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CONSTITUTIONAL HUMAN RIGHTS AND PRIVATE LAW

Justice Aharon Barak*

The question whether constitutional human rights merely define and delimit the relationship between citizen and state or whether such rights also apply to relations between citizens is fundamental to any constitutional democracy. The author examines the scope of the application of constitutional human rights to private law with a view to resolving the issue for the Israeli context. He sets out and analyses four models for defining the appropriate scope of the application of constitutional human rights and roots these models in the jurisprudence of various countries. The author goes on to make a case for the model in which constitutional human rights apply, albeit indirectly, to relations between private citizens. Such an approach, he argues, is the one most consistent with the guiding impulses that drive human rights: respect for equality, dignity and individual autonomy. In addition, the author argues, the tools for facilitating his model of choice already exist in private law, in the form of concepts like "good faith," "public policy" and "unconscionability."

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

* President, Supreme Court of Israel.

I. PRIVATE LAW AND PUBLIC LAW

A. THE ESSENCE OF THE DISTINCTION

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

[1] For this distinction, see B. Akzin, "On Public Law" Statements of The Israel National Academy for Sciences 72 (Volume C, 5730). See also J. Beatson, "'Public' and 'Private' in Administrative Law" (1987) 103 Law Q. Rev. 34.

[2] See H.C. 1601/90 *Shalit* v. *Peres*, P.D. 44 (3) 353; H.C. 1635/90 *Gergovsky* v. *Prime Minister*, P.D. 45 (1) 749; see also G. Shalev, "Political Agreements" Iyunei Mishpat 16 215 (5752).

characterized as "quasi-public" bodies[3] or as "hybrid creatures".[4] Bodies have been recognized as "dual-nature" bodies, to which "both the principles of private law and the norms of public law" are applicable".[5] The obligations of trustworthiness,[6] fairness,[7] and reasonableness[8] — applicable to the government in its relations with private parties in the spheres of public law — have infiltrated private law, initially in private law relationships between the government and private parties,[9] and subsequently in private law relationships between private parties.[10] The "good faith" principle functioned as an instrument of influence from public law to private law,[11] and from private law to public law.[12] Fundamental concepts of public law, applicable between the government and private parties — such as the principles of natural justice[13] and the prohibition on conflict of interests[14] — have penetrated into relationships between private

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

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

5 Civ. App. 294/91 *Hevra Kadisha* v. *Kastenbaum*, P.D. 46 (2) 464.

6 See H.C. 262/62, *Peretz* v. *Kfar Shmaryahu*, P.D. 16 2101; H.C. 142/70 *Shapira* v. *Central Committee of the Jerusalem Bar Association*, P.D. 25 (1) 325.

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

8 See H.C. 389/80 *Golden Pages Inc.* v. *Broadcasting Authority*, P.D. 35 (1) 421.

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

10 See Civ. App. 207/79 *Raviv* v. *Beit Yules*, P.D. 37 (1) 533; Fur. Hrg. 22/82 *Beit Yules* v. *Raviv*, P.D. 44 (1) 441.

11 *Ibid.*

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

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

14 H.C. 174/54 *Simel* v. *Licensed Authority for Emergency Land Requisition (Regulation) Law*, P.D. 9 459; H.C. 531/79 *Likud Party* v. *Petah Tikvah City Council*, P.D. 34 (2) 566.

parties. The borderline between the jurisdiction of the Hight Court of Justice and that of the civil court is blurred,[15] and the "twilight" zone is broad.[16]

B. COMMON LAW HUMAN RIGHTS

1. Human Rights Originating in the Common Law

Fundamental human rights also are classified according to the distinction between public and private law. Public law includes among its obligations common law human rights which were developed by the High Court of Justice and are directed towards the government. These are the "fundamental rights 'which are not inscribed in a book,' but rather arise directly from our State's nature as a freedom-loving democracy. In its decisions, this Court has looked to these fundamental rights as a guiding light for interpreting law and reviewing the acts of the State's administrative bodies."[17] Recognized within the framework are, *inter alia*, the basic right to human dignity, freedom of occupation, freedom of expression, and freedom of movement. Alongside this development in public law, the civil courts have recognized human rights in private law. These rights are aimed at other private parties, and they include, *inter alia*, freedom of contract,[18] the right to one's good name,[19] freedom of movement and personal liberty.[20]

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

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

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

16 See Civ. App. 256/70 *Friedman* v. *City of Haifa*, P.D. 24 (2) 577; Civ. App. 463/85 *Ravivo* v. *Bentuv*, P.D. 39 (4) 494, 497; see also I. Zamir, *Adjudication in Administrative Cases* (Jerusalem: The Hebrew University, 1987); and I. Zamir, "Public Tenders in Civil Courts" (1992) Mishpat Umimshal A 197.

17 H.C. 243/62, *Upaney Hosrata Blsrael B.M.* v. *Geri*, P.D. 16, 2407 at 2415 (Justice Landau).

18 See Civ. App. 207/79, *supra*, note 10.

19 See Civ. App. 214/89 *Avneri, et al.* v. *Shapira, et al.* , P.D. 43 (3) 840.

20 See Civ. App. 243/83 *City of Jerusalem* v. *Gordon*, P.D. 39 (1) 113.

against the government, and the civil court recognized their applicability against other private parties. Take, for example, the right to property: it has been held that, "the property right is among the basic rights of the person in Israel."[21] It is directed towards the government, which is not entitled to infringe it without legislative authorization.[22] But the property right is not directed solely against the government, but towards "the entire world." Private parties are also not allowed to infringe it. It is protected, *inter alia*, by property and tort law.

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

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

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

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

24 See Crim. App. 677/83 *Burochov* v. *Yafet*, P.D. 39 (3) 205.

25 See H.C. 337/81,*Mitrani* v. *Sar Hatahbura*, P.D. 37 (3) 337.

3. Human Rights in Private Law

Against the background of this normative reality, the following question arises: whether legislative human rights, set forth in the basic laws regarding human rights, are directed towards the government only, or are they directed both towards the government and towards other private parties? Do the constitutional human rights set forth in the basic laws apply in private law? Is it possible to speak about "the privatization of human rights?"[26] This question is of central importance. It arises in most legal systems and while at times it is given an explicit answer in legislation, most constitutional texts are ambiguous, and the determination is judicial.[27]

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

A. THE POTENTIAL MODELS

It is possible to build four principle theoretical models for the determination of the influence of constitutional[28] human rights on relations between private

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[26] See F. Raday, "Privatization of Human Rights' and Abuse of Power" (1994) Mishpatim 23 21.

[27] There is a great deal of literature on this topic. See, *inter alia*, Clapham, "The 'Drittwirkung' of the Convention" in R. St. J. MacDonald, F. Matscher and H. Petzold, eds., *The European System for the Protection of Human Rights* (1993) 163; J. H. Garvey, "Private Power and the Constitution" (1993) 10 Const. Comm. 311; R. S. Kay, "The State Action Doctrine, The Public-Private Distinction, and the Independence of Constitutional Law" (1993) 10 Const. Comm. 331; U. Scheuner, "Fundamental Rights and the Protection of the Individual Against Social Groups and Powers in the Constitutional System of the Federal Republic of Germany" in Rene Cassin, ed., *Amicorum Discipulorumque Liber*, Vol. III (Paris: Éditions A. Pedone, 1971) 253; J.D.B. Mitchell, "Some Aspects of the Protection of Individuals Against Private Power in the United Kingdom" in Rene Cassin, *ibid.* 235; O. Espersen, "Human Rights and Relations Between Individuals, in Rene Cassin, *ibid.* 177; Clyde W. Summers, "The Privatization of Personal Freedoms and the Enrichment of Democracy: Some-Lessons from Labor Law" (1986) U. Ill. L. Rev. 689.

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

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

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

The third and fourth models are mid-points between the two extreme models. The third model states that protected human rights apply in private law. However, this application is not direct, but indirect (indirect application model).

1993).

Protected human rights do not directly permeate private law "in and of themselves," but rather by means of private law doctrines (either through existing doctrines or through new doctrines created for the purpose of public law "absorption"). Reuven who refuses to sell his products to Leah is likely to be responsible to her for conducting negotiations with a lack of good faith.

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

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

B. DIRECT APPLICATION MODEL: ARGUMENTS FOR AND AGAINST

1. Textual Arguments for Direct Application

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

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

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29 Basic Law: Freedom of Occupation, para. 3.

30 Basic Law: Human Dignity and Liberty, para. 3.

31 Basic Law: Human Dignity and Liberty, para. 4.

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

33 Basic Law: Human Dignity and Liberty, para. 1A.

34 Basic Law: Human Dignity and Liberty, para. 1.

of his life, and of his freedom." The recognition of the worth of man, the sanctity of his life and of his freedom justifies recognition of the application of human rights in private law. The danger of harm to the worth of man, the sanctity of his life and his choices is liable to come not only from the government but also from violent private parties. It is true that *Basic Law: Freedom of Occupation* states in its "respect clause" that "every authority of the government authorities must respect the freedom of occupation of every person or resident,"[35] and a similar provision exists in *Basic Law: Human Dignity and Liberty*.[36] Nonetheless, respect clauses are not judicial "presumptions," from which it must be inferred that basic laws apply exclusively to relationships with the government alone. The purpose of these provisions is to establish the normative super-legislative status of basic laws, and their existence as a source of judicial authority and not just political rights. The respect clause is an insufficient basis from which to deduce a negative rule regarding the application of human rights in private law.

2. Substantive Arguments for Direct Application

The textual arguments that arise from the text of the Israeli Basic Laws allow for the application of constitutional human rights to relationships between private actors, but they do not mandate this conclusion. To this end substantive arguments are available. The first — and the most important of them — is the argument that the danger to human rights does not only emanate from the government, and that it must be recognized that grave danger to human rights emanates from non-governmental bodies. Indeed, there are even those who claim that in democratic regimes, the danger of harm to human rights from private parties is greater at times than the danger of harm from the government.[37] Appropriate protection of human rights requires, therefore, a general test, which extends across both the public and private sector. The second substantive

35 Basic Law: Freedom of Occupation, para. 5.

36 Basic Law: Human Dignity and Liberty, para. 11.

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

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

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

3. Textual Arguments Against Direct Application

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

[38] Basic Law: Human Dignity and Liberty, para. 5.

Basic Laws only apply against the government, because it is impossible to recognize human rights between private parties without recognizing a limitation of one human right arising from the existence of a different human right. Third, if the Basic Laws apply also to relations between private parties, it means that they not only grant one private party a right against another private party, but they also impose obligations on one private party towards another private party. But the case law holds that a human right cannot be negated or limited except by legislation explicitly stating as much.[39] In the absence of an explicit provision applying Basic Laws to relations between private parties, the Basic Laws should not be interpreted as applying to these relations. Fourth, Basic Laws include respect clauses, according to which "every authority of the government authorities is obligated to respect"[40] the basic rights set forth in them. The implication is that Basic Laws are directed solely at the government and not at private parties.

4. Substantive Arguments Against Direct Application

The first substantive argument is that constitutional dealings in human rights are always vis-à-vis the government.[41] The fear is that the government — either the legislature or the executive — will infringe human rights, and the sole way to overcome this is by giving "super-legislative" (i.e. constitutional) normative status to human rights. Indeed, guaranteed human rights in relations between private parties require no constitutional provision because regular legislation or common law is sufficient. Constitutional treatment of human rights is by its very essence treatment of human rights in relation to the government.

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

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39 See H.C. 252/77, *Bevugnee* v. *City of Tel Aviv*, P.D. 32 (1) 404, 415; H.C. 337/81, supra note 25.

40 Basic Law: Freedom of Occupation, para. 5; Basic Law: Human Dignity and Liberty, para. 11.

41 See K. Swinton, "Application of the Canadian Charter of Rights and Freedoms" in W. Tarnopolsky and G. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) 41.

only grant rights, but they also negate rights — since the right of one private party is the obligation of another private party. We will find that the negation of basic rights is raised to a constitutional level. This result is untenable. Basic Laws were intended to grant private parties protected basic rights, not to take these rights away.

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

C. NON-APPLICATION MODEL: ARGUMENTS FOR AND AGAINST

1. Arguments For Non-Application

The textual arguments supporting the non-application model are the same textual arguments which argue against the direct application model.[42] The same is true for the substantive arguments.[43] Indeed, the non-application model is the complete opposite of the direct application model. At the base of this model stands the assumption that a formal constitution is intended — in everything related to human rights — to protect private parties against the government, and it is not at all interested in dealing with the rights of one private party against

[42] See text associated with notes 38-40.

[43] See text associated with note 41.

another private party. The latter relationship is regulated from time immemorial by private law.[44]

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

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

[44] See Swinton, *supra*, note 41; Raday, *supra*, note 26.

direct or indirect — of constitutional provisions regarding human rights in private law. Justice McIntyre of the Supreme Court addressed this point in the Canadian case which decided that the provisions in the Canadian *Charter* regarding rights and liberties do not apply to private law:[45]

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

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

2. Arguments Against Non-Application

The arguments in favor of the direct application model[46] are the same as the arguments against the non-application model. The danger to human rights emanates not only from the government, but also from private parties, and primarily strong private parties, such as certain private corporations. If a small city is not entitled to discriminate — because it falls within the definition of "government" — why should a large corporation be entitled to do so? Moreover, if we say that human rights in a formal constitution are aimed at the government, what is the rule regarding a legislative enactment which sets forth rights and

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[45] In the case of *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 603.

[46] See text associated with notes 30-37.

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

But if so, why does a similar rule not apply to the development by courts of the common law concerning relations between private parties? Is this not "judicial legislation"[47] to which constitutional limitations must directly apply? In either case: if constitutional provisions regarding human rights are directed also against the judiciary, and it is restricted in the development of common law concerning relations between private parties and the government, why would this restriction not also apply — just as it applies to the legislature — to the development of common law concerning relations between private parties? And if we say that constitutional provisions regarding human rights are not at all directed against the judiciary, is it reasonable that a court will be able to develop the common law regarding the right of a private party against the government without constitutional limitations? Indeed, the conception of a court as a government body subject to constitutional provisions indicates that the non-application model cannot stand, since even if it prevents the infiltration of human rights constitutional provisions by means of the direct application model, in the end it will be "entangled" in constitutional provisions by means of the court as government authority and, if so, it is preferable to reach the appropriate result by the direct application model than by the application to the judiciary model.

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

[47] For judicial legislation, see A. Barak, *Judicial Discretion* (New Haven: Yale University Press, 1989) at 147.

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

One possible answer is that constitutional provisions in fact only deal with human rights against the government, and when the government acts in the private law area it acts as a private party and not as the government. This response — the critics claim — is unsatisfactory.[48] It is not reasonable that the state can discriminate, infringe the right of speech, right of movement and the other human rights, just because it has changed "cloaks." There has been no change of identity and it is appropriate that constitutional limitations apply. The obligations of the state towards private parties under the constitution are the "personal law" of the state, and it takes this law with it in all its endeavours.

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

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

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

[48] See sources cited *infra*, note 95.

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

D. INDIRECT APPLICATION MODEL: ARGUMENTS FOR AND AGAINST

1. Arguments For Indirect Application

The indirect application model — like the direct application model — recognizes the application of human rights set forth in the constitution to relations between private parties. Most of the arguments supporting the direct application model[49] also support the indirect application model. According to its supporters,[50] the advantage of this model is that it has an answer to some of the criticism levelled against the direct application model. The departure point of the indirect application model is that private law — which deals with relations between private parties — has always considered human rights. At the base of private law rules stand the human rights of personhood, self-realization, and dignity. The specific private law rules — like protection of one's good name, property, and assets — reflect rights of the private party (as against the state and against other private parties). The "value" concepts — like "good faith," "reasonableness," "negligence" — reflect, *inter alia*, an appropriate balance between opposing human rights. The right of one private party to freedom of action confronts the right of another private party to bodily integrity.

The balance is found in various "institutions" of private law, such as negligence.[51] Another private law institution which "absorbs" human rights

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[49] See text associated with notes 30-37.

[50] See sources cited *infra*, note 95.

[51] See, for example, Civ. App. 243/83, *supra* note 20.

originating in the constitution is "public policy."[52] According to the claims of the proponents of the indirect application model, "public policy" reflects the position of constitutional human rights. The freedom to make a contract is a constitutional freedom and the freedom of occupation is a constitutional freedom. When Reuven makes a contract with Shimon to limit freedom of occupation, there is a confrontation between the various liberties. From time immemorial these confrontations have been solved within the framework of the "public policy" principle,[53] which weighed conflicting rights according to their relative status in the constitutional system. Indeed, "public policy" is the channel through which constitutional values flow into private law.[54]

When private law gives expression to human rights, it does not create a special system of human rights in private law; there are not two human rights systems, that of private law and that of public law. There is one human rights system. In the past, human rights were anchored in common law rules "which were not inscribed in a book";[55] today they are anchored in a "super-legislative" norm. In the past, common law human rights "infiltrated" private law by means of private law "value terms"; now constitutional human rights themselves have "infiltrated" private law by means of these terms. The difference in constitutional status is likely to bring about a difference in outcome.

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

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52 Contracts Law (General Part), 5733-1973, para. 30.

53 See M. Goldberg, "Contractual Restraint of An Employee" Mechakrei Mishpat 5 (5747) 7; A.D. Hermon, *Public Policy and Restrictions on Freedom of Occupation in The Looking-Glass of Israeli and British Case Law*, Yitzhak Kahan Book (Tel Aviv: Papirus, 1989) 393.

54 See Civ. App. 294/91, supra, note 5.

55 H.C. 243/62, *supra* note 17.

performance which it did not recognize in the past. Similarly, a restaurant owner who refuses to proffer services for discriminatory reasons is likely to be deemed to be conducting negotiations in "good faith" if the right to equality is only common law, because, as such, the right does not have the power to overcome the restaurant owner's freedom of contract. The same restaurant owner is likely deemed to be conducting negotiations with a lack of "good faith" if the right to equality is constitutional. The advantage of the indirect application model over the direct application model is that it makes use of private law tools. These are likely to be old tools, imbued with new content, or new tools, created by the private law with private law techniques, for the purpose of giving expression to the new content.

2. Arguments Against Indirect Application

The arguments against the indirect application model are, in principle, identical to the arguments against the direct application model.[56] Surely, if constitutional human rights are protected only as against the government, they are not applicable — either directly or indirectly — to relations between private parties. The indirect application model attempts to ease the "digestion" of application of rights from public law in private law, but this easing is misplaced, because at its base the idea is not worthwhile. If human dignity, liberty and property are constitutional rights against the government, how do they succeed in shaping public policy whose concern is relations between private parties? Why is a contract which limits freedom of occupation contrary to public policy, if freedom of occupation in principle is not directed against other private parties, but only against the government?

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

1. Arguments For Indirect Application

The application to the judiciary model is different from the previous three models. Those are located on one continuum, while the fourth model (applica-

[56] See text associated with notes 38-41.

tion to the judiciary model) represents a separate category.[57] Its primary importance is in situations where the text of the constitutional provision indicates that the human right is directed against the government, and the government alone. The constitutional provision on the human right in such a situation is directed also against the judiciary, and it obliges the courts to develop common law rules, to interpret legislation or to give specific relief which will give expression to the constitutional human right and not contradict it. Thus, for example, in a legal system where the constitutional right to freedom of expression is drafted in language which prohibits the government from infringing freedom of expression, the courts must develop the common law in which the rules of defamation will not infringe freedom of expression. On this basis it was decided in the United States that the common law on defamation must recognize the defense of negligence to defamation against a public personality.[58]

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

Moreover, if the common law is subject to constitutional basic rights, individual law must also be subject to them. There is no distinction, in this regard, between a general normative act of the judiciary, which develops common law, and an individual normative act of the judiciary, which grants relief in a dispute between private parties. When a court issues an order enforcing a discriminatory contract, it places the power of the state — which acts via various means, including the principles of contempt of court — at the disposal of one private party who is infringing another private party's right to equality. Thus it violates the government's duty not to discriminate.[59] This result

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[57] See Peter E. Quint, "Free Speech and Private Law in German Constitutional Theory" 48 Mar. L. Rev. 247 (1989).

[58] As indeed the Supreme Court decided in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

[59] See *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

should be prevented, because the principle of the rule of law or, more aptly, the rule of the constitution, also applies to the judiciary.[60]

2. Arguments Against Indirect Application

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

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

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

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60 See Hogg, *Constitutional Law of Canada*, 3rd ed., (Toronto: Carswell, 1992) at 842.

61 The *Dolphin Delivery*, *supra*, note 45 at 600.

If indeed the court will seek to make these distinctions — and comparative law points to extensive attempts in this direction — then the application to the judiciary model will meet with a second critique. This critique states that distinctions between instances in which the court acts as a "neutral arbiter" outside the constitutional prohibition, and instances in which it acts as government, subject to constitutional prohibition, is artificial. Why is an order enforcing a discriminatory contract an act of government violating the state's duty not to discriminate,[62] but an order decreeing that the bylaws of a discriminatory club are valid not violate the state's obligation not to discriminate?[63] Let us assume the case of a restaurant owner who refuses to give service for racist reasons, and the discriminated-against person who refuses to leave the place. The restaurant owner turns to the court and requests an eviction order; does the court — acting as the government — violate its obligation not to discriminate by giving the eviction order?[64]

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

III. COMPARATIVE LAW

A. THE WEALTH OF COMPARATIVE LAW

The application of constitutional human rights in private law is a problem that has arisen in many legal systems.[65] It exists regarding all constitutional

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62 As was decided in *Shelley*, *supra*, note 59.

63 See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

64 *Peterson* v. *Greenville*, 373 U.S. 244 (1963); *Bell* v. *Maryland*, 378 U.S. 226 (1964).

65 See Michael J. Horan, "Contemporary Constitutionalism and Legal Relationships Between Individuals" (1976) 25 Inst. Comp. L.Q. 848.

human rights, and primarily regarding the right to equality.[66] Comparative law is an important source of inspiration for the Israeli jurist:[67] "By comparison with your counterpart you learn to know yourself better."[68] With the assistance of comparative law we succeed in separating ourselves from thought patterns we have become accustomed to, and from distinctions that appear essential to us. In their stead comes a comprehensive view as to the essence of the order and its goals, and its place in the systematic and social structure. By means of comparative law, our horizons are broadened.[69] We consider additional possibilities and new solutions, and understand better the normative potential concealed in the local order. Surely comparative law is a guide to finding the appropriate solution. It grants comfort to the judge and gives him the feeling that he is treading on safe ground, and it also gives legitimacy to the chosen solution.

Nonetheless, it is necessary to be careful of overreliance on comparative law. First, recourse to comparative law is merely permissive, and does not have any obligatory basis. Second, a fitting comparison is only possible if the foreign legal institution or arrangement to which the expositor turns fills a function similar to that filled by the parallel local institution or arrangement.[70] I addressed this in one case, where I stated:[71]

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

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

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66 See T. Koopmans, ed., *Constitutional Protection of Equality* (Leyden: A.W. Sijthoff, 1975) at 227.

67 See Civ. App. 546/78 *Kupat Am Bank Inc.* v. *Hendels*, P.D. 34 (3) 57, 67.

68 Fur. Hrg. 40/80 *Kenig* v. *Cohen*, P.D. 36 (3) 701, 707.

69 Civ. App. 295/81 *Estate of Sharon Gavriel* v. *Gavriel*, P.D. 36 (4) 533, 542.

70 See K. Zweigert and H. Kotz, *An Introduction to Comparative Law,* 2nd ed. (Oxford: Clarendon Press, 1992).

71 Civ. App. 546/78, *supra* note 67 at 67. See also H.C. 428/86 *Barzilai* v. *Government of Israel*, P.D. 40 (3) 505, 600.

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

B. DIRECT APPLICATION MODEL

1. Switzerland

The direct application model is accepted in Switzerland.[72] In several cantons it is based on explicit language in the canton constitution;[73] in the remaining cantons — and on the federal level — there is no explicit provision,[74] and direct application was accepted by jurists and courts by means of interpretation. The direct application model is called *Drittwirkung der Grundrechte*. This is a phrase borrowed from German literature.[75] *Drittwirkung* means "impact on a third party." The private party possessing a constitutional right is one party, the government is the second party, and every other private party is the "third party." According to the *Drittwirkung* doctrine, constitutional human rights act both vertically — between private parties and the state — as well as horizontally — between private parties. The need to recognize the relationship arises primarily from the recognition that the danger of infringement of human rights does not only come from the state, and that great danger to human rights is perceived to emanate from private power centers. This recognition is also based on the conception that constitutional human rights are super-principles which operate throughout the entire system. Accordingly, it was decided that freedom of religion exists not only as to the state, but also in relations between private citizens,[76] and it was decided that anyone who participates in a meeting has a right against another person who infringes his freedom of association by vocal

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[72] See J.P. Müller, *Elemente Einer Schweizerischen Grundrechtstheorie* (Bern: Stempfli, 1982); Haeflin and Haller, *Schweizerisches Bundesstaatsrecht* (1988) at 344. This is the controlling view. It has opponents; see J.-F. Aubert, *Traité de droit constitutionnel suisse*, 3 vols. (Bd. II, 2967) (Neuchatel: Éditions Ides et Calendes, 1967-82) 626.

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

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

[75] See text below associated with notes 79-82

[76] See BGE 4, 434 FF and BGE 86 II 365 FF..

disturbances.[77] Similarly, an agreement among car importers not to place advertisements in a newspaper is characterized as illegal because, *inter alia*, it infringes the newspaper's freedom of expression.[78]

2. Germany

The "impact on third parties" (*Drittwirkung*) theory was developed in Germany. The accepted opinion is that human rights set forth in a basic law (*Grundgesetz*) apply not only to relations between private parties and the government in public law, but also to relationships between private parties in private law. The constitutional basic rights have, therefore, "impact on a third party." Opinions differ as to whether this application is direct (without an intermediary) or indirect (through an intermediary). Scholars and courts are divided on this issue. Nipperdey[79] — one of the great German jurists — and the Supreme Court for Labor Law (which he headed) adopted the direct application model.[80] Durig,[81] and the Constitutional Supreme Court (the *Bundesverfassungsgericht*) adopted the indirect model.[82]

According to the approach of direct application adherents, constitutional human rights influence the legal system in its entirety.[83] Human rights came to grant the individual "breadth of action" and to protect him from extremist powers. This power in the past was primarily the State's power, but it is not the only power likely to do harm in the protected area of private parties. This harm can come from non-state powers, and private parties must also be protected

77 See BGE 101 IV 172 ES.

78 See Müller, *supra*, note 72 at 84.

79 See Enneccerus - Nipperdey, *Allegmeiner Teil des Burgerlichen Rechts* 93, 15th ed., Vol.1 (1959); Leisner also deals a great deal with this topic: see Leisner, *Grundrecht und Privatrecht* (1960).

80 See Kenneth M. Lewan, "The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany" (1968) 17 Int. Comp. L.Q. 571.

81 See Lewan, *ibid.* at 576.

82 See Quint, *supra*, note 57 and also Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989).

83 See H. van Mangoldt and F. Klein, *Das Bonner Grundgesetz*, 3rd ed. (Munich: F. Vahlen, 1985) at 132 (Band I).

against them — by means of human rights granted by the constitution. These apply, therefore, not only against the government, but also against other private parties. In relations between private parties, various human rights may conflict. Thus, for example, the freedom of contract of one person is likely to conflict with the freedom of expression of another. This conflict must be resolved by balancing the conflicting values. This balancing is done on a constitutional level, and it is employed directly in private law.

This can be illustrated by several decisions handed down in Germany: Reuven had a report on Shimon's health, and he gave the document to an insurance company. It was decided that this breached Shimon's constitutional right to dignity and personal development — protected by paragraphs 1 and 2 of the Basic Law — and that he is entitled to relief from the insurance company.[84] In its reasoning, the court stated that the human rights set forth in paragraphs 1 and 2 of the basic law come "to secure a basic right, which obtains not only regarding the state and its organizations, but also in private law relationships against every person." In another instance, the plaintiff's picture was published in connection with drugs, and for this he sued the distributor. According to German private law, in such circumstances the plaintiff is entitled to damages only if he can prove pecuniary harm. This type of harm was not proven, but nonetheless the Supreme Court (*Bundesgerichtshof*) held that the plaintiff was entitled to damages because the plaintiff's constitutional right to dignity and personal development was breached.[85]

An additional example is the case where in a collective agreement a lower salary was fixed for women than for men doing the same work. It was held that paragraph 3 of the Basic Law sets forth the equality principle, and that this principle applies directly to private law. Accordingly, the Supreme Court for Labor Law voided the provision of the collective agreement.[86] In another instance an employer announced that it was giving its employees gifts for Christmas, and that women whose husbands also worked at the factory would receive two-thirds of the gift. The Supreme Court for Labor Law decided that this was prohibited discrimination, which directly led to the cancellation of the

[84] See 24 BGHZ 72, 76.
[85] See 26 BGHZ 349.
[86] See 1 BAG 258.

gifts.[87] An example from another area is the case in which resident doctors signed a contract with a hospital, and according to the contract their residency ended if they got married. The Supreme Court for Labor Law decided that this contract provision violated the protections the constitution gave to the family, and accordingly voided it.[88] In another instance a women sued her husband because he brought his mistress into the family's home. The Constitutional Supreme Court granted her an order enjoining the mistress to stay away from the home, and in its reasoning explained that its conclusion was based on the constitutional provisions regarding the special protections the Constitution grants to the family.[89]

3. Other Countries

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

> (1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
> (2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to —
>
> (a) access to shops, public restaurants, hotels and places of public entertainment, or...

On this basis it was determined that subsection (1) imposes an obligation on the state, whereas subsection (2) imposes an obligation also on private parties.[90] One

87 See 11 BAG 338.

88 See 4 BAG 274.

89 See BGH 360 6.

90 See K.C. Dwivedi, *Right to Equality and the Supreme Court* (New Dehli: Deep & Deep, 1990) at 77. See also Durga Das Basu, *Commentary of the Constitution of India*, Vol. I. (Calcutta: S.C. Sarkar, 1961) at 463: "Prohibition against discrimination on ground of race even in public places managed by private individuals, places the Indian Constitution in advance of any other leading Constitution of the World".

private party can sue another private party for breaching the constitutional provision.[91]

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

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

On the basis of this text it was held that the provision applies in private law, and grants rights and obligations in private law.[92]

C. NON-APPLICATION MODEL

1. Canada

The non-application model is accepted in Canada. In the *Dolphin Delivery* case,[93] the Supreme Court of Canada determined that human rights set forth in the Canadian Charter are directed against the government, and it alone. The provisions do not apply in private law, not directly and not indirectly. The Canadian Supreme Court also does not accept the application to judiciary model.[94] This resolved the argument between those siding with application

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

92 See L. Tribe, *American Consitutional Law*, 2nd ed. (Mineola: Foundation Press, 1987) at 1688. See also *Civil Rights Cases*, 109 U.S. 3, 20 (1983); A.R. Amar and D. Widawsky, "Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney" (1992) 105 Harv. L. Rev. 1359.

93 *Supra* note 45.

94 *Ibid.*

(direct or indirect) of constitutional provisions in private law[95] and their opponents.[96] This decision received both praise[97] and fierce criticism,[98] but so long as it remains unchanged, it reflects the accepted rule in Canada. The Court's primary rationale was based on the Charter provision[99] according to which the Charter provisions apply to the Parliament and Government of Canada, and to the Legislature and Government of each of the Canadian provinces. According to the Court, by virtue of this provision, the rights and liberties set forth in the Charter apply to the government whether it acts in public law (as ruler), or whether it acts in private law (as private party); whether it acts pursuant to legislation or pursuant to common law rules. In contrast, the Charter provisions do not apply to private parties in their relationships among themselves, whatever the source of their actions.

The Supreme Court of Canada has had occasion to deliberate on the application of the *Charter* in two recent cases. In *C.B.C. v. Dagenais*,[100] in the context of a challenge to a court-ordered publication ban issued during criminal proceedings, the Court seemed to move in the direction of the indirect model of application. A majority of the Court held that the *Charter* applied indirectly to court-ordered publication bans issued under the common law in light of the

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95 See R. D. Gibson, "The Charter of Rights and the Private Sector" (1982-1983) 12 Man. L.J. 213 ; B. Slattery, "Charter of Rights and Freedoms — Does it Bind Private Persons" (1985) 63 Can. Bar. Rev. 148; Y. de Montigny, "Section 32 and Equality Rights" in A. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 565; A. McLellan and B. P. Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986) 24 Alberta L. Rev. 361; W. Lederman, "Democratic Parliaments, Independent Courts and the Canadian Charter of Rights and Freedoms" (1985) 11 Queens L.J. 1.

96 See Hogg, *supra*, note 60 at 674; Swinton, *supra* note 41; J. Whyte, "Is the Private Sector Affected by the Charter?" in L. Smith, ed., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 145.

97 See Peter Hogg, "The Dolphin Delivery Case: The Application of the Charter to Private Action" (1986) 51 Saskatchewan L. Rev. 273.

98 B. Slattery, "The Charter's Relevance to Private Litigation: Does Dolphin Deliver?" (1987) 32 McGill L.J. 905; G. Otis, "The Charter, Private Action and the Supreme Court" (1987) 19 Ottawa L.Rev. 71; A. Petter and A. Hutchinson, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278.

99 *Charter*, section 32 (1).

100 *C.B.C.* v. *Dagenais*, [1994] 3 S.C.R. 835.

statement in *Dolphin Delivery* that judges ought to take into account Charter values in the development of common law rules. But in the subsequent case of *Hill* v. *Church of Scientology*,[101] the Court made clear that it was not willing to apply the *Charter*, even indirectly, to matters that were "purely private," here an action for common law defamation. The approach in *Dagenais* was distinguishable because it arose in the "essentially public" criminal context. For cases classified as "purely private," such as *Hill*, the Court would invoke *Charter* values only to influence the development of the common law. The Court insisted that the judiciary should be cautious in changing the common law so as to conform with *Charter* values, leaving major changes to the legislature.[102] Accordingly, in *Hill*, the Supreme Court of Canada left the common law of defamation intact, finding the existing common-law regime for the protection of reputation consistent with the *Charter* guarantee of freedom of expression.

D. INDIRECT APPLICATION MODEL

1. Germany

The indirect application model has won recognition and development in Germany. It is accepted by both constitutional[103] and private law experts. Larenz[104] and Flume[105] point to this as the proper model for the application of constitutional human rights in relationships between private parties in private law. This model was adopted in the decisions of the Constitutional Court in Germany.[106]

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101 [1995] 2 S.C.R. 1130.

102 *Ibid.* at para 95.

103 See T. Maunz and G. Dürig, *Grundgesetz* (Munich: Beck, 1958).

104 See K. Larenz, *Lehrbuch des Schuldrechts*, 11 ed. (Munich: Beck, 1975) at 48; K. Larenz, *Allgmeiner Teil des Deutschen Burgerlichen Rechts*, 6 ed. (Munich: Beck, 1983) at 79.

105 W. Flume, *Allgemeiner Teil des Burgerlichen Rechts* (Berlin: Springer, 1992) at 20.

106 See Kommers, *supra* note 82 at 368.

The central decision is the Luth case.[107] A film director named Harlan who, during the Nazi era, directed the "*Jüd Siss*" film, returned after the war to his work and directed a new film. Luth, an activist in an association for mutual understanding between Christians and Jews, spoke before film-makers and called for a boycot of Harlan's new film. The film distributors turned to the civil court and received an order barring Luth from any urging of the general public not to see the film, and from requesting movie theatre owners and distributors not to show it. The civil court determined that by his behaviour, Luth violated the provisions of paragraph 826 to the Civil Code (B.G.B.), which states that "everyone who intentionally causes damage to his fellow-man in a manner that harms good morals must compensate for the damage."

Luth turned to the Constitutional Court, claiming harm to his constitutional right to free expression, a right protected in the Basic Law.[108] The Constitutional Court adopted Luth's position. It stated that basic human rights constitute an objective value system, influencing all branches of law, whether private or public. This objective value system is a standard for assessment of every action, whether legislative, executive or judicial. Every private law arrangement must adjust itself to this value system. However, the impact of this objective system in private law is by the doctrinal means of the private law itself. The dispute remains, therefore, a private law dispute decided according to private law provisions, although those provisions operate and are interpreted in accordance with the Constitution. This is particularly apparent in the private law rules reflecting public policy. These rules are closely linked to public law, and they complete it. They are exposed to influence by constitutional law. On this basis it was held that Luth's behaviour was not behaviour harming good morals and, accordingly, did not constitute wrongdoing as per paragraph 826 of the Civil

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[107] See 7 B. Verf. GE (1958). See Kommers, *ibid.* at 368; Quint, *supra* note 57 and also Kommers, "The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany" (1980) 53 So. Cal. L. Rev. 657.

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

Code.[109] In reaching this conclusion, the Constitutional Court weighed the distributor's right to distribute the product against Luth's right of speech.

A later German decision gave additional expression to the indirect application of the constitutional right to private law. It was determined, for example, that an unlawful infringement of freedom of expression constitutes wrongdoing according to paragraph 823 of the Civil Code, by being an act (intentionally or negligently) which infringes another's right in a manner violating the law.[110] It was also held that the Constitution defends the right to privacy, and that infringement of this right — which constitutes wrongdoing according to paragraph 823 — gives rise to damages under private law. The Civil Code was interpreted as granting a right to damages only when the damage is pecuniary, but in light of the constitutional provisions — which protect non-pecuniary values such as privacy — it also was held that it should be interpreted in a way that recognizes the right to damages for non-pecuniary harm.[111]

By the very same principle, according to which the constitutional principle radiates into private law by private law doctrines, it was decided that the right to privacy, derived from constitutional provisions,[112] is recognized by the Civil

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

[110] In the *Blinkfuer* case; see 25 B. Verf. GE 256.

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

[112] Basic Law, paras. 1 and 2.

Code which protects people in the face of unlawful intentional or negligent harm.[113] Thus it was decided that where the validity of discharging a worker is limited by the existence of "good cause" or "proper basis," this condition does not exist if the discharge was based on the fact that the worker exercised his constitutional right to free expression.[114] In a different case, a contract was made between a cab driver and his employer, according to which the employee would not drive for another employer for three months from the termination of the employment contract, and if he breached this provision he would have to pay a one-hundred Deutschemark fine. It was held that this provision was void.[115] The Labor Court held that the validity of the provision was determined according to the principle of public policy. In this framework it is necessary to weigh all the relevant facts, and among them it is necessary to give — as a result of the Basic Law — a heavier weight than would be given in the past to freedom of personhood and freedom of occupation. The provision does not advance any interest of the employer worth protecting and, accordingly, was void. In developing this model in German law, the courts did not hesitate to create new private law tools — as the non-pecuniary damage example demonstrates — so as to absorb the basic constitutional rights. Nevertheless, it should be noted that, generally, use is made of existing tools.

2. Italy

The indirect application model has been accepted in Italy.[116] It has been held that, in light of the statutory provisions regarding the protection of health,[117] the Civil Code provisions[118] — that thus far had been interpreted as granting damages only where pecuniary harm was caused — should be interpreted as granting damages also for non-pecuniary harm such as pain and suffering. It was

[113] B.G.B. para. 823.

[114] See 1 BAG 185.

[115] See BAG 22.11.65; (1966) VI Juristische Schulung.

[116] See Sentenza 14 luglio 1986, 184 (Gazzella uffiale, 1a serie speciale, 23 luglio 1986, No. 35. For a review of the decision, see Foro Italiano, 1986, I, 1, 2053 ff.

[117] The court pointed to paragraph 32 of the Italian Constitution, which states in English translation: "The Republic will protect and supervise health as a fundamental individual right and also as a public interest, and will guarantee free medical treatment to the poor".

[118] Civil Code, pare. 2043.

held that there is a connection between the constitutional provisions and the Civil Code provisions, in that the Civil Code is given a constitutional dimension. In order to give content to the Civil Code provisions it was found to be necessary to turn to a legal source on the highest normative level — the Constitution. As such, the constitutional provisions must be integrated into private law.

3. Spain

The accepted approach in Spain is that human rights indirectly influence private law.[119] In one case, an employee was fired after being selected to represent the other employees against the employer. According to private law he was entitled to damages for unlawful termination. He turned to the Constitutional Court, and it held that, because the motivation for the termination infringed a constitutional provision which establishes worker representation, the appropriate remedy was not simply damages, but also reinstatement to his job. The civil court was requested, therefore, to create new remedies which would give expression to constitutional rights.[120] If the civil court fails to do so, it is possible to appeal to the Constitutional Court, where the subject of the appeal is the claim that a constitutional right was violated.[121]

4. Japan

In Japan, constitutional law applies indirectly to private law.[122] Most problems have arisen in labor law, primarily regarding violations of the principle of equality and freedom of expression. The problem reached the Supreme Court of Japan in the following circumstances:[123] the claimant was hired for work as a temporary employee. After a three-month trial period his contract was not renewed. The reason given by the respondent — the worker's employer — was that, before he was hired and despite the fact that he was asked about it, the

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[119] See Sanchis, *Estudios Sobre Derechos Fundamentales* (1990) at 205.

[120] See Stc. 5/1981, de 13 de febrero. See also Domenech, *Practicas De Derecho Constitucional* (1988) at 167.

[121] See Moreno, *El Proceso de Amparo Constitutional* (1987).

[122] See Horan, *supra* at 864.

[123] In the case of *Takano* v. *Mitsubishi Jushi K.K.*, 27 Minshu 1536. A summary of the decision in English appears in (1974) 7 Law in Japan 150.

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

E. APPLICATION TO THE JUDICIARY MODEL

1. United States

As noted, the fourth model for the relationship between constitutional human rights and private party relationships states that constitutional human rights are directed against the state and the state alone. Nevertheless, the judiciary is an organ of the state and, accordingly, constitutional provisions are directed against it as well. This model has been adopted in the United States. The Bill of Rights in the United States Constitution is drafted in language which places prohibitions or obligations on the State. Except for the 13th Amendment — which concerns the prohibition of slavery — the rest of the amendments are drafted in language from which the courts' have deduced that the provisions are directed against the state and the state alone. But who is the "state" against whom the rights are directed, and when does "state action" violate a private party's right? Extensive

scholarship has been developed on this matter.[124] At the base of this scholarship stands the recognition that the judiciary is an arm of the state as well. When the judiciary acts, the state acts. Human rights are protected and entitled to protection not only against the legislature and executive, but also against the judiciary. Hence, two inferences are drawn: The first is that there is some "state action" in the creation and development of the common law. Accordingly, it was held in the case of *New York Times* v. *Sullivan*[125] that common law rules regarding defamation must adjust themselves to the principle of freedom of expression established in the First Amendment to the United States Constitution. In addressing the claim that the First Amendment to the constitution is directed against the state, whereas the dispute before the Court was a civil matter between private parties, Justice Brennan stated:[126]

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

The second inference drawn by the Court was that, in granting relief within the framework of private law, the court is likely to find itself in a situation in which the relief it grants stands in contradiction to constitutional human rights. This is the rule of *Shelley* v. *Kraemer*.[127] Suppose a contract was made between Reuven and Shimon, in which Reuven was obligated not to grant property rights in land to black people. Reuven sold land to Levy, a black person. Shimon turned to the Court with a claim against Levy, based on the restrictive covenant in the contract. Shimon asked the Court to issue an order enjoining Levy not to enter the land. Such a suit was dismissed in the U.S. Supreme Court. The Court noted that the Fourteenth Amendment to the constitution, which establishes the right to equality, is directed against the state and not to relationships between private parties, and that in the contractual relationship between Levy and Shimon, Levy's constitutional rights were not breached. But here judicial

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[124] See Tribe, *supra* note 92 at 1688.

[125] See *New York Times* v. *Sullivan*, 376 U.S. 1 (1948).

[126] *Ibid.* at 265.

[127] See *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

enforcement was requested, and the act of judicial enforcement is a "state action" violating Levy's constitutional right to equality.[128] Chief Justice Vinson noted:[129]

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

The Court noted that without the active involvement of the Court, behind which stands the power of the state, Levy would be free to enter the land which he purchased without any restriction. On account of the Court's involvement, Levy is prevented — because of his being black — from the enjoyment of a right he would have received as a willing buyer from a willing seller.[130]

The scope of the *Shelley* rule is not at all clear. Fierce criticism has been levelled against it.[131] If we take the case to its extreme, then every constitutional right directed against the state becomes, by virtue of the court's action, a right directed against private parties. American courts refrained from drawing a conclusion of this sort; extensive case law narrowed the scope of application of

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

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

[130] *Shelley*, *ibid.*

[131] See Louis Henkin, "*Shelley* v. *Kraemer* Notes for a Revised Opinion" (1962) 110 U. Pa. L. Rev. 473; Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1; Harold W. Horowitz, "The Misleading Search for 'State Action' Under the Fourteenth Amendment" (1957) 30 So. Cal. L. Rev. 208.

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

IV. CONSIDERATIONS FOR THE PROPER SOLUTION

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

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

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

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[132] G. Gunther, *Constitutional Law,* 12th ed., (Mineola, N.Y.: Foundation Press, 1991) at 904.

[133] See *Evans* v. *Abney*, 396 U.S. 435 (1970).

[134] For the Hohfeldian study of human rights, see W.N. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1934); see also Crim. App. 95/51 *Pudmasky* v. *Attorney General*, P.D. 6 341.

clearly rejects the non-application model as the proper model. I addressed this point in the *Kestenbaum* case, when I noted:[135]

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

The danger to human rights does indeed primarily emanate from the government, but it is not the only danger. Danger to human rights also lies in wait from the conduct of other private parties. Alongside the need to restrict the power of the state as to private parties, there is also a need to limit the power of private parties in their mutual relations. The non-application model is not appropriate because it draws too stark a line between public and private law. Indeed, basic human rights are not directed solely against the government. They apply also to mutual relationships among private parties.[136]

B. DIRECT OR INDIRECT APPLICATION

1. Strengthened and Augmented Indirect Application

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

[135] Civ. App. 294/91, *supra*, note 5 at 530.
[136] Civ. App. 294/91, *ibid.* at 530.

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

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

2. The Essence of Strengthened Indirect Application

As mentioned, I believe that constitutional human rights apply (indirectly) in private law. This outlook is based on two assumptions. First, that constitutional human rights set forth in the Basic Laws are directed not only against the government but also against other private parties. The freedom of property is the freedom of a private party against both the government and against other private parties. Second, that remedies for breaching human rights in interpersonal relationships must find a place in private law. According to this concept, private law is the "geometric place" to formulate remedies for an infringement that one private party imposes on the constitutional right of another private party. According to this approach, when a constitutional right of one private party is

breached by another private party, the injured private party must find his relief within private law. To the extent that existing private law grants an appropriate remedy — i.e., a remedy consistent with the scope of the right and proper protection as demanded by the Basic Law — it fulfils its role, and does not give rise to any practical difficulty. To the extent that existing private law does not grant an appropriate remedy — i.e., despite breach of the constitutional right, no remedy is granted in private law — the strengthened indirect application model states that private law must change itself, such that it will find a remedy as needed. Thus, the uniqueness of the strengthened indirect application model is that it places a demand upon private law. It obligates it to prepare appropriate tools "for the absorption" of constitutional human rights. To the extent that these tools do not exist, it is upon private law to create tools such as these. These can be created by means of new interpretations of existing tools (such as giving a new interpretation to the principle of good faith) or by the creation of new tools, whether by filling *lacunae*, or by the general principle that where there is a right, there is a remedy.

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

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

4. Indirect Application Model and Strengthened Indirect Application Model

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

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

The strengthened indirect application model is based on the concept that private law must create tools to give relief for infringement of a constitutional human right. Where these tools do not exist, it is incumbent upon the legislature to create them. What can be done if the legislature refrains from action? It seems to me that it is possible to point to several lines of thought: first, at times a constitutional duty (*status positivus*) is placed upon the legislature to fix remedies for infringements of constitutional human rights, such as damage to human dignity; second, the absence of a legal arrangement is likely at times to be considered a *lacunae*, allowing it to be filled according to the applicable rules; third, sometimes it is possible to create new tools by renovating old tools,

for example, new understandings of concepts such as good faith,[137] negligence, and public policy. Fourth, the general private law principle, according to which where there is a right, there is a remedy (*ubi ius, ibi remedium*), is likely to be a source for the creation of new tools which will be part of private law.

6. Indirect Application Model And Breach of Statutory Duty

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

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

Examination of human rights requires a distinction between the scope of the right and the level of protection afforded to it. The scope of the right means the variety of actions captured within its framework. Examination of the scope of the right to expression requires an answer to the question of whether the right to expression extends to actions (and not just speech), such as the display of a wooden dummy,[138] to the right to be silent, and to racist expression.[139] The level of protection afforded to the right examines the full range of the right and determines which areas within the entire range will be protected and which areas will not be protected. Failure to protect is likely to arise from public interest alone (for the sake of protecting state secrets, speech exposing state secrets is not protected), or from the private interest alone (for the sake of protecting personal

[137] See text associated with notes 179-185, *infra*.

[138] See H.C. 953/89 *Indor* v. *Mayor of Jerusalem*, P.D. 45 (4) 83.

[139] See H.C. 399/85, *Kahana* v. *Haraad Hamnuhel Shel Reshut Hashidur*, P.D. 41 (3) 225.

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

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

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

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[140] See text associated with note 75, *infra*.

[141] See Torts (Civil Wrong) Ordinance (New Version).

[142] Basic Law: Human Dignity and Liberty, para.5.

[143] The old legislation was entrenched: See Basic Law: Human Dignity and Liberty, para. 10.

weighs in an appropriate manner the human rights set forth in the Basic Laws. At times this balance is formulated by means of value terms, such as "good faith,"[144] "negligence,"[145] "reasonableness,"[146] "public policy."[147] These terms reflect the basic values and concepts of the Israeli legal system. They are the expression of constitutional values. They are the expression of protected human rights themselves.

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

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

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144 See, for example, Contracts Law (General Part) 4733-1973, paras. 12, 39; Sales Law 5728-1968, para. 6.

145 See Torts (Civil Wrong) Ordinance (New Version), paras 35, 36.

146 See Contracts Law (General Part), 5733-1973 paras. 21, 41, 56; Contracts Law (Remedies for Breach of Contract) 5731-1971, paras. 6, 7, 8, 9, 14.

147 See Contracts Law (General Part), 5733-1973, para. 30.

148 Civ. App. 294/91, *supra*, note 5.

149 Civ. App. 239/92, *Egged* v. *Mashiach*, P.D. 48 (2) 66. See also President Goldberg's statement in Lab. Ct. Hrg. 53/3-177-8-9 *Sharam Inc. Spokesperson* v. *Globus Inc.*, P.D.E. 395, quoted *infra*, note 160.

To be more precise: all of private law reflects balancing between conflicting values. Within the framework of private law it has been deemed appropriate to establish value rules, which permit flexibility in the workings of private law. These value provisions are particularly sensitive to constitutional considerations. They permit expression of human rights and public interests according to their state at various times, without any need to make a formal change in the private law balances. Thus, for example, the principle of "public policy" is a flexible principle, by means of which the court balances the constitutional freedom to fashion the content of a contract against human rights and different constitutional values.[150] Similarly, the "good faith" principle is an objective principle which fixes a minimum level of appropriate conduct between private parties, which reflects that which is deemed appropriate in our society. This principle reflects a proper balance between conflicting human rights.[151] The same applies as to the wrong of negligence, which reflects what the person in Israel "must" foresee, and expresses the basic principles of Israeli law,[152] including the proper balance between human rights set forth in the Basic Laws.

8. Private Law as a Balancing System

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

[150] See Civ. App. 294/91, *supra* note 5.

[151] See H.C. 59/80 *Be'er Sheva Public Transportation Services* v. *National Labor Court*, P.D. 35 (1) 828; Civ. App. 391/80 *Lasserson* v. *Workers Housing Inc.*, P.D. 38 (2) 237; Civ. App. 207/79, *supra*, note 10; Add. Hrng. 7/81 *Pnidar* v. *Castro*, P.D. 37 (4) 673.

[152] See Civ. App. 451/64 *Kornfeld* v. *Shmuelov*, P.D. 21 (1) 310, 324; Civ. App. 243/83, *supra* note 20 at 130; Civ. App. 343/74 *Grovner* v. *City of Haifa*, P.D. 33 (1) 141; Civ. App. 518/82 *Zidov* v. *Katz*, P.D. 40 (2) 85.

of judicial discretion. It also considers basic values and human rights set forth in the Basic Laws. It is the fruit of the judicial "limitation clause," which acts within the framework of private law itself.

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

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

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

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

[154] See text associated with note 158, *infra*.

Basic Law: Human Dignity and Liberty realigned an old statute because of this need.[155] Second, the value terms must be imbued with concrete content by the basic rights and values at the time of their interpretation. Indeed, this is the role and power of value terms. They absorb social values, constitutional human rights and public interests according to their state at the time of their interpretation, and not according to their state at the time of legislation. Therefore, current "public policy" is considered in the new constitutional system, including the super-legislative nature of human rights.

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

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

[155] Regarding this, see Article 10 of the Basic Law.

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

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

1. The Autonomy of Individual Will as a Constitutional Right

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

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

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

158 See text following note 48, *supra*.

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

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

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

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

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

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

[161] See Basic Law: Human Dignity and Liberty, para.5.

[162] Civ. App. 294/91, *supra* note 5 at 531.

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

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

As an example, take the limitation clause set forth in the Basic Laws. It does not provide a great deal of judicial guidance. The "majestic generalities"[163] in the Basic Laws do not fill themselves with normative content. They require judicial consideration. Just as it is assumed and hoped — on the basis of past experience — that the judge will give expression to the basic conceptions of society and not his own personal views in giving content to the "limitation clauses," it is assumed and hoped that the judicial balancing formulae in conflicts between protected human rights will reflect the "views accepted by the enlightened

[163] As per Justice Jackson's words in *Fay* v. *New York*, 332 U.S. 261 (1947) at 282.

public,"[164] and not the judge's private views. Indeed, the skilled judge is expert in this activity, and there is no reason to assume that he will fail in this task.[165]

3. Freedom to Fashion Contractual Content and Protected Human Rights

The application of protected human rights in private law need not cause, in principle, conceptual difficulty where a contract is made and the question is the extent of its validity.[166] This question was addressed routinely in the past, and great experience has been amassed in this area. Courts have dealt expansively with the question of the relationship between freedom of contract (in the sense of freedom to fashion a contract) and the right to freedom of occupation or trade.[167] The same applies in other situations in which a contract is made which is claimed to be contrary to a human right. Thus, for example, courts have dealt with the relation between the freedom to fashion a contract and the freedom of expression, when a contract was made which contained a provision according to which a newspaper took upon itself an obligation not to publish certain items.[168] Likewise there is case law regarding the relationship between freedom to fashion a contract and the right to personhood and human dignity.[169] The courts have dedicated much attention to the relationship between freedom to fashion a contract and the principle of equality, where a contract has created discrimination.[170]

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[164] On the "enlightened public," see A. Barak, "The Enlightened Public" in *Landau Book*, Vol. 2 (Tel Aviv: Bursi, 1995).

[165] See F. Frankfurter, *Of Law and Life and Other Things That Matter: Papers and Addresses of Felix Frankfurter*, ed. by P.B. Kurland (Cambridge: Harvard University Press, 1965) at 188.

[166] See Cohen, "'Equality' versus Freedom of Contract" 1 Ha Mishpat A 131 (1993).

[167] Within the doctrine of restraint of trade, see Cheshire, Fifoot and Furmston, *Law of Contracts*, 12th ed. (London: Butterworths, 1991) at 397.

[168] See *Neville* v. *Dominion of Canada News Co.* [1915] 3 K.B. 556.

[169] See *Horwood* v. *Millar's Timber and Trading Co.* [1917] K.B. 305.

[170] See 33/3-25 *Daily Air Staff Committee* v. *Chazin*, P.D.E. 4 365; H.C. 410/76 *Herut* v. *National Labor Court in Jerusalem*, P.D. 31 (3) 124; H.C. 104/87 *Nevo* v. *National Labour Court*, P.D. 44 (4) 749: Paragraph 6 [to the Collective Arrangement] creates a discriminatory arrangement, which harms the women's rights to participate equally in work affairs. Accordingly in my opinion, this paragraph is contrary to public policy, and by law, accordingly, this Court should involve itself and void its content" (Justice

In all these cases a contract existed (an expression of the freedom of connection and the freedom to fashion), and the question is whether by its content it violates a human right (such as freedom of expression, freedom of occupation, and human dignity). The private law principle regarding "public policy" examines these questions, while reflecting in its very substance the totality of society's basic conceptions, including the weight and status of human rights. In the past it was done regarding human rights "which were not inscribed in a book."[171] Now it is done regarding "rights inscribed in a book" entitled to constitutional protection. To be precise: just as the right to freedom of property and freedom of occupation were elevated in normative level — from a "common law" right to a "constitutional" right — so too the right to freedom to fashion a contract was elevated a level. This right is an expression of human dignity and liberty, and it too has constitutional status.

Just as courts dealt in the past with the appropriate balance between freedom to fashion a contract and the other unprotected human rights, so too they will deal in the future with the appropriate balance between freedom to fashion a contract and the other protected human rights. Of course, the content of the balance is likely to change. Indeed, the proper balance reflects the status and weight of the human right relative to other human rights.[172] Perhaps in the past human rights (such as freedom of occupation) had lower status than today. If indeed a change takes place in the status of the right, the matter will find expression in the balance between it and other rights in the framework of the principle of "public policy." To be precise: the balance between freedom to fashion a contract and the other human rights will be made according to "balancing formulae" which differ from those according to which these human rights will be balanced in their conflicts with the public interest. Indeed, it is necessary to distinguish between the conflict of values in public law (public order against human rights), and conflicts of values in private law (the right of

Bach).

171 As per Justice Landau's words in H.C. 243/62, *supra*, note 17 at 2415.

172 See Lab. Ct. Hrg. 53/3-177-8-9, *supra*, note 163: "Where an agreement restricts an employee's freedom of occupation, and a period of time is fixed for the restriction, the court will assess the reasonableness of the restriction and weigh it as necessary, considering the basic laws and rights: Basic Law: Freedom of Occupation, Basic Law: Human Dignity and Liberty (particularly para. 3) and the constitutional basic right of freedom of contractual connection" (President Goldberg).

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

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

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

Freedom of contract has two aspects: the freedom to enter into a contract and the freedom to shape the content of a contract. Regarding the second aspect, there is substantial legal experience in fixing the balance between the freedom to fashion the content of a contract and other human rights. The law of restraint of trade deals with those problems. There is no legal experience, however, in fixing the balance between freedom to make a contract and other human rights.[173] The principle problem arises where freedom to make or not to make a contract conflicts with the equality principle.[174] Is a restaurant owner entitled to refuse to give service on the basis of gender, race or religion? Can a private party, seeking to rent out a room in his apartment, refuse to rent it out on the basis of gender, race or religion? On a practical level, the problem does not arise where there is legislation dealing with the topic ("civil rights legislation"). But

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

[174] The analysis is based on the assumption that equality is a constitutional human right.

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

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

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

5. Balance Between Autonomy of the Individual Will and Equality: The Good Faith Principle

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

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

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

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[175] Contracts Law (General Part), 5733-1973, para. 12.

[176] This is the objective doctrine of *culpa in contrahendo* which was developed in continental law. See N. Cohen, "Pre-contractual Duties: Two Freedoms and the Contract to Negotiate" in J. Beetson and D. Friedmann, ed., *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) at 25.

[177] See Fur. Hrg. 22/82 .

[178] *Ibid.*

[179] *Ibid.* at 471-472.

> since the good faith principle is one of the important and special principles of the valued norms of our legal system, and it expresses the additional soul in this system — especially because of this we must be careful not to include anything in it that is far from its content and is not justified by its own terms.

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

The minority opinion took a different approach. President Meir Shamgar noted that there are likely to be situations in which good faith will require equality, and there are likely to be situations where good faith will not require equality, stating:[180]

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

And I expressed a similar view in that case, where I stated:[181]

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

[180] *Ibid.* at 461.
[181] *Ibid.* at 479.

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

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

6. New Tools: Negligence, Breach of Constitutional Duty, Abuse of Right

Nonetheless, it should be acknowledged that it is necessary to develop other private law tools, by means of which it will be is possible to cause the equality principle to permeate into pre-contractual negotiations. I am primarily referring to the tort of negligence, to breach of constitutional duty, and abuse of right. It can be said that where, in balancing between the principle of freedom to make or not to make a contract and the equality principle, the equality principle is greater and a (notional) duty of care is imposed not to discriminate. Continental courts operate in this manner.[182] From the general tort law rule prohibiting

[182] See Larenz, *supra* note 104 at 53.

causing damage caused maliciously or in an immoral manner,[183] responsibility for discriminatory negotiations was derived, in which framework it is possible to even obtain an injunction.[184] Similarly, it is possible to view the constitutional provision on equality as a provision intended to protect a category of people and grant them a right, in a manner that breach of the duty constitutes a breach of a constitutional duty.

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

[183] See B.G.B., para. 826.

[184] See Larenz, *supra* note 104 at 53.

[185] On abuse of rights in comparative law, see H.C. Gutteridge, "Abuse of Rights" (1953) 5 Camb. L.J. 22; J.E. Scholtens, " Abuse of Rights" (1958) South African L.J. 39; J. Cueto-Rua, "Abuse of Rights" (1975) 35 La. L. Rev. 965; V. Bolgar, "Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine" (1975) 35 La. L. Rev. 1015; K. Sono and Y. Fujioka, "The Role of the Abuse of Right Doctrine in Japan" (1975) 35 La. L. Rev. 1037; C.J.H. Brunner, "Abuse of Rights in Dutch Law" (1977) 37 La. L. Rev. 729.

[186] See Land Law 5729-1965, para. 14. See also Z. Tseltner, "Abuse of Rights" Mishpatim B 465 (5730).

human rights into private law. Thus the "integrated tools" principle and the (indirect) transfer of constitutional human rights into private law is preserved.

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

Recognition of the application of protected human rights in private law to a great extent relieves the need for taking a stand regarding the application to the judiciary model.[187] Indeed, the need for this model was created by the approach that protected basic rights are directed solely against the government. The court is characterized as an organ of the state, and thus (indirect) and partial application of protected human rights to private law is made possible. All this is not necessary if one takes the principal stand that human rights are protected not only in relationships between man and the government, but also in relationships between private parties. The court employs human rights, not because they are directed against it as an organ of the state, but rather because they are directed towards relations between private parties.

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

[187] For this model, see text associated with notes 57-64, *supra*.

view it as a model that assists the other models, applying to them simultaneously and likely to complete them when they fail.

D. PROTECTED HUMAN RIGHTS AND PRIVATE LAW LEGISLATION

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

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

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

In my opinion, the text of the respect clause in the Basic Laws does not express non-application clearly enough. This formula states that:[188]

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

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

Moreover, if we want to negate the application to the judiciary model, it is desirable to use explicit language in this regard. As we saw, the appropriate arrangement in my opinion is that which recognizes the application of human rights, set forth in the Basic Laws, to private law. It is desirable to establish an explicit arrangement in this matter. The proposed Basic Law: Basic Human Rights, contains a provision with the following language:[189]

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

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

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[188] Basic Law: Human Dignity and Liberty, para. 11; Basic Law: Freedom of Occupation, para. 5.

[189] Proposed Law, para. 22.

IMPARTIALITY AFTER DIFFERENCE

Christine Sypnowich*

Much contemporary political theory has been concerned with articulating the reasons for basic constitutional rights and regimes that promote equality and respect for difference. In his latest contribution, John Rawls articulates a political justification for the public culture of pluralism which accommodates a diversity of reasonable and comprehensive views about political life. In this essay reviewing Rawl's latest work, Christine Sypnowich engages Rawlsian liberalism with the idea of difference. Theorists of difference have questioned the precepts of Rawlsian liberalism as it concerns such concepts as reason, impartiality and cooperation. In tracing this encounter between Rawls and the theorists of difference, Sypnowich suggests that Rawls' project is better recast as a defence of the comprehensive ideal of impartiality, an ideal which can best accommodate claims to difference and diversity.

La théorie politique contemporaine s'attache en grande partie à décrire le bien-fondé des droits et régimes constitutionnels fondamentaux qui favorisent l'égalité et le respect de la différence. Dans ses tout derniers travaux, John Rawls propose ainsi une justification politique pour la culture publique de pluralisme qui autorise une variété d'opinions raisonnables et de vues d'ensemble sur la vie politique. Dans le présent article consacré au dernier ouvrage de Rawls, Christine Sypnowich confronte le libéralisme de Rawls au principe de la différence. Les théoriciens de la différence remettent en question les préceptes du libéralisme de Rawls qui impliquent notamment les concepts de raison, d'impartialité et de coopération. En retraçant ce face-à-face entre Rawls et les théoriciens de la différence, Sypnowich suggère que le projet de Rawls gagne a être représenté comme une défense de l'idéal d'impartialité dans son ensemble — un idéal qui se prête le mieux aux revendications à la différence et à la diversité.

Ever since John Stuart Mill made his eloquent argument for freedom of expression, political theorists have been concerned with the consequences of this freedom for social order. Thus arises the problem of pluralism: of how to reconcile citizens' diverse conceptions of the good in a single polity. In his recent book, *Political Liberalism*, John Rawls asks: "[H]ow is it possible that there can be a stable and just society whose free and equal citizens are deeply divided by conflicting and even incommensurable religious, philosophical, and moral doctrines?"[1] Rawls poses this question to heighten and clarify the

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1 J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 133 [hereafter "*Political Liberalism*"].

arguments of his now classic work, *A Theory of Justice*.[2] One of the main themes of the earlier book was distributive justice, and Rawls proposed that inequalities would be justified only if they were to the advantage of the worst-off class in society. This "difference principle" was advanced by means of a complex thought experiment, where parties to a theory of justice could not help but opt for the securing of basic liberties along with some redistributive scheme if they were forced to consider the matter in an "original position" behind a "veil of ignorance," deprived of knowledge of who they would be in the society they were designing. "Justice as fairness" refers to the requirements of this peculiar bargaining position: a fair procedure will yield a just regime. Further, in such a position, the parties would be concerned to ensure that society would not prefer one conception of the good over another; the original position embodies the idea that the right is prior to the good.

'Political Liberalism' and Community

How does the new book address questions of pluralism? *Political Liberalism* is so called to distinguish the scope of Rawls's theory from that of "comprehensive" doctrines which pronounce on "what is of value in human life, as well as ideals of personal virtue or character" that bear on "much of our nonpolitical conduct."[3] Typical comprehensive doctrines are the world views of fundamentalist religions, but Rawls contends that the liberalisms of Kant or Mill are also comprehensive because their political theories require that citizens subscribe to a liberal personal morality on the basis of certain moral views, concepts of the person or metaphysics.[4] Political liberalism is more narrow in scope, referring only to the question of the "basic structure" of society, that is, a society's main political, social, and economic institutions.[5] Further, political liberalism is less comprehensive, capable of being presented as independent of citizens' opposing religious and moral allegiances. Thus the politically liberal state is prohibited from espousing and promoting a liberal way of life. Interestingly, Rawls takes his approach to mark an abandonment of the more grandiose aims of the Enlightenment project of "finding a philosophical secular

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2 *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

3 *Political Liberalism*, *supra* note 1 at 175.

4 *Ibid.* at 78.

5 *Ibid.* at 11.

doctrine, one founded on reason and yet comprehensive."[6] This may seem a pragmatic course, since Rawls argues that in the face of diversity, the alternative — the imposition of community — would involve an intolerable level of force.[7] But Rawls also advocates the idea of political liberalism on the basis of respect for citizens' deeply held moral views. A proper appreciation for the importance of forming our own conceptions of the good, and the attachment that we have to the conception we choose, requires that we do not risk repressing some conceptions for the sake of a single, preferred one: neutrality is a means of respecting moral autonomy.[8]

We should observe that Rawls restricts the scope of his theory in two significant respects. First, in contrast to the impression of universality given by *A Theory of Justice*, Rawls holds that justice as fairness applies only to a modern constitutional democracy.[9] Such a society is conceived as a "fair system of cooperation over time, from one generation to the next," where citizens do not consider their social arrangements to be dictated by a fixed natural order, or by a religious or aristocratic hierarchy.[10] Rawls states baldly that principles of justice emerge from the public culture of such a society;[11] the rhetoric of the archimedean point is now abandoned. (If anything, Rawls is overly narrow in his understanding of the object of his theory: his remarks about a Supreme Court and his rejection of constitutions based on parliamentary supremacy suggest that only the United States will fit the bill of political liberalism.[12]) In a constitutional democracy citizens have the capacity to adopt what Rawls calls a "political conception of the person." This is an interesting development of the idea of the political as opposed to the comprehensive; it refers to people's public identity, the *persona* we take when deliberating about how the state should be administered, or when claiming our rights and honouring our legal obligations. (Thus while individuals have two moral powers, the capacity for a conception of the good, and a capacity for a sense of justice,[13] it is the latter which is

6 *Ibid.* at xviii.
7 *Ibid.* at 37.
8 *Ibid.* at 311.
9 *Ibid.* at 311.
10 *Ibid.* at 15.
11 *Ibid.* at 8.
12 *Ibid.* at 233.
13 *Ibid.* at 19.

deployed in the public domain.) A political conception of the person presupposes that while individuals may draw on their religious or moral commitments to reach an "overlapping consensus," they can also distance themselves from these commitments to revise or appraise them or, if they are in conflict with political liberalism, to put them to one side for the purposes of taking part, as citizens, in public institutions. Conceiving of themselves as "self-authenticating sources of valid claims,"[14] citizens acknowledge their entitlement to press the interests that follow from personal attachments, so long as they do not undermine the requirements of a political conception of justice; citizens must, therefore, take responsibility to adjust their claims in light of these requirements and in view of the exigencies of cooperation, more generally.[15]

The second respect in which Rawls qualifies the scope of the original theory follows from the first; since not all interests constitute a basis for legitimate claims on the state, it is a "reasonable pluralism," not pluralism *per se*, which is to be accommodated by political liberalism. Reasonable pluralism follows from Rawls's assumption of a "public culture of democracy." In such a context there will be a diversity of reasonable doctrines and, moreover, it is from within those doctrines that a "substantial majority of its politically active citizens" support "an enduring and secure democratic regime."[16]

The reasonable is an important benchmark throughout Rawls's argument. Parties to the original position are not just rational, in the sense of choosing means that are effective given their ends; this, after all, is something of a non-moral virtue and, as such, a slender resource for social life. "Rational agents approach being psychopathic when their interests are solely in benefits to themselves."[17] Reasonableness, in contrast, refers to a commitment to fair dealings, openness and good faith. Reciprocity is the essence of the reasonable; Rawls deems it a virtue which lies between the altruism of pure impartiality and the self-interest of mutual advantage. Reasonable persons "desire for its own sake a social world in which they, as free and equal, can cooperate with others

[14] *Ibid.* at 32.
[15] *Ibid.* at 29-35.
[16] *Ibid.* at 38.
[17] *Ibid.* at 51.

on terms all can accept."[18] Such persons affirm only reasonable comprehensive doctrines, that is, conceptions of the good which evolve from some tradition of thought, are more or less consistent or coherent, and are worked out by means of both theoretical and practical reason.[19]

This loose understanding of a reasonable doctrine means that political liberalism counts as reasonable a number of views which are not themselves liberal in the comprehensive sense; Rawls supposes that one can see a doctrine as reasonable without subscribing to it. By focussing on the reasonable, Rawls hopes to avoid debate about which views of morality are true or acceptable, without endorsing some kind of scepticism. It is not the existence of moral truth which is being disputed; what Rawls denies is the appropriateness of personal doctrines serving as a guide for public life and, in particular, the legitimacy of people being forced to give up reasonable doctrines to live by creeds other than their own. Indeed, for Rawls, we cease to be reasonable once we use political power to repress comprehensive views which are not unreasonable.[20]

Rawls's confidence in the reasonable is such, however, that he contends that citizens will gradually coalesce around a set of political values. Thus in practice the spectrum of reasonable doctrines can be expected to converge upon a shared understanding of liberal democracy. While justice as fairness may initially find only the tenuous support of prudential calculation (as, for example, the principle of toleration historically garnered only the acceptance of a "modus vivendi" or a basis for co-existence), this support will evolve into something more substantial. Political institutions are seen to function effectively, and citizens' comprehensive doctrines accordingly begin to shift and reflect the values of the constitutional order. Once the "rules of political contest" are firmly established, and public reason is seen to be the means of their application, a spirit of cooperation develops; a "stable constitutional consensus" emerges. This in turn, deepens and expands to become an "overlapping consensus" that goes beyond procedural guarantees to matters of substantive justice, and which has the allegiance of citizens on the basis of their political conceptions of justice. For Rawls, a hallmark of the resulting well-ordered society is a certain homogeneity

[18] *Ibid.* at 50.
[19] *Ibid.* at 59.
[20] *Ibid.* at 61.

in citizens' political views.[21]

All this looks like a rejoinder to communitarian critiques of *A Theory of Justice*.[22] "Justice as fairness" was targeted by critics such as Alasdair MacIntyre and Michael Sandel for disavowing the pursuit of the good as an appropriate aim of political theory, whilst simultaneously smuggling in a certain conception of the good inherent in the idea of the rational, choosing self.[23] In this light, Rawls's new strategy seems ingenious: he admits to the specificity of justice as fairness and its rootedness in a certain historical milieu, yet mounts a defence of the value of neutrality which is both principled and pragmatic. Political liberalism respects individuals' pursuit of the good within the reasonable confines of the democratic tradition in which we find ourselves.

Plurality and Difference

Since the communitarian assault on Rawlsian liberalism, a similar but distinctive critique has emerged from thinkers who stress, not the importance of community, but the salience of "difference."[24] For these thinkers, the idea of a universal political order which subsumes a diversity of social groups is a chimera, an illusory and self-defeating goal, in the face of incommensurable identities and interests. These thinkers are not moved by the communitarian ideal of a common conception of the good, but they share with the communitarians a suspicion of the ideal of impartiality and the Rawlsian view that the individual should put his or her attachments to one side in order to cooperate in the political domain. Difference theorists insist on the inevitability of a plurality of identities — the diversity of ethnic groups, gender and sexual orientation, race, degrees of physical and mental ablement, and so forth — which undermines the idea that there could be a posture of neutrality as required by Rawls's political liberalism.

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21 *Ibid.* at 32, and at 158-59.

22 Rawls, however, denies this (*Ibid.* at xvii, fn. 6); see also the discussion in Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (Oxford, U.K.: Blackwell, 1992) at 167-70.

23 MacIntyre, *After Virtue* (London: Duckworth, 1981) and Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

24 For further discussion see my "Some Disquiet about 'Difference'" (1993) 13 Praxis International 99.

The political orientation of communitarianism has been a matter of some controversy, since it is unclear how seeing ourselves as, for example, 'inter-subjective beings' might bear on matters like the distribution of wealth or the scope of liberty. Indeed, it is often argued, notwithstanding the protestations of some communitarians, that communitarianism involves some kind of tradition-bound conservatism, where the community sets out a way of life over which individuals have limited choice. Whatever one thinks about the merit of these criticisms, it is more difficult to make them when it comes to the discourse of difference. The invocation of difference is an explicitly radical move, aiming to give more power to the disadvantaged. And as a political position which finds the social constitution of the individual's identity to raise radical questions for equality, it tackles Rawls's own ground, the ground of social justice. In this light, a dialogue between the 'new Rawls'[25] and the discourse of difference seems imperative.

In what follows I assess Rawls's new position to determine what resources it offers for the problem of difference. I shall suggest that there are tensions between Rawls's project and the idea of difference which raise questions about the tenability of Rawlsian liberalism in the current milieu. These tensions are grouped under the concepts of reason, impartiality, and cooperation. Nonetheless, I defend Rawls's view that the ideas and practices of reason, impartiality and cooperation are resources essential for social life. Without them the claims of difference threaten to destroy the possibility of social justice of any kind. However, I will suggest that these resources must be justified by reference to a substantive conception of the good, and that Rawls's position is best seen as "comprehensive" after all.

Reason

An attack on the ideals of rationality and reason is prominent among difference theorists. Recall that Rawls holds that his conception of political liberalism takes as its starting point reasonable and rational persons who cooperate in the institution of a liberal constitution and, eventually, a complex system of justice; they are reasonable because of their ability to compromise and

25. See Mulhall and Swift, *Liberals and Communitarians*, *supra* note 22.

reciprocate, and they are rational because they are capable of selecting appropriate means to achieve any given end.

One criticism might centre on the model of normal functioning implicit in Rawls's political conception of the person. Rawls's silence on the question of justice in the family is taken by Martha Minow, for example, to indicate that Rawlsian rationality may "pretend an unsituated perspective that calls some people marginal or different."[26] For Minow:[27]

> The views of mentally disabled persons, children, and any others deemed to lack capacity for rational thought become relevant only through the imaginations of the "rational" people who ask what they themselves would want if they were in the position of these incompetent persons.

Minow's point here is unclear, since she balks at any bald statement to the effect that mentally disabled people or children are in fact less rational than Rawls's ideal participants, suggesting instead that it is a matter of Rawls "deeming" it so. But children and mentally disabled adults pose special problems for a theory of justice precisely because their lack of rationality makes it difficult for them to fend for themselves; it is hard to see how their situations could be adequately addressed by means of a more inclusive conception of the rational. Minow's argument relies on the rather desperate inference that a theory which calls upon rational citizens to deliberate about justice must be found inadequate given the unequal distribution of rationality.[28]

The question of what justice requires for mentally disabled people and children is by no means a simple one, particularly since the two groups are in many ways unlike. And Rawls's remark that he "puts aside" permanent

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26 *Making All the Difference* (Ithaca, New York: Cornell University Press, 1990) 150.

27 *Ibid.*

28 Minow also criticises Rawls on behalf of those who more generally lack "the time and ability to reflect" on public affairs. This objection is rather difficult to assess; it could be seen as raising the interesting question of the undemocratic implications of a class of professional political thinkers, but this would impugn all political theory, difference theories included. Otherwise one is tempted to draw the odd conclusion that Rawls's theory favours the unemployed since they have more leisure to reflect on justice as fairness than most other categories of persons!

disabilities that prevent people cooperating in society[29] is bound to frustrate. Children are cared for as an interim measure until they reach adult reason. In the case of mentally retarded persons, however, we do not expect their capacity for reason to develop to equal that of the fully capable, and our concern is thus how to provide long-term care which is not an affront to their dignity. Thus we hope that resources go to children to develop their capacity to reason as they mature, whilst resources should go to mentally-retarded adults to assist them in living a life of self-respect in the face of a lack of rational capacity. It would seem unavoidable that there will be classes of people for whom decisions are bound to be made by the "rationally privileged," even if we think that much consultation with, and regard for, the persons involved is required.

The problem of difference calls into question the role of reason in several ways, but we can distill the debate into two arguments. One accepts the concepts of rationality and reasonableness, but finds that these virtues are too little in evidence in the world of difference to serve as a resource for the achievement of justice. The other, more radical, objection finds the concepts themselves to be intrinsically flawed: reason and rationality are impossible. (Minow's position sways between the two, since on the one hand the problem of children and the mentally disabled seems straightforwardly one of an empirical lack of rationality, while on the other her argument is that certain people are constructed as inadequate in light of a standard which is itself dubious.)

Let us take a clearer example of the first kind of objection, that reason may be in short supply in light of the problem of difference. This is not just a matter of the antagonistic nature of struggles for power which offer poor prospects for reasonableness on the part of the parties involved. If we take persons to be subsumed under incommensurable and conflicting identities, and not just economic resources but political power is unequally distributed along these lines, then we face a history where reciprocity and fair dealings have been absent. This history is likely to have a legacy for the present; those who have been on the losing end may well resist displaying the virtues of reasonableness, with the rationale that these virtues have not been displayed in relation to them. Such social conflict would thus seem immune to resolution by appeal to

[29] *Political Liberalism*, *supra* note 1 at 120.

reasonableness. Ernesto Laclau and Chantal Mouffe, for example, conclude that traditional ideas of dispassionate reason are impossible to realise.[30]

Difference theorists would resist casting the problem in terms of unreasonableness on the part of the disadvantaged, but there is a sense in which this is implicit in their case. Indeed, if we look at historical examples, it might be argued that the legacy of oppression, that is unreasonableness on the part of the oppressing class, can make for unreasonableness on the part of the oppressed such that even if the oppressors mend their ways and begin to establish a record of reasonableness, it cannot erase a sense of grievance. The oppressed refuse to be reasonable, even if their claim to being oppressed is less tenable. To illustrate: in Canada, separatist sentiment has grown apace among the francophone Québécois just as the national government has conceded more power to Quebec, and as social and economic relations between French-speaking and English-speaking Québécois have become more equal.

Moreover, even rationality can be impugned if lack of power renders disadvantaged people unable to recognise and marshall effective ways for pursuing their aims. This is hardly an attractive proposition. Difference involves recognising the "voice" of the oppressed on its own terms, whereas attributing irrationality to the disadvantaged, like the idea of false consciousness, relies on a view that people do not know their own interests. Nonetheless, if we take irrationality to refer to the inability to choose the best means for an individual's *given* ends, then it is a less problematic idea, and there certainly are examples of this among disadvantaged people. Buying lottery tickets is not the most effective means of getting wealthy; martyr-like sacrifice of self will likely fail to promote the happiness of either the housewife or her family; taking drugs will not provide a real escape from the ghetto. If people feel trapped enough in their situations of powerlessness, then they may act in ways that legitimate their situation or that involve fantasies of escape; as such, they are perhaps understandable, but they are not rational on Rawls's terms.

Nonetheless, if we are concerned to remedy disadvantage, the fact that disadvantaged people respond to their situation in ways which seem irrational

[30] *Hegemony and Socialist Strategy* (London: Verso, 1985) at 122-7.

or unreasonable by some external criterion might call into question the legitimacy of the criterion itself. A second, more abstract objection to reason and rationality, which centres on the concepts themselves, thus emerges. Minow broadens her complaint to criticise Rawls on behalf of those "historically treated as incompetent." Here Minow means that lack of capacity to reason is *attributed* to certain classes of persons by liberal theory. This is because the process of the original position, which calls upon detaching oneself from attachment, renders rationality "deeply exclusionary." Minow points to the communitarian critique here, but what is at issue for her is not so much an alternative way of understanding the human condition, but the condition of alternative groups in society whose identity involves attachment unlike the Rawlsian 'norm.'

This more wholesale rejection of reason has its root in feminist critiques. Recall that Minow framed her objection in terms of the significance of the family, intimating that "reason" is the province of those who can more easily separate themselves from familial relations. Feminists have long argued that the ideal of reason, understood as the accepted canons of classification and argumentation, has historically figured in political philosophy as a masculine capacity premised on separation from the domestic domain of care and reproduction, a purportedly female domain.[31] The feminist position has traditionally been associated with the view that women are no less capable than men of forsaking the domestic domain for public reason, but more recently feminists have sought to reclaim the affective domain as specifically female, even if they urge a future where this domain is populated by both men and women. Thus Carol Gilligan has famously argued that women have historically reasoned with a "different voice," and poststructuralist thinkers have maintained that the feminine is a mode of being that is bodily, fluid and open, opposed to the logocentric, closed order of masculine reason.[32] Moreover, Minow maintains that

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[31] See, for example, S.M. Okin, *Women in Western Political Thought* (Princeton, New Yersey: Princeton University Press, 1978); C. Pateman, *The Sexual Contract* (Oxford: Polity Press, 1988); G. Lloyd, *The Man of Reason: "Male" and "Female" in Western Philosophy* (London: Methuen, 1984).

[32] See C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982), and S. Ruddick, *Maternal Thinking: Toward a Politics of Peace* (London: Women's Press, 1990), and writings by Luce Irigaray and Julia Kristeva compiled in Elaine Marks and Isabelle de Courtivron, eds., *New French Feminisms: An Anthology* (New York: Schocken Books,

the reason of mainstream political thought might be specific, not just to men, but to men of certain historical, ethnic, and religious backgrounds; thus women are joined by members of minority groups in their exclusion from reason.[33]

This conclusion, if accepted, might prompt one to a call for a more inclusive conception of reason, but the force of this critique also casts doubt on the very idea of reason other than a mode of thinking specific to a culture, time, and place, in which case Rawls's ambitions to include all the diverse members of American society are not only inadequately realised, but inevitably so. Moreover, if reason is a method for, as Iris Marion Young puts it, "scaling bodies," for manipulating persons, domesticating them by means of what Foucault calls a "normalizing gaze," ordering them into hierarchies according to some general attribute, as in racist ideologies, then not only is reason historically conditioned, but it is inherently oppressive — a poor resource for the pursuit of justice.[34]

Impartiality

Related to the critique of reason is a critique of impartiality. Young writes:[35]

> The ideal of impartiality is an idealist fiction. It is impossible to adopt an unsituated moral point of view, and if a point of view is situated, then it cannot be universal, it cannot stand apart from and understand all points of view. ... Not only is impartiality impossible, however, but commitment to the ideal ... helps reproduce relations of domination or oppression by justifying them or by obscuring possible more emancipatory social relations.

The latter objection, about the ideological function of the idea of impartiality, predates the discourse of difference. Marxists have made this objection to the idea of the rule of law, that the law's claim to procedural justice disguises and thus legitimates the substantive unfairness of the capitalist order. However, the claim about ideology does not provide sufficient grounds for eschewing the ideal

1988).

33 Minow, *supra* note 26 at 152-53.

34 Young, *Justice and the Politics of Difference* (Princeton, New Jersey: Princeton University Press, 1990) at 124-30.

35 *Ibid.* at 104, 112..

of impartiality.[36] That one institution, A, serves to legitimate another, B, does not demonstrate that A is itself without value. Someone's cruelty might be masked by their polite manners, but this is not sufficient to show that polite manners are without worth. And indeed, as E.P. Thompson said of the rule of law, in order for impartiality to function as ideology it must proffer some genuine moral value. Thus one might take the view that the capitalist order should be overthrown or reformed, whilst retaining a commitment to the institutions of impartiality that obscured the anti-capitalist enterprise. Minow's insight that "[i]mpartiality is the guise that partiality takes to seal bias against exposure" might prompt one to argue for genuine impartiality, rather than to reject the ideal (and, indeed, Minow's book ends with a gesture of this kind).[37] A functional argument, then, does not demonstrate that impartiality is intrinsically worthless.

The harm that impartiality poses as a camouflage for oppression is, however, a supplement to Young's main argument about the incoherence of the ideal of impartiality itself. For Young, a moral point of view must be situated, a claim that may recall the view of some feminists that impartiality is a mode of moral interaction that is inferior to more intimate modes of care. The feminist argument is that this posture is developed in the care for loved ones in the home, and is thus historically associated with a female moral voice. On this view, we can attend to others' needs more adequately if we permit fuller knowledge of their particular situation, and if we are not dispassionate but involved in their welfare.[38] Again there is something of this idea in the socialist tradition, which appeals to the ideal of a society founded on fellowship and community rather than the abstract relations of disinterested citizens. But whereas the socialist might commend the caring community as a realisation of socialist principle, the feminist favours it both as an ideal and as a means of including a previously excluded group.

However, as the quotation from Young above reveals, at issue in the difference critique is not just that impartial regard is inferior to other modes of moral interaction, but that impartiality is an unattainable goal, however attractive

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[36] I make this argument in *The Concept of Socialist Law* (Oxford: Clarendon, 1990) at ch. 1 and 3.

[37] *Supra* note 26 at 376.

[38] *Ibid.* at 382.

or unattractive we might find it. Patricia Williams also lambastes the "myth of a purely objective perspective":[39]

> the godlike image of generalized, legitimating others...too often reified in law as 'impersonal' rules and 'neutral' principles, presumed to be inanimate, unemotional, unbiased, unmanipulated, and higher than ourselves.

There is some overlap here with the critique of reason, which finds it futile to attempt the posture of distance required by rational thought. This is put in terms of the metaphysics presupposed by impartial reason. Impartiality, it is claimed, suppresses difference, imposes a unity by means of a single formula which subsumes concrete particulars. But this unity is achieved by means of a binary opposition where the universal is in fact just one principle asserted to the exclusion of others. Thus Jacques Derrida, for example, contends that "one insures phallocentric mastery under the cover of neutralization every time."[40]

This argument can also take the form of a less abstract, sociological observation, which finds that insights about our situatedness, our embeddedness in context and social relations, render the pursuit of impartiality futile. Young contends that "one has no motive for making moral judgments and resolving moral dilemmas unless the outcome matters, unless one has a particular and passionate interest in the outcome."[41] For Young, our situatedness renders us incapable of impartiality, a fact about ourselves which is essential for us to take a moral point of view.

Cooperation

The virtue of cooperation is essential to Rawls's theory. Cooperation is intrinsic to his view of reasonableness as a commitment to fair play and reciprocity, and Rawls contends that the idea of society as a fair scheme of cooperation is implicit in our public political culture. One might think it odd to

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[39] *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991) at 11.

[40] J. Derrida quoted in D. Cornell, *Transformations: Recollective Imagination and Sexual Difference* (New York: Routledge, 1993) at 95; Young, *Justice and the Politics of Difference*, *supra* note 34 at 98.

[41] *Ibid.* at 104.

reject the ideal of a just society where individuals interact harmoniously. However, it is argued that so long as cooperation is premised on the false universals of reason and impartiality, cooperation is a vain hope. Alternative models of cooperation must be premised on the recognition of difference. Minow urges a "social relations approach" which emphasises the "basic connectedness of people" and where we learn to "take the perspective of another."[42] Young calls for a "democratic discussion where participants express their needs," and where valid claims are "generalizable" in the sense that they can be recognised without risk of domination or violating rights, whilst no one appeals to a "general interest" or "speaks from an impartial point of view."[43] She urges a "cultural revolution" involving the "politicisation" of the hitherto nonpolitical: "habits, feelings and expressions of fantasy and desire," with the result of a "politics which asserts the positivity of group difference" and which "allows affinities to develop across different groups."[44] Once "oppressed groups insist on the positive value of their culture and experience," Young maintains, "it becomes increasingly difficult for dominant groups to parade their norms as neutral and universal."[45]

A yet more radical position finds the admission of difference to jeopardise cooperation in a much more fundamental way than is considered by Young. This position invokes a model of society as one riven by deep-seated divisions and antagonisms, where agreement is always tenuous and provisional. Foucault thus refuses to imagine a future without the fragmentation of diverse discourses, with the attendant imperative to resist. And, drawing on the idea of the friend/enemy distinction of the fascist jurist, Carl Schmitt, Chantal Mouffe, for example, insists on the irreducibility of social conflict, the inevitability of exclusion. Institutions might limit and contest violence and domination, but they cannot hope to eliminate such forces. At best, diverse "subject positions" of race, class, occupation or sexuality will come to provisional coalitions, crystallised into "nodal points" of common resistance.[46] On this view, even cooperation on the

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42 Minow, *supra* note 26 at 379.

43 Young, *supra* note 34 at 107.

44 *Ibid.* at 153 and 163-73.

45 *Ibid.* at 166.

46 C. Mouffe, "Political Liberalism. Neutrality and the Political" (1994) 7 *Ratio Juris* 314 at 322.

model of Rawls's "modus vivendi" looks like it is too ambitious a social order.

The Objectivity of Public Reason

How fatal are these objections? Rawls seems to anticipate the concerns of those preoccupied with questions of race, gender and ethnicity. He notes in the introduction that his emphasis on "the long controversy about toleration as the origin of liberalism" may seem "dated in terms of the problems of contemporary life."[47] Rawls insists, however, that the responses of liberalism to historical questions of religious toleration and slavery are pointers to the resolution of contemporary problems: "[it is] a matter of understanding what earlier principles require under changed circumstances and of insisting that they now be honored in existing institutions."[48] This suggests that Rawls's theory is limited merely with respect to application: he did not apply his theory to problems of race and gender, but it is easy enough for egalitarians concerned with questions of identity to do so.

However, the idea of difference is, I think, more tricky. Rawls's own historical preoccupations suggest issues of substance and structure that divide him from his new critics. Take Rawls's example of the reformation: there the problem was how to countenance more than one religious view in a society characterised by the union of church and state. Religious toleration, and the idea of a state which prescinds from doctrinal commitment, thus provided the "modus vivendi" necessary for social order, which ultimately evolved into a more substantive and deeply held (though still fragile) constitutional consensus. But what is at issue in the claims of difference is not so much pluralism — the freedom to practice one's beliefs or live out one's identity — but inequalities of power which, it is argued, can only be remedied by public recognition of plurality, of the identities of diverse groups. Similarly, Rawls's examples of the emancipation of black slaves and the civil rights movement involve equality and freedom from coercion by reference to the ideals of the American constitution. In the case of difference, the coercion at issue is oftentimes covert, implicit in the seemingly neutral postures of public reason. This might mean women forgoing the demands of child care in order to participate in a male-dominated

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47 *Political Liberalism*, *supra* note 1 at xxviii.

48 *Ibid.* at xxviii-xxix.

workplace, disabled people opting out of public services designed according to the "universal" standard of the fully-abled person, or people of minority cultures checking their habits and inclinations to live by the prevailing white norms.

One remedy might be to concentrate on Rawls's idea of primary goods, those goods we require for pursuing our moral conceptions, whatever they may be, and which provide the criteria with which we assess our principles of justice. Can the claims of difference be accommodated here? It has been suggested by Will Kymlicka, for example, that along with such goods as rights and liberties, the good of membership in community should be added to the list, and it might be argued that the good of care be added also.[49] I think, however, that justice as fairness risks incoherence in the eyes of both liberals and communitiarians if communitarian values are included as primary goods, given that the goods are intended to be described in instrumental terms as the preconditions for pursuing our projects, be they communitarian or not. In any case, in order for this move to assuage the concerns of difference, it cannot just mean the granting of an opportunity to belong or to assert one's identity. Rather, the difference position is calling for far-reaching changes in public institutions so that the bearers of given identities and inevitable belongings have restored to them the sense of self-worth which is central to the achievement of justice. Rawls insists that the social bases of self-respect are the most important primary good, suggesting a similar concern for the sense of full membership demanded by difference theorists. But as a primary good, this criterion remains too formal for those concerned with cultural recognition.

The critique of difference has considerable force when confronting the practice of liberal societies. All too often in legal cases, political decisions and everyday confrontations with bureaucracies, reason seems but an instrument for manipulation where the disadvantaged are relegated to the realm of the non-rational, impartiality a mask behind which prejudice operates, and cooperation the pretence by which those without power are expected to easily conform to the will of the powerful. But, as we have seen, opposition to such phenomena might actually invoke reason, impartiality and cooperation, as ideals which have been betrayed. The politics of difference, in contrast, repudiates the ideals themselves.

[49] W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon, 1989) at 177.

The target of difference is what we might call the ambition of emancipatory political theory, the grounding or foundations that we take to be necessary to their articulation and force. Taking a single identity, that of class in the Marxist case for example, is obviously vulnerable to charges of exclusion. On the other hand, if our theories of justice require assumptions about the possibility of actualising a "view from nowhere" or an "archimedean point," or persons dissociating themselves from others or their commitments, then a liberal politics risks collapsing with its grandiose metaphysics. Rawls's earlier formulations were perhaps vulnerable in just this way.

It is worth thinking more carefully about the precise role of the idea of objectivity in Rawls's present work. Rawls certainly attempts to leave behind burdensome philosophical baggage, insisting, for example, that the original position is a "device of representation," a position we simulate in order to reason about principles of justice. It is a matter of role-playing and does not commit us to any particular metaphysical doctrine about the nature of the person.[50] We are persons who, according to Rawls, cannot be imagined outside of our societies.[51] This is some distance from ideas such as Ronald Dworkin's Herculean judge.[52] And it would seem that Rawls avoids, for example, the curious metaphysics involved in conceiving of the person as possessing both a personal standpoint and an impersonal one, as commended by Thomas Nagel.[53] Rawls states:

> the objective point of view must always be from somewhere. This is because, as calling upon practical reason, it must express the point of view of persons, individual or corporate, suitably characterised as reasonable and rational. There is no such thing as the point of view of practical reason as such.[54]

Nonetheless, the objective is not necessarily instantiated in our current practices. Justice as fairness is objective because it produces a structure of reasoning that meets the criteria of rational inquiry, seeks to be reasonable, assigns reasons to agents in the world, and takes it as possible that reasonable

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50 *Political Liberalism, supra* note 1 at 27.

51 *Ibid.* at 40-41.

52 See R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

53 T. Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991) ch. 2; see also *The View from Nowhere* (Oxford: Oxford University Press, 1986).

54 *Political Liberalism, supra* note 1 at 116 [footnote ommitted].

persons can learn and master, not just the mechanics of practical reason, but the principles of justice that issue from the procedure of construction (i.e. the original position). The objective point of view is the view of appropriately defined reasonable and rational agents and must be distinguishable from the point of view of a particular group of agents: "It is part of understanding the concept of objectivity that we never suppose that our thinking something is just or reasonable, or a group's thinking it so, makes it so."[55]

Reluctantly deploying the term "neutrality," Rawls clarifies the sense in which it figures in his argument: justice as fairness is substantive and thus not procedurally neutral in the sense of only appealing to procedural values of consistency and impartiality. It is neutral, however, in its aim with respect to comprehensive doctrines, although the effect of this aim is not neutral since "the facts of commonsense political sociology" are such that some doctrines will gain more adherents than others.[56]

Thus the term neutral refers to the posture of justice as fairness with respect to comprehensive doctrines, while the objective is the perspective agents must have in order to conceive and subscribe to justice as fairness. One of the difficulties with the discourse of difference, however, is the extent to which the terms impartiality, neutrality, and objectivity are interchanged, all seeming to refer to an extra-human view, devoid of perspective or commitment.[57] Surprisingly, Rawls eschews the vocabulary of impartiality because it suggests an overly altruistic concern for the general good.[58] He prefers to talk of neutrality, although he avoided using the term in his earlier work, and one must agree with him here that the term is unfortunate; being neutral does indeed invoke the idea of 'neutering' oneself of one's identity, values or beliefs. The idea of the objective also suggests a subject-less perspective, but Rawls insists on an "in-the-world" conception of objectivity in keeping with its use in common parlance as a posture to which human beings, with all their convictions and concerns, can realistically aspire. Nonetheless, some kind of ideal

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55 *Ibid.* at 110-12.

56 *Ibid.* at 192-93.

57 See B. Barry, *Justice as Impartiality* (New York: Oxford University Press, 1995) for a discussion of a more situated understanding of impartiality.

58 *Political Liberalism*, *supra* note 1 at 50.

perspective emerges here, too, since for Rawls the objective point of view is not, after all, our point of view, but that of "certain appropriately defined reasonable and rational agents"[59] whose reasoning meets Rawls's criteria of "success." [60] Indeed, he goes so far as to say that one of the essentials of objectivity is that it distinguishes the agent's point of view from the objective point of view. Attainment of objectivity is thus determined by reference to an ideal model, potentially beyond real people's reach. The advocate of difference may thus suspect that a particular, advantaged perspective, defined as "normal" — that of the proverbial, able-bodied, heterosexual white male, perhaps — can sneak in under the cover of Rawlsian objectivity, however contrary to Rawls's intentions.

Thus an idealised objectivity lingers in the new Rawls. On the other hand, Rawls ties his argument to practices current in contemporary liberal societies. He refers to how his theory involves "collecting settled convictions" from the "public culture's shared fund"[61] and he insists that "citizens themselves" view his political conception of justice as "derived from, or congruent with, or at least not in conflict with, their other values."[62] Thus for Rawls, "agreement in judgment, or narrowing of differences ... suffices for objectivity."[63] Here Rawls's theory is vulnerable to the wars of difference in a more direct way. This is because a theory which is taken to be based on existing practices or currently held values runs the risk of becoming hostage to the vicissitudes of history. In particular, in the milieu of difference, it can be argued that there is no consensus on the idea of political liberalism, that individuals are not reasonable in the way he specifies, and that the idea of the objective is eschewed. Given the injustice of the present, Rawls's neglect of, for example, the problem of participation on the part of disabled people looks more problematic. That is, in taming justice as fairness, rendering it an interpretive theory of the actual practices of citizenship, Rawls becomes guilty of an undue optimism about, not just the value of agreement on his terms, but the extent to which this agreement is in place.

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59 *Ibid.* at 111.

60 *Ibid.* at 119-20.

61 *Ibid.* at 8.

62 *Ibid.* at 11.

63 *Ibid.* at 120. This looks like more than the usual proviso of any democratic theorist, that the prescriptions offered could not be put into practice without some kind of popular mandate; popular belief is in some sense constitutive of the prescriptions themselves.

Indeed, the former seems dependent on the latter, since Rawls is adamant that justice as fairness has its foundation in the agreement it finds in our public culture. If this agreement is lacking, Rawlsian justice is in trouble.

Equality and Impartiality

If impartiality is to be retrieved, its justification is not easily made by reference to a current consensus about political values, given the realities of difference. A revision along the lines suggested by Jürgen Habermas, that consensus should be conceived as that which is available in some idealised communicative structure, might be attractive. Here the idea is that our modes of discourse have political exigencies which would produce and affirm a liberal constitutional democracy under certain conditions.[64] In the ideal communicative context, frank, open exchanging of views cannot help but contribute to a just and democratic politics. From the perspective of difference, however, such a view puts the cart before the horse, since cultural identity renders persons unable to communicate in the way Habermas requires.

I think that the basis for ideas like impartiality must come from political theory itself; Rawls cannot avoid casting his position in terms of a "comprehensive doctrine," suitably understood. I say suitably understood, because it would obviously be no solution, in either Rawls's terms or those of his radical opponents, to resuscitate some kind of foundationalism, a doctrine of truth or such like. But we can make a more modest attempt by reference to the political ideas that have served us well, that have made the world a more, if not wholly, just place, admitting that our understandings of these ideas may still be incomplete. In doing so, we are undertaking a commitment to a conception of the good, a commitment that states baldly that human beings' dignity depends on their pursuit of the good life, a life of autonomy, self-determination and freedom from coercion, and that such a life must be available equally to all. Rather than smuggling such ideals into a theory of justice as "primary goods" which are the mere instruments for pursuing our conception of the good, whatever it might be, we have to admit that these ideals are features of the good itself. Here I have in mind something like the idea of positive freedom as involving the full

[64] As Habermas commends against the postmodernists in *The Philosophical Discourses of Modernity*, transl. by F. Lawrence (Cambridge, Mass.: MIT Press, 1987) ch. 11-12.

development of one's capacities, a kind of self-mastery. This strategy need not run foul of Rawls's worries about dictating a single way of living to all. Although not all ways of living are autonomous, there remains, of course, a wide variety of ways that are, so this modern comprehensive doctrine has little in common with monistic conceptions such as theological ones from the past. And the task of the state is not necessarily to outlaw certain ways of life deemed unworthy (though of course, as any liberal will admit, it might do this and indeed already does), but through taxation and subsidy, to promote valuable ways of life and discourage valueless ones.[65]

Such a position is both a scaling down from the heights of a God's eye view and a building up from the thin theory of value that emerges from the reference to public reason. For the postmodernists are surely right that reason is in trouble, even if we do not want to join their dance on reason's grave. The solution to Rawls's dubious reliance on the immanent consensus in current political practices is not to leap outside our practices to attain the "view from nowhere." More modestly, we can say that reason is the faculty necessary to elicit and attain the reasonable among citizens in a democracy.

What is the role of impartiality in this account? To fit our picture thus far, it cannot mean agnosticism about the good, nor can it mean a perspective beyond human experience. Impartiality is perhaps better able to accommodate such demands than the more grandiose, god-like terms of objectivity and neutrality, but impartiality still has something of the transcendent about it: a posture devoid of partiality. In what follows I hope to show how impartiality might be appropriately 'tamed.'

Of course, the debunking of impartiality often generates an implicit appeal to its ideals. When, for example, Marx declares that "the ruling ideas are always the ideas of the ruling class" he appeals to a communist alternative where ideas are not the effects of power. Such a vision is ruled out of court by postmodern interpretations. Jean-Francois Lyotard's view that the postmodern condition is one of incommensurable narratives, or Richard Rorty's idea that "this is the way

[65] Such a pluralist perfectionism is inspired by Joseph Raz's idea of the "morality of freedom" in *Morality of Freedom* (Oxford: Clarendon, 1986) at 133, though Raz considers his position to be a stark alternative to that of Rawls.

we do things around here" is the only defence a political culture can muster for its practices and beliefs, certainly puncture the ideal of impartiality in any grand sense.[66] But they also inspire little confidence that we can be open to the claims of difference themselves; such ideas, despite themselves, prompt an appeal to impartiality as that which we cannot help but invoke in response to a world of cultural intolerance. In a sense, even Foucault's contention that there are but competing discourses, where moral legitimacy resides only in the temporary fact that one's discourse is at present the oppositional one, produces such a bleak picture of a world without impartiality that it cannot help but produce a yearning for the recovery of that which is rendered impossible.

Indeed, there is a sense in which the force of the critique of difference relies on the idea of impartiality. The appeals on behalf of disenfranchised groups call upon us to see their claims as legitimate, to take a more distanced view of our own particular concerns in order to see the concerns of others aright. Young's idea that the claims of different groups be "generalisable" in public debate deploys a conception of impartiality, however much she disavows the term. After all, when the different voices are articulated in the public sphere, some kind of impartial reckoning of their comparative worth is inevitable. It is because of our commitment to the ideal of impartiality that the claims of the different demand our attention, and it is because of the fact of difference that impartiality is required. Like Habermasian communication, impartiality is elusive because of our differences, but it would also have no point in the absence of difference, for we would not need to impartially deliberate if we were all the same.[67] The ideas of reasonableness, impartiality and cooperative communication owe their necessity to the difficulties that beset them.

Impartiality thus figures as a regulative ideal, a measure which has its worth precisely because of our status as situated, interested participants in moral and political affairs. We can take Rawls's cue here and point to the value of

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[66] J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge*, transl. G. Bennington and B. Massimi, foreword by F. Jameson (Minneapolis: University of Minnesota Press, 1984) and R. Rorty, "Postmodernist Bourgeois Liberalism" (1983) Journal of Philosophy 80, and *Contingency, Irony and Solidarity* (Cambridge: Cambridge University Press, 1989).

[67] I am grateful to Neil MacCormick for suggesting this to me.

impartiality as a feature of modern political culture, that which animates political disagreement and underlies resistance and opposition. As a virtue of public institutions, impartiality might seem an unsuitable subject for a comprehensive doctrine. A comprehensive doctrine refers to the good life an individual or community might lead, and the idea of a life governed by the principle of impartiality sounds like a life which avoided the pursuit of the good in the usual sense, which was bereft of commitment and value. But impartiality is consistent with this perfectionist picture, since we expect public institutions to be impartial so that we may pursue worthwhile commitments and values to the full, so long as they do not interfere with anyone else's pursuit. Substantively, this means that within the wide scope of worthwhile ways of life, the state must remain impartial; procedurally, it means that the state must accord each individual, regardless of their way of life, the formal rights of the rule of law. Moreover, impartiality could actually play a role as a feature of the good itself. First, it makes sense to think of the good life as requiring a well-ordered, impartial society, not just in order to secure one the good, but because the good involves it being enjoyed by one's fellows. A good which is the fruits of, or consistent with, a partial, unfair society would thus in some sense be flawed as a good.[68] Second, the good life is a life which is marked, not just by the fulfilment of one's desires and goals, but where one has developed a moral consciousness, characterised by, amongst other things, some measure of impartiality.[69] Impartiality in society and in the person are both therefore features of the good. We might think of impartiality principally as a precondition of the good life, which ensures we attain a life of autonomy, freedom from coercion, and self-determination; but it is also a feature of the good life itself, a value which we seek to realise. It follows that we should invoke a pluralist conception of the good to demonstrate the value of impartiality, to point to its role in achieving and constituting the good life, in order to answer critical voices.

Thus we can avoid the twin horns of Rawls's dilemma — the metaphysical implausibility of the idealised perspective versus the moral implausibility of the

[68] R. Dworkin makes a similar point in his "Foundations of Liberal Equality" in G. Veterson, ed., *Tanner Lectures on Human Values* 11 (Salt Lake City: University of Utah Press, 1990).

[69] This is to render Rawls's claim that a sense of justice is one of our highest-order interests a more explicit moral requirement, rather than a quasi-empirical claim.

empirically given — by changing Rawls's framework in some subtle but important respects. First, we eschew a merely political liberalism and dare to defend the idea of freedom as central to the good life and the idea of impartiality in terms of its contribution to achieving that good life for all citizens. Second, we conceive of ideals such as impartiality as an orientation in our current practices, rather than exemplified by them; impartiality is both besieged and evolving, a fragile, partial historical achievement on which we draw in political debate.

The dilemma of difference is precisely that the different are other than us, distanced from our concerns and thus unable to call upon our care in any intimate sense. And yet of course the different are like us, human beings who require fair treatment. Thus we aim to design our public institutions so that we need not rely on the precarious moral attentions of particular persons, so that we as others are treated as the same in worth and dignity in the public domain. It would seem that Rawls's idea of reasonableness is essential in this endeavour. The impartial treatment to which we are entitled as citizens is a politics of civility, a care and attention which, unlike the care of intimates, is generalised and abstract. Indeed, even as underrated a virtue as politeness has more than just an etymological affinity with politics, with the relations of citizens in the polis. Impartiality is civil in two senses. It is a mode of interaction appropriate to a certain space: a secular, public domain, be it on a crowded bus or in a courtroom. And it is civil in the sense of being a form of decency, a mode of consideration, an expression of regard, which does not call upon us the unreliable and potentially patronising sentiments of charity or pity. Impartiality is the expression of the civility of citizens.[70]

Civility, of course, is by definition a posture which we ought to take to all, and intrinsic to impartiality is the idea that it subsumes all citizens; it has an inevitable egalitarian aspect. Historically, impartiality's egalitarian origins were quite modest, referring only to how laws, however partial, applied equally to all. And indeed it seems quite consistent to favour impartiality as a formal virtue while insisting that the law be unequal in its content, operating, say, on the principle of desert. However, a sharp distinction between a formal, procedural

[70] See M. Kingwell's stimulating essay, "Is it Rational to Be Polite?" (1993) 90 Journal of Philosophy 87.

understanding of impartiality and a substantive construal of impartiality is difficult to maintain. Impartiality carries with it an idea of fairness, and fairness is a natural site for substantive political and moral controversy. Moreover, all political concepts — equality, justice, liberty — have the same dynamic, where a narrow, formal interpretation causes us to ask whether it reflects the 'true' meaning of the concept, whether it enables ways of living that are consistent with its ideals. Thus the dismissive view of the difference theorist, that formal impartiality is worthless because of its failure to live up to a substantive fairness, fails to appreciate the way in which the discourse of impartiality opens up a terrain where both the formal and the substantive are at issue. And indeed, the dissonance between form and substance has also become increasingly hard to maintain historically. Why apply the law impartially if partiality is legitimate in the law's content? And if all citizens are equal before the law, why not ensure that all are equal according to the law? Impartiality has evolved in our time so that it is no longer only a feature of the rule of law; our regard for impartiality prompts us to call for the substantial entitlement of citizens to live a life of dignity, of autonomy, self-determination and freedom from coercion. Everyone's life matters and that is why we should be impartial.

This is not to deny the legitimacy of partiality in certain contexts; we are entitled to prefer some people over others in matters both important and mundane, when it comes to the objects of our love or whom we choose to sit beside on a journey. At the public level, however, such preferences are deemed inappropriate.[71] My need for autonomy (or my beloved's, for that matter) is no more important than that of any other citizen. This idea of impartiality as equal concern is a historical achievement, but it remains unfinished. The difference critique makes a salutary contribution in pointing out that our culture is steeped in practices which affirm disadvantage, and which hamper impartial governance by the state. Thus it is not just distribution of resources that is at stake in matters of justice, but the promotion of self-esteem and full participation on the part of the disadvantaged; "social equality" is Young's phrase.[72]

There is a sense in which Rawls, too, in his preoccupation with the political culture of inclusion, has shifted his focus from questions of distributive justice.

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[71] Nagel, *Equality and Partiality*, *supra* note 54 at 11, 65.

[72] Young, *supra* note 34 at 173.

He now states that the difference principle, the redistributive maxim which dictates that inequalities must be to the benefit of the worst off, is not a "constitutional essential" since, unlike basic freedoms, it is less urgent, more difficult to find agreement about and harder to ascertain whether it has been realised than questions of liberties or rights.[73] At the same time, Rawls now concedes at the beginning of his argument that the satisfaction of basic needs is a precondition for the institution of constitutional principles about rights and liberties.[74] In a sense, questions of substantive egalitarianism have been removed from the heart of the debate about justice, to be resolved either prior to the basic structure, or after it.

Here Rawls's concern to base his theory on a consensus immanent in the political culture of liberal societies prompts some moves which again seem question-begging. It is not at all clear that in a society such as the United States there is agreement that basic needs be met as a preconstitutional essential, for the very reason that we might think there is indeed agreement that more radical redistribution is an issue too contentious to bear on the constitution. This suggests, again, that consensus looks like an unreliable measure with which to defend Rawls's position. The defence will have to be a more principled one, in which case questions of material position must be addressed in a deliberate way, not presupposed or postponed. Of course, the principles involved will derive from practices and ideas which have been current, but we will have to "work them up" both in terms of providing moral arguments for them, and in terms of expanding their range. Moreover, if as I have suggested, impartiality derives its force from the equality of citizenship, and if cultural identity is a problem of equality, then it seems difficult to justify the placement of material equality outside the purview of a political theory. After all, while self-esteem is an important part of equality, it does not exhaust it, and it would be a mistake to neglect the issue of economic well-being. The neglect of social class on the part of the (largely American) proponents of difference thus seems revealing. For class is, in its classical conception, an objective position which would disappear upon the achievement of equality, rather than a self-perception calling for public recognition, and as such it remains a useful analytical tool. We can certainly imagine persons whose material position is substantially unequal to that of

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[73] *Political Liberalism*, *supra* note 1 at 227-30.

[74] *Ibid.* at 7.

others but who enjoy a healthy sense of self-esteem; the latter should not blind us to the former. Indeed, as Amartya Sen has argued, the fact of difference may mean that an adequate, multi-faceted conception of equality dictates radical revisions to ideas such as primary goods. For Sen, given the variations in people's capacities, it is hardly fair to secure for everyone the same index of primary goods to cover their needs as citizens.[75] Sen's criticism reminds us how we may have to opt for variegated treatment, diverse standards, in order to fulfil the universal ideas intrinsic to Rawls's project; just like the judge who passes sentence, we must take account of the particular in order to impartially apply a universal standard of equality. The ideal of a common humanity requires an appropriate respect for difference; but this should figure as an impetus for revising our understandings of equality, rather than postponing their consideration.

Liberal theory has tended to be couched in ways which fail to take seriously the problem of difference. The idea that cultural identity may require recognition is often reduced to a communitarian desire for a univocal community and a monistic conception of the good, and thus liberals such as Rawls provide a neutralist response which misses the mark. The problem of difference is that of the diversity of oppressions, not just a style of life which the public sphere is asked to endorse. On the other hand, the challenge of difference is often interpreted by liberals as a matter of legal and material equality which requires only the wider application of existing ideas of rights and redistributive justice. However, these ideas themselves are now the target of attack, precisely because of their role as universal measures by which to treat people with respect and by which to measure their demands. Difference thus poses a unique challenge to political theories such as that of Rawls.

Central to this challenge is a critique of impartiality, castigated as both an impossible metaphysical pretense and an undesirable political goal. I have argued that impartiality is an idea which, suitably understood, is essential if we are to take the claims of difference seriously. In the face of a crisis of legitimation of liberal ideas in political culture, the defence of impartiality requires making an argument based on more substantive principles than are

[75] *Inequality Reexamined* (Oxford: Clarendon, 1992) 8-9, 26-7 and ch. 5.

allowed by the Rawlsian constraints of neutrality. However, it should be defended not as a metaphysical perspective, but rather the point of view of citizens seeking to be fair in their dealings with each other. As such, it involves a reference to equality which requires the retrieval of Rawls's earlier egalitarian concerns, placing them at the heart of a theory of justice. Being fair to those different from ourselves, whom we do not know or understand, requires a posture of civility, of consideration born of respect for equals. In a world torn apart by the calls for recognition of identity, civility looks like an increasingly rare and precious public virtue. And it is the power of the idea of a society informed by the civility of fairness, as a vision if not an actuality, that ensures Rawls's project will continue to be both important and controversial.

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R. v. *DAVIAULT:* A PRINCIPLED APPROACH TO DRUNKENNESS OR A LAPSE OF COMMON SENSE?

Martha Shaffer*

The Daviault *decision has caused intense public controversy. While the author recognizes that the decision itself is consistent with contemporary conceptions of* actus reus *and* mens rea*, the author challenges the court's treatment of the drunken accused. The paper criticizes the* Daviault *decision from three different perspectives. First, from a doctrinal point of view, the author questions the retention by the court of the specific/general intent dichotomy as well as the reversal of the onus of proof onto the drunken accused. Second, the decision is filtered through a feminist lens to reveal the specific impact on women. Some concerns include: the absence of detailed facts in the case, triers of fact too readily accepting the* Daviault *defence in cases of sexual assault, discouragement of the reporting of male violence by the victims when alcohol is involved, and less prosecutions undertaken because the police and prosecutors will mistakenly believe that the* Daviault *standard of drunkenness has been achieved. Third, the author disagrees with the vision of moral responsibility the court endorses in that accuseds can be absolved of moral responsibility for their actions by engaging in socially irresponsible behaviour. In conclusion, the paper examines Bill C-72 whose purpose is to reverse the* Daviault *decision.*

La décision Daviault *a provoqué une vive controverse publique. Bien que l'auteure reconnaisse que la décision elle-même est conforme aux notions contemporaines de l'*actus reus *et du* mens rea*, elle remet en question la façon dont la Cour a traité l'accusé ivre. L'article critique la décision* Daviault *sous trois angles différents. Tout d'abord, d'un point de vue doctrinal, l'auteure remet en question le fait que la cour ait retenu la dichotomie de l'intention spécifique/générale tout en inversant le fardeau de la preuve sur l'accusé ivre. Deuxièmement, la décision est examinée dans une perspective féministe en vue de révéler les répercussions particulières sur les femmes. Les préoccupations soulevées incluent notamment l'absence de faits détaillés dans cette cause, le fait que les juges des faits acceptent trop vite les arguments de* Daviault *dans les cas d'agression sexuelle, que les victimes puissent être dissuadées de rapporter la violence masculine quand l'alcool est impliqué, et que le nombre de poursuites diminuent parce que la police et les procureurs auront conclus à tort que la norme* Daviault *relative à l'ivresse s'applique. Enfin, l'auteur s'élève contre la notion de responsabilité morale avalisée par la cour, en ce que les accusés peuvent ne pas avoir à répondre de leurs actes en adoptant un comportement social irresponsable. En conclusion, l'article examine le projet de loi C-72 visant à réformer la décision* Daviault.

The Supreme Court of Canada's decision in *R.* v. *Daviault*[1] has provoked a maelstrom of public controversy. By a majority of 6-3, the Court accepted the

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[1] [1994] 3 S.C.R. 63, 93 C.C.C. (3d) 21, 33 C.R. (4th) 165 [hereinafter *Daviault* cited to S.C.R.].

argument that extreme self-induced intoxication can be a defence to sexual assault and to other crimes of general intent. Many expressed outrage with a legal system that would permit drunkenness to absolve a person of responsibility for criminal action. Women's groups saw *Daviault* as a dangerous precedent, making it more difficult for women to bring sexual assault charges and providing accused men with another possible avenue of achieving unwarranted acquittals. In response to the public outcry, Parliament acted swiftly to introduce legislation making the defence of voluntary drunkenness unavailable in violent offences.

In this comment, I will briefly review the *Daviault* decision. I argue that while the decision may be consistent with our contemporary conceptions of the principles of *mens rea* and *actus reus*, it raises some serious questions regarding the just treatment of the drunken offender. I will conclude by offering some brief observations on the proposed legislation.

Facts and Issues

To appreciate fully the context in which the Supreme Court of Canada accepted the defence of drunkenness, the facts in *Daviault* must be laid out in some detail, particularly since the judgment itself is short on facts.[2] During the early evening of May 30, 1989 the complainant telephoned the accused's residence, looking for his wife. The complainant, a 65 year old woman, was confined to a wheelchair and relied on acquaintances — including Mrs. Daviault — to assist her with certain tasks. The complainant wanted Mrs. Daviault to buy her a bottle of brandy. Mrs. Daviault was not at home and the accused, Henri Daviault, offered to buy the brandy in her place. Upon the accused's arrival at her home, the complainant invited him in for a drink of the brandy. After only one sip of brandy, the complainant passed out in her wheelchair.

The complainant awoke in the wee hours of the morning and attempted to go

[2] The facts are mentioned briefly in Sopinka J.'s dissenting judgment. However, Sopinka J. does not give a description of the acts constituting the sexual assault. My description of the facts is drawn from P. Healy, "Another Round on Intoxication" (1995) 33 C.R. (4th) 269. Professor Healy, in turn, derived his recitation of the facts from the factum of the Crown at the Supreme Court of Canada supplemented by conversations with both Crown and defence counsel in the case.

to the bathroom. The accused blocked her passage, took her to the bedroom, threw her from her wheelchair and began to sexually assault her. In the course of the assault, the accused fondled the complainant under her dressing gown, attempted to penetrate her, and pulled her up by the hair and demanded that she perform fellatio. At one point, when the complainant attempted to call 911 for assistance, the accused hit her several times in the face. After about an hour, at approximately 4:00 a.m., the accused left and returned home.

Although Daviault denied sexually assaulting the complainant, he also claimed, somewhat inconsistently, that he could not remember anything that happened between the time he arrived at the complainant's house and the time he awoke at 4:00 a.m. to find himself naked in the complainant's bed. His main defence, however, was that if anything had happened between himself and the complainant, he was so drunk that he did not have the *mens rea* to commit the offence of sexual assault. There was evidence to support a claim of drunkenness. The accused was a chronic alcoholic. He testified that prior to arriving at the complainant's residence, he had spent the day in a bar and had consumed seven or eight bottles of beer. He may also have consumed the entire bottle of brandy he had bought the complainant, which the complainant noticed was empty when she awoke to use the washroom. However, other evidence cast doubt on the accused's degree of drunkenness. The complainant testified that during the sexual assault, the accused did not appear to be drunk. These observations were supported by Mrs. Daviault who testified that the accused did not appear drunk when he arrived home at 4:20 a.m., that he was able to unlock the door with his own key, walk without difficulty and undress himself before going to bed. When drunk, the accused was usually unable to unlock the door and usually passed out fully clothed. In addition, when drunk, the accused was usually "agitated or tormented" and on this occasion he was calm.

To support his claim of drunkenness, Daviault called one expert, a pharmacologist named Mr. Leonard. Mr. Leonard testified that consuming large quantities of alcohol could lead to a state of "l'amnesie-automatisme" or "blackout" in which the brain is dissociated from normal functioning and a person loses contact with reality. In this state, a person might be capable of performing certain actions, but would not be aware of performing them nor have any memory of them the next day. Mr. Leonard also testified that the accused's blood alcohol level would have been between 400 and 600 milligrams per 100

millilitres of blood, assuming he had consumed the amount of alcohol he claimed. Although this level of intoxication would result in death or coma in an average person, Mr. Daviault's alcoholism made him less susceptible to alcohol and able to tolerate intoxication of this magnitude. Finally, Mr. Leonard also testified that a person with the blood alcohol level of Mr. Daviault might well experience a "blackout." The Crown did not call any experts, nor lead any evidence disputing Mr. Leonard's conclusion that a state of "l'amnesie-automatisme" existed or that Mr. Daviault might have been in such a state.[3]

The legal issue emerging from these facts was whether intoxication to the point of automatism or insanity could provide a defence to a crime of general intent. Since the 1978 decision of the Supreme Court of Canada in *R.* v. *Leary*,[4] Canadian law has permitted voluntary drunkenness to serve as a defence in a small group of offences, those requiring "specific" intent. Crimes of specific intent are defined as "those generally more serious offences where the *mens rea* must involve not only the intentional performance of the *actus reus* but, as well, the formation of further ulterior motives and purposes."[5] For example, assault with intent to resist arrest is a specific intent offence because in addition to requiring the *mens rea* to commit an assault, it requires the accused to have the further *mens rea* to be resisting arrest. Most criminal offences do not require specific intent but are simply "general" intent offences. These offences require merely the "minimal intent to do the act which constitutes the *actus reus*."[6] Drunkenness operates as a defence to crimes of specific intent because it calls into question the accused's ability to form the ulterior motive or purpose part of the *mens rea*. In contrast, because the intent of general intent crimes is described as "basic" or "minimal," according to the strict rule in *Leary*, drunkenness cannot negate the *mens rea* of these offences. As sexual assault is a crime of general intent[7], *Daviault* presented a factual framework that invited the court to

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3 M. Code, (remarks presented to the Round Table on the *Charter* and the Criminal Law, Saturday May 6, 1995) [unpublished].

4 [1978] 1 S.C.R. 29.

5 *R.* v. *Bernard*, [1988] 2 S.C.R. 833 at 880, McIntyre J. (as cited in Sopinka's reasons).

6 *Daviault*, *supra* note 1 at 123, per Sopinka J.

7 *R.* v. *Chase*, [1987] 2 S.C.R. 293; see also *Bernard*, *supra* note 5, and *R.* v. *P.L.S.*, [1991] 1 S.C.R. 909.

re-examine the "*Leary* rule."[8] In particular, *Daviault* required the court to consider whether the blanket prohibition on raising drunkenness in general intent offences violated the principles of fault and criminal responsibility that the courts have been developing in recent years, now constitutionalized in the *Canadian Charter of Rights and Freedoms*. It was on this point that the majority and dissent in *Daviault* came to very different conclusions.

The Decisions

The majority decision, written by Cory J., took the position that prohibiting the trier of fact from considering extreme drunkenness in general intent offences violates the principles of fundamental justice in section 7 of the *Charter* and the presumption of innocence in section 11(d). He accepted that, as a general rule, drunkenness will not affect the "minimal" *mens rea* of general intent offences. Where, however, intoxication reached a level approaching automatism or insanity, the accused although capable of action might not have been able to form even this minimal *mens rea*. As Cory J. put it:

> Given the minimal nature of the mental element required for crimes of general intent, even those who are significantly drunk will usually be able to form the requisite *mens rea* and will be found to have acted voluntarily. In reality it is only those who can demonstrate that they were in such an extreme degree of intoxication that they were in a state akin to automatism or insanity that might expect to raise a reasonable doubt as to their ability to form the minimal mental element required for a general intent offence. Neither an insane person nor one in a state of automatism is capable of forming the minimal intent required for a general intent offence. Similarly, as the words themselves imply, "drunkenness akin to insanity or automatism" describes a person so severely intoxicated that he is incapable of forming even the minimal intent required of a general intent offence. The phrase refers to a person so drunk that he is an automaton. As such he may be capable of voluntary [sic?] acts such as moving his arms and legs but is quite incapable or forming the most basic or simple intent required

[8] Prior to *Daviault*, the distinction between specific and general intent had been harshly criticized and there had been many calls to permit drunkenness to go to the trier of fact in all cases. See, e.g.: D. Stuart, *Canadian Criminal Law: A Treatise*, 2d. ed. (Toronto: Carswell, 1987) at 363-83; A. W. Mewett & M. Manning, *Mewett & Manning on Criminal Law*, 3d ed. (Toronto: Butterworths, 1994) at 173, 410ff; M. Goode, "Some Thoughts on the Present State of the 'Defence' of Intoxication" (1984) 8 Crim. L.J. 104; T. Quigley, "Specific and General Nonsense?" (1987) 11 Dalhousie L. J. 75.

to perform the act prohibited by a general intent offence.[9]

According to Cory J., convicting someone in this state of intoxication of a general intent offence like sexual assault conflicts with principles of fault and moral blameworthiness enshrined in section 7 of the *Charter*. These principles forbid convicting those who do not possess the *mens rea* of a criminal offence and who are therefore morally innocent of that offence. A person who commits a sexual assault while in a state of drunkenness akin to insanity or automatism (and who is thus incapable of forming the *mens rea* to sexually assault) is morally innocent of that assault, even where that drunkenness is self-induced. To convict people in these circumstances would require the court to *substitute* the accused's decision to become drunk (or at least to consume alcohol) for the *mens rea* to commit a sexual assault. Since the decision to become drunk cannot be said to be as blameworthy as the decision to commit a sexual assault, this substitution violates both sections 7 and 11(d). In Cory J.'s words:

> It was argued by the respondent that the "blameworthy" nature of voluntary intoxication is such that it should be determined that there can be no violation of the *Charter* if the *Leary* approach is adopted. I cannot accept that contention. Voluntary intoxication is not yet a crime. Further, it is difficult to conclude that such behaviour should always constitute a fault to which criminal sanctions should apply. However, assuming voluntary intoxication is reprehensible, it does not follow that its consequences in any given situation are either voluntary or predictable... A person intending to drink cannot be said to be intending to commit a sexual assault.[10]

In reaching this conclusion, Cory J. relied upon studies establishing that no direct causal link can be drawn between the consumption of alcohol and violence. According to this research, while drinking may be a *facilitator* of violent behaviour, it cannot be said to be the *cause* of violence.[11] Since drinking

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9 *Supra* note 1 at 99-100. It is hard to know what Cory J. means by the word "voluntary" here. Given that throughout his judgment Cory J. seems to equate the "minimal level" of *mens rea* of general intent offences with the voluntariness requirement of *actus reus*, one would have thought that Cory J. should be speaking of involuntarily moving arms and legs, rather than voluntarily so doing.

10 *Supra* note 1 at 92.

11 Cory J. quoted from a research report published by the Saskatchewan Alcohol and Drug Commission (SADAC), *Legal Offences in Saskatchewan: The Alcohol and Drug Connection* (February 1989), which gave the following explanation of the relationship between alcohol and violence:

> generally an accused who is not afflicted by a disease of the mind to plead absence of *mens rea* where he voluntarily caused himself to be incapable of *mens rea* would be to undermine, indeed negate, that very principle of moral responsibility which the requirement of *mens rea* is intended to give effect to.[17]

Sopinka J. was also of the view that the penalties available for sexual assault were not disproportionate to the moral blameworthiness of an offender who sexually assaults while in a state of extreme intoxication. In his view, sexual assault is a "heinous crime of violence" and those who commit it are "rightfully submitted to a significant degree of moral opprobrium."[18] This does not change where the offender is intoxicated since "[the] moral blameworthiness [of these offenders] is similar to that of anyone else who commits the offence of sexual assault and the effects of their conduct upon both their victims and society as a whole are the same as in any other case of sexual assault."[19] Any difference in moral blameworthiness between intoxicated and sober offenders could, in Sopinka J.'s view, be dealt with in sentencing.

Finally, Sopinka J. also disagreed with the majority's conclusion that the principles of fundamental justice require a departure from the *Leary* rule where the issue of drunkenness is analyzed in terms of voluntariness. In his view, the rule that conduct must be voluntary, while generally true, is not a rule of universal application nor is it a principle of fundamental justice. Instead, the rule brooks exceptions in cases in which the accused's lack of volition is brought about through his or her own fault. For example, the law currently denies accused persons' the right to use the defence of automatism where that condition arises from their own negligence or fault. In Sopinka J.'s view, this represents sound policy as people who render themselves automatons are far from morally blameless and "should not escape punishment."[20]

Analysis

The majority decision in *Daviault* is, in general terms, consistent with principles of moral responsibility that the Supreme Court has been fashioning

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17 *Ibid.* at 119.
18 *Ibid.* at 119-20.
19 *Ibid.* at 120.
20 *Ibid.* at 121.

under the *Charter*.[21] These principles hold that a person should not be criminally responsible for his or her actions unless he or she acted voluntarily and with the requisite mental state. A person whose drunkenness approaches a state of automatism or insanity will not be capable of acting consciously or voluntarily, much less of forming the *mens rea* for criminal action. By permitting consideration of the possibility that drunkenness has robbed the accused of the potential for voluntary action or for forming the *mens rea* to commit a general intent offence, *Daviault* may be seen to bring the law of drunkenness in line with contemporary legal thinking on moral responsibility. The view that drunkenness should be available as a defence to all crimes has, in fact, enjoyed overwhelming academic support for many years.

Nonetheless, three types of criticism may be levelled at the *Daviault* decision: criticism of a doctrinal nature, criticism from a feminist perspective, and criticism of the conception of moral responsibility the decision endorses. I will explore each of these briefly.

In terms of doctrine, the main criticism of *Daviault* is that it hedges the very *Charter* principles it purports to adopt. This occurs in two places: the decision to retain the distinction between specific and general intent, and the decision to reverse the onus of proof of drunkenness in general intent offences. Both decisions are perplexing in light of the majority's insistence that moral blameworthiness must be proven and neither substituted nor assumed.

The retention of the specific/general intent distinction is the more puzzling of the two decisions. Academics have roundly criticized the distinction as being unprincipled and indefensible yet the majority offers no reason for preserving it beyond noting that it is a well established part of Canadian law.[22] This explanation is hardly compelling as many time honoured principles have given

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21 Much of the jurisprudence under s. 7 of the *Charter* concerns issues of moral blameworthiness. See: *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486; *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636; *R.* v. *Martineau*, [1990] 2 S.C.R. 633; *R.* v. *Hundal*, [1993] 1 S.C.R. 867; *R.* v. *Creighton*, [1993] 3 S.C.R. 3; *R.* v. *Finlay*, [1993] 3 S.C.R. 103; *R.* v. *Gossett*, [1993] 3 S.C.R. 76.

22 *Supra* note 1 at 77.

way to *Charter* scrutiny.[23] The court's repeated incantation of *Charter* principles makes its failure to re-examine the distinction all the more bewildering. If it is true as the majority holds, that prohibiting consideration of extreme drunkenness in crimes of general intent violates sections 7 and 11(d) of the *Charter* by permitting the intention to become intoxicated to be substituted for the mental element of the crime that the accused ultimately commits, why is it that prohibiting consideration of less severe states of drunkenness does not violate these provisions for the same reason? To put this another way, why is it that drunkenness falling short of insanity or automatism will have no bearing on the accused's *mens rea* when he or she is charged with a general intent crime? Why would it not be possible for an accused, by reason of drunkenness, to fail to have the *mens rea* for a general intent offence yet not be so intoxicated as to approach a state of insanity or automatism?[24]

The majority's analysis here — to the extent that there is any — is highly unsatisfactory. The majority simply posits that drunkenness short of insanity or automatism will have no effect on general intent offences because the *mens rea* for these offences is so minimal that it could not be affected by anything less than extreme intoxication. The court does not, however, provide support for this conclusion. Two possible explanations arise. Either the court is making a policy decision that drunkenness short of insanity or automatism *should not* constitute a defence to a criminal charge regardless of whether it affected the accused's *mens rea*, or the court is making a medical decision that as a matter of scientific fact drunkenness short of this standard can *never* affect *mens rea*. In either case, the court's conclusion is problematic. If the court's decision rests on a medical conclusion, it is made without any documentation or medical evidence

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23 The constructive murder rule rejected by the Supreme Court of Canada in *Vaillancourt* and *Martineau*, *supra* note 21, is one example of a long standing legal rule felled by the *Charter*.

24 For example, in sexual assault, might an accused be capable of acting voluntarily and consciously realize that he is applying force of a sexual nature to the complainant, yet because of drunkenness fail to perceive the risk that the complainant is not consenting, or mistakenly believe that she is? The *Criminal Code* currently removes the defence of mistaken belief in consent where an accused has formed this belief as a result of self-induced intoxication (s. 273.2(a)(i)). However, Dickson C.J.'s reasoning in *Bernard*, *supra* note 5, and one might argue the *Charter* principles on which the *Daviault* majority rely, suggest that this provision violates ss. 7 and 11(d).

whatsoever. If instead the court's decision rests on a policy determination that less extreme levels of drunkenness *should not* serve as a defence to general intent offences even if they negate *mens rea*, why shouldn't this policy decision apply to all degrees of drunkenness? Why shouldn't the policy be that an accused will be held responsible for actions he or she performs in a state of voluntary intoxication regardless of the degree of inebriation?

If it is possible, as numerous legal academics have suggested, for an accused to lack the *mens rea* of a general intent offence through intoxication that does not approach insanity or automatism[25], the decision to retain the specific/general intent distinction simply replicates the *Charter* problems the majority asserts mandate a flexible approach to the *Leary* rule. Removing consideration of lower levels of drunkenness from the trier of fact would have the same effect on the accused as precluding consideration of extreme drunkenness — the *mens rea* for committing the offence would be substituted or assumed rather than proven. One would have thought that the court's refrain of needing to conform to *Charter* principles would have compelled at least some consideration of this possibility.

The court's decision to reverse the normal criminal burden of proof and to require the accused to prove his or her extreme intoxication on a balance of probabilities also seems at odds with its reasoning. The effect of this reversal, as others have noted,[26] is that an accused who may be able to raise a reasonable doubt as to the voluntariness of his or her conduct may nonetheless be convicted if he or she is unable to meet the much higher burden of establishing his level of drunkenness on a balance of probabilities. If it is true that denying the defence of drunkenness violates sections 7 and 11(d) because it permits the accused to be convicted notwithstanding the existence of a reasonable doubt as to whether his conduct was voluntarily or intentional, how is it that the court's new rule is constitutionally sound when it allows the same result to occur? Why reverse the onus at all? Again, the court's reasoning is unpersuasive. The majority devotes very little time to explaining this requirement, contenting itself with drawing an analogy to the defence of mental disorder in section 16 of the *Code* (formerly the

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25 See *infra* note 34 and accompanying text.

26 See P. Healy, I. Grant, T. Quigley & D. Stuart, "Criminal Reports Forum on *Daviault*: Extreme Intoxication Akin to Automatism Defence to Sexual Assault" (1995) 33 C.R. (4th) 269.

defence of insanity) which requires the accused to prove mental disorder on a balance of probabilities. However, the court fails to discuss why it draws this analogy, rather than one to the defence of automatism, which does not reverse the onus onto the accused. Presumably, the court's decision here stems from concerns specific to the intoxication defence, factors which it should have made explicit.

To my mind, the court's decisions to leave intact the specific/general intent distinction and to reverse the onus of proof can only be understood as reflecting discomfort with the full implications of its *Charter* reasoning. By refraining from dismantling the specific/general intent distinction and thus circumscribing the scope of the drunkenness defence, the court in effect shies away from the full implications of its analysis for reasons which are — from a principled standpoint — difficult to support. Similarly, by requiring the accused to prove his or her extreme intoxication and thus making it difficult (one might have thought next to impossible) for the defence to succeed, the court seems to balk from the ramifications of its reasoning by limiting the availability of the defence in a way that is difficult to reconcile with the *Charter* principles it articulates.

Examining *Daviault* through a feminist lens reveals a different and in some ways more troubling set of problems. First, the facts of the sexual assault are conspicuously absent from the decision. While Sopinka J. does provide a brief overview of the facts, one would have thought a more detailed description were required to indicate exactly what acts Mr. Daviault performed while allegedly in a state of extreme drunkenness. Feminists have often argued that the factual context is imperative to understanding legal issues. This is particularly true in a case such as this where knowledge of the facts will bear directly upon the ability to assess the defence. To put it bluntly, it would be useful to know the events that actually transpired in the case in which the Supreme Court of Canada accepted the possibility of drunkenness serving as a defence to general intent offences.[27]

[27] One could argue that the court did not need to provide a detailed recounting of the facts because it merely sent the case back for a new trial and did not accept Daviault's claim on the facts. Although this is true, I believe the facts are important to show the kind of case in which courts would be prepared to entertain the drunkenness defence.

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Most of the feminist criticism of *Daviault*, focuses not on the reasoning but on the result of allowing the defence of intoxication to be available in cases of sexual assault and for other crimes of general intent. Feminist groups have raised two primary concerns. The first relates to the impact that permitting intoxication as a defence will have on women subjected to male violence and on the likelihood that men who commit crimes while drunk will be convicted for their acts. The second concern is more general and takes issue with the majority's conclusion that people who commit violent crimes while severely intoxicated are not fully morally responsible for those acts. This concern is not, of course, exclusively feminist as it is shared by others who do not necessarily take feminist views.

The feminist concern with the impact of *Daviault* on women arises from the confluence between the use of alcohol and drugs by men on the one hand, and male violence of both a physical and sexual nature against women on the other. While it is true, as the majority notes, that studies have revealed no direct causal link between the use of intoxicants and violence, it is also true that the use of these substances often precedes woman abuse. In a paper prepared for the Canadian Advisory Council on the Status of Women, Professor Elizabeth Sheehy gives the following statistical portrait of the link between alcohol and violence against women:

> [A]lcohol has been identified as a "risk factor" for violence against women. For example, in 1993, 55% of men who killed their partners had consumed some amount of alcohol...For wife assault, alcohol is cited by 29% of victims as a precipitating cause for the man's violence. Further, it appears that the violence is more severe if alcohol is consumed: 56% of the violent men who were drinking (as compared to 33% of non-drinking men) caused physical injuries to women; 47% of the women injured by drinking men required hospital treatment (compared to 37% of the victims of non-drinking men)...For sexual assault, selected police forces report that alcohol or drug consumption was apparent for 28% of accused. In these cases, 66% of the victims suffered physical injuries compared with 59% of women attacked by men not known to have consumed substances.[28]

The link between the use of intoxicants and violence against women means

[28] E. Sheehy, "The Intoxication Defence in Canada: Why Women Should Care" (Paper Prepared for the Canadian Advisory Council on the Status of Women, January 1995) at 8 [unpublished].

that one can expect men charged with sexual assault or wife abuse[29] to attempt frequently to absolve themselves of their actions by recourse to the defence of drunkenness. While many of these claims *should not* succeed based on the need to introduce expert evidence and to establish intoxication on a balance of probabilities, there is reason for concern that triers of fact may too readily accept the defence. The number of acquittals rendered post-*Daviault* lends support to this fear. Despite the Supreme Court's assurances that the defence of drunkenness will rarely succeed, within the four months following *Daviault*'s release, there had been at least five acquittals on the basis of the defence, four of which involved male violence against women.[30] These acquittals can be accounted for in three ways: lower court judges have misunderstood the stringency of the *Daviault* test, triers of fact truly but erroneously believed that the accuseds' intoxication met the *Daviault* standard, or the Supreme Court simply was wrong and drunkenness will succeed in far more cases that it anticipated.

While the belief that the high number of acquittals is a transitional problem that will disappear as trial judges more fully comprehend the application of the drunkenness defence has some merit, there are reasons for suspecting that it reflects a deeper problem. Both sexual assault and wife abuse have shown themselves to be areas in which the faith our legal system places in triers of fact is to some degree misplaced. Myths and stereotypes continue to abound in these areas, despite concerted feminist attempts to debunk them.[31] Triers of fact may too readily accept a claim that the accused would not have engaged in assaultive behaviour had it not been for the affects of alcohol consumption, and may also too quickly accept that the accused had reached the *Daviault* level of

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29 I use the term "wife abuse" to refer to violence by men against their intimate female partners. In choosing this term, I do not mean to suggest that male violence only occurs in marital relationships. I do, however, wish to avoid the gender neutral terms "domestic" of "family" violence as these terms mask the gendered nature of such violence.

30 Sheehy, *supra* note 28.

31 The Supreme Court recognized this problem in *R.* v. *Lavallee*, [1990] 1 S.C.R. 852, where it permitted expert evidence on the "battered woman syndrome" in the case of a woman accused of murdering her abusive male partner. This evidence was necessary, the court reasoned, to dispel myths about battered women that members of the jury might hold.

drunkenness. As a result, *Daviault* may actually generate a greater number of acquittals than it ought, many of which may not be appealed.

The concern with the willingness to accept the defence of intoxication is not restricted to triers of fact. Police officers to whom women will report the crimes and who will investigate the allegations will be subject to the same influences as judges or juries, as will the prosecutors in charge of arguing the case against the accused. There is a danger that cases in which the accused has consumed alcohol may be filtered out by police officers or prosecutors who too quickly accept that the accused meets the *Daviault* standard and who conclude that a conviction would be hard to secure. In this way, *Daviault* may have an impact on cases before the drunkenness defence is even raised in court by reducing the number of cases that reach the trial stage.

Finally, the *Daviault* decision may discourage women who have been victims of male violence in situations in which alcohol or drugs were consumed from reporting the assault. Women may fear that their assailants' ingestion of intoxicants raises a very real possibility of acquittal and may avoid putting themselves through an emotionally difficult trial by failing to report the assault altogether. In the case of sexual assault, a crime which is notoriously under-reported,[32] this could have the effect of driving the reporting rate down even further.

All of these concerns are aspects of a broader problem with the criminal law and with law generally. While *Daviault* may appear to be a principled approach (subject to the doctrinal criticisms raised earlier) to the problem of the severely intoxicated offender, in a society fraught with deep-seated sexist attitudes seemingly neutral principles may have a differential impact on men and women.[33] The defence of drunkenness will certainly arise in cases where the

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32 See L. Freedman, "Wife Assault" in C. Guberman & M. Wolfe, eds., *No Safe Place: Violence Against Women and Children* (Toronto: The Women's Press, 1985) 41 at 44ff.

33 This criticism may be seen as a version of Martha Minow's "dilemma of difference." Minow argues that structural inequalities — or difference — pose a dilemma for those who seek to rectify them. On the one hand, if you ignore the difference, you risk recreating it. On the other, if you confront the difference explicitly, you risk entrenching it. See: Martha Minow, *Making All the Difference: Inclusion, Exclusion,*

victims of violence are men, and in some of these cases it may well succeed. However, for the reasons just given, it is likely that the defence will have negative consequences in offences in which women are the victims. Even if one agreed with the approach to moral blameworthiness endorsed in *Daviault*, one would still have to ask what to do about the fact that these principles, when filtered through a sexist lens, will not yield truly principled results. There is no indication in *Daviault* that the Supreme Court is even cognizant of this problem.

Finally, the question remains whether the *Daviault* majority is correct in its vision of moral responsibility. Is it right to say that through excessive consumption a person can drink him or herself into a state of moral innocence with respect to subsequent violent acts? Two points must be made here. First, as a factual matter, the *Daviault* decision rests on the claim that drunkenness can produce a state of "blackout" in which a person can engage in complex behaviour, yet be incapable of conscious or voluntary action. The factual foundation for the existence of such a state consists entirely of the evidence of one pharmacologist, M. Leonard, who was the sole medical practitioner to testify at trial. As it turns out, M. Leonard's opinion is not shared by medical experts studying intoxication who instead believe that when a person becomes so drunk as to lose conscious control of one's actions, he or she will no longer be capable of acting.[34] Thus, the bulk of medical evidence suggests that the *Daviault* defence should never have been recognized. Perhaps more importantly now that the defence has been recognized, medical thinking suggests that the defence should *never* succeed.

Second, even if it were possible for drunkenness to induce a state of automatism, the view of the Supreme Court that people whose voluntary consumption of alcohol causes them to enter into this state are not fully responsible for their actions strikes many as counter-intuitive. To those unfettered by legal doctrine (and even to some deeply mired in legal convention), *Daviault* seems to say that those who engage in socially

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and American Law (Ithaca: Cornell University Press, 1990). Here the problem is to recognize how neutral rules will have a gendered impact in a society stratified along gendered lines.

34 D. Vienneau, "Drunkenness Ruling Said Based on Error: Intoxication Doesn't Cause 'Automatism' Researcher Says" *The Toronto Star* (12 April 1995) A2.

irresponsible behaviour — excessive drinking — will be rewarded for their actions, and the more irresponsibly one behaves — the more one drinks — the greater the likelihood of reaping the reward. To the majority of the Supreme Court this result is not only acceptable but correct because a person who has lost the capacity for voluntary action or for forming the basic intent of general intent offences simply is not morally responsible for his or her actions. That an accused lost this capacity through self-induced intoxication is irrelevant, according to the majority. What does matter is that a person in this state is not *as morally blameworthy* as a person who consciously engages in the same conduct. This difference in moral blameworthiness means that it would be wrong to convict an extremely drunken offender of the same offence as the person who offends while sober.

Again, this line of reasoning is neither self-evident nor indisputable. It is not obvious why a person who commits a violent act while extremely intoxicated should not, to borrow language used often by philosophers, fully own the consequences of his or her action. To make this point another way, is it right to say that a person is morally innocent who has, through socially irresponsible conduct, placed himself or herself in a state in which he or she is no longer able to control his or her actions? Is the difference in moral blameworthiness between the voluntarily intoxicated accused and the sober accused so great that the principles of fundamental justice forbid convicting the two of the same act? In my view, the answer to this question is not as straightforward as the majority of the Supreme Court suggests. While the majority can say that its view is consistent with the notions of *mens rea* and *actus reus*, the *Daviault* case raises questions about whether these concepts as we currently interpret them are fully synonymous with the norms of moral responsibility that should animate our criminal law.

This line of questioning brings me to Bill C-72, the government's proposed legislation. Bill C-72 attempts to limit the scope of *Daviault* by providing that self-induced intoxication cannot be a defence for crimes that include "as an element an assault or any other interference with the bodily integrity of another person." In restricting the defence, the Bill explicitly takes issue with the *Daviault* majority's view of moral responsibility. Rather than viewing the extremely intoxicated as morally innocent, the Bill provides that people who reach this state of intoxication "depart[] markedly from the standard of

reasonable care generally recognized in Canadian society and [are] thereby criminally at fault." In essence, the Bill states that people who commit an offence of violence while in a state of self-induced intoxication are criminally negligent and can be held fully accountable for their actions.

In putting forward legislation which directly conflicts with the Supreme Court's reasoning, Parliament may be seen to be adopting an "in your face" response to *Daviault*. The grounds on which the government believes this approach to be justified are clear from the Bill's preamble. The preamble acknowledges many of the feminist concerns with the impact of *Daviault* on women, including the fact that "violence has a particularly disadvantaging impact on the equal participation of women and children in society." In addition, the preamble states that:

> the Parliament of Canada shares with Canadians the moral view that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it.

Bill C-72 indicates Parliament's belief that it can simply legislate its view of moral responsibility in spite of the Supreme Court's endorsement of a very different conception. How the Supreme Court of Canada responds to this approach remains to be seen.

THE EMPIRE (OF LAW) STRIKES BACK

A REVIEW OF *CONSTITUTIONAL LAW IN THEORY AND PRACTICE*
by David Beatty (Toronto: University of Toronto Press, 1995)

Thomas M.J. Bateman*

It is now trite for academics, especially political scientists, to say that law is politics. For this reason it is refreshing and stimulating to read a vigorous defence of the integrity of law. For some time now David Beatty has trenchantly defended the integrity of law and judicial review against the charges of legal realists and Charter sceptics.[1] His *Constitutional Law in Theory and Practice* follows closely in line with his earlier work. One can normally expect that scholars, in response to criticisms of earlier work on a subject, will in their subsequent publications on the subject be chastened and tentative, couching their claims in more qualified terms. But Beatty's defence of the integrity of law and constitutional review is, if anything, more sweeping than his past efforts.

Beatty argues that two basic rules of law undergird constitutional review and render it coherent as well as neutral and objective. They go by various names but can most conveniently be called the rule of proportionality and the rule of necessity. Even when courts do not clearly explain their decisions with reference to these rules, the rules can usually be understood to support the results. These rules are only loosely related to actual constitutional texts. Constitutional review is more about the justification of government conduct than the interpretation of constitutional provisions. The rules coherently apply, argues Beatty, equally to federalism review and to civil liberties issues. The two rules of constitutional law confirm the legitimacy of judicial review in liberal democracies; they are valid across time and space. The judicial record in all liberal democratic countries with written constitutions evidences the universality of the two

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1 In particular, see D. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston and Montreal: McGill-Queen's University Press, 1987); *Talking Heads and the Supremes: The Canadian Production of the Constitutional Review* (Toronto: Carswell, 1990), and "Human Rights and Constitutional Review in Canada" (1992) 13 Human Rights L.J. 185-196.

principles. Many court decisions, however, fail to incorporate these rules. In these cases, Beatty avers, courts either betray an inappropriate judicial deference to the legislative branch or an unwarranted exercise of arbitrary judicial discretion.

These are weighty claims to make at a time when any claim of universality in politics and law is hotly contested. This review will concentrate on the meaning and coherence of Beatty's two rules of constitutional law and examine whether his distinction between justification and interpretation is sustainable. It will further examine whether the rules can coherently apply to both federalism and civil liberties review. Involved in this latter issue is whether Beatty's conception of the state fits contemporary reality. The theme running through this article is that courts and judicial review must be put in proper institutional context, one in which inter-institutional dialogue is the hallmark of constitutional government.

First, some comments about the book's style. This is an accessible, readable treatment of what can be, for the non-specialist, a technical, difficult subject. Beatty has dropped the use of annoying and distracting metaphors like that of a review of a musical performance used in *Talking Heads*. Instead, Beatty writes directly, anticipating readers' reactions to his argument. In one sense, he writes too directly. Some key Supreme Court of Canada decisions figure prominently in his analysis and are mentioned frequently: *R. v. Oakes*,[2] *Westendorp v. The Queen*,[3] *Citizens Insurance Company of Canada v. Parsons*,[4] and *R. v. Crown Zellerbach of Canada Ltd.*[5] Yet they are scarcely summarized, so readers unfamiliar with the cases are given little sense of the factual contexts in which the rules of constitutional law operate. In another sense, he does not write directly enough. Steps in the argument are covered several times in different places. Formulations of the rules of constitutional law are strewn throughout the text. One wonders if it could have been tightened up by removing some needless repetition. Notwithstanding this, the reader is presented with a cogent defense of constitutional review.

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2 [1986] 1 S.C.R. 103.
3 [1983] 1 S.C.R. 43.
4 (1881) 7 App. Cas. 96.
5 [1988] 1 S.C.R. 401.

Theory versus Practice

Beatty's strategy is implied in the title of the book. He makes a crucial distinction between constitutional review properly carried out and constitutional review as actually conducted by Canadian and other courts. The chasm between theory and practice is of course the cause of much disillusionment among "progressives" and "human rights activists" about the ability of courts to advance the values of personal autonomy and equality. But Beatty counsels against despair. On the one hand, the distinction between theory and practice is important because empirical evidence showing that courts do not follow the patterns of judicial review he recommends will not be fatal to his argument. Though judges do the wrong things, he suggests, the possibility of objective, neutral, principled judicial review is unimpaired.

On the other hand, Beatty wants to ground proper judicial review in the actual decision making processes of courts and so cites decisions which illuminate his preferred scheme. Why is it important to show that proper judicial review *is* being practised to a greater or lesser degree by courts? The answer seems to lie in his desire to avoid a purely normative argument about how judges *ought* to read the constitution, a strategy which would merely pit his preferences against those of others. What the reader is not told is the degree to which judicial decision making currently conforms to Beatty's model. If the lion's share of judicial decision making departs from his theory, then the argument appears largely prescriptive. Is Beatty picking and choosing among cases to cite the ones conforming to his model, or is he building a theory based on the broad sweep of court decision making? Readers are left wondering.

The Rules of Constitutional Law

Beatty's test for the integrity of constitutional law is this: "If judges are not governed by rules of law — if the rule of law has no definite, determinate meaning that can distinguish laws that are constitutionally valid from those that are not — judicial review should have no place in a society that claims a liberal-democratic pedigree."[6] There are two basic rules of law that comprise "general

[6] D. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 15.

standards of justice"[7] and that "give expression to timeless ideals of equality, justice, and personal autonomy."[8] These rules "are universal in space as well as in time,"[9] judicially-developed tests to reduce sweeping, grandiose constitutional provisions into manageable terms.

The first rule he variously calls "proportionality," "balance," "consistency," or "anti-discrimination." It concerns a weighing of the purposes of impugned legislation against the interests of individuals, groups, or other orders of governments affected or impaired by that law. In his words, this rule "requires the court to do a kind of 'cost-benefit' analysis to ensure that the gains to the community that the law is intended to provide outweigh the loss of personal freedom or restriction of another's government's jurisdiction that it entails."[10] In this formulation, the proportionality rule seems to require a weighing of competing interests: those of the legislature against those of affected parties. This, Beatty notes, is how courts have sometimes understood it. But he insists that the proportionality rule does not require the court to pronounce upon the constitutionality of a legislative purpose. "Properly applied, proportionality acts as a consistency constraint in which governments and their officials are made to respect a basic standard of equal treatment. Rather than permitting judges to weigh competing interests affected by a law against some independent, external standards of their own, the proportionality principle asks how the particular balance that is struck by a law compares with how earlier legislators and Governments have reconciled similar interests in the past."[11] In this formulation, proportionality is a rule of comparative analysis requiring courts to impose a standard of equal treatment among similar (but not identical) interests affected by laws.

Beatty's second rule or "test" is variously called "rationality" or "necessity." Its closest counterpart in Supreme Court jurisprudence is the "least drastic means" or "minimal impairment" branch of the *Oakes* test for applying section 1 of the Charter. Here courts decide whether the legislative means or policy

7 *Ibid.* at 104.
8 *Ibid.* at 103.
9 *Ibid.* at 104.
10 *Ibid.* at 16.
11 *Ibid.* at 152.

instrument used to attain a legislative objective was the "best available."[12] Defenders of a law before a court must show that no alternative means were available to them that would have allowed them to accomplish their purposes "in a way that displayed more respect for the freedom of individuals or the sovereignty of other governments. They must establish that it really was necessary for them to follow the route that they did."[13]

Together these two principles constitute a judicial test of legislative methodology. Never, notes Beatty, has the Supreme Court in the post-*Oakes* era invalidated a law because the law's objectives were unconstitutional. Courts have, however, been able to find laws wanting on grounds of legislative "overkill":[14] either the importance of the purpose of the law was "outweighed" by its effect on others' interests, or more commonly, the means used to attain an objective were more intrusive than necessary. In this sense, claims Beatty, constitutional review is compatible with democracy. Governments pronounce upon democratic objectives; courts pronounce upon the constitutionality of means and consistency in the use of state power. Democracy and liberal freedom are preserved and advanced.

These formulations of the rules of constitutional law raise several questions. To take proportionality first, Beatty insists that the rule does not require judges to pronounce upon the objectives of a law set by a legislature. This is doubtful. In another formulation of the rule, the reader is left wondering whether such pronouncements can be divorced from proportionality analysis:[15]

> Proportionality does not tell a court to put the public interest and constitutional rights that are affected by a law on opposite sides of a balance or scale and read off which is the more substantial (viz., weightier) of the two. Proportionality requires judges to examine the impact the law has on various interests/rights that it affects separately. The idea is to measure how critical the law is to each of the interests/rights involved rather than judge their relative worth (weight) against each other. The critical judgement is more like one made by an inspector who examines how much wine has been decanted from two casks containing different vintages than a decision made by a taster whose job is to say something about the quality (worth, substance) of each. The really critical question for a court is how

12 *Ibid.* at 16.
13 *Ibid.*
14 *Ibid.*
15 *Ibid.* at 154.

deeply the challenged law cuts into each interest or right — how much wine it draws off from each cask.

Despite the mechanistic metaphor of the measurement of quantities of wine, the distinction made between "weighing" competing interests and "measuring" how critical a law is to an interest is unclear. One seems as discretionary as the other. To compare the weight of one interest with that of another is precisely to make a judgement of worth. And the very identification of an interest implies a judgement as to its nature, depth, and importance. Such judgements are as political as they are legal. Madame Justice Beverly McLachlin, before her ascent to the Supreme Court, wrote that section 1 analysis requires the court to make a judgement "of a political rather than a legal nature. The answer cannot be determined by logic or stare decisis, even assuming precedents were available; the answer resides ultimately in the values of the court deciding the case."[16] Even Bertha Wilson, one of Beatty's most favoured Charter interpreters, argued that "the alleged dichotomy between law and policy [is] quite unsupportable. Policy considerations have always to a greater or lesser degree been an essential component of judicial decision-making .... The Charter has not changed that: it has simply brought it more dramatically to the fore."[17]

This is not necessarily fatal to the legitimacy of judicial review. It is, however, damaging to Beatty's conception of what judges do. In his comparative assessment of judicial review in the United States, Germany, India, Japan, and the European Court of Human Rights, Beatty explains widely divergent decision-making practices in terms of different degrees of judicial restraint and activism across jurisdictions. In addition, the differences occur "because of different perceptions that judges may take of the relevant factual (evidentiary)

[16] Hon. Madame Justice Beverly McLachlin, "The Charter of Rights and Freedoms: A Judicial Perspective" (1989) 23 U.B.C. Law Rev. 579 at 583. LaForest J. agrees: "We undoubtedly derive assistance from a principled approach and the development of the relevant criteria [for balancing interests in the Charter], but in the end we must select what we think is the best balance between competing interests in the particular circumstances before us. That is what we are there for" (Hon. Mr. Justice Gerard LaForest, "The Balancing of Interests Under the Charter" (1992-1993) 2 N.J.C.L. 133 at 162).

[17] B. Wilson, "Building the Charter Edifice: The First Ten Years" in G.-A. Beaudoin, ed., *The Charter: Ten Years Later* (Cowansville: Les Editions Yvon-Blais Inc, 1992) 93 at 97-98.

material and the legal and cultural background against which the principles are applied."[18] But does this not mean that different weights are attributed to different interests across jurisdictions? If so, judicial review looks less neutral, objective, and universal than Beatty would have us believe.

Regarding the second rule of constitutional law, rationality, much the same problem appears: it is doubtful that the assessment of legislative means can be neatly separated from an assessment of legislative objectives. In the case of Canadian Charter jurisprudence, the determination of legislative objectives is "inevitably a discretionary choice" and judges frequently disagree among themselves about the objective any particular impugned law was designed to advance.[19] Legislative objectives are frequently determined by reference to the means used to attain them.[20] Yet the objective cannot be coextensive with the means. If it were, then the proportionality branch of the *Oakes* test would be left with no work to do and judges would be left merely to pronounce on the constitutionality of the objective. On the other hand, if the legislative objective were expressed so generally as to be uncontroversial, then a law serving such a putative objective would almost never be judged to be the "least drastic means" to attain it. The definition of the legislative objective is itself a discretionary exercise in balancing and in any event cannot be hived off from a consideration of legislative methods alone. I will return to problems of the rule of rationality when I consider the relationship between federalism and civil liberties review.

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[18] Beatty, *supra* note 6 at 145.

[19] P. Hogg, "Section 1 Revisited" (1991) 1 N.J.C.L. 1 at 7; J. Hiebert, "The Dilemma of the Charter: Is Judicial Deference Appropriate?" Paper presented to the 66th Annual Meeting of the Canadian Political Science Association, Calgary, June, 1994 [unpublished]. Judges often have recourse to legislative history for help in determining the objective of legislation. Beatty's position on this is not clear, but one would surmise that he would regard the practice as, if not illegitimate, then at least futile. He argues elsewhere in the book that the search for drafters' intent for written constitutional documents is in vain because the multifarious opinions and perceptions of many contributors cannot be reduced to a single clear intention. If this is the case for constitutional texts, it must also be the case for legislation which passes through several collective bodies before proclamation and is the subject of turbulent differences of opinion as to purpose and scope.

[20] R. Moon, "Stop in the Name of Sense: Comment on David Beatty's *Talking Heads and the Supremes*" (1992) 42 U.T.L.J. 228.

Justification versus Interpretation

For Beatty, judicial review is about justification, not interpretation, and this is for two reasons. First, constitutions bind governments and guarantee an environment of liberty and equality for citizens; governments should bear the burden of demonstrating before a court that their activities are constitutional. Governments are more often the violators than the guarantors of rights. The onus ought to be on them to disprove this presumption in particular cases. Second, judicial review as interpretation is beset with a variety of familiar problems: determining drafters' intent, being chained to frozen concepts, and, in general, dealing with the imprecision of language. As Beatty puts it in his discussion of the prolixity of the Indian constitution, "words can only limit, never expand, the protection that a constitution can provide"(121).[21] The novelty of Beatty's approach is that it seeks to establish the neutrality and objectivity of judicial review without recourse to doctrines of interpretivism. Customarily, interpretivism is associated with the search for a stable conceptual foundation for judicial review, immune to the political forces of the day. Noninterpretivism is linked to the use of courts for the attainment of social and political goals not contemplated by constitutional founders.[22] Beatty wants to break out of these associations.

If words in a constitutional text get in the way, what informs judges about what the constitution is all about? To answer this, he distinguishes between the words in the text and the "structure" or "logic" of the text.[23] In respect to federalism, his assessment of the *Constitution Act, 1867* reveals to him that underlying the sections on the federal division of powers is "the federal principle" — two coordinate orders of government, each maintaining sovereign status. When the two principles of constitutional law are applied to the federal principle, two federal tests are produced. One is the idea of "mutual

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21 Note, however, that he does not think words are meaningless. He objects to the inclusion of social rights in the constitution because they would force courts to trench upon the legislative role (158-160). Arguably this concession to the importance of the text is more a contradiction than a qualification of his essential position on the status of the text in constitutional review.

22 R. Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson, 1992) c.5.

23 Beatty, *supra* note 6 at 24, 63-65.

modification" whereby one government's authority cannot be interpreted to subsume or extinguish a related head of power of the other order of government. This is the proportionality rule applied to federalism. The second principle is "concurrency," according to which judges interpret the division of powers to maximize the powers of each order and thus encourage shared jurisdiction over policy areas. These, Beatty argues, emanate logically from the federal principle, no matter how much they conflict with words in the text of the written constitution referring to "exclusive" powers of the two orders of government.

When considering federalism review, one may sympathize with Beatty's desire to distinguish structure from text. It is tempting to say that the words of the *Constitution Act, 1867* reveal no coherent federal vision of the country. While the "federal principle" is a plausible way to understand the federal division of powers, it has not been the only way. A long tradition of scholarship decries the movement from Sir John A. Macdonald's vision of a highly centralized quasi-federation to a federalism exalting Canada as a collection of provinces.[24] And even if we accept that the federal principle is found in the structural meaning of the federalism sections of the constitution, it is still not clear that the principles of mutual modification and concurrency are the only operational rules to follow from it. Myriad demands to disentangle the two orders of government and return to a more compartmentalized federal system are heard from Quebec and other provinces — even from within the federal government. Further, what about the idea of subsidiarity as an operationalization of the federal principle?[25] Subsidiarity does not even rate a mention in the book, even though it is a regular component of European debates on federalism.[26] The Supreme Court's decision in *Crown Zellerbach* is as much an example of the principle of subsidiarity as it is the principles of mutual modification and

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24 For example, G. Stevenson, *Unfulfilled Union*, 3rd ed. (Toronto: Gage, 1989).

25 In general terms, the principle of subsidiarity provides that policy matters should be handled by the unit of government closest to the affected population unless a higher level of government can do so more effectively and efficiently.

26 M. Burgess, "The European Tradition of Federalism: Christian Democracy and Federalism" in M. Burgess and A.-G. Gagnon, eds., *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Toronto: University of Toronto Press, 1993) at 138; L. C. Blickner and L. Sangolt, "The Concept of Subsidiarity and the Debate on European Cooperation: Pitfalls and Possibilities" (1994) 7 Governance 284.

concurrency.[27] While interdependence and shared jurisdiction may be the federal vision currently favoured, it is not the only one, and indeed may be the product of a judicial recognition that federalism review does not make much difference in the federal arrangements of a country.[28]

In civil liberties review, it is the structure of the Charter, not the substantive provisions, that guides judges. Here, the presence of section 1, setting up the courts' interpretive approach to the Charter, is crucial.

But if the words do not stipulate the interests of those opposed to the coercive power of the state, then what does? The advantage of the interpretative approach is that it claims to find the interests to be balanced embedded in the words of a constitutional document. Noninterpretivism raises the spectre of judges producing justiciable social and political values *ex nihilo*, a problem that seriously undermines the neutrality and integrity of constitutional review. How do we know the interests whose breach must be justified by governments before the courts? Beatty's answer echoes that of the Supreme Court in *Oakes*. He refers to the *purposes* of the Charter. As outlined in *Oakes*, the purposes behind the substantive provisions as well as the limitation on rights are the following: "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society ...."[29] This creates as many problems as it solves for Beatty's emphasis on justification in constitutional review. Where do these purposes come from — the intentions of the drafters, the text itself, a broader analysis of Canadian liberal democracy? Is the list of purposes exhaustive? Are the purposes mutually compatible? Do they have equal weight? Does the weight of each purpose vary with circumstance? If

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27 P.C. Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 N.J.C.L. 341.

28 P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 224-240. While Beatty cites Supreme Court decisions to show that federalism review makes a difference and that the principles of constitutional review "really do have some bite" (49-50), Monahan cites some of those same cases to show how federal and provincial governments got around the Court's rulings.

29 Quoted in Beatty, *supra* note 6 at 66.

so, which purpose has what weight in which circumstances? Beatty makes things seem simpler than they really are.

This emphasis on structure and purpose versus the words of the constitution provides the analytical basis for the notion of constitutional review as justification. But is it sustainable? Can the structure and purposes of a constitutional document be so neatly hived off from the words comprising it? If the words were redundant, then one may wonder what *should* go into a written constitutional document. Clearly the Supreme Court's identification of the purposes of the Charter was not drawn from thin air but was distilled in some fashion from a reading of the substantive provisions of the Charter. Surely the words mean something, otherwise there would not have been such heated debate between the federal government, the provinces, and various interest groups in 1981 over the wording of sections 1, 15, 25, 28, and 33 of the Charter. Drafters made clear reference to the experiences in Canada under the Bill of Rights and to the United States when they put pen to paper. Wordings of several provisions were intended specifically either to avoid or incorporate certain constitutional principles. And the structure of the Charter itself depends on the existence of section 1 and the way it is drafted. Indeed, Beatty himself refers at several points in the book to the explicit wording of provisions in the *Constitution Act, 1982* to support arguments that certain judicial interpretations are invalid.[30]

Universality and Particularity

There is a deeper reason for Beatty's distinction between structure and text. This has to do with his desire to demonstrate the *universality* of objective, neutral, and principled constitutional review. While constitutional texts differ from place to place, Beatty argues, the basic decision-making approach remains constant across time and space. This raises more questions about the relation between text, structure, and the rules of constitutional law. If the texts differ from country to country, are they nonetheless similar enough to reveal a common structure grounding the principles of proportionality and rationality? Or is structure independent of text? If this is so, then the structure or logic of the constitution must inhere in the concept of constitution itself. Or do the rules of

[30] *Ibid.* at 85-87, 91.

proportionality and rationality have no relation either to the words or the structure of the constitution, being in this case purely abstract principles?

If the latter is true, then where do they come from? The answer must be liberalism. The common theoretical thread linking the countries examined in the book is that they are liberal democracies with written constitutions subject to judicial construction. Beatty hints that it is liberalism that informs the rules of constitutional law when he suggests that the judicial function is primarily methodological and negative. It is methodological in the sense that courts pronounce only upon legislative means to arrive at democratically determined objectives. It is negative in the sense that courts tell governments when they go too far, determining what governments cannot do rather than what they must do.

Two comments can be made about this. First, it is difficult indeed to derive constitutional rules of proportionality and rationality from a collection of ideas as controversial and various as those associated with liberalism. In any event, Beatty makes no such attempt. Second, insofar as the words of the text do matter in constitutional review, Beatty must contend with the rich diversity of constitutional documents liberal democracies share. To take the Canadian case alone, many commentators and the Supreme Court itself have repeatedly noted the differences between the American and Canadian documents. For every Andrew Petter and Allan Hutchinson who proclaim that the Charter represents the planting of the purest liberalism on Canadian soil,[31] there is a David Elkins who traces the distinct, unique Canadian balances between community and individual in the Charter.[32] If the words of a constitutional text do not matter, then the universal constitutional rules must be so general as to be arid and uninformative. Readers of Beatty's book will have to decide for themselves whether his two rules are universal and, if so, whether they are specific enough to be meaningful. There are reasons to be sceptical. One cannot isolate the legal and judicial process from broader cultural patterns.[33] To take one example,

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31 A. Hutchinson and A. Petter, Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 University of Toronto L.J. 278.

32 D. Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness" (1989) 22 C.J.P.S. 699.

33 W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

Japanese culture has traditionally emphasized personal rather than legal authority, a trait revealed in the strength of the administrative arm of government. One observer reports that Japanese laws are numerous and strict but bureaucrats are given wide discretion to enforce them. Consequently, civil servants can exercise a great deal of informal power over those to whom the laws technically apply.[34] Beatty admits of cultural variation in judicial performance but does not take it as seriously as he might.

Constitution, State, and Society

Judicial review was traditionally premised on the judicial protection of rights and liberties threatened by an intrusive, overreaching state. The notion of "state as enemy of freedom" has an impressive philosophical pedigree but fits awkwardly with the realities of the large welfare state. Three related points indicate the awkwardness of the fit. First, while minimalist liberals fear the untramelled trespasses of the state on the individual's rights, others convincingly suggest that problem with the contemporary state is that it is incapable of effective action at all. Second, the minimalist view of the state is also at odds with the view that the modern welfare state is seen an instrument of human liberty, not its enemy. Third, the contemporary state is deeply involved in the identities and fortunes of groups defined by all manner of territorial and non-territorial social characteristics. "The state," argued Alan Cairns in 1985, "is no longer meaningfully visualized as an aloof, distant, unitary actor presiding over a relatively autonomous society and economy for which it provides a limited bundle of public services and enforces a few durable rules of the game." It is better understood as "embedded in, or tied down to, the society it serves and has a responsibility to lead."[35]

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[34] E. Fingleton, "Japan's Invisible Leviathan" (1995) 74:2 Foreign Affairs 69; L. Pye and M. Pye, *Asian Politics and Power: The Cultural Dimensions of Authority* (Cambridge, MA: Belknap Press, 1985).

[35] A.C. Cairns, "The Embedded State; State-Society Relations in Canada" in *State and Society: Canada in Comparative Perspective* (Toronto: University of Toronto Press, 1985) 53 at 56-57. On the increasingly non-territorial character of sovereignty — what some call the appearance of social federalism — see D. Elkins, *Beyond Sovereignty: Territory and Political Economy in the Twenty-First Century* (Toronto: University of Toronto Press, 1995).

The courts have grappled with varying degrees of success with the constitutional implications of these contrasting views of the Canadian state. Bertha Wilson wrote eloquently of the evolution of the Canadian state in *McKinney* v. *University of Guelph*,[36] noting its more positive contemporary role in furthering human dignity and social development. Yet even she would snap back, in spasms of classical liberalism, to Lockean images of rights as fences around the human body over which the state must never leap.[37] The Supreme Court has tried to accommodate different views of the state by imposing different standards of section 1 justification on governments when they defend the constitutionality of different types of laws. Criminal legislation conforms most closely to the image of state as enemy of freedom, while social and economic legislation, the Court has suggested, accords with the image of the state as instrument of human freedom. A strict standard of justification should apply to criminal laws and a more relaxed standard should apply to the justification of socio-economic legislation.[38] Yet it has not been consistent on the point, not least because almost any law, including criminal law, can be understood as an legislative attempt to reconcile competing societal groups and interests.

Beatty's analysis betrays a similar ambiguity about the nature and role of the state. He is no classical or neo-liberal, but for him the state is more the obstacle to than the facilitator of personal autonomy; hence his fears that the state might intrude more than necessary to achieve a legislative objective. He writes of the state "going too far," and engaged in "overkill," rhetorical codes that push all the right liberal buttons. He argues that the Supreme Court is at its best when it portrays the state as a singular antagonist and accordingly imposes a stringent section 1 test on justifications of rights infringements. He considers the Court's relaxation of the minimal impairment branch of the *Oakes* test to be an abdication of the Court's supervisory role. A tough justificatory rule, he insists, should be imposed on government in all cases.

But is it not true that much legislation *does* in fact balance or reconcile the claims of different social groups? And should not the Court defer to the

[36] [1991] 2 C.R.R. (2d) 1.

[37] See for example, *R. v. Morgentaler* (1988) 44 D.L.R. (4th) 385 at 485.

[38] See *Irwin Toy Ltd. v. Quebec* [1989] 1 S.C.R. 927, esp. 993-994.

particular choices legislatures make to reconcile given constellations of complex social forces? One does not have to depict Parliament as the vessel of all wisdom and truth to acknowledge the merit of notions of institutional capacity and competence. More fundamentally, there is something quaint about the image of the all-powerful state ready to pounce on unsuspecting citizens unless reined in by a vigilant court. The contemporary state is a more complicated thing. The mythic struggle between individual and society is more a rhetorical construct than an accurate portrayal of society as a collection of various groups organizations and identities.[39] And it is not obvious that the Charter is always the friend of the weak and vulnerable. Legislation often serves the interests of the vulnerable against the interests of the more powerful. A strict section 1 test can simply nullify such legislative determinations. As Gerard LaForest put it, "those who invariable support stringent tests for the constitutional validity of legislation under the Charter are not always on the side of the angels."[40]

Beatty's view of the state has implications for his claim that the two rules of constitutional law apply coherently to both federalism and civil liberties review. When applied to federalism, the principles of proportionality and rationality serve to expand the policy room of governments. Mutual modification tends to limit the powers of one order of government to preserve the jurisdiction of the other, while concurrency serves to maximize the policy room of both orders. On the other hand, the two principles serve generally to restrict the power of government when applied to Charter challenges. The two principles appear to apply contradictorily. Beatty responds:[41]

> The differences in the results of the federalism and human rights cases are not caused by the courts applying the principles of rationality and proportionality deferentially in the former and more aggressively in the latter. Rather, the outcomes diverge because in federalism cases the overarching commitment to the independence and sovereignty of two levels of government usually argues for upholding the law, while, when human rights are at stake, the logic of equality, personal autonomy, and human dignity on which the Charter is based results in more findings of constitutional invalidity.

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39 A. Arblaster, *The Rise and Decline of Western Liberalism* (New York: Basil Blackwell, 1984), 49-50. See also, Bogart, *supra* note 33 at 91.

40 LaForest, *supra* note 16 at 148.

41 Beatty, *supra* note 6 at 100.

Human rights issues, he argues, are of a zero-sum character so competing interests cannot be managed by maximization.[42] Fundamentally, he asserts, there is no tension between constitutional review of human rights and federalism.

There is reason to question this conclusion. The federal principle could be construed to require deference in human rights as well as federalism review. Remember that Beatty's argument requires that courts apply stringent standards of justification upon governments found to have infringed rights. So if a provincial law is found to violate a Charter right, the government defending the law would have to show that the law represented the least drastic means available to achieve the legislative objective. The effect of a strict section 1 test, though, is to set a constitutional standard that other provinces' legislation must meet. If the federal principle means anything, it means that provinces possess some policy room to implement policies according to local conditions. Accordingly, the effect of the federal principle is to relax the minimal impairment standard in the *Oakes* test as the Supreme Court of Canada did in *R. v. Edwards Books and Art Ltd.*[43] Yet such a relaxation Beatty considers anathema: "There is no more justification for applying the tests of constitutional legitimacy deferentially in some cases than in refusing to apply them at all .... Nowhere does the Charter say that judges have the authority to differentiate between types of law in the intensity of review to which they will be subjected. Section 52, proclaiming the supremacy of the constitution, refers to 'any' law and speaks in absolute terms."[44] His favoured strict justificatory requirement places Charter jurisprudence in conflict with the federal principle.

As Alan Cairns has so frequently noted, the Charter and federalism are two constitutional pillars representing two distinct forms of community: non-

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42 *Ibid.* at 101.

43 [1986] 2 S.C.R. 713. See also Hogg, "Section 1 Revisited" *supra* note 19; P. Hogg *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 879; Knopff and Morton, *supra* note 22, chapter 13; and J. Hiebert, "The Charter and Federalism: Revisiting the Nation-Building Thesis" in D.M. Brown and J. Hiebert, eds., *Canada: The State of the Federation, 1994* (Kingston: Institute of Intergovernmental Relations, 1994) 153. Hiebert argues that section 1 is actually the bulwark of judicial deference to legislatures, not the linchpin of a strict justificatory standard governments have to meet.

44 Beatty, *supra* note 6 at 91, 97.

territorial and territorial.[45] Clashes between these two forms of community can appear as conflicts between an individual and a wider collectivity, thus conforming to the traditional liberal model of competing interests. Often, however, these conflicts are best understood as clashes of competing community or group interests, either between territorial interests (federal-provincial conflict in its common form), between territorial and non-territorial interests, or between versions of non-territorial interests. How does the liberal ideal of personal autonomy figure in these clashes? The question is exceedingly complex since personal autonomy is, as many theorists now suggest, intimately bound up with group associations and memberships.[46] Judicial deference to legislative balances is wise in the circumstances.

Finality versus Dialogue

As mentioned above, Beatty draws a clear line between theory and practice. The theory is pristine. Judicial practice, however, is a messy, muddled record punctuated by the following errors: reading ss. 91 and 92 as watertight compartments; interpreting POGG alternatively as swallowing provincial jurisdiction or as a federal emergency power; shielding private law from Charter application; imposing onerous requirements on persons claiming a Charter violation; imposing definitional limits on the rights protected by the Charter; and varying the stringency of section 1 analysis according to the type of legislation under review. But the gap between theory and practice, we are assured, is not hopelessly wide and can be significantly narrowed by some institutional engineering.

A surprise recommendation appears at the end of the book — surprising not because it is unknown in Beatty's other work but because it seems at odds with

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[45] This theme permeates Cairns' work but is concisely stated in "The Case for Charter-Federalism" in D.E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change: Selected Essays by Alan C. Cairns* (Toronto: McClelland and Stewart, 1995), 186. In the same volume see also "Dreams Versus Reality in 'Our' Constitutional Future: How Many Communities?" 315.

[46] C. Taylor, *Multiculturalism and the 'Politics of Recognition'* in A. Gutmann, ed. (Princeton: Princeton University Press,1992); Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989); and Elkins, supra note 35, c.6, esp. 180-81.

his whole argument. In the last few pages he resurrects a recommendation made in *Talking Heads*, that the review and appointment of Supreme Court judges should be the responsibility of the legislative branch of government.[47] He takes up a criticism ritually offered by left-wing Charterphobes: that judicial decision making is only as progressive as the politics of the people sitting on the bench.[48] While some would insist that even with the "right people" on the bench the institutional and structural purposes of the court — to legitimize the capitalist order and depoliticize conflict — would prevail, Beatty suggests that the right people will make the difference. "Only if methods of appointment are devised that can identify those whose commitment to the principles of rationality and proportionality is strong and uncompromising will constitutional protection of human rights realize its potential as an instrument of social justice."[49]

There are two problems with this. The first is that his recommendation would be more cogent if it were easy to separate the vigorous enforcers of the Charter from the timid. If it were all a matter of personnel and appointment, one would expect the lines clearly drawn between the "right" justices employing the two rules of constitutional law and the "wrong" ones spinning their wheels in the mire of definitional balancing, relaxed section 1 analyses, and so on. In a general sense one can make distinctions.[50] We know that Wilson was more activist than McIntyre. On the other hand, Beatty's judicial exemplars are responsible for some of the sins of a deferential court. Dickson wrote the seminal *Oakes* decision but also contributed an opinion in *Edwards Books* that backed away from the strict minimal impairment standard. Wilson imposed a definitional limit on section 2(a) in *R.* v. *Jones*.[51] The issue cannot simply be court membership.

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47 "In personal terms," Beatty argued in 1990, " consent by the legislature means that ultimately it is for the people to decide whether, when the next vacancy occurs, they want to appoint a clone of William McIntyre or Bertha Wilson to the Court." See Beatty, *Talking Heads and the Supremes*, *supra* note 1 at 262.

48 R. Martin, "Ideology and Judging in the Supreme Court of Canada" (1988) 26 Osgoode Hall L.J. 797. Also R. Sigurdson, "Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics" (1993) 5-6 International Journal of Canadian Studies 95.

49 Beatty, *supra* note 6 at 158.

50 A. Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judge Hears an Appeal" (1991) 24 Canadian Journal of Political Science 289.

51 [1986] 2 S.C.R. 284.

The second problem is that the emphasis on court personnel undermines his claims about the objectivity and neutrality of the law. Judicial appointment is shielded from overt public and political participation precisely to preserve the aura of independence and impartiality undergirding the legitimacy of the judicial function. The current appointment process does not produce political eunuchs. No process can, because there are no political eunuchs to appoint. The important consideration here surely is legitimacy. It is hardly possible to open up the process without further politicizing it, and it is not possible to see how further politicization would advance Beatty's purposes. Beatty wants to open it up for the opposite reasons — to select people who will vigourously enforce the "objective" principles of proportionality and rationality. But these principles, for the reasons suggested above, are not neutral; they will not be perceived as neutral when defended in the public forum; and they will in any event be associated with all manner of ideas, interests, claims, and theories in what will inevitably become a politicized *melee*.

All this is simply to say that courts, *especially* when they engage in constitutional review, are functioning agents in the political order. In Europe constitutional courts have been described as "third chambers" to denote their integral role in the legislative process.[52] The centrality of the United States Supreme Court in American politics hardly needs comment. Recognition of this fact need not jeopardize the idea of constitutional review. It should however, lead to a fuller appreciation of the political role of courts.

A degree of institutional fungibility knits the three branches of government together. Contrary to the Dworkinian typology, courts are not the only forums of principle and legislatures are not the only forums for pragmatic politics. The separation of powers turns out to be a misnomer: the constitutional principle is actually a separation of institutions and a (limited) sharing of powers.[53] Courts and legislatures observe different formalities and speak in different dialects, but they do converse. Thus the constitutional separation of powers Beatty discerns in the legislative pronouncement upon ends and the judicial pronouncement

[52] A. Stone and M. Shapiro, "The New Constitutional Politics of Europe" (1994) 26 Comparative Political Studies 397.

[53] D. Verney, *The Analysis of Political Systems* (London: Routledge & Kegan Paul, 1959) at 40-41.

upon methods can also, and perhaps more persuasively, be evident in the ways in which the judicial branch engages in a dialogue with the others on the ends and means of legislation.[54] Courts are, of course, aware of this relationship. They suggest how laws can be tailored in constitutional terms and they prompt legislatures to deal with issues left unattended for too long.[55]

This is a more modest understanding of constitutional review than Beatty's, but it may be the more realistic. And it should not be threatening to formalists like Beatty. In fact, judicial finality arguably produces restraint, since courts' mistakes can only with difficulty be corrected. The dialogue model, conversely, can allow them to proceed vigorously, knowing that judicial errors can be corrected by their interlocutors. The Supreme Court's recent controversial decision in *Daviault* v. *The Queen*[56] is a case in point. Here, Sopinka J. in dissent noted that if Parliament had thought the unavailability of the drunkenness defence for general intent crimes was wrong it could have changed it, as the Supreme Court had suggested in 1978 when it considered the issue. He thought it unwise to disturb this social policy. "Parliament is free to intervene," Sopinka wrote, to alter its policy.[57] While Parliament did not intervene to change the drunk defence, the majority in *Daviault* did, and Parliament has promptly reacted to restore the *status quo ante* with impressive multi-party consensus. Thus the courts are a part of a continuing conversation; they win some battles, lose others. But this may be too modest and too political a vision for Beatty the formalist.

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54 Peter Russell has developed the idea of dialogue in "Standing Up for Notwithstanding" (1991) 29 Alberta L.R. 293; see also "The Three Dimensions of Charter Politics" in J.P. Bickerton and A.-G. Gagnon, eds., *Canadian Politics* 2nd ed., (Peterborough: Broadview, 1994) 344.

55 R. Elliot, "The Supreme Court's Rethinking of the Charter's Fundamental Questions (Or Why the Charter Keeps Getting More Interesting)" in P. Bryden, et al, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life* (Toronto: University of Toronto Press, 1994) 141.

56 24 C.R.R. (2d) 3.

57 *Ibid.* at 50.

CONFEDERATION WITHOUT TEARS, WITHOUT FEARS, WITHOUT CANADA: CHILLY-CLIMATE HISTORIOGRAPHY

A REVIEW OF *BRITAIN AND THE ORIGINS OF CANADIAN CONFEDERATION, 1837-67* by Ged Martin (Vancouver: UBC Press, 1995)

Janet Ajzenstat*

Ged Martin, Director of Canadian Studies at the University of Edinburgh, and author of numerous works on Canadian topics, has written a study of Confederation like no other. On the surface *Britain and Canadian Confederation* has a limited objective: to describe British views on the provinces of British North America in the years after the Rebellions. The book's more ambitious and decidedly radical character emerges only slowly.

Five of the seven chapters explore the idea that a favourable climate of opinion in Britain facilitated British North American union. Who in Britain favoured Confederation? Who believed it possible? Martin showers the reader with data in the form of short quotations, interspersed with brief notes about the personality and background of the man or woman. He takes his excerpts from briefs, dispatches, private letters, official correspondence, minutes, gossip: evidence of years of archival work. And he gives us everything: the serious proposals for federation, rejected options, changes of mind, and expressions of personal prejudice and ignorance. He avoids chronological presentation; each chapter goes over the years again, bringing in new quotations and personages.

Martin's interest lies always with opinion rather than ideas and arguments. The shortness of the quotations, and the lack of extended exposition of ideas suggests to the reader that the British had little information about British North America (indeed Martin says outright that the British were abysmally ignorant), and that they had no coherent or developed theories about the nature of the imperial connection, or about institutions of government in British North

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America. At times the suggestion seems to be that they had no coherent theories even about institutions of government in Britain.

The approach is democratic; the ignorant, the frivolous, and the reputedly wise get equal treatment. Tocqueville's argument "that the tendency of all societies was to move towards Americanstyle democracy," is noted so that we may enjoy the *Morning Post*'s sour rejoinder that it's the tendency of all mankind to slide into sin.[1] There is no doubt that Martin has a marvellous eye for the apt and amusing phrase. Discussing British opinion on the U.S., he says of Henry Bliss, New Brunswick's agent in London: "Bliss was convinced that anyone who studied the theory and practical operation of the American constitution `must find the former an absurdity and the latter an accident'."[2] He offers no suggestion that Bliss could support this bon mot.

Earnest and principled statements get short shrift. Thus we have *The Times* on party allegiance in the colonies: a Canadian politician "sets about making a party as he would a salad;"[3] Governor Arthur Gordon on the Legislative Assembly of New Brunswick: election is "proof that a man is uneducated and is not a gentleman";[4] and Elgin on colonial federation: it "can hardly fail to become either a nuisance or a legislative Union."[5] Martin is a phrase-maker himself: "the future is a vast reservoir for procrastination and a hopeful storehouse for dreams."[6]

The question is whether Martin intends this entertaining catalogue of British ignorance to contribute to an understanding of the causes of union. Is he explaining Confederation? It is clear that he finds the familiar explanations unsatisfactory. Showing us the inadequacies of previous scholars is without doubt one of his objectives. Thus he does not believe union was necessary for the defence of British North America, or for construction of the Intercolonial

1 Ged Martin, *Britain and the Origins of Canadian Confederation, 1837-67* (Vancouver: UBC Press, 1995) at 178.
2 *Ibid.* at 150.
3 *Ibid.* at 13.
4 *Ibid.* at 140.
5 *Ibid.* at 149.
6 *Ibid.* at 191.

railway and Westward expansion of trade. Nor is he impressed by the idea that Confederation was the deliberate creation of "high-minded nation-builders."[7] Cartier's boast that Confederation would erect a "new nationality" in the northern part of the continent Martin treats as mere political rhetoric, "inconvenient froth"[8] - "inconvenient" insofar as it has led Canadian historians to "reify" Confederation, that is, to erect around it an aura of dignity and consequence.

The peculiar feature of the literature review is that Martin avoids all discussion of the theories of the historians and political scientists who have written about 1867. He scatters scathing comments about Donald Creighton as historian, for example, but says nothing about the ideas that inform Creighton's work; there is not a hint of the notion that the British connection had an impact on the Canadian political identity, a central idea for "laurentians" like Creighton. And he is silent about the academic debate, still very lively in this country, on whether Confederation was influenced by tory ideology. Martin refers to Peter J. Smith as leading authority on the ideas of the United Empire Loyalists, but fails to point out that Smith's views on the Loyalists are radically revisionist. Smith is the foremost proponent of the idea that there is no tory conservatism in Canada's past. In failing to note what it is Smith is saying about the Loyalists, Martin misses entirely Smith's differences with Creighton, and the heart of the current scholarly debate on Canada's origins. It is obvious that Martin wishes to raise a matter of substance in his discussion of Canadian scholars; the puzzle is this: what argument can he be making that does not require him to expound on their research or theories?

The fact is that Martin addresses almost none of the issues familiar from the literature. He says nothing about federalism as constitutional principle; the 1867 division of legislative power is barely mentioned. There's no discussion of the parliamentary form of government, Canadian political culture, or Canadian political ideology. He appears to be completely uninterested in the fact that a new nation began in 1867. All in all, a challenging book! Some of the strangeness stems from the fact that the Canadian reader, not unnaturally, expects a book about Canada. But it was not Martin's intention to describe the

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7 *Ibid.* at 44.

8 *Ibid.* at 67.

politics and society of British North America, and he rejects emphatically any suggestion that what he has to say sheds light on the nation after union.

Conviction grows that explaining Confederation is not what Martin is about. Certainly he never pretends that surveying British views will provide a sufficient explanation. Moreover, as he is careful to point out, the idea that British views made a difference is very close to being received wisdom. Insofar as he is offering an explanation, he is saying nothing new; his conclusion merely echoes Phillip Buckner's: "while British support was essential for confederation, it was circumstances within British North America which gave the British something to support."[9] What impresses is that Martin is as reluctant to explain Confederation as to expound on constitutional principles, or the ideas and theories of other scholars, or arguments advanced by historical figures.

The clue to this diffidence about explaining, and the key to his overall objective, lies in the chapter entitled "Canadian Confederation and Historical Explanation." By far the most interesting in the book, it shows that Martin's quarrel with the Canadian historians has little to do with whether he believes their explanations wrong. What he objects to is the very fact that they are attempting to explain. Scholars are at fault if they believe explaining an appropriate task, if they try to put events into an order, if they search for patterns in history. "Accounts of Confederation are altogether too neat and clinical," Martin says at one point.[10] "Confederation may be better understood through a blurred focus."[11]

Martin comes close to rejecting the idea of historical causation entirely. It is true that there are places where he seems to be trying put events into the kind of order that could be called an explanation; he is not entirely consistent. Nevertheless he says enough about problems of causality to give us the outline of a highly provocative thesis. To explain is invariably to be in error. When we look at the past we are able to say only that we see one damn thing, and another, and another. The best historians can do is to report some of what they find in documents. They must not reify events; they must not look for order. Above all

9 *Ibid.* at 1, 114.
10 *Ibid.* at 30.
11 *Ibid.* at 117.

they must not try to interpret the past for later generations; they must not use the past to preach. In short, Martin has been converted to postmodern historiography.

The strong version of postmodern historiography maintains that it is impossible for an author to refrain from writing history in terms of "explanations." History books are always and inevitably expressions of class, or a personal will to power, the author's ambitions, etc. The notion that the happenings of the past can be recorded truthfully and objectively is nothing but another "explanation." But Martin does not embrace this strong postmodernism. He admits that it is not possible to avoid all explanation, but he does think historians can do much to avoid injecting messages into their work. This is the point of his criticism of the Canadian historians. They could have avoided reifying Confederation; they could have avoided interpreting it as a "message for modern times."[12]

In light of the understanding that Martin is rejecting "explanation," what are we to make of this book? My first thought is an unworthy one. Postmodern historiography is most interesting when it is thoroughly debunking, when the author rips into the ideas and arguments of historical figures, and fellow historians. Martin's book would have been more exciting if he had embraced strong postmodernism. He can't engage in deconstruction of theories and arguments, because he has chosen to avoid mention of anything theoretical. He criticizes Creighton for "explaining," and "pattern-making," but never tells you what Creighton's explanations and patterns are. He has opted to demonstrate postmodern historiography by writing a history as bare of explanation as possible. Unfortunately without patterns, lively deconstruction of arguments, or chronology to keep the pace going, the reader's attention tends to wander.

The more worthy thought is that Martin is right to insist that patterns and explanations can distort and mislead. A book that explores this idea in the context of a study of the origins of Confederation is a valuable scholarly endeavour.

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[12] *Ibid.* at xi.

And yet! Think of the fact that Martin presents Henry Bliss as an opinionated know-nothing, without even a rationale to dress up his bon mot. Perhaps Bliss was an ignoramus. But could they all have been ignoramuses in this period? The problem is that if there were able and serious men in Britain in the pre-Confederation years, if the Fathers of Confederation did have coherent and serious ideas about the institutions needed to promote freedom and democracy, Martin's approach prevents us from discovering it.

Of course history-writing has sometimes been used to legitimize ruling powers, suppress free enquiry, publicize the author's own prejudices, and inculcate dangerous notions of selfsatisfied patriotism. And of course one doesn't want this kind of historiography. But in the first place it is surely not the case that Canadian scholars have given us this kind of history. Insofar as Martin's critique suggests that they have it leaves a bad taste. Canadian historiography exhibits differences of opinion among scholars, but it is impossible to believe that it tells us nothing about the past as it was.

In the second place, an account of the origins of Confederation that leaves out all mention of liberalism, federalism, democracy, political independence, and selfgovernment, an account that ignores exposition of documents, and exposition of statements by historical figures about their intentions, opens the door to historical explanation of another kind. It invites the idea that the events of history are caused by nothing more than the push and shove of petty, short-sighted, self-seeking individuals. And it inculcates the notion that there can be no sustained argument for constitutional government, liberal institutions, democracy, or federal institutions in a culturally diverse nation. One has to ask: isn't Martin's posture of disinterested perplexity as dangerous as the jingoistic historiography he is so anxious to avoid?

I find it difficult to accept the idea that historiography without exposition of political ideas and arguments tells us about the past. In fact I have trouble believing that a really good book can be written about Canadian Confederation that leaves out Canada.