative action).

concepts and legal standards such as “good faith” and “public policy” provide a wide enough spectrum for the judiciary to protect human rights within private law. However, we think that this preference is problematic since the valve concepts lack *a priori* contents of their own. This in turn evokes the question of whether we are actually dealing with a direct application model in disguise. Rather, we opine that (1) all elements of society have a direct duty to protect human rights of the other instead of a general vague duty to protect public policy, (2) human rights hold an honorable role in all legal systems, including private law.

Additionally, the differences between the manner with which human rights are treated in public and private law creates a barrier to the general protection of human rights in the democratic system. Thus, ostensibly creating two separate legal systems and disregarding the fundamental guarantee of human rights. Moreover, we hold that the source of the implemented rights does not influence the extent of their implementation—in other words, the direct application model does not grant citizens, *per se*, additional rights, rather it is reliant on the *ad hoc* balancing of their constitutional rights, as enacted by the indirect application model.

This claim also has declaratory and educational advantages. Through a general declaration stating that human rights set in constitutions apply in *all* legal interactions, and through a direct and explicit judicial reference to them in every relevant legal interaction presented to the courts, the direct application model can help us understand the context of human rights, their conceptual role, and their place within democratic theory.²⁷

2.3. *Balancing Human Rights Conflicts within the Direct Application Model*

The arguments for rejecting the direct application model and adopting the indirect application model rely largely on practical concerns over excessive violation of individual rights in the direct application model. These arguments, however, mistakenly conflate two separate questions—one discussing the *mode* of applying human rights, and the other regarding the *balance* between

²⁷ See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (pointing out that educating toward democracy is one of the roles of the judiciary in a democratic society).

conflicting human rights. In our view, the question about the mode of applying human rights in private law – both direct and indirect – does not help answer the second question of the balance between conflicting human rights in private law. Quite the opposite. As is described in the next section, various legal systems already use a range of doctrines and techniques to apply human rights in private law, subjecting it to human rights standards.²⁸ But these too, by themselves, fail to answer questions about the scope of conflicting rights and the balance between them. This issue requires a separate analysis that is obviously influenced by the private or public standing of the body that violates human rights.²⁹ This standing is not derived, strengthened, or weakened due to the use of the direct or indirect application model of human rights set in the constitution. In the first stage of a court's analysis, it is determined whether an individual has a constitutional right to be protected from the government (or from another individual), and in its second stage, the scope and contents of the right will be determined. Ferreres Comella and Kumm emphasize that differences between various legal systems in the application of human rights in private law originate in structural and procedural variations rather than in the essential question of balancing conflicting human rights: "There is a line to be drawn between the public and the private sphere, but doctrines such as indirect effect or state action have little to do with guiding substantive choices about where the lines are to be drawn."³⁰

In the application of the models and any discourse on rights, the balancing act is an inevitable and inherent feature. Ultimately every right is relative, whether located in public or private law and the balancing act between conflicting human rights is implicit in the current use of valve concepts. We can and should also implement valve concepts in the direct application model, relying on the proportionality and balance tests set in the constitution and in the

²⁸ See Kumm & Ferreres Comella, *supra* note 4.

²⁹ Michal Tamir, *Human Rights in Private Law: Hybridization of the Balancing Tests*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 401 (Gideon Sapir, Daphne Barak-Erez, & Aharon Barak eds., 2013).

³⁰ Kumm & Ferreres Comella, *supra* note 4, at 284.

case law, while taking into account that this balance between conflicting human rights is taking place in the private sphere.

Choosing the direct application model allows us to be concerned with the true challenge facing all forms of application—the balance and proportionality of conflicting human rights according to the interaction at stake. Ultimately, *the* issue in a democracy is the conflict between two conflicting rights.³¹ As long as the direct application model endorses a proper system of balances, we should not fear it might entail harm to individual liberties (beyond the one already inflicted by the indirect application model) and to the worthy separation between private and public law. Private law presumes that an individual (or a private entity) works for its own benefit, whereas in public law it is presumed that the government works only for the collective benefit. The government, as the public's trustee, clearly has no rights of its own, whereas individuals do have rights of their own, a difference inevitably leading to distinctions in the scope of their duties. Obviously, the dosage of human rights and duties to be weighed in the balance between one individual and another, as well as between a corporation and an individual, differ from those between the individual and the government. The differences, however, are not a function of the sources deriving human rights—especially when private entities today, such as Google³² and Apple, are larger and more powerful than some countries, while espousing “corporate social responsibility”³³ as discussed below.

The scope of the duty to respect human rights—which is not derived in binary fashion (either government or private) from the identity of the party to the interaction—is also influenced by more subtle considerations touching, *inter alia*, on the relative power of the confronting entities, on their exposure to the public realm, and on the power of the constitutional right at stake. Thus, for example, even within private law, the duty incumbent on individuals to respect human rights is greater for those who enjoy significant power and public exposure. Furthermore, the determination of the borders between conflicting human rights follows not only from the

³¹ See KASHER, *supra* note 6, at 16.

³² See SHUMEET BALUJA, *THE SILICON JUNGLE: A NOVEL OF DECEPTION, POWER AND INTERNET INTRIGUE* (2015) (discussing Google's overt economic and political power in today's market).

³³ See Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38(3) *BUS. & SOC'Y* 268 (1999) (discussing the evolution of corporate social responsibility since the beginning of the 1950s).

identity of the infringing party but also from the identity of the party whose right has been infringed (such as a government body, a powerful socio-economic corporation, a small corporation, or an individual). Be that as it may, the *fundamental* duty to respect human rights in the democratic system is indifferent to these questions. The source of this fundamental right is the constitution and the legal system's basic laws. The constitution creates the law and given this supremacy, the basic rights determined within it should have immediate and constant influence on private law, particularly in the absence of a sub-constitutional norm that regulates these relationships.

Alternatively, this article's fundamental approach on the direct application of human rights on the public and on the need for a constant balance between them draws further support from the significant changes in imposing human rights on business corporations,³⁴ an issue which we thoroughly discuss in the next part, and from the increasing use of contract law for that purpose. Contract law, the quintessential realm of private law, serves as a dominant framework for implementing human rights in private law.³⁵ Human rights are tested through private day-to-day interactions no less, and perhaps even more so, than in individual encounters with the government. Direct application of human rights in the most banal voluntary interactions seems to reinforce their role and the awareness of them in every individual and every agency, in all places and at all times.

Recognizing the power and responsibility of individuals in the interpersonal context, then, enhances the protection of basic freedoms as well as the role of all components of the legal system – not only the government – in the structuring of a freedom-fostering society. This approach is not surprising since the contractual

³⁴ Cf. Special Representative of the U.N. Secretary-General, *supra* note 1, with Gavriel Mairone *A Grotian Moment: Corporations are Required to Respect Human Rights*, 54 JUSTICE 27 (Summer 2014) (discussing the tumultuous relationship between corporate responsibility and human rights); John Gerard Ruggie, *Business and Human Rights: The Evolving Incarnational Agenda*, 101 AM. J. INT'L L. 818 (2007) (discussing the evolving nature of corporate responsibility regarding human rights in the wake of the 2003 UN recommended "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights."); Donald Robertson, *Business & Human Rights: A New Era of Accountability?* (Sydney L. Sch., Legal Studies Research Paper No. 14/75, 2014) (discussing the complexity of corporate liability since the publication of the 2011 UN Guiding Principles on Business and Human Rights).

³⁵ See ELI BUKSPAN, *THE SOCIAL TRANSFORMATION OF BUSINESS LAW* 60–71 (2007) [Heb.] (In Israel this also holds true for torts, labor law, property law, and others).

institution, perhaps more than any other legal act, is sensitive to the human rights of the other. The main purpose of a contract is to enable people, as social animals, to create relationships, to realize themselves, and to voluntarily satisfy most of their needs through coordination, cooperation, and mutual concessions. In this sense, an ordinary interpersonal contract may be seen as a microcosm of the social contract that explains the existence of the most basic human frameworks. Entrenched in both the private and the social contract is insight on the importance of imposing limitation on liberties so as to actually enable their existence and expansion.

Therefore, the implementation of human rights in the most common and diverse private interactions, contract and corporate law alike, prepares for the direct application of human rights, a message that also indicates the general importance of human rights as well.

2.4. Comparative Law – Close Proximity to the Direct Application Model

With the exponential rise in international discourse on the application of human rights in private law, as is described in the next section, the variety of contrasting constitutions and legal structures evident in different states cannot be ignored. As we believe that the proper and efficient way to decrease human rights violations in the private sector is through internal state action in accordance to the UN General Principles, this section will be devoted to describing the slow, but sure, change toward the direct application model that can be seen in legal systems worldwide.

Indeed, various countries separate human rights from private law in the procedural, rhetorical sense. However, in the essential sense, the depth perception and the judicial trend prevailing in most legal systems push toward growing recognition of the application of human rights in private law.

Though few constitutions explicitly determine that the direct application approach applies, such as South Africa and Greece, most countries' courts generally endorse an interpretive move that blurs this certitude. Other constitutions, such as those of the United States and Canada, convey reservations concerning their application in private law. For example, the Canadian Charter determines that constitutional rights ostensibly apply only in the relationship

between the state and individuals.³⁶ Similarly, almost all sections of the U.S. Bill of Rights explicitly address the relationships between the state and the citizen. However, the Thirteenth Amendment to the Constitution, in a formulation that departs from the general trend, the American legislator determined the implicit direct application of a specific constitutional right—freedom from slavery—between individuals.³⁷

Whereas the constitutions of the United States and Germany are not unequivocal on the direct application of human rights in private law, the formulation in the Greek constitution is clear-cut. An amendment dating back to 2001 inserted into the constitution an explicit section that applies constitutional rights in Greek private law:³⁸

The rights of human being as an individual and as a member of the society and the principle of the welfare rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered exercise thereof. These rights also apply to the relations between individuals to which they are appropriate.

The constitution of South Africa, as said above, also determines the direct application of constitutional rights on private law, stating “[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”³⁹

³⁶ See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Art. 31(1) (“This Charter applies(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament . . . and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”).

³⁷ See U.S. Const. amend XIII, §2 (stating “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.”); see also INDIA CONST. art. 15, § 2 (prohibiting discrimination on the grounds of religion, race, caste, sex, or place of birth.).

³⁸ 2001 SYNTAGMA [SYN.][CONSTITUTION] 25 (Greece).

³⁹ See S. AFR. CONST., 1996 Art. 8. See also BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 35, para. 1 (Switz.) (adopting the direct application model of human rights in private law. In other countries, such as Ireland, Spain, and Brazil, high courts interpreted certain constitutional rights as applying to interpersonal relations as well). Maria Vittoria Onufrio, *The Constitutionalization of Contract Law in the Irish, the German and the Italian Systems: is*

Still, this brief review, pointing out differences in the wording of the different constitutions, is insufficient in outlining the accepted model for the application of human rights to interpersonal relationships. Unfortunately, neither is a review of the comparative case law on the accepted approaches of the application of human rights in private law.⁴⁰

The German constitution, for example, unequivocally determines the model of application that applies in German law. It appears that the German constitution views the protection of human rights as a general social task that compels not only the authorities, as implicit from Section 1(2) and 1(3) of the German constitution stating, "(2) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law."⁴¹

However, in Germany, as in other countries, court has found ways to apply its determinations to private law as evident in German judicial holdings.⁴² Beginning with the *Lüth* case, a variety of decisions show an *indirect* application of human rights in private law at the formal institutional level.⁴³ This is because only German constitutional courts can hear claims that are authorized to determine the constitutionality of a law and the way that compels

horizontal indirect effect like direct effect? 4 INDRET (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371538 [<https://perma.cc/6TSN-JT4N>] (discussing the horizontal effect of constitutional rights which has been accepted by many European countries); THE ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 184-85 (Mark Tushnet, Thomas Fleiner & Cheryl Saunders eds., 2013) (stating that Canada and South Africa especially interesting examples regarding the horizontal-effect doctrine and how it has proven to be a popular transplant).

⁴⁰ See Kumm & Comella, *supra* note 4, at 284 (explaining that an attempt was made to explain the difference through institutional and formal arguments).

⁴¹ GRUNDGESETZ [GG] [BASIC LAW], art. 1, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/S6AK-GD42>].

⁴² BVerfGE 7/198, Jan. 15, 1958, <https://germanlawarchive.iuscomp.org> [<https://perma.cc/SX93-NEJG>]; BVerfGE 39/1, 1975, <http://www.hrcr.org/safrica/life/39bverfge1.html> [<https://perma.cc/S2CV-XFCB>].

⁴³ *Id.*

individuals to respect it.⁴⁴ This means that “mundane” courts lack discretion to apply human rights in private law in cases between individuals. The non-recognition of explicit direct application seems to reflect the suspicion that such recognition would enable civil courts in Germany to issue rulings on matters bearing on individual constitutional rights, which would not be an issue in Common Law systems such as the United States and Israel. Yet, given that in a conflict between individuals the German civil court is compelled to rule in the spirit of constitutional rights (even though they are only determined in the constitutional court), the justification for determining how constitutional rights are applied obviously relies on procedural rather than essential grounds. In other words, barring any influence on the court’s practical and final authority to rule on constitutional rights, which cover all areas of the law,⁴⁵ it is hard to find in Germany a principled-practical difference (as opposed to a procedural one) between direct and indirect application.⁴⁶

Another interesting case to examine the legal system’s vague attitude to the application of human rights in private law is the one used in Canadian law that formally adopts a model assuming non-application. Nevertheless, the case law essentially attests to rulings that lessen the dominance of this model in favor of one that increasingly strengthens the influence of human rights between individuals.⁴⁷ Resembling the German model, the Canadian model endorses the approach that private law and legislation must develop in the spirit of the basic rights determined in the constitution and, in Canada, in the Charter.⁴⁸

⁴⁴ See Kumm & Comella, *supra* note 4, at 275.

⁴⁵ See *id.* at 244–245.

⁴⁶ See *id.* at 250–251; Tamir, *supra* note 29, at 405 (referring to cases where courts in Switzerland and Germany applied to themselves the direct application model through judicial legislation).

⁴⁷ See *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 (Can.) (holding the Canadian Charter of Rights and Freedoms applies to governmental action). See also *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 (Can.) (interpreting Ontario’s libel laws in connection with the Canadian Charter of Rights and Freedoms).

⁴⁸ See Lorraine E. Weinrib & Ernest J. Weinrib, *Constitutional Values and Private Law in Canada*, in *HUMAN RIGHTS IN PRIVATE LAW* (DANIEL FRIEDMANN & DAPHNE BARAK-EREZ EDS., 2001).

The U.S. case is even more complex since the U.S. Constitution addresses government responsibility. The central approach in American law emphasizes that the judicial system is part of the ruling administration to which the Constitution applies and, therefore, rights are applied in American law by means of the judiciary. Let us begin by noting that the accepted doctrine for applying human rights in private law, in the United States too, is the doctrine of state action stating that the demand of a constitutional right must be based on a state action, either through the constitution or through legislation.⁴⁹ The doctrine of state action, however, which compels the state to protect human rights, applies to judges as well in their role as a branch of government.⁵⁰ Indeed, as is noted above, the formulation in the American constitution determines that claims of breaching constitutional rights, with very few exceptions, can only be addressed to the state.⁵¹ By comparison with the German legal system, the doctrine of state action seems to separate constitutional rights from private law far more clearly than the doctrine of indirect application.⁵² Even with all of this, the American system has also found ways to enable the flow of human rights into private law.⁵³

In one such example, the Court in *Shelley* significantly expanded the doctrine of state action in the American legal system.⁵⁴ In the *Shelley* case, the Court considered a petition by a resident of St. Louis, Missouri who sought to prevent an African-American family from living in his neighborhood, relying on a contract forbidding the sale of the house to "Blacks." The Court concluded that even in classic conflicts between individuals, every contract holds some sort of state involvement, as it determines the relevant legal arrangements

⁴⁹ See Kumm & Comella, *supra* note 4, at 266.

⁵⁰ See BARAK, *supra* note 6, at 375.

⁵¹ The most prominent among them being the Thirteenth Amendment, which can be interpreted as applying also to individuals the constitutional right to freedom from slavery.

⁵² See *e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding racially restrictive covenants violated the Equal Protection clause of the Fourteenth amendment). See also Kumm & Comella, *supra* note 4, at 245.

⁵³ See Kumm & Comella, *supra* note 4, at 267.

⁵⁴ See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

between individuals.⁵⁵ Furthermore, relying on the idea that courts can apply human rights through the judiciary, *Shelley* determined that courts could not uphold actions that breach the right to equality—which is protected in the U.S. Constitution.⁵⁶ This expanding interpretation of the Constitution, which covers all legal realms, paves the way for applying constitutional rights in individual relationships and practically voids the state action requirement. The American court does indeed continue to endorse a rhetoric that examines constitutional rights according to the doctrine of state action and continues to preserve the official division between direct and indirect application.⁵⁷ This insistence, however, including its formal arguments, is not clear, nor does it seem to explain precisely why the law strives so hard and so creatively to attain essential protection for human rights in private law.

To summarize, the status of human rights in private law (manifested in various constitutions) is, in principle, blurred and subject to broad interpretation. Although the various legal systems often refrain from defining the model of application as direct, human rights seemingly play a clear and explicit role in private law. Moreover, even when the direct application approach is explicitly mentioned in constitutions, its judicial interpretation remains vague. This can be seen in Greece, where the recognition of the direct application constitutional model was a jurisprudence innovation for the constitution's relationship with private law. In light of technological and social developments (including a shift of power from the state to private players), this need arose with changes in the media and its social influence and the growing need to protect individual rights in the civil realm.⁵⁸ This innovation adopted the expression "horizontal balance" between rights or "interpersonal influence" between individuals, entailing a violation

⁵⁵ See Kumm & Comella, *supra* note 4, at 267.

⁵⁶ See U.S. Const. amend. XIV (addressing citizenship and equal protection of the laws and was proposed as a response to the American Civil War).

⁵⁷ See Kumm & Comella, *supra* note 4, at 268.

⁵⁸ HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY, *supra* note 5, at 159.

of a right.⁵⁹ Nevertheless, even in the Greek legal system, the scope of human rights in private law and their application between individuals remains undetermined.⁶⁰ Resembling the Greek constitution, the South African constitution also explicitly determines the direct application of human rights in private law, however, it still needs to be interpreted by judges.⁶¹

In conclusion, the development of the protection of human rights in private law worldwide – based on considerations of democracy, social justice, and cooperation – illustrates, or at the very least predicts, the growing trend toward broader recognition of the direct application model. Unquestionably, common law is ripe for recognizing direct mutual relationships with the human rights set in the constitution, and the next chapter discusses significant international forces that promote this position.

3. THE DIRECT APPLICATION MODEL, MODERN CORPORATIONS, AND UN LED INTERNATIONAL INITIATIVES

Over the last few decades it has become very common to discuss public aspects of corporations, particularly various social obligations imposed on corporations. Due to the enormous financial and political power that corporations have gained in the public sphere, and their comprehensive impact on the lives of citizens, they have been transformed into a legitimate key player in the discourse on human rights – even those that are clearly privately originated.⁶²

⁵⁹ *Id.* at 158.

⁶⁰ See Nicos Alivizatos & Pavlos Eleftheriadis, *South European Briefing: The Greek Constitutional Amendments of 2001*, 7(1) SOUTH EUROPEAN SOC'Y AND POL., 63–71 (2002) (recognizing that, although, the constitution had performed well so far, “wide amendment was necessary.” Unfortunately, the amendment “lost its direction . . . [and] became a vehicle for a vaguely defined modernization.”).

⁶¹ For further discussion of this topic, see Delisa Futch, *Du Plessis v. De Klerk: South Africa's Bill of Rights and the Issue of Horizontal Application* 22 N.C.J. INT'L L. & COM. REG. 1009, 1011 (1996-1997); see also *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) (S. Afr.).

⁶² See John G. Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges*, 1, 2–6 (Harvard University, Corporate Social Responsibility Initiative, Working Paper No. 66, 2015),

In addition, human rights encounters arise frequently and have become inherent in day-to-day private interactions with corporations (regardless of their size, sector, location, ownership and structure) – perhaps, much more than an average individual’s encounter with their domestic government.⁶³ Interactions between individuals have reached beyond classical human rights violations, such as slavery and unlivable work conditions, and focus on new aspects, such as privacy, mental and economic well-being, and gender.

In the next few paragraphs, we attempt to describe the current state of affairs regarding the balance of power between corporations and individuals, namely emphasizing the main changes regarding human rights witnessed within modern corporations. This description will substantiate the claim that we are at a crossroads heading toward the direct application of constitutional human rights in light of the semi-public role of the private corporations in the protection of human rights.

A brief numerical analysis supports this trend: 500 corporations control about seventy percent of world trade and each year approximately three million new limited liability companies are registered. Likewise, the past decades show an increase in the privatization of government functions private corporations have increasingly acquired “state-like-impact.”⁶⁴ Indeed, we are witnessing an increasing number of corporations that choose to

<https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cr/files/workingpaper.66.oecd.pdf> [<https://perma.cc/WX7Q-6S9A>] (stating that 2011 OECD Guidelines dedicated human rights chapter that includes a formulation of what it means for businesses to respect human rights and the corporate responsibility of respecting human rights); see NADIA BERNAZ, BUSINESS AND HUMAN RIGHTS: HISTORY, LAW AND POLICY - BRIDGING THE ACCOUNTABILITY GAP 3–8 (2017) (for more on corporate social responsibility and its influence on different forms of capitalism).

⁶³ Eric De Brabandere and Maryse Hazelzet, *Corporate Responsibility and Human Rights – Navigating between International, Domestic and Self-Regulation*, 1, 2–6 (Universiteit Leiden, Research Handbook on Human Rights and International Investment Law, 2017), <http://www.ssrn.com/abstract=2913616> [<https://perma.cc/2H62-J4DF>] (explaining that there is an undeniable link between human rights and non-state actors, which leads to an enhanced need of accountability on behalf of the corporations).

⁶⁴ See BALUJA, *supra* note 32. See also SARAH ANDERSON & JOHN CAVANAGH, FIELD GUIDE TO THE GLOBAL ECONOMY (2005).

adopt corporate activities in light of human rights principles, as well as instill ideas of Corporate Social Responsibility (CSR) through designated functionaries and publish a “social vision.”⁶⁵

3.1. *The Corporation in the Modern Era*

The discourse surrounding questions of the corporations’ role in advocating for human rights within democracy relates to an age-old question in corporate law: should companies be exclusively economic and profit-focused or should they also consider broader social causes?⁶⁶ This question will not be discussed in this article, nor is it discussed whether corporations obey court rulings, or whether courts and legal actors can or should serve as agents of social change.⁶⁷ Instead, our discussion focuses on those concrete characteristics of corporations that illuminate the course of potential social change. The implementation and development of legal change as it applies to corporations does not occur randomly. Rather, progress in social change naturally proceeds from factors related to the corporation’s socio-economic pervasiveness and on essential considerations related to their political and financial power as social-legal mediators and social innovators, and lack of human characteristics that interfere with freedom of contract and personal autonomy.

⁶⁵ DENISE WALLACE, HUMAN RIGHTS AND BUSINESS: A POLICY-ORIENTED PERSPECTIVE 90-119 (2015).

⁶⁶ *Id.*

⁶⁷ Gad Barzilai, *The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 247-279 (Terry C. Halliday et al. eds., Oxford and Portland Oregon: Hart Publications 2007) (arguing that it is “the politics of a ‘legal complex’ of legally trained occupations . . . that drives advances or retreats from political liberalism.”).

3.1.1. *The Corporation's Pervasiveness as a Social Component*

Most of society rests on the activities of companies or corporate bodies.⁶⁸ In fact today, some corporations are larger than states—among the largest 100 organizations in the world, 52 are corporations and 48, less than half, are states.⁶⁹ Since most business deals are conducted by corporations, their activity not only dominates contractual interactions but also affects other human and legal dimensions.

The business corporation's routine contractual activities involve countless arenas, including capital, labor, property, products, and services. It is fitting that the corporation's relationship with other entities and communities is described as a "nexus of contracts," a particularly apt description regarding mega-corporations' involvement in tangled webs of seemingly endless contracts.⁷⁰ In modern society individual self-realization depends, to a great degree, on an individual's success in negotiating the corporate world. Thus, it is critical that values concerning social change and human rights apply to corporations as well as to individuals.

3.1.2. *The Corporation's Exposure and Socio-Economic Power*

The significance of corporations as social agents strongly affects the change unfolding in modern discourse, primarily since corporations are so widespread. Corporation's independent legal personalities, size, and the separation between ownership and management, justify imposing social responsibility and constitutional duties on their activities. For example, a corporation (the most common corporate model) has an independent legal personality that is separate from that of its investors, who have limited responsibility for the company's actions, omissions, and

⁶⁸ See J. E. PARKINSON, *CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW* (1993). See also ALFRED D. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

⁶⁹ ANDERSON & CAVANAGH, *supra* note 64.

⁷⁰ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

debts. As such, a corporation holds the incentive and the capability to externalize its actions and omissions onto the non-corporate world.⁷¹ Here, the “principal-agent problem” or “agent’s dilemma,” the fundamental problem in company law, comes into play.⁷²

This concept highlights the separation between ownership and control and the ensuing externalization incentives. The “agent’s dilemma” justifies and explains corporate and securities law, while imposing on the company’s officers responsibilities toward those subject to their decisions.⁷³ The “agent’s dilemma” also intensifies the demand to impose social responsibility and human rights on business companies and their agents, due to their inherent incentives to focus on their own interests at the expense of other corporate constituencies, including, *inter alia*, the capital, environmental and human (both labor and customers) realms.⁷⁴

The corporation’s public dimension and standing are greater than the individual’s; the corporation’s public nature is evidenced by its similarities to a state in terms of structure and socio-economic power.⁷⁵ Aharon Barak relied on these grounds in dismissing the notion that human rights are “not applicable” to private law: Human rights are endangered not only by governments . . . human rights are greatly endangered by *non-governmental bodies*. Indeed, some even claim that, in democratic regimes, human rights face greater danger from other individuals than from the government.⁷⁶

The greater the public exposure and consequences of interaction, the greater lies its responsibility □ especially due to its wide-scale

⁷¹ Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001) (arguing that veil piercing cannot be justified and should be abolished because it has no social payoff and a regime of direct liability should be put in place).

⁷² See Jensen & Meckling, *supra* note 70.

⁷³ See generally ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION & PRIVATE PROPERTY* (1991) (analyzing the separation of ownership and control within a corporation and the consequences of that dynamic).

⁷⁴ See Further Hearing 7/81 *Penider, Investment Co. v. Castro* 37(4) PD 673, 694 (1983) (Isr.); CrimA 4148/03 *Cohen v. State of Israel* 58(2) PD 629, 632 (2004) (Isr.).

⁷⁵ The regime of a business company is very similar to that of a democratic state. Thus, for instance, the structure of rights and voting in a business company, from which “control” also derives, is usually set up democratically, *i.e.*, one vote per share. The institutional structure and the typical corporate government of the business company also resemble a state. Similar to government, a business company also has a small and elected implementing body (the board and the executive) that holds control through the delegation of authority. The social attitude toward the business company is also illustrated in the vigorous discussion of its social purposes, far exceeding the maximization of the shareholders’ wealth.

⁷⁶ Aharon Barak, *Protected Human Rights and Private Law*, in KLINGHOFFER BOOK ON PUBLIC LAW 163, 208 (Y. Zamir. Ed.) (Heb.) (emphasis added).

influence and ability to “endanger” its many constituencies. Thus, public companies with marketable investments and publicly traded shares have increased social responsibility more than that of small family firms with limited social exposure and few investors. Similarly, large, multinational conglomerates have greater social responsibility (mainly toward consumers) than small businesses. The graded imposition of social responsibility according to a corporation’s potential level of exposure rests on both utilitarian and functional grounds. Acknowledging the social responsibility of the corporation “simultaneously” acknowledges its effects on a relatively large number of “beneficiaries.”

3.1.3. *The Use of the Corporation as a Legal-Social Mediator*

The prevalent social exposure of corporations as opposed to that of individuals suggests another possible explanation for the development of social and constitutional change as it applies to them. As we note, society is significantly affected by the existence, actions, and views of large companies.⁷⁷ A corporation, whether small or large, is a community composed of a nexus of contracts. The nature of corporations, specifically that they are comprised of many participants, enables them to act as “mediators” in the adoption of social norms.⁷⁸

The influence of the corporation, then, is not only “local” – affecting only the human elements close to it, such as its officials and

⁷⁷ See PARKINSON, *supra* note 68, at ch. 1. See also CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY (Ramon Mullerat ed., 2005) (compiling insights on the function of corporate social responsibility and how it works worldwide).

⁷⁸ Robert D. Cooter & Melvin A. Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 U. PA. L. REV. 1717 (2001) (demonstrating how a company can encourage trust and good character among its agents in ways that overcome the agency problem and encourage others to cooperate). See also Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253 (2018) (examining the relationship between social norms and certain areas of corporate law like fiduciary duties, corporate governance, and takeovers); THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 297 (2005) (“[Global corporations] are going to command more power, not only to create value but also to transmit values, than any transnational institutions on the planet.”).

employees – but extends also to a broader public that includes the corporation's clients, suppliers, and shareholders (however small and scattered). Indeed, it is common, particularly when environmental liability is at stake, for the corporation's actions to influence the general public. The goal is to create mechanisms that account for social considerations arising from the company's actions and the company's relationships with associated communities.

A good example of this type of mechanism is adoption of ethics programs.⁷⁹ Ethics programs and codes usually include systematic visions of constitutive legal, social, and business validity, which represent and explain compulsory ethical rules, *inter alia* on the basis of the organization's constitutive features and of democratic values. The codes relate to such topics as responsibility, trust, credibility, honesty, professionalism, and sensitivity to the organization's negative image. They are also concerned with the organization's commitment to the protection of human dignity, especially to life and health, to its clients (creditors, suppliers, employees, and the public), and to environmental issues. In this manner, the ethics code is a link that serves to mediate between the economic goals of the corporation and its social ones and serves as an identity card that is unique to the company and can reflect the company's context and its responsibility toward society.

3.1.4. *The Autonomy of Personal Will in a Corporate Context*

Due to corporate characteristics, the typical corporation can further the development of social and constitutional changes more

⁷⁹ See Eli Bukspan & Asa Kasher, *Ethic in Business Corporations: Legal and Moral Considerations*, 2 L. & BUS. 159 (2005) (Heb.). See also *Growing the Carrot: Encouraging Effective Corporate Compliance*, 109 HARV. L. REV. 1783 (1996) (assessing the difficulties that corporations face in deciphering and complying with the Federal Sentencing Guidelines for Organizations, and suggesting additional and potentially more effective measures for ensuring appropriate corporate conduct); *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2122-41 (2003) (arguing that the good intentions of the Sarbanes-Oxley legislation will do little to improve corporate behavior due to complications surrounding the drafting of corporate codes and the way the statute incentivizes rewriting the corporate codes of well-behaved companies in order to avoid litigation).

effectively than individuals can. Besides their greater social exposure and power, the corporations' lack of a natural (as opposed to a legal) personality eases their categorization as significant social actors and explains their relative dominance in the process of social change affecting the international discourse. The corporations' legal personality may explain the reason why the court has shown higher readiness to interfere with their freedom of contract (through the principles of good faith and public order) than with that of individuals. In other words, although corporations enjoy constitutional protection and are acknowledged as legal personalities and individual liberties do not fully apply to them.⁸⁰

A corporation is an artificial creation and interference in its affairs touches on financial issues rather than on personal rights. Given the autonomy of private will, the usual reluctance to apply basic principles of public law to private law is milder.⁸¹ Intuitive and legal sensitivity to the constitutional right (the autonomy of personal will) is thus lower when the subject is a corporation. This fact can also explain the jurisprudential inclination, even if unconscious, to encourage adoption of social responsibility as it applies to corporations through the erosion of the traditional laws of autonomy – contract law.

A more qualified protection of corporate freedom of contract relies on an approach suggested in literature and in judicial opinions

⁸⁰ See generally Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985) (suggesting that the Santa Clara case has not been fully understood and that the brief opinion does not express a pro-big-business theory of the corporation); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (discussing the historical reasons for why corporations are referred to as legal persons rhetorically, and noting that the original theoretical reasoning for the rhetorical convention no longer applies to modern corporate law); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577 (1990) (assessing why the Supreme Court provided Bill of Rights guarantees to corporations and evaluating which theory of corporations would allow for such protections).

⁸¹ Perceiving the corporation as real is actually compatible with imposing responsibility on it. See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767 (2005) (tracing the changes to corporate form throughout history and the accompanying theories of the corporation, and positing that the dominant real entity theory of the corporation is compatible with corporate social responsibility measures).

whereby not all rights held by people are also held by corporations.⁸² Thus, an existence of a *physical* entity does not necessarily lead to the protection of autonomy of *personal will*. The liberty at stake first and foremost protects the “human” in people and as such, its application to a corporation is not without question.

In conclusion, there is no doubt that corporations play a significant role in democracies today and are natural trustees for reinforcing human rights. However, both the state domain and the global domain attempt to prevent corporations from violating human rights. These challenges mainly arise from the principles of international human rights law, which is nearly always state-based and applicable to corporations or the private sphere through specific legislation: first, the state has sovereignty to determine the extent of human rights law to be applied in its territory; second, even though the past few decades have shown incredible progress in standardizing human rights law within international law, corporations are generally not recognized as entities bound by international law.⁸³

Accordingly, the direct application model presented in this article justifies and establishes suitable and practical intergovernmental solutions to applying human rights to corporations and contend with the trends described. This approach coincides with the winds of change that have defined recent international discourse on human rights and corporations; advocating that states, rather than international law and multilateral initiatives, must prevent violations of human rights by corporations.⁸⁴

⁸² See CA 105/92 *Re'em Engineers & Constructors Ltd. v. Nazareth Ilit Municipality* 47(5) PD 189, 212-214 (1993) (Isr.) (“A corporation enjoys liberties enabled by its character as a corporation. Freedom of occupation, property rights, defendant’s rights, and other rights for which the existence of a physical (‘flesh and blood’) entity is not vital (such as the right to a family) are the lot of every legal personality. Hence, a corporation enjoys freedom of expression, as does any flesh and blood creature.”).

⁸³ Dana Weiss, *Corporate Responsibility for Human Rights*, in MARKET, LAW AND POLITICS: ON CORPORATE SOCIAL RESPONSIBILITY 65, 67 (Resling ed., 2012) (Heb.).

⁸⁴ See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001) (providing justifications for the advantages of using international law and multilateral initiatives to increasingly enforce human rights on corporations).

3.2. *New International Discourse and Institutional Conceptual Change*

Two main aspects lead to the conclusion that the direct application model in corporate context provides an efficient alternative to safeguarding and protecting human rights today. The first aspect, discussed above, shows the significance of corporations in modern democracies. The second aspect deals with increasing international discourse on human rights and corporations—led by the “Protect, Respect and Remedy” Framework that can be found in the United Nations Guiding Principles on Business Human Rights □ which is applicable to “all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”⁸⁵ Despite the fact that this discourse takes place internationally, its implementation focuses on individual state action. The international discourse on corporation’s human rights responsibilities—in addition to the legal blurring of the once clear line between the private and public spheres that is mentioned above—strengthens the claim that the purpose of the corporation no longer solely focuses on sustaining profits, rather it plays an important societal role in protecting human rights.

Escalating reports of human rights violations by corporations triggered the establishment of the 1998 United Nations (UN) Sub-Commission on the Promotion and Protection of Human Rights working group on business and human rights.⁸⁶ The group’s task was to recommend and propose methods to promote economic, social, and political rights⁸⁷—producing a twenty-three article

⁸⁵ Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/17/31, at 6 (Mar. 21, 2011) (annexing the Guiding Principles to a report made to the Human Rights Council). See also WALLACE, *supra* note 65, at 233–251 (showing attempts of the United Nations to regulate transnational corporations); César Rodríguez-Garavito, *Business and Human Rights: Beyond the End of the Beginning* in BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING 11 (César Rodríguez-Garavito ed., 2017).

⁸⁶ John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 820 (2007).

⁸⁷ Sub-Commission on Prevention of Discrimination & Protection of Minorities Res. 1988/8, U.N. Doc. E/CN.4/Sub.2/Res/1998/8 (Aug. 20, 1998).

document in 2003. However, their recommendations were not approved by the Commission on Human Rights (since replaced by the Human Rights Council).⁸⁸

Although the document was not approved – nor was it binding –⁸⁹ the impact of the document resonated throughout several leading countries believing that the issue of business and human rights did require serious attention.⁹⁰ In 2005, the UN Secretary General, Kofi Annan, appointed a Special Representative – Professor John Gerard Ruggie – with a wide-ranging mandate to “identify and clarify” international standards and policies in relation to business and human rights, elaborate on key concepts including “corporate complicity” and “spheres of influence,” and submit “views and recommendations” for consideration by the commission.⁹¹

During the first two years of his mandate, Ruggie empirically mapped current international standards and practices regarding business and human rights, ranging from the most deeply rooted international legal obligations to voluntary initiatives.⁹² After three years, Ruggie made only one recommendation: the most effective way to conceptualize the way forward was through the “Protect, Respect and Remedy” Framework,⁹³ which he elaborated in his final report.⁹⁴ The Framework rests on three pillars:

⁸⁸ U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprise with regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/Res/1998/8 (Aug. 20, 1998).

⁸⁹ UN Human Rights Commission Res. 2004/11, U.N. Doc. E/CN.2/2014/L.73/Rev.1 (Apr. 20, 2004)

⁹⁰ Ruggie, *supra* note 86, at 821.

⁹¹ UN Human Rights Commission Res. 2005/69, U.N. Doc. E/CN.4/2005/L.87 at 2 (Apr. 15, 2005).

⁹² Ruggie, *supra* note 86, at 819.

⁹³ John G. Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovation and Implementation Challenges 3* (Harv. Kennedy Sch. Corp. Soc. Resp. Initiative Working Paper No. 66, 2015).

⁹⁴ John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), *Protect, Respect, and Remedy: A Framework for Business and Human Rights*, U.N. doc. A/HRC/8/5 (Apr. 7, 2008).

1. It is the state's duty to *protect* against human rights abuses by third parties, including business, through appropriate policy-making, regulation, and adjudication;

2. Corporations have an independent responsibility to *respect* human rights: business enterprises should act with due diligence to avoid infringing upon the rights of others and to address adverse situations with which they are involved;

3. Victims of human rights abuses need greater access to effective *remedies*, be them judicial or non-judicial.

After six years of extensive research, in 2011, the UN Human Rights Council unanimously "endorsed" the Framework and its thirty-one Guiding Principles, marking the first time a UN body had ever endorsed a normative text that governments did not negotiate themselves.⁹⁵

Although the Framework and Guiding Principles are not legally binding, they provided an unprecedented international standard for states and corporations to take an active role in protecting human rights. Their resonance and impact worldwide is indisputable, with numerous international bodies and states adopting and implementing the Guiding Principles on large corporations. In light of this, a 2017 UN Working Group on Business and Human Rights provided guidelines to assist small and medium sized enterprises (SME's), defined commonly as companies with under 250 employees, to implement the Guiding Principles.⁹⁶ These new guidelines highlight and emphasize that although the SME's may have less capacity and more informal processes, their impact upon human rights can be just as significant as on transnational corporations.⁹⁷

Numerous important resolutions have been adopted within the three major UN organs dealing with human rights – the Third Committee of the General Assembly,⁹⁸ the United Nations High

⁹⁵ Ruggie & Nelson, *supra* note 93, at 5.

⁹⁶ Human Rights Council, Rep. of the Working Group on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/35/32 (2017).

⁹⁷ See RODRÍGUEZ-GARAVITO, *supra* note 85, at 19–22.

⁹⁸ See generally *Social, Humanitarian & Cultural Issues (Third Committee)*, GENERAL ASSEMBLY OF THE UNITED NATIONS <https://www.un.org/en/ga/third/index.shtml> [<https://perma.cc/XX57-4S7R>].

Commissioner for Human Rights (OHCHR)⁹⁹ and the United Nations Human Rights Council,¹⁰⁰ in light of the Guiding Principles. First, Resolution 26/22, proposed by Norway, focused on the “Access to Remedy” Pillar of the Guiding Principles.¹⁰¹ In this resolution, in order to redress the imbalance of remedies for victims of human rights violations, the Human Rights Council requested to “continue work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses.”¹⁰² Second, In November 2014,¹⁰³ OHCHR launched the “Accountability and Remedy Project” in order to contribute to more effective implementation of the Guiding Principles. The project focused on substantive legal and practical issues that have an impact upon the effectiveness of judicial mechanisms in achieving corporate accountability and access to remedy in cases of business-related human rights abuses. Third, the 2030 Agenda for sustainable

⁹⁹ See generally UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <http://www.ohchr.org> [<https://perma.cc/2Q3U-49K2>].

¹⁰⁰ The Human Rights Council replaced the former <http://www.ohchr.org/EN/HRBodies/CHR/Pages/CommissionOnHumanRights.aspx> [<https://perma.cc/FAF2-MWPF>]; See UNITED NATIONS HUMAN RIGHTS COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> [<https://perma.cc/C522-5DUY>] (detailing the history of the Human Rights Council and how it replaced the former United Nations Commission on Human Rights).

¹⁰¹ Note Resolution 26/9, proposed by Ecuador, to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights to elaborate an international legally binding instrument to regulate activities of transnational corporations and other business enterprises. This Resolution has not received much support, as the creators of the General Principles envisioned their application on an individual state level, and an international binding treaty would decrease their chance of implementation throughout the world. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (Jul 14, 2014).

¹⁰² Human Rights Council Res. 26/22, U.N. Doc. A/HRC/RES/26/22 at 3 (Jul. 15, 2014).

¹⁰³ See *OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses*, UN OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx> [<https://perma.cc/FG4X-3LQW>] (explaining the purposes and phases of the Accountability and Remedy Project).

development adopted by the General Assembly on 25 September 2015,¹⁰⁴ expresses another perspective of the important role of the Guiding Principles in the private sector. This agenda includes a plan of action with 17 goals to be initiated over the next 15 years and specifically acknowledges the desire to diversify the private sector, from micro-enterprises to cooperatives to multinational corporations, calling “upon all businesses to apply their creativity and innovation to solving sustainable development challenges.”¹⁰⁵ In June 2017, the Human Rights Council asked that a working group on the issue of human rights, transnational corporations, and other business enterprises give due consideration to the implementation of the Guiding Principles in the context of the 2030 Agenda.¹⁰⁶

In addition, the Guiding Principles have been effective outside the United Nations as well.¹⁰⁷ A leading example can be seen in the 2011 Organization for Economic Cooperation and Development (OECD)¹⁰⁸ Guidelines Revision,¹⁰⁹ which included also an added human rights chapter indicating the importance of businesses to respect human rights and determine the systems that companies instill to meet their responsibility to respect human rights, centered on human rights due-diligence processes. In addition, the “General Policies” chapter of the OECD Guidelines repeats the General Principles framework to respect human rights, while establishing a new due-diligence requirement for all subjects covered by the Guidelines.¹¹⁰ Additional examples can be seen in the International

¹⁰⁴ G.A. Res. 70/1, Transforming our world: the 2030 Agenda for Sustainable (Oct. 21, 2015).

¹⁰⁵ *Id.* at 29.

¹⁰⁶ Human Rights Council Res. 35, U.N. Doc. A/HRC/35/L.11, at 3 (June 19, 2017).

¹⁰⁷ WALLACE, *supra* note 65, at 119–132.

¹⁰⁸ The OECD is an intergovernmental economic organization with 35 member countries, which focuses on promoting policies that will improve economic and social well-being. See generally ORG. FOR ECON. COOPERATION & DEV., <http://www.oecd.org> [<https://perma.cc/28JX-6Q3F>].

¹⁰⁹ Org. for Econ. Cooperation & Dev. [OECD], OECD Guidelines for Multinational Enterprises 2011 edition (2011) (providing advice to multinational businesses on how to conduct business responsibly).

¹¹⁰ Ruggie & Nelson, *supra* note 94, at 5–6.

Finance Corporation (IFC)¹¹¹ – the largest global institution focusing exclusively on encouraging the private sector development in developing countries; the adoption of the ISO 2600's Social Responsibility Standard of the International Organization for Standardization (ISO),¹¹² providing guidance rather than rules for its members on social responsibility –translating the Guiding Principles into effective action.

Moreover, the Guiding Principles have found their way into the European Union, seen by the European Commission initiative to produce produced guidelines for small and medium-sized enterprises in accordance with the Guiding Principles. Over the past few years, there have been significant steps paving the way for regulation that will be uniformly binding for all EU member states. In December 2014, the European Commission published the *directive on disclosure of non-financial and diversity information*, which determines that all large public-interest entities (listed companies, banks, insurance undertakings and other companies that are so designated by Member States) with more than 500 employees should disclose in their management report relevant and useful information on their policies, main risks, and outcomes relating to human rights. The Directive required the Commission to prepare non-binding guidelines on reporting non-financial information, which should be first reported in early 2018.¹¹³ An additional area showing the EU's intent to promote binding regulation is the EU institution's political agreement to control trade in "conflict minerals" (tin, tantalum, tungsten and gold) from conflict-affected and high-risk areas.¹¹⁴

¹¹¹ See generally INT'L FIN. CORP., <http://www.ifc.org> [<https://perma.cc/R4KY-3QXF>].

¹¹² See generally ISO 26000 - Social Responsibility, INT'L ORG. FOR STANDARDIZATION, <https://www.iso.org/iso-26000-social-responsibility.html> [<https://perma.cc/6G76-TY6A>] (collecting information concerning ISO 26000 including supporting organizations and relevant publications).

¹¹³ See generally *Company Reporting*, EUROPEAN COMMISSION, http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm [<https://perma.cc/FED2-ZFFU>] (providing resources on financial and non-financial reporting requirements for the EU).

¹¹⁴ See 2017 O.J. 60 (May 19, 2017) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2017:130:TOC>. In May 2017 the European Parliament approved a draft of the regulation. The "conflict minerals" law will oblige all but

Most importantly, the Guiding Principles have reached individual states, which have slowly begun to implement various corporate regulations on human rights. Many countries choose to create a National Action Plan (NAP)—a state policy outlining the strategic orientation and concrete activities to address a specific policy issue, advocated by the UN Working Group on the issue of human rights and transnational corporations and business enterprises.¹¹⁵ The NAP outline provides states recommendations on implementing the General Principles on procedural and content aspects to be considered in the light of the national context.¹¹⁶

France is one of the leading countries to implement the Guiding Principles.¹¹⁷ In February 2017, the French National Assembly passed a legislation requiring French-based companies, which directly or indirectly employ at least 5,000 workers in France or 10,000 workers worldwide, to establish a “plan de vigilance” (due diligence document),¹¹⁸ addressing all possible risks within the corporation’s daily work in the areas of human rights (the legislation was later declared constitutional by the French Constitutional Court).¹¹⁹ Any company breaching this law faces civil liability and

the smallest EU importers of tin, tungsten, tantalum, gold to do “due diligence” checks, in accordance with OECD guidelines, on their suppliers. Moreover, big manufacturers will also have to disclose how they plan to monitor their sources to comply with the rules. Due diligence obligations will apply from January 1, 2021 to allow member states time to appoint competent authorities and importers to become familiar with their obligations. Although this regulation is very specific, it indicates a step towards direct application of human right in the private sphere.

¹¹⁵ See RODRÍGUEZ-GARAVITO, *supra* note 86, 26–32.

¹¹⁶ Many states have already produced a NAP, such as UK, USA, Italy, Germany and France, with a full list available at OHCHR, State national action plans on Business and Human Rights <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>. [<https://perma.cc/3FJZ-LNZA>] (last visited Nov. 4, 2018).

¹¹⁷ Important: The French Government Published Its National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights, VIGEO EIRIS (Feb. 5, 2017).

¹¹⁸ Edwin Lopez and Jennifer McKeivitt, *France Passes Law Requiring Supply Chain Due Diligence*, SUPPLY CHAIN DIVE (Mar. 2, 2017), <http://www.supplychaindive.com/news/France-supply-chain-human-rights-reporting-audits/437191/> [<https://perma.cc/Y8AN-QQV2>].

¹¹⁹ Sandra Cossart, Jérôme Chaplier, and Tiphaine Beau De Lomenie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*,

potential fines of up to ten million euros. Other examples include: Switzerland's obligations to Swiss corporations and their subsidiaries, including imposing a due diligence obligation;¹²⁰ British companies' requirement to submit anti-slavery and human trafficking statements;¹²¹ and the unique cooperation in the Netherlands between the government, local corporations, NGOs, and employee organizations to create a plan embracing the Guiding Principles.¹²²

The United States does not have any federal legislation imposing direct binding duties on human rights issues on corporations and has mostly relied on the indirect application model of human rights. However, there are a few proposals and cases that could indicate a change. First, the June 2000 Corporate Code of Conduct required any U.S. corporation employing over twenty persons in a foreign country, either directly or indirectly to ensure the protection of human rights.¹²³ Second, Section 1502 of the Dodd-Frank Wall Street and Consumer Protection Act requires companies listed on the American stock exchange (including foreign companies and subsidiaries) to report any payment made to a foreign government or to the U.S. government for the purchase of oil, natural gas, or mineral resources, mainly concerned with associated human rights violations to these fields.¹²⁴ Third, the recently revived use of the

Bus. & Hum. Rts. J., 2(2), 317-323 (2017); Bettina Grabmayr, *Duty of Care Law: French Constitutional Council Gives the Green Light*, ECOVADIS (Apr. 20, 2017).

¹²⁰ Elizabeth Umlas, *Human Rights Due Diligence: Swiss Civil Society Pushes the Envelope*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (Mar. 13, 2015), <https://business-humanrights.org/en/human-rights-due-diligence-swiss-civil-society-pushes-the-envelope> [<https://perma.cc/BJ5B-NPB4>].

¹²¹ Eric De Brabandere and Maryse Hazelzet, *supra* note 63, at 1, 2-6, 17.

¹²² *Id.*, at 18.

¹²³ Corporate Code of Conduct Act of 2000, H.R. 4596, 106th Cong. (2000). The Act was eventually rejected by the American Congress but shows discusses the importance of a implement a safe and healthy workplace, ensure fair employment, including prohibition of the use of child and forced labor, prohibition of discrimination based upon race, gender, national origin, or religious affiliation, respect for freedom of association, and the payment of a living wage to all workers and additional duties related to human rights. <https://www.congress.gov/106/bills/hr4596/BILLS-106hr4596ih.pdf> [<https://perma.cc/2C55-39R8>].

¹²⁴ De Brabandere and Maryse, *supra* note 63, at 16; Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2009-2010).

Alien Tort Statute (ATS) has been used by U.S. courts to implement human rights obligations on corporations indirectly, by granting remedies to foreign citizens for human rights violations committed outside of the United States.¹²⁵ U.S. Federal Appellate Courts remain divided over whether corporations can be sued on the basis of ATS or whether they are excluded outside the scope of the law.¹²⁶

3.3. *The Way Forward: The Corporation as the Spearhead of the Direct Application Model*

The role of the corporation in modern international society, specifically the State's duty to *protect* its citizens from human rights violations by the private sector, by taking appropriate steps to ensure effective *remedies* upon abuse, and the independent corporate responsibility to *respect* human rights, illustrate the justifications and benefits of the direct application model of human rights in the private sphere. The basis of the UN Guiding Principles, as established by John Ruggie and later ratified by numerous international bodies, provided States with the necessary tools to first address human rights violations by corporations. Ruggie's motive was not to create a binding multilateral treaty, but rather to create a non-binding international standard that can be modified within each state as it deemed fit. An example can be seen in the recommendations for States to adopt a National Action Plan to address specific human rights issues, as done by numerous states worldwide. Still, the State's mission to "protect" its citizens from human rights violations, accompanied by the State's obligation to supply appropriate and effective "remedies" for human rights breaches, challenge the State to a new legal and constitutional mindset.

The direct application model focuses on the nature of the democratic regime, and the duties of the State itself, under the social

¹²⁵ Alien Tort Statute 28 U.S. Code § 1350; De Brabandere and Maryse, *supra* note 63, at 9–12; BERNAZ, *supra* note 62, 260–284.

¹²⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). See also *Jesner v. Arab Bank* 137 S. Ct. 1432 (2017) (currently pending in the United States Supreme Court); Adam Liptak, *Supreme Court to Weigh if Firms Can Be Sued in Human Rights Cases* *Image*, N.Y. Times (Apr. 3, 2017) <https://www.nytimes.com/2017/04/03/us/politics/supreme-court-human-rights-arab-bank-terrorism.html?mcubz=0&r=0> [https://perma.cc/B3CU-UKWN].

contract, to protect its citizens or their basic liberties from others and to take appropriate steps, i.e., remedies, to punish and redress business-related human rights abuses when they occur. The democratic regime with the State is the only player that can effectively solve conflicts between individuals and guide them to uphold two major concepts essential to democracy—protecting human dignity and providing fair arrangements for its protection. Using the constitution, the direct application model provides an effective arrangement that allows the legal system and individuals to safeguard human dignity. As opposed to the indirect application model, albeit which is more commonly used but through a series of sophisticated “legal acrobatics,” preventing the justice system to easily *protect* its citizens from human rights violations by the private sector, the direct model provides incentive for corporations to *respect* human rights as a whole and provide a direct system of *remedies* that simplifies the process for individuals to create human rights claims directly against corporations as opposed to the indirect application model.¹²⁷

Each State implements the direct application model differently. Some States, such as South Africa, have already applied the direct application of human rights to the private sector using the state constitution. Others have revived indirect legal techniques and old legislation to find procedural and fundamental loopholes that allow states to apply human rights to the private sector, as was recently done with the Alien Tort Statute.¹²⁸ Regardless, it seems that the acceptable law, and even the appropriate law, shows trends toward subjugating corporations to the constitutional human rights obligations. Moreover, the direct application model provides this trend with the necessary expressive recognition in today’s corporate and democratic reality.

¹²⁷ Cf. *Protect to Principles 2, 3, 7 and 8 of the UN Guiding Principles, respect to Principles 11-15 and remedies to Principles 25 and 26.* For a possible tool, representing the indirect method of applying human rights on the corporate directors and officers, see Cynthia A. Williams and John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?* 74 UNIV. OF CINCINNATI L. REV. 75 (2005).

¹²⁸ See Weiss, *supra* note 83 at 67 (discussing Israel); Ratner, *supra* note 84 at p. 498.

4. CONCLUSION

This article discusses the direct application of human rights in the realm of private law. In many legal systems constitutional human rights are part of public law and their application to private law through an indirect application model is limited, implicit, and unsystematic.

This article holds that this mechanism challenges the implementation of a democratic worldview, which recognizes not only a basic individual right to realize human liberties, but also, the need to protect the possibility of realizing these rights. Accordingly, the article holds that the state must be involved in protecting citizens from any violation of their rights, both in public and private spheres, especially in context of the modern corporation.

However, the prevalent distinction concerning the identity of the breaching entity creates two ostensibly separate constitutional systems, all within one single regime drawing its power from systematic and coherent basic principles. Furthermore, this distinction engages in legal “acrobatics” through its use of creative legal techniques, such as the “State Action” doctrine, or blurred valve concepts such as the “good faith” and “public policy” principles. We contend that democratic regimes need not “camouflage” their actions, rather openly rely on a direct application model.

Moreover, the direct application of human rights in private law actually realizes the constitution’s goals as required by a democratic legal system, without any dependence on the identity of the infringing entity, whether it is public or private.

Some hold that adopting the direct application model in private law may lead to the violation of human rights, given that private law lacks the necessary tools to balance rights. As we argue and show at length, this fear is unrealistic. The discussion on individual rights, including in public law, unfolds within the context of balancing rights, which is struck regardless of whether human rights are applied directly or indirectly.

Recent trends show that corporations hold increasing social responsibility, due to their incredible financial and political power in key areas that were once dominated by public entities. As the social responsibility of the private sector grows, so too does its responsibility. It is not surprising that international discourse and state action following the 2011 UN Guiding Principles advocates

that states enforce the newly acquired responsibility, and the direct application model is closely connected to this mission as well as its mission to enable more efficient and accessible remedies for corporate human rights breaches.

Moreover, the comparative review of the status of human rights in private law indicates that even though most legal systems refrain from formally defining the application model as direct, human rights have become increasingly significant in the context of private law as if the direct application model is almost here. The suggested approach is not meant to blur the current trends and distinctions between public and private law but to add additional justifications to applying human rights in private law.

To conclude, this article holds that the direct application model is not only justified by deep democratic ideals and the current international discourse, but can also serve as the most expressive, effective, and pertinent manner to ensure the implementation of basic rights; it is essential to democracies and their legal systems to challenge their current “constitutional mindset.” A modern corporations’ legal obligation to respect human rights embodied in the liberal constitutions is a crucial component for a democratic and humane society, and the direct application model—with its expressive and legal significance—is a natural step in the right direction.