

Direct Application of Constitutional Human Rights on the Citizenry

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This article deals with the possibility of, and need for, applying human rights directly in the realm of private law. This is in contrast to the prevalent view, which claims that constitutional human rights are part of public law and their application in private law through an indirect application model is limited, implicit, and unsystematic.

We hold that this mechanism is incompatible with a democratic worldview, in its deep and ideal sense. A democratic outlook recognizes not only a basic individual right to realize one's liberties freely and without disturbance, but also a need to protect the possibility of exercising these rights without any disruption preventing it.

Consequently, we hold that the state is meant to protect its citizens from any violation of their rights, in both public-law and private-law contexts. We hold that, in a democratic regime, there is no room for assigning a decisive standing to the identity of the infringing agency—the various branches of government as opposed to individuals or other private entities—as a litmus test for determining the source of the legal protection granted to human rights.

The prevalent distinction concerning the identity of the breaching entity creates an undesirable duality between two ostensibly separate constitutional systems, all within a single regime drawing its power from systematic and coherent basic principles. Furthermore, this distinction engages in legal “acrobatics” through its use of blurred valve concepts such as the “good faith” and “public policy” principles. What is the point of resorting to this kind of camouflage instead of relying on an open direct application model?

Indeed, some hold that adopting the direct application model in private law will actually lead to the violation of human rights, given that private law lacks the tools needed for deciding which basic right overrides the other. As we outline in the article and expand upon at length, we hold that this fear is unrealistic. The discussion of individual rights, including in public law, unfolds within the context of a balance between rights, which is struck regardless of whether human rights are applied directly or indirectly.

Moreover, the comparative review of the place 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 actually become increasingly significant in the context of private law. A review of common law in Israeli law and comparative law shows that, in recent years, the approach acknowledging indirect application of human rights in private law has drawn closer and almost blended with the one acknowledging direct application.

Our approach, then, is not to suggest an arrangement that could be harmful to the stability of the current legal approach, with its existing laws and rules, but rather to open the door to another, deeper, and more precise type of justifications and potential applications of the direct application model of human rights in private law, without disrupting fundamental tenets.