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## Extreme Makeover - Contract Law Edition: A New Home for Human Rights and Social Responsibility (Lessons from Israel)

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EXTREME MAKEOVER –  
CONTRACT LAW EDITION:  
A NEW HOME FOR HUMAN RIGHTS AND  
SOCIAL RESPONSIBILITY  
(LESSONS FROM ISRAEL)

ELI BUKSPAN\*

*I. Introduction*

As recently declared by Time Magazine, “the Protester” was the “Person of The Year” of 2011.<sup>1</sup> Whether it was through participation in the Arab Spring, the U.K. riots, or Occupy Wall Street, the protester’s activism reflects the universal power of private individuals when they fail to trust principal social institutions - governments and businesses alike - all over the world. The business realm has proven to be one of the primary catalysts of the global crisis, and therefore requires acute treatment in order to regain the public’s trust.

This article suggests novel legal methods that can be used to integrate a culture of trust and the protection of human rights and social responsibility into the private sphere, based on the Israeli experience, by the contractual principles of “good faith” and “public policy,” which are cornerstone legal principles in the U.S. legal system as well.<sup>2</sup> The use of contract law and the domain of business law is not accidental – this institution may emerge as an agent of real social and legal change, both because it deals with the most common daily interactions and because of its growing social stature at a time of a weakening state and increasingly stronger private players. This

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<sup>1</sup> Kurt Anderson, *The Protestor*, TIME MAGAZINE, Dec. 14, 2011, *available at* <http://www.time.com/time/person-of-the-year/2011>.

<sup>2</sup> See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 5.1-7.17b (3d ed. 2004).

reality may signal a deep legal and conceptual transformation as contract law has traditionally been perceived as the ultimate example of private law, focused on the individual's self-interest in realizing his or her autonomy.<sup>3</sup> The thesis presented in this article holds, however, that a social approach based on solidarity and consideration for the other's expectations is highly compatible with the inherent aims of modern contract law, as well as with the complex position of private law, which is meant to regulate interpersonal relationships not only in the legal sphere, but in a broader social context as well.

As aforementioned, this article discusses this potential transformation by analyzing Israeli law, which reflects a young legal system striving to remodel basic social norms through contract law. Indeed, the application of fundamental social principles to interpersonal relations is not unique to the Israeli legal system,<sup>4</sup> but, in Israeli law, this topic seems to have evolved with great impetus.<sup>5</sup> Contract law in Israel has been undergoing fundamental changes in recent years. The development of social justifications attendant on the broad implementation of such principles as good faith, public policy, trust, and human rights in contractual and interpersonal

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<sup>3</sup> FARNSWORTH, *supra* note 2, at §1.7; P.S. ATIYAH & STEPHEN A. SMITH, *ATIYAH'S INTRODUCTION TO THE LAW OF CONTRACT* (6th ed. 2005); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993).

<sup>4</sup> See ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* (2006); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 206-08 (1992); JOHN N. ADAMS & ROGER BROWNSWORD, *UNDERSTANDING CONTRACT LAW* 112-13 (3d ed. 2000) (describing how this topic interfaces with the development of an increasingly significant trend in legal literature touching on the connection between social and legal norms). See also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

<sup>5</sup> Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933); MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 41, 69, 102 (Aechon Books 1967) (1933) (explaining how this vigorous development exposes the social-public meaning of law and creates a synthesis between private and public law.) On this issue, see the sober assertions of Morris Cohen dating back to 1933: "The law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction." *Id.*

relations points to the “social revolution” affecting Israeli law.<sup>6</sup> In essence, this reality not only emphasizes individual liberties and individual autonomy, but also the responsibility of all participants in social interactions in considering the justified expectations of “the other”—the individual or entity that is the other party in the interaction.<sup>7</sup> Israeli law, therefore, appears to be undergoing a genuine transformation in its reflection of the interpersonal and social aims of private law and in the assimilation of a culture of interpersonal trust.

The article proceeds as follows: Part II explores various aspects of the social transformation of private law in Israel, beginning with a discussion about the theoretical and practical roles of contract law—the “classic” and distinctive realm of “private” and voluntary law. This area leads to the legal assimilation of social responsibility and consideration for the expectations of others, promotes the development of a holistic approach to law, and exposes its social and public purpose. Consideration for the justified expectations of the other and for the fundamental principles of the legal system, even within the context of purely voluntary interactions, emphasizes both the “publicization” of contract law and

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<sup>6</sup> See ELI BUKSPAN, *THE SOCIAL TRANSFORMATION OF BUSINESS LAW* (2007). This phenomena is also connected to the developing debate about the constitution in the private sphere. HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedmann et al. eds., 2001); *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* (Ardras Sajo & Renata Uitz eds., 2005); *CONSTITUTIONALISATION OF PRIVATE LAW* (Tom Barkhuysen et al. eds., 2006); *HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY* (Dawn Oliver & Jörg Fedtke eds., 2007).

<sup>7</sup> This comprehensive approach clearly came to the fore in Chief Justice Barak’s statement in the case of *Hevrah Kadisha Jerusalem Comty. v. Kastenbaum*. CA 294/91 *Hevrah Kadisha Jerusalem Comty. v. Kastenbaum* 46(2) PD 464, 502 [1992] (Isr.) (illustrating a landmark in Israeli law by stating that “[q]uite obviously, the fundamental principles of the system in general, and basic human rights in particular, are seemingly not limited to public law... Basic human rights are not intended only against the government, but extend also to mutual relationships between private parties.”). See also HCJFH 4191/97 *Recanat v. The Nat’l Labor Court* 54(5) PD 330, 362 [2000] (Isr.). “Indeed, fundamental principles do not belong only to public law; they are part of the entire system, and they direct human behavior in all its aspects.” *Id.*

the “privatization” of fundamental social principles into this interaction. This two-way relationship between the public and the private, which subverts the anachronistic distinction between “public” and “private” law,<sup>8</sup> reflects the influence and the quasi-public (or indeed public)<sup>9</sup> character of all social “actors,” and sharpens the social context of all human interactions.

In brief, contract law is extremely well suited to provide means to assimilate the “social” revolution into law generally. This is mainly because of the characteristics of contract law,<sup>10</sup> but it is also due to its close ties to every individual and to all social components of everyday life, as well as its association with comprehensive and diversified social values.<sup>11</sup> The main purpose of contract law is to enable individuals, as “social animals,” to create various kinds of relationships, to realize their autonomy, and to provide most of their needs voluntarily through coordination, cooperation, and mutual concessions.<sup>12</sup> In this sense, it is evident that responsibility and freedom are not mutually contradictory, but rather draw on each other. Recognizing the power and responsibility of individuals in the context of interpersonal relationships improves the protection of basic liberties and confirms the inextricable role of all components of

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<sup>8</sup> See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

<sup>9</sup> The reference is to the term “public” in its practical and widespread use and not necessarily in its legal meaning, to the individual’s membership in, and influence on, the social fabric rather than to its classification as a “trustee” of the public.

<sup>10</sup> Eli Bukspan, *The Notion of Trust as a Comprehensive Theory of Contract and Corporate Law: A New Approach to the Conception that the Corporation Is a Nexus of Contract*, 2(1) HASTINGS BUS. L. J. (2006).

<sup>11</sup> At the abstract level too, even if intuitively, the contractual institution is analogous to the most basic social associations. Thus, as an institution dealing with voluntary interactions and with cooperation, the contractual institution is recognized as a basic model underlying “contractualist” political theories concerned with state structures. This view facilitates the claim that the interpersonal contract can be a suitable venue for the application of social change in the realm of “private” law and even a “legal” microcosm for basic human-social-economic insights.

<sup>12</sup> STANLEY I. BENN & RICHARD S. PETERS, *SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE* 279 (1977).

the legal system, not only of government authorities, in the structuring of a freedom-seeking society.<sup>13</sup>

After developing the claim justifying the inherent social standing of contract law, Part III explains the contractual *processes and means* through which the ideas of social responsibility and solidarity are assimilated into private law. The gist of these processes and means is the use of the “good faith” and “public policy” principles in contract law. The good faith principle, in particular, has been widely accepted and applied in Israel. The principle has been included in the second section of a proposed codification of civil law,<sup>14</sup> prominently placed in the opening chapter dealing with “basic principles.” Invocation of the good faith principle continues to be a powerful means of “importing” social responsibility and proper interpersonal behavior into private law, as well as of strengthening the social context of many different human interactions. The principle has been defined as “establishing an objective criterion for the fair behavior of rights holders seeking to realize their personal self-interest against the background of the general social interest, while also taking the interest of the other into account.”<sup>15</sup> Even before the enactment of the Israeli Basic Laws

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<sup>13</sup> CHARLES FRIED, *CONTRACT AS PROMISE* 7 (1981) (defining the liberal ideal, which assumes a necessary connection between individualism and responsibility for the other). “It is a first principle of liberal political morality that we be secure in what is ours, so that our persons and property not be open to exploitation by others, and that from a sure foundation we may express our will and expand our powers in the world... But whatever we accomplish and however that accomplishment is judged, morality requires that we respect the person and property of others, leaving them free to make their lives as we are left free to make ours. This is the liberal ideal.” *Id.*; Cohen, *supra*, note 5. “To put no restrictions on the freedom to contract would logically lead not to a maximum of individual liberty but to contracts of slavery, into which, experience shows, men will ‘voluntarily’ enter under economic pressure, a pressure that is largely conditioned by the laws of property. Regulations, therefore, involving some restrictions on the freedom to contract are as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways.” *Id.*

<sup>14</sup> Draft Bill Civil Law Codification, 712 HH (2011) (Isr.).

<sup>15</sup> CA 2643/97 Gans v. British & Colonial Ltd. 57(2) PD 385, 400 [2003] (Isr.).

dealing with human rights in the early nineties,<sup>16</sup> good faith was recognized as a mandatory objective principle that sets standards for proper “inter-contractual” or “interpersonal” relationships.<sup>17</sup> Good faith establishes “a minimal level of decent behavior between individuals that reflects what is perceived as proper in our society...reflects a suitable balance between conflicting human rights,”<sup>18</sup> and is incumbent “on every person in Israel performing legal actions.”<sup>19</sup> Many other instances of this trend could no doubt still emerge.<sup>20</sup> This approach has strengthened the social and normative standing of every contractual negotiation and interaction, as well as every non-contractual legal action.<sup>21</sup> The good faith principle’s grounding in social concerns, its formulation as a general standard, its mandatory and normative standing that calls for taking into account the other’s justified expectations, and its broad implementation – have all turned it into the most essential element. This has set the stage for the absorption of other social and public principles (such as human rights) into law in general, and contract law in particular. The good faith principle thus became a significant tool for mediating between the “private” view of legal interactions and the view that legal interactions are inextricably bound with social and public considerations, long before the explicit approach dealing

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<sup>16</sup> Basic Law: Human Dignity and Liberty, 1992 [hereinafter Basic Law 1992]; Basic Law: Freedom of Occupation, 1994 [hereinafter Basic Law 1994]. In Israel, there is no formal constitution, but these basic laws have been recognized by the Israeli Supreme Court as its equivalent. *See generally Kastenbaum*, CA 294/91 [1992].

<sup>17</sup> LCA 6339/97 *Rocker v. Salomon* 55(1) PD 199, §17 [1999] (Chief Justice Barak’s Opinion) (Isr.). *See also* Chief Justice Barak’s statements in *Leave for* CA 5768/94; CA 5614/95; CA 993/96 A.S.I.R. *Import, Production, and Distribution v. Forum Accessories* 52(4) PD 289, §14 [1998] (Isr.).

<sup>18</sup> Aharon Barak, *Protected Human Rights and Private Law*, in KLINGHOFFER *BOOK ON PUBLIC LAW* 163, 207 (Zamir ed., 1993) (Isr.).

<sup>19</sup> CA 610/94, 1989/94 *Buchbinder and Zussman v. The Official Receiver as Liquidator of the Bank of North America* 57(4) PD 289, §74 [2003] (Isr.).

<sup>20</sup> CA 6601/96 *AES System Inc. v. Sa’ar* 54(3) PD 850, 878 [2000] (Isr.) (“...[i]n all that concerns considerations of trust, fairness, good faith, and fair trade. In these regards, the law is only at its initial stages of development.”).

<sup>21</sup> *The Contracts (General Part) Law, 5733-1973*, 694 LSI §§ 12, 39, 61(b) (1973-1974) (Isr.).

with the “percolation” of public law into private law came into being.

Part IV of the article focuses on the birth pangs of social responsibility as it is developing in contract law in Israel. The process appears to have gone too far in diluting the *a priori* social goals of contract law, and lacks a consistent, coherent backbone. Accordingly, a proposal will be formulated to trace the suitable scope of social responsibility imposed by contract law according to the considerations detailed in this section.

## *II. On the Social Basis of the Contractual Institution and the Term “Private Law”*

Although Israel lacks a written constitution, “constitutional revolution” has become a mainstream concept in recent years following the enactment of two Basic Laws in the early 1990s—Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation.<sup>22</sup> This “revolution,” however, marks the culmination of a deep and longstanding social transformation that has been taking place in Israeli law, fundamentally resting on an emphasis on individual liberties, but also on individual responsibility for proper interpersonal behavior. The core of this behavior is consideration for the justified expectations of all the legal system’s components, protection of the legal system’s fundamental principles, and assimilation of the values of interpersonal trust required for the consolidation of a liberal civic society.<sup>23</sup> Imposing some type of

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<sup>22</sup> Basic Law 1992, *supra* note 16, at art. 7(a), available at <http://www.unhcr.org/refworld/docid/3ae6b52618.html>; Basic Law 1994, *supra* note 16, available at <http://www.unhcr.org/refworld/docid/3ae6b52610.html>; Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL 9 (1993) (Isr.) (coining and defining the term “constitutional revolution”).

<sup>23</sup> This is not a universally accepted view. *Contra* ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 356 (1993). Qualifying the approach in the context of corporate law:

The dangers of the privatization of human rights are particularly acute where human rights norms are invoked against associations. Should associations which form in order to provide



social responsibility on all of society's elements, including both individuals and the government, is indeed the law's primary task. The formulation of this responsibility, however, is now more generalized and "lofty" than in the past,<sup>24</sup> as is its scope, which increasingly extends to include voluntary interactions and consideration for the other's ethical, emotional, and human qualities, which are broader than "physical" and material ones.

Besides the rhetoric emphasizing the application of fundamental principles to the legal system as a whole, the practical assimilation of the commitment to these principles in Israeli law is evident in three ways. The process unfolds mainly:

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a collective defense for their members' interests be prevented from operating effectively by the unnecessary application of human rights regulation, then we will be faced with the re-emergence of the abuse of the human rights discourse. It is suggested that as long as the application of human rights in the private sphere is limited to the protection of dignity and democracy then we can avoid unduly over-regulating that area.

*Id.*

<sup>24</sup> This section focuses on the general and open principles through which courts, without defined legislative guidance, promote the social transformation. In light of their general scope and application, these principles are viewed as particularly significant in the unfolding of the social transformation in Israeli law. *Compare A.S.I.R.*, CA 993/96 [1998] at §14. Chief Justice Barak's opinion concerning the use of a general and abstract principle in the Law of Unjust Enrichment:

The legislator should be praised for determining a general principle ensuring flexibility and allowing the adaptation of the law to the changing reality in this specific field. True, the general formulation of the law creates vagueness and insecurity. This is an undesirable situation in specific branches of law, such as determining offences in the criminal realm or recognizing property rights. This situation is desirable, however, when the law determines criteria for proper civic *behavior* between people. Indeed, the law's finest hour is its ability to formulate a general principle that directs human behavior, without stating rigid categories that do not stand the test of time. The law did so when determining a general principle of good faith in interpersonal behavior; the law did so when imposing a duty of general (conceptual) caution; and the law does so when determining a general principle for a restitution duty (emphasis added). *Id.*

in the area of *contractual disputes*;  
*on the backs of corporations in general and business companies in particular*; and  
 through “*open*” *legal doctrines anchored in contract law* (principles of good faith and public policy).

These areas constitute the stronghold of classic private law that, traditionally, viewed the relationships between the parties to a legal interaction as a private matter, given mostly to voluntary and consensual regulation and invoking the parties’ autonomy and the freedom of contract derived from it. Prima facie, then, the social transformation also attests to a genuine conceptual transformation of legal views in Israel since, according to the classic individualistic tradition of contract law, each side sees to its own interests and is expected to promote its own commercial aims in disregard of the interests of the other side. In this view it is the fusion of the parties’ various aspirations that creates the contract desirable to both.

This traditional atomistic approach now emerges as narrow, shortsighted, and based on an internal and social fallacy. In fact, this approach is also incompatible with the aim of contract law, which is by nature concerned with mutual social interaction, and with the law’s aim not to neglect fundamental social principles even in the contractual realm, which involves basic, daily, and frequent human interactions. Contrary to the traditional approach, then, it appears those contracts—as legal institutions—are natural receptacles for the social transformation, focusing on the mutual consideration of all elements of the legal system for each other’s justified expectations.

*First*, consideration for the other’s justified expectations is the main interest that is *ab initio* protected in contract law, and originates in the initial and shared will of the parties themselves. A contract is by nature a voluntary and mutual act of exchanging promises, so that at its source are the parties’ intentions and expectations to cooperate in order to realize their personal aims. This insight is warranted by the definition of the contract, by the promise latent within it,<sup>25</sup> and by the conditions posed by contract

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<sup>25</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 1-2 (1979).

law for its signing,<sup>26</sup> and its interpretation.<sup>27</sup> Thus, the contract is, by nature, an interaction that is constitutive of an interpersonal relationship, rather than an individualistic act.<sup>28</sup>

*Second*, the contractual institution is meant to allow individuals, as “social animals,” to reach their optimal realization and liberties through mutual involvement and cooperation.<sup>29</sup> Hence, this evidences the close links between the legal categories bearing on this institution—perhaps even more than all others—and the social-human-economic foundations of existence. The liberty of individuals, who are generally required to cooperate in order to realize more fully their desires and aspirations, rests on a delicate balance of acceptance and renunciation. Resembling the contractual mechanism, this duality of personal liberty and commitment to the other is the essence of social life, and their integration does not imply a damaging erosion of the personal realm.

*Third*, a significant—even if only intuitive—parallel prevails between the legal institution of the contract on the one hand, and basic social institutions, such as states, on the other. This parallel enables a powerful use of this legal institution for the purpose of assimilating social responsibility in the mutual relationships between individuals. Contract law is a fundamental and widespread legal institution, conceptually parallel to the idea of the social contract substantiating liberal political theories. It deals directly with the most elementary relationships between individuals—exchanges of promises and voluntary cooperation. Every contract, therefore, can be seen as a private case of the broadest social contract, as being at the basis of the civic society—a supra-contract between all its

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<sup>26</sup> The rules intended to identify a “meeting of the minds” between “the offering and accepting parties.”

<sup>27</sup> A process which is meant to reveal the estimated *shared* view of the parties.

<sup>28</sup> See Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 816 (2000) (holding that every contract is actually relational: “...virtually all contracts either create or reflect relationships. Discrete contracts--contracts that are not relational--are almost as imaginary as unicorns. A contract to build something as simple as a fence creates a relationship. A contract to sell almost any commercial product is likely to either create or reflect a relationship.”).

<sup>29</sup> BENN & PETERS, *supra* note 12 .

members. In other words, individual contracts and their fulfillment reflect, in some sense, the broader ethos of the social contract and the strengthening of civic liberal society. The contractual institution, thus, can be viewed as a legal microcosm of social relationships and basic human ideas; a kind of natural, central, and direct venue for the application of the social transformation in the realm of private law. Basic social principles are not so significant unless tested in the context of government actions, and the existence and standing of these principles are indeed more often tested in the daily mutual relationships of individuals and companies.

The traditional linkage between respect for basic principles and the action of government authorities *per se* created a split legal system, hence the importance of the harmony currently developing between the commitment of *all* elements of the legal system and fundamental social principles. Responsibility means power rather than weakness, so that the metaphorical “privatization” of basic principles in the realms of the contract empowers all social actors. This is generally true, and even more so, in an era in which many corporations exert substantial socioeconomic influence, attesting to increasing formal and practical privatization of actions that in the past had been perceived as the government’s responsibility. When the traditionally public realm increasingly becomes voluntarily regulated (mainly through contractual and corporate institutions), imposing social responsibility through the legal realms that control these institutions becomes justified and urgent. Thus, the contractual institution is intimately connected to all elements in society and many social interactions. In fact, it is a crucial component of the public sphere and is one of the chief tools for assimilating social awareness and social responsibility.

Harnessing the contractual institution to assimilate social responsibility may also seem “hard to digest” due to its traditional classification under the rubric of “private” law. Indeed, the term “private” law should be examined through the lens of the social transformation in order to remove—or update—this anachronistic classification, and for the sake of this transformation’s continued development.

*First*, a semantic note, in all that concerns the term

“private”—and particularly at a time privacy is protected supra-legally<sup>30</sup> (in Israel, in Section 7(a) of the Basic Law: Human Dignity and Liberty) and legally<sup>31</sup> (in Israel—in the Protection of Privacy Law 5741-1981) —we must remember that this term does not really fit with the public and social nature of the voluntary interactions related to contractual and corporate institutions. Contractual interaction and action in a corporate body are naturally related to shared and mutual activity, which does exceed atomistic privacy bounds quantitatively but not qualitatively, so that the “sanctity” of their privacy needs to be examined accordingly. *Second*, the expression “private law” constitutes a conceptual oxymoron since law, by its very nature, is a social arrangement and, as such, is never “private.”<sup>32</sup> *Ab initio*, the classification of a certain legal realm as “private” also draws on a broader social perception that, relying on social considerations, chooses to transfer public power to private individuals.<sup>33</sup> Furthermore, the accepted distinctions between private and public law—such as the view of “private” law as determining the relationships between individuals, as opposed to “public” law, which

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<sup>30</sup> Basic Law 1992, *supra* note 16, at art. 7(a), available at <http://www.unhcr.org/refworld/docid/3ae6b52618.html>.

<sup>31</sup> Protection of Privacy Law, 5741-1981 (1981) (Isr.).

<sup>32</sup> HCJ 164/97 Kontram Ltd. v. Ministry of Finance, Tax Authority, Customs and VAT Dep’t 52(1) PD 289 [1998] (Isr.) (statement of Justice Cheshin) (“[t]he mission of law is mainly to regulate the mutual relationships between the individual and society and between individuals themselves, and to see to the society’s proper organization.”). See also EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 68 (1964). “All law is private in the sense that it is always about individuals who are present and acting; but more importantly, all law is public, in the sense that it is a social function and that all individuals are, whatever their various titles, functionaries of society.” *Id.*; REINIER KRAAKMAN, ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 28 (2009) (“[w]hat is the goal of corporate law, as distinct from its immediate functions of defining a form of enterprise and containing the conflicts among the participants in the enterprise? As a normative matter, the overall objective of corporate law—as of any branch of law—is presumably to serve the interests of society as a whole. More particularly, the appropriate goal of corporate law is to advance the aggregate welfare of a firm’s shareholders, employees, suppliers, and customers without undue sacrifice—and, if possible, with benefit—to third parties such as local communities and beneficiaries of the natural environment.”).

<sup>33</sup> Cohen, *supra* note 5.

determines the division of authority between government bodies and the relationship between the government and the individual—dim perceptions concerning the social role of the law and hamper the coherent development of the social transformation.

These accepted definitions, in whose regard even their endorsers admit to a broad “penumbra,”<sup>34</sup> are neutral concerning the social context of the mutual relationships between individuals as well as the social character of the law. One should note that these accepted definitions focus on the identities of the parties involved in the legal interaction rather than on the *essence* of their social place or on the obligations incumbent on their mutual relationships. Thus, for instance, in the context of contract law, the contractual act cannot be viewed in personal and social isolation. Every contract affects the other even if slightly, and, more broadly, affects the nature of the contractual institution as a recurrent social game and, at times, furthers social values as well. When this distinction between private and public law rests on the axis of the relationship at stake (government vs. individual or individual vs. individual), it may mistakenly lead to a sweeping conclusion concerning the *normative sources* of the law: private law as being derived solely from mutual arrangements between individuals, and public law as being dictated by legislation. By contrast, the social transformation that develops in law holds that, although private law deals with relationships between individuals, individuals need not—conclusively—determine their responsibility toward others. The fact that the contractual parties themselves are those who *ordinarily* determine most of the contractual content need not change this conclusion, since its cause is the public perception ascribing social importance to the autonomy of individuals to determine their own rights and obligations.<sup>35</sup> This perception was anchored in contract law, which sanctifies the autonomous and voluntary encounter, and determines that the parties’ expectations and the contents of the contract will be determined by the parties themselves. But contract law also

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<sup>34</sup> Barak, *supra* note 18.

<sup>35</sup> Compare Menachem Mautner, *How the Doctrine of Implied Terms was Deposed from its Position in Israel’s Contract Law*, in *ESSAYS IN HONOUR OF JOSHUA WEISMAN* 429, 457 (Isr. 2002).

determines the “rules of the game” and the legitimacy of the parties’ expectations in light of additional social values perceived as necessary.<sup>36</sup>

Furthermore, confusion could arise not only from the definitions that distinguish between private and public law, but also from the rhetoric trying to reconcile (rather than abandon) these terms. This approach, enabling the “import” of public law into private law, obstructs the development of a harmonious outlook. This process had been necessary in the past in order to pave the way for the transformation generally taking place in law, involving the integration of private law into public law. In the future, however, this “import” could act as a two-edged sword by perpetuating the alienation of private law from public law.

In order to shed light on these issues, I will describe the process of the social transformation (the “publicization”) of private law in Israel, particularly through its reflections in the contractual principles concerning good faith and public policy.

### *III. Key Principles of Contract Law:*

#### *The Development of Social Responsibility in Israeli Private Law*

##### *A. The Good Faith Principle: Fairness and Consideration for Others*

Law, by its very nature, deals with the creation and protection of rights through the imposition of social responsibility. In recent years, as noted, Israeli law fulfills this role in more explicit, direct, and lofty ways, and through open and dynamic norms that extol the role and weight of every social element.<sup>37</sup> The incorporation of this social outlook, chiefly by means of doctrines rooted in private law,

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<sup>36</sup> The Contracts (General Part) Law, 5733-1973, §§ 12, 30, 39 (Isr.). These borders are determined particularly by the good faith and public policy principles. *Id.* See also The Contracts (General Part) Law, 5733-1973, art. 61(b) (Isr.).

<sup>37</sup> In this part of the article, the focus is on the general, open principles through which the courts promote social change without defined legislative guidance. These principles, due to their general scope and application, are viewed as particularly significant for the social changes in Israeli law.

began with the broad application of the good faith principle in contract law before the enactment in the 1990s of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, and even before their principles were incorporated into mutual individual relationships. The *declarative* breakthrough concerning individuals' social commitment to these basic principles occurred with the enactment of the Basic Laws. But the *essential* breakthrough—the acknowledgement of the social obligation and the responsibility of individuals for interpersonal trust and proper behavior, which raises the legal “threshold” of the worthy behavior—began before that. The good faith principle, which thoroughly filtered through the entire legal system in broad, systematic, and mandatory fashion, set a standard requiring consideration for the justified expectations of others and of society. The question as to where the “self” ends and the “other” begins is mainly a philosophical issue, but the emphasis of the good faith principle on the balance between individual freedom and responsibility to the other highlights the fact that it is a legal issue as well.

The good faith principle and its scope are regulated in Israel in Sections 12, 39, and 61(b) of the Contract Law 1973. According to Section 12:

(a) In negotiating a contract, a person will act in a customary manner and in good faith.

(b) A party who does not act in a customary manner and in good faith will be liable to pay compensation to the other party for the damage caused to him in consequence of the negotiations or of the conclusion of the contract, and the provisions of Sections 10, 13, and 14 of the Contract (Remedies for Breach of Contract) Law 1970 will apply, *mutatis mutandis*.

Likewise, Section 39 states: “An obligation or right arising out of a contract will be fulfilled or exercised in a customary manner and in good faith.”<sup>38</sup> Section 61(b) makes clear that the law applies to non-contractual events as well: “The provisions of this law will, as

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<sup>38</sup> The Contracts (General Part) Law, 5733-1973, art. 39 (Isr.).



far as is appropriate and *mutatis mutandis*, apply also to legal acts other than contracts and to obligations that do not arise out of a contract.”<sup>39</sup>

The importance of the good faith principle in Israeli law is evidenced by the prominent placement of the principle in a recent proposed codification of civil law.<sup>40</sup> Immediately after the section that sets the purposes of the law, Section 2 of the chapter dealing with “basic principles” states: “When exercising a right, performing a legal action, and fulfilling an obligation, good faith should be observed.”<sup>41</sup> Thus, the good faith principle is formulated as a general normative criterion, invoking consideration for the other’s justified expectations. The principle is positioned as essential in the synthesis of an understanding of contractual undertakings—indeed of all legal interactions, as shown in Section 61(b) of the Contract Law—as personal and “private,” and an understanding of legal interactions as interpersonal, social, and public.

The public perception of the good faith principle is also evident in its linkage to the social goals of “public policy.” In fact, application of the good faith principle imbues every contractual and legal interaction with social-economic-humane qualities. In the words of Israeli Supreme Court Chief Justice Shamgar: “It is clear that if, and only if, apartment owners and tenants behave fairly and in good faith toward one another, will the condominium be administered properly, to the shared benefit of its inhabitants.”<sup>42</sup> Although this case involved the specific circumstances concerning social-communal neighborly relations among condominium residents, Chief Justice Shamgar’s words express a general truth about life in any shared social context.<sup>43</sup> The good faith principle

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<sup>39</sup> The Contracts (General Part) Law, *supra* note 36.

<sup>40</sup> Draft Bill Civil Law Codification, *supra* note 14.

<sup>41</sup> *Id.* art. 2.

<sup>42</sup> CA 2896/90 Trotsky v. Alfonso 46(5) PD 454, 460 [1992] (Isr.). This basic perception is also evident in the saying from the Decree of Delphi, 125 B.C., that “[t]he greatest good for humans consists in relations of mutual good faith.” Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 303 (1999).

<sup>43</sup> See *Trotsky*, CA 2896/90 [1992] at 459-60 (stating that “[a]t the normative

has been recognized as a social, unconditional, and objective principle, which sets a proper behavioral standard of trust and fairness between individuals,<sup>44</sup> constitutes a “criterion for ‘inter-contractual’ or ‘interpersonal’ behavior,”<sup>45</sup> sets “a minimal standard of proper behavior between individuals reflecting what is considered worthy in our society,” and “reflects a suitable balance between clashing human rights.”<sup>46</sup> Even before the “constitutional revolution,” the good faith principle gave expression to the importance of mutual responsibility and social commitment in all legal interactions and obligations—contractual, pre-contractual, and non-contractual.<sup>47</sup> The increasing legal-social significance of the good faith principle in Israel’s legal system and in mutual relationships could thus be expected to lead to the inclusion of additional social and public principles, such as those set forth in Israel’s Basic Laws, in all human interactions. The incorporation of these principles was part of a process involving the realization of justified expectations among elements in the legal system and the assimilation of proper standards of interpersonal behavior. In sum, the good faith principle is an essential and logical means for taking into account the values of consideration for others and of social responsibility, particularly because the principle applies to *all* social interactions.<sup>48</sup> The good faith principle—which may also be thought

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level, this conclusion is based, above all, on the application of the good faith principle in the circumstances of this case... This is even more true when at stake are the mutual relationships between neighbors living in a condominium. These relationships are usually characterized by the fact that the parties do not choose one another and are, as it were, randomly forced upon one another due to the very fact of their dwelling. Often, these relationships go on for many years. They are also characterized by close physical proximity between the parties... so that one’s actions necessarily affect the other’s situation. Given these elements, when considered as a whole, it is clear that if, and only if, owners and tenants act in good faith and fairness toward one another, the condominium will be able to run properly, for the shared benefit of all its dwellers.”)

<sup>44</sup> HCJ 59/80 Pub. Transp. Serv. of Beer Sheva v. Nat’l Labor Court 35(1) PD 828 [1980] (Isr.).

<sup>45</sup> *Rocker*, LCA 6339/97 [1999] at § 17.

<sup>46</sup> Barak, *supra* note 18, at 195.

<sup>47</sup> The Contracts (General Part) Law, *supra* note 36.

<sup>48</sup> See *Public Transport*, HCJ 59/80 [1980]. For this purpose, the good faith

of as the fairness principle—is an element not only of public law, but of private law as well.

Although its current standing is uncontested, the incorporation of the good faith principle into Israel's legal system was not universally welcomed. Objections were raised concerning the “metamorphosis” and the “change in the legislator's contractual philosophy” that occurred in contract law following the addition of the good faith principle.<sup>49</sup> The primary reason for rejecting the principle was that it sacrifices—or at least diminishes—the elements of expectations and trust because it is the court, and not the parties, who will retroactively decide the content of the good faith principle in contractual deals.<sup>50</sup> For example, the court may find that it contradicts traditional patterns and principles of contract law;<sup>51</sup> that it constitutes an exceptional residual principle meant to alleviate the harsh consequences ensuing from an ordinary application of formal law; that it blurs the provisions of a contract; that it contradicts the need for legal certainty; and that generally, it acts as a “wild card.”<sup>52</sup> Today, however, with social change manifesting itself in Israeli law, it is clear that these concerns have proved baseless. The good faith principle, and its development, are intended to strengthen justified expectations and are highly compatible with the goals stated in the proposed codification of civil law. These goals, detailed in the aforementioned proposed codification of civil law, include the

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principle—like the public policy principle, which was the main channel for introducing the basic constitutional principles into private law—was interpreted as an objective and mandatory principle. *Id.*

<sup>49</sup> Gabriela Shalev, *Article 12 in the Contract Law: Good Faith in Negotiation*, 7 ISR. L. REV. 118 (1976).

<sup>50</sup> *Id.* at 121.

<sup>51</sup> Nili Cohen, *Contract Law and Good Faith in Negotiation: Formalism versus Justice*, 37 HAPRAKLIT 13-61 (1986) (Isr.). See also, CA 838/75 Spector v. Tsorfati 32(1) PD 231, 244 [1977] (Isr.) (warning against ardent support for such concepts as good faith, due to the fear that exaggerated judicial interference in the name of fairness could be excessively harmful to individual autonomy and also misrepresent contract law due to conceptual impreciseness). “In other words, there are limits to the role of guardian that the court can assume in for consenting adults who entered into deals for their commercial benefit.” *Id.*

<sup>52</sup> Miguel Deutsch, *Good Faith in the Implementation of Rights: Boundaries of the Principle*, 18 TA U. L. REV. 261 (1993).

following: to ensure “justice, fairness, and reasonableness;” to promote “faith, certainty, and effectiveness in law;” to reconcile “different civil law arrangements;” to protect “acquired rights;” and to defend “the parties’ appropriate expectations and reliance.”<sup>53</sup> The good faith principle and its development are also compatible with the social goals of contract law—reciprocity and interpersonal trust—that are inherent, though at times not obviously so, in every detail and doctrine of contract law. The social, public obligation of parties to a contractual interaction—“to cooperate with one another, and act with due consideration for their shared interest in the contract. . . to act for the fulfillment of their common intent, with loyalty and devotion to the goal they had set themselves, and with consistency in the realization of their shared reasonable expectation. . . with [each party] fulfilling the trust the other had placed in him”<sup>54</sup>—was always inherent in contract law. This obligation was not a new concept introduced by Section 39 of the Contracts Law.<sup>55</sup> Indeed, as the adoption of Israel’s Basic Laws and their application to private law later showed,<sup>56</sup> the explicit enactment of the good faith principle helped to focus the social lens on contract law. This is not a conceptual revolution, but rather an evolutionary, riper, and more precise perspective on private law, including contract law.

The good faith principle, then, is the “missing link” between the objectives of contract law and the goals of social change. This principle, like the essence of social change, is concerned with the integration of personal freedom and with the obligation to consider the other’s reasonable expectations and to protect “the foundations of the social order” even in the most ordinary voluntary interactions.<sup>57</sup>

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<sup>53</sup> See Draft Bill Civil Law Codification, *supra* note 14.

<sup>54</sup> *Public Transport*, HCJ 59/80 [1980] at 834.

<sup>55</sup> *Id.* See also, JOHN N. ADAMS & ROGER BROWNSWORD, KEY ISSUES IN CONTRACT, ch. 9 (1995) (viewing cooperation as an inherent value in contract law).

<sup>56</sup> See *infra* Part IV for further discussion of the incorporation of human rights in human interactions through the public policy principle.

<sup>57</sup> See *Kastenbaum*, CA 294/91 [1992] at 531 (interpreting Article 30 of the Contract Law as “the main legal tool—beside other principles, such as good faith—through which general harmony is ensured in the legal system. This is the main tool reflecting the ‘foundations of the social order.’”).

The good faith principle is the linchpin of Israeli law. We see this, above all, in the legal formulation of the principle as a general positive obligation, (rather than as an exception or a list of exceptions to be avoided), which surrounds pre-contractual proceedings and contractual relationships and is sweepingly imposed “on any individual in Israel performing legal actions.”<sup>58</sup> Second, the dominant standing of the good faith principle is constantly buttressed by the attitude that jurisprudence, charged with the *implementation* of legal norms, displays toward it. The first hint of the principle in Israeli jurisprudence appeared in 1969 in *Adani v. Cohen*.<sup>59</sup> Although this opinion preceded the enactment of a law recognizing the good faith principle, the opinion defined the principle as “universal.”<sup>60</sup> However, the practical ascendancy of this principle reached its height in the 1980s, approximately ten years after its inclusion in legislation. Jurisprudence accompanied its application with a rhetoric that stresses the mutual obligations of parties to a legal interaction and the social idea of trust in pre-contractual, contractual, and overall legal interactions:

The meaning of the obligation to perform a contract in good faith and in an acceptable manner is that the parties to the contractual relationship act toward one another with fairness, honesty, and according to what decent contractual parties consider acceptable. True, parties to contracts are not angels toward one another, but neither should they be wolves. . . All parties to a contract are obliged to cooperate with one another and act with due consideration for their common interest in the contract. Parties to a contract must act for the fulfillment of their common intention, with loyalty and devotion to the goal they had set themselves, and steadily realize their shared reasonable expectation. Indeed, had terms such as “trust,” “faith,” and “loyalty” not been “taken,” the relationship that is created between contractual parties following Section

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<sup>58</sup> *Buchbinder*, CA 610/94 [2003] § 74.

<sup>59</sup> CA 230/68 *Shimon Adani v. Shimon Cohen* 23(1) PD 142 [1969] (Isr.).

<sup>60</sup> *Id.* at 147.

39 of the Contract Law could be described as a relationship of trust, when a party to the contract must perform it faithfully, fulfilling the trust placed in him by the other.<sup>61</sup>

It is evident that the Israeli Supreme Court's support of the good faith principle has strengthened in the thirty-one years since it embraced the principle in *Public Transport*.<sup>62</sup> The court has repeatedly made clear that it considers the good faith principle to be the most basic and normative meeting point for the internalization of the norms that dominate all aspects in which people interact socially. Thus, for instance, Justice Cheshin notes in *Kal Binyan*:

This provision [in Section 12 (b) of the Contracts Law]—together with the provision about fulfilling in good faith an obligation arising out of a contract (see Section 39 of the Contract Law, and the extension of this obligation in Section 61 (b) of the Contracts Law)—is a basic provision of Israeli law in general, and of private law in particular. It reflects a “royal” doctrine. . . it is the “soul” of the legal system. . . it imposes on the individual the obligation to behave fairly and honestly. . . it does not set a high demand for “piety”; it does not require the parties to be angels toward one another. It is meant to prevent a situation of *homo homini lupus*. It seeks to introduce a normative framework whereby *homo homini—homo*. . .<sup>63</sup>

Elsewhere, Justice Cheshin notes: “The good faith doctrine will be the foundation of a legal system, and whoever says it represents the whole law—and the rest is commentary—will not be far from the truth.”<sup>64</sup> Along these same lines, the *Yavin Plast*

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<sup>61</sup> *Public Transport*, HCJ 59/80 [1980] at 834.

<sup>62</sup> *Id.*

<sup>63</sup> CA 6370/00 *Kal Binyan Ltd. v. A. R. M. Ra'anana Building and Leasing Ltd.* 23(1) PD 289, 297 [1969] (Isr.).

<sup>64</sup> CA 1407/94 *Credit Lyonnais Suisse S. A. v. Mediterranean Shipping Co. S.A.* 48(5) PD 122, 131-32 [1994] (Isr.). Indeed, Justice Cheshin immediately added that “[p]recisely for this reason, and given that the good faith doctrine is

decision states:

Indeed, Section 39 of the Contract Law is a multifaceted “royal” provision. At times, it imposes obligations that are not explicitly mentioned in the contract between the parties, and at times, it offers new remedies that are required for its fulfillment. . . . At times, it acts as a sword, and at times, it is only a shield; at times, it functions at the level of rights, and at times, it functions at the level of remedies.<sup>65</sup>

This view of the good faith principle did not take shape immediately after the enactment of the Contracts Law but only a decade or more later. However, the principle quickly attained exceptional support and wide acceptance in Israeli law. Israeli law reflected the Court’s goal of developing jurisprudence that gave prominence to the concepts of social responsibility in general and of interpersonal trust in particular.

The pioneering role of the good faith principle in the justification of social change was expressed, as noted, in the incorporation of the general obligation to consider the other’s justified expectations, and in the combination of social and personal perspectives. Previously, the assumption had been that the behavior expected from parties to a contractual interaction derives from the nature of the encounter between them as a meeting of selfish parties seeking to maximize profits.<sup>66</sup> Today, the emphasis is on the *relationship* between the parties to the interaction, on the social context of this relationship, and on the obligation to adopt a behavior—not defined *a priori*—that shows consideration for the other’s justified expectations. The good faith principle has been defined as “determining an objective criterion of fair behavior on the part of a rights owner who, against the background of the general social interest, seeks to realize his self-interest while showing

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what it is, I think it would be proper to resort to it only when ordinary tools fail us.” *Id.* Whether this “warning” is currently heeded seems questionable.

<sup>65</sup> HCJ 1683/93 Yavin Plast Ltd. v. Nat’l Labor Court in Jerusalem, 47(4) PD 702, 708 [1993] (Isr.).

<sup>66</sup> FARNSWORTH, *supra* note 2.

consideration for the interest of the other.”<sup>67</sup> The principle thereby highlighted the importance, and the benefit, of integrating the personal interest with the social interest of consideration for the other, without necessarily upholding a communitarian or altruistic theory:

These obligations [the obligation of good faith and the prohibition on the abuse of a right], despite their importance, do not impose an obligation of altruism, they do not compel the individual to ignore his own self-interest. If we turn to the contract, the obligation of good faith does not compel a party to renounce his self-interest in the contract and its fulfillment. The obligation of good faith imposes on a party to a contract the obligation to take into account his and the other party’s common interest in the contract. The obligation of good faith compels the parties to the contract to act so as to realize their shared intent, devoting themselves to the shared aim they had set themselves, steadily realizing their shared expectation. . . Good faith assumes, as a starting point, that the individual cares for his own interest. Good faith seeks to ensure that this concern will be appropriate, and will consider the other party’s justified expectations. Good faith is not based on the assumption that each party must take care of the other’s interest at the expense of his own. Good faith is based on the assumption that each party to the contract takes care of his own interest, but seeks to ensure that this concern will be pursued honestly, protecting the parties’ shared aim as is appropriate in a civilized society. . . Good faith, then, sets rules for fair play between “adversaries.”<sup>68</sup>

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<sup>67</sup> *Gans*, CA 2643/97 [2003] at 400.

<sup>68</sup> *Kontram*, HCJ 164/97 [1998] at §5 (Justice Barak); Cf. Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 744 (1982). “The fact that a bargain promise is rooted in self-interest rather than altruism tends to ensure that it will be finely calculated and deliberately made.”



Furthermore, the argument for taking into consideration the justified expectations of the other is not intended to restrict the individual's freedom and profits, but is actually strengthened by a utilitarian rhetoric stressing that behaving in good faith could benefit self-interest. The imposition of social responsibility, then, is anchored in complementary and integrative considerations rather than on distributive ones.

Thus, in *Eximin S.A.*,<sup>69</sup> Chief Justice Shamgar emphasized—in terms intuitively obvious—that the benefits accruing from cooperation and mutual disclosure between the parties derive from the principle of good faith.<sup>70</sup> He also stressed the existence of a linkage, on which the parties had actually relied in their contractual or pre-contractual interaction at the start of their relationships, between their own advantages and a spirit of cooperation and interpersonal trust.<sup>71</sup> Moreover, he pointed out that because “incumbent on each of them is also an obligation to help the other to act, obviously in reasonable measure, their trust in the fulfillment of the deal will be strengthened, and their ability to rely on one another will grow.”<sup>72</sup> In his formulation:

Like every contract or agreement, the basis of a sale is the parties' will to cooperate, obviously on the assumption that cooperation will benefit each of them, and both of them together. This cooperation cannot be assumed to end with the signing of the contract. . . but

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*Id.*

<sup>69</sup> CA 3912/90 *Eximin S. A. Belgian Corporation v. Textile and Shoes ITEL Style Ferrari Ltd.* 47(4) PD 64 [1993] (Isr.). The appellant, a Belgian company, acquired from the defendant, an Israeli company, a given quantity of jean boots for a client of the appellant in the United States of America. *Id.* When the goods arrived in the U.S.A., the model was shown to breach a registered U.S. trademark, and was therefore delayed in customs. *Id.* The appellant demanded that the price of the goods be returned on the grounds that the defendant was to blame for the failure of the deal. *Id.* The opinion of this case is innovative because of the imposition of joint responsibility on the parties to the contract for its breach, and the introduction of the “contributory negligence” doctrine into contract law. *Id.*

<sup>70</sup> *Id.* at 76.

<sup>71</sup> *Id.* at 82-83.

<sup>72</sup> *Id.* at 82.

it is reasonable that, along their shared path, the parties will encounter various problems that will require a certain flexibility and even deviation from what had been determined at the start. Unquestionably, cooperation will also be required in the future.<sup>73</sup>

A similar view, reflecting the insight that the good faith principle can effectively exhaust mutual advantages, is evident in the justification given in *Beth Yules* for the restriction of freedom of contract resulting from the good faith principle:

Freedom of contract is not absolute. Like any constitutional basic right, this freedom is relative. It needs to be balanced against other freedoms and other interests that deserve protection. Fairness, honesty, integrity, equality—all these are worthy interests that, under given conditions and in given circumstances, may balance the freedom of contract. *These balances limit freedom, but they also strengthen it. Imposing an obligation to negotiate in good faith limits freedom of negotiation, but strengthens its powers and its consequences.*<sup>74</sup>

The good faith principle is not exhausted by the Court's normative declarations and arguments but is also manifest in its broad implementation in contract law and beyond. The scope of the good faith principle was expanded both “internally”—regarding its contents and results, and “externally”—to other areas of Israeli law; such as property and intellectual property laws, family and inheritance law, procedural civil law, the law of promissory notes, and the law of companies, all by virtue of explicit provisions in the Contract Law.<sup>75</sup> Thus, for instance, this broad application left a mark in *Penider* and *Beth Yules*, both of which were the subject of unusual

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<sup>73</sup> *Eximin*, CA 3912/90 [1993].

<sup>74</sup> FH 22/82 *Beth Yules v. Raviv* 43(1) PD 441, 486 [1989] (Isr.) (emphasis added).

<sup>75</sup> The Contracts (General Part) Law, *supra* note 36.

further hearings before expanded judges' panels.<sup>76</sup> These decisions stated that, in a contractual negotiation, Section 12 of the Contract Law was viewed as a provision mandatorily incumbent on the negotiation process (even if no contract was signed in its wake) and on all parties to the negotiation (even if they were not part of the final contract, if eventually signed).<sup>77</sup>

This last point, which sets a broader scope for adverse parties that far exceeds classic contractual privity, attests to the embedding of broad responsibility through the good faith principle. The "spectrum" of remedies and consequences in Section 12 of the Contract Law was also expanded beyond its wording, which ostensibly confines it to the remedy of compensation. For instance, in *Kalmar v. Guy*,<sup>78</sup> the appellant's lack of good faith led to the recognition of a real estate contract [even though it was unwritten and hence presumably invalid], according to Section 8 of the Real Estate Law.<sup>79</sup> Similarly, in *Kal Binyan* and *Alrig Property Ltd.*, the court awarded positive compensation typically granted for the breach of a signed contract to a breach of the good faith obligation at the negotiation stage.<sup>80</sup>

The good faith principle is broadly applied in Israel outside contract law as well. To expand the scope of the good faith principle in Israeli law, the Court has relied, as noted, on Section 61 (b) of the Contract Law, which applies the provisions of contract law to "legal actions that are not strictly a contract and to obligations that are not derived from the contract."<sup>81</sup> In accordance with this provision, the obligation of good faith has been described as "incumbent on every person in Israel performing legal actions."<sup>82</sup> Hence, although the

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<sup>76</sup> 7/81 Penider Investment Co. v. Castro 37(4) PD 673 [1983] (Isr.). See also *Beth Yules*, FH 22/82 [1989].

<sup>77</sup> *Id.*

<sup>78</sup> CA 986/93 *Kalmar v. Gai* 50(1) PD 185 [1996] (Isr.).

<sup>79</sup> Real Estate Law, 5729-1969, art. 8 (Isr.).

<sup>80</sup> CA 8144/00 *Alrig Assets Ltd. v. Yosef Bernard* 57(1) PD 158 [2002] (Isr.). See also *Kal Binyan*, CA 6370/00 [1969].

<sup>81</sup> The Contracts (General Part) Law, *supra* note 36.

<sup>82</sup> *Buchbinder*, CA 610/94 [2003] at § 74; see also AHARON BARAK, JUDICIAL DISCRETION (1987) (Isr.) ("Indeed, 'good faith' should be integrated into a broader

original and natural anchoring of the good faith principle is in contract law, which sets the standards for the most frequent voluntary interactions, the principle has also spread widely to other legal areas, including criminal law.<sup>83</sup> In the words of Chief Justice Barak, the good faith principle “is not limited to contracts or to obligations. [It] is a basic principle ruling all areas of the law,”<sup>84</sup> which has only begun to exert its influence on Israeli law.<sup>85</sup> This reference to the sweeping application of the good faith principle to all branches of the law emphasizes its centrality in Israeli law and highlights the role it played in the strengthening of a “culture of trust” in the legal and business spheres, the social change it involves, and the attempt to enhance proper interpersonal behavior in all legal actions of the legal system’s components by taking into account the other’s justified expectations.

To illustrate the sweeping spread of the good faith principle

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perception of the legal system as a whole and of the individual’s proper behavior within it.”); Justice Cheshin in *Rocker*, *supra* note 17, at § 3. Concerning Article 61(b) of the Contract Law Justice Cheshin states that Article 61(b):

[V]iews itself as a bus station that sends buses to the entire country. Article 61(b) is as a bus station, which sends Article 39 (as well as Article 12, and actually all sections of the Contract Law) to all areas of Israeli law. Like Article 61(b) of the Contract Law, Article 39 planted itself in the genetic code of legal acts other than contracts and in obligations that do not arise out of a contract ‘as far as is appropriate and *mutatis mutandis*.’ The addition of the provision in Article 61(b) to Article 39 of the Law turns the provision of Article 39 into a doctrine that cuts across the entire spread of Israeli law. *Id.*

The good faith principle was explained as including not only doctrines external to Contract Law but also doctrines “internal” to it (such as the frustration doctrine). See Justice Englard in § 20 of his opinion in the case of *Regev v. Minister of Defense*. CA 6328/97 *Regev v. Minister of Defense* 54(5) PD 506 [2000] (Isr.) (finding that Chief Justice Barak joins in § 2 of Justice Englard’s opinion).

<sup>83</sup> CrimC (Hi) 3186/04 M.I. v. Shlomo ben-Yehuda Giladi (unpublished decision) [10 May 2005] (Isr.).

<sup>84</sup> *Rocker*, LCA 6339/97 [1999] at § 2 (Opinion of Chief Justice Barak); see also CA 700/81 Paz v. Paz 38(2) PD 736, 742 [1984] (Isr.) (applying the good faith principle to “the legal system in Israel as a whole.”); see also *Penider*, 34(4) PD [1983] at 687; CA 789/82 Ezra v. Mograbi 37(4) PD 565 [1983] (Isr.).

<sup>85</sup> *Sa’ar*, CA 6601/96 [2000].

over a range of human interactions, I cite below several Supreme Court references to this principle that touch on non-contractual issues. In the context of Israeli Real Estate law:

The general principle of good faith constitutes a normative umbrella covering all provisions of real estate law. Section 14 of the Real Estate Law is only a special expression of this principle. . . This provision was enacted before legislation had determined that the good faith principle is a general principle. As for myself, I hold that now, when the good faith principle applies to all areas of the law in general and real estate law in particular, the special provision in Section 14 of the Real Estate Law is no longer necessary. The general principle of good faith will suffice to solve the problems that arise, including those currently covered by Section 14 of the Real Estate Law. . . I will thus be able to put aside the various disputes concerning the scope of Section 14 of the Real Estate Law. The central provision is Section 39 of the Contracts Law (General Part), and the different situations will be examined in light of its parameters.<sup>86</sup>

Similar remarks on the good faith principle may also be found regarding the *Unjust Enrichment Law*<sup>87</sup> and the *Law of Intellectual Property*.<sup>88</sup> An opinion issued by seven judges in *A.S.I.R.* discusses the copying and marketing of a product that was not registered as a prototype or a patent.<sup>89</sup> The judges' opinion shows that the answer to this question draws on the unjust enrichment law that, in turn, rests on the good faith principle and on mutual social responsibility:

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<sup>86</sup> *Rocker*, LCA 6339/97 [1999] at § 3 (Opinion of Chief Justice Barak). Article 14 of the Israeli Real Estate law, 5729-1969, states: "Ownership and other real estate rights cannot, in and by themselves, justify any action causing damage or inconvenience to another". Real Estate Law, 5729-1969 (Isr.).

<sup>87</sup> Unjust Enrichment Law, 5739-1979 (Isr.).

<sup>88</sup> Copyright Act, 5768-2007 (Isr.).

<sup>89</sup> *A.S.I.R.*, CA 993/96 [1998].

Indeed, a direct and close link prevails between enrichment “not according to a legal right,” and good faith laws (as expressed in Section 39 of the Contracts Law [General Part] 1973). . . The duty of restitution according to the Unjust Enrichment Law expresses the basic view of behavior in good faith in interpersonal relationships. The question is not how people actually behave in the market of assets and ideas; the question is what is the proper behavior in the market of assets and ideas. The criterion is objective. It is not altruistic, it reflects what we consider proper in the behavior of a person taking care of his interests, who is not obligated to sacrifice himself for the sake of the other. The criterion addresses itself to the “ordinary,” “simple” person. To the reasonable person. It reflects our basic feelings concerning situations where imposing a duty of restitution is fair. It reflects the sense of justice of the Israeli public concerning the proper behavior between people with opposite interests.<sup>90</sup>

A similar attitude is expressed in another case dealing with Inheritance Law:<sup>91</sup>

In my view, the more suitable venue for examining the validity of renouncing an inheritance in a private law context is the demand of good faith that appears in Section 39 of the Contracts Law, and is applied to the issue before us by virtue of Section 61 of this law. Good faith is the principle that compares in the most balanced fashion an individual’s personal right not to partake from assets that suddenly “land” on his doorstep due to the death of his relative, and the rights of parties who depend on him and demand from him to fulfill his commitments toward them. This principle does not demand altruism but fair and reasonable

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<sup>90</sup> *A.S.I.R.*, CA 993/96 [1998] at § 19.

<sup>91</sup> Inheritance Law, 5725-1965 (Isr.).

criteria in human relationships.<sup>92</sup>

In an Israeli *family law* case concerning the presumption of partnership applying in some cases to a residence acquired before marriage, the Court determined as follows:

The *Zeitgeist*, the possibility of accepting an approach that is not only “formal” and rests on property registration but also examines the essence of social and personal situations, has long been hovering over the jurisprudence about assets-sharing, including assets acquired before the marriage, and particularly the family residence. . . . Beside all these, at the foundation of these arrangements is the expectation of fairness in human relationships in general, derived from the good faith principle that rules private law. . . . The greater the significance of the shared content invested in an asset, and certainly in the residence of a couple and a family, and the longer the marriage partnership and its range of manifestations, even if not a “rose garden” at all times, the fairer the justification for the presumption of partnership, particularly concerning an asset such as a residence, the family nest.<sup>93</sup>

The scope of the good faith principle has also been acknowledged in civil procedural law. Thus, for instance, the ruling in *Shiloh*,<sup>94</sup> discusses the interpretation of ordinance 171(a) in Israel’s civil procedural law stating—in regard to an opinion presented to the court—that the litigant is entitled to send “a written demand to submit the opinion to the examination of a doctor of his

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<sup>92</sup> CA 4372/91 *Sitin v. Sitin* 49(2) PD 120, §12 (Opinion of Chief Justice Shamgar) [1995] (Isr.). In this case a man in the process of obtaining an annulment of his marriage renounced an inheritance, obviously intending to prevent his wife from exercising any rights that she might have to it, as a creditor in the marriage annulment procedures. *Id.*

<sup>93</sup> LFA 5939/04 *So-and-so v. So-and-so* 59(1) PD 665, § 6 [2004] (Isr.).

<sup>94</sup> LCA 305/80 *Raphael Shiloh v. Shlomo Ratskovsky* 35(3) PD 449 [1981] (Isr.).

choice.”<sup>95</sup> Justice Barak, as he was then, stated that regarding this procedural issue, the litigant must take the other into consideration and exercise discretion “in a customary manner and in good faith,” in keeping with Article 39 of the Contract Law.<sup>96</sup> Further, the litigant must behave as a “reasonably fair” person would in these circumstances.<sup>97</sup> Accordingly, the defendants’ demand that the minor (whose claim was being litigated) be examined by a doctor in Tel Aviv, rather than in Jerusalem, was not considered reasonable under the circumstances of the case.<sup>98</sup>

In another case, the application of the good faith principle was acknowledged in the procedural context—both as a doctrine that blocks right of access to the court, and as regards the relationship between the doctrine of laches and the claim of limitation:

In my view, the doctrine of laches . . . should be seen as part of (objective) good faith laws. All powers should be exercised in good faith (Sections 39 and 61[b] of the Contract Law 1973). Hence, so should the power of prosecution, lest we be involved in the abuse of a right. . . The power to turn to the court must operate in the context of limitation statutes, and these statutes should be applied in good faith. Hence, if a lawsuit is filed only days before the limitation period ends, it might fail because of a doctrine of laches, since its late filing in the circumstances of the case does not show good faith.<sup>99</sup>

The broad scope of the good faith principle can also be illustrated in the context of Bankruptcy Law:

The protection of the creditors’ interests in ensuring their right and the interest of the debtor in his own

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<sup>95</sup> *Ratskovsky*, LCA 305/80 [1981] at 461.

<sup>96</sup> The Contracts (General Part) Law, *supra* note 36.

<sup>97</sup> *Id.* at 461-62.

<sup>98</sup> *Id.*

<sup>99</sup> CA 6805/99 General Talmud Torah and High Yeshiva Ets Hayyim Jerusalem v. the Jerusalem Local Planning and Building Committee 57(5) PD 433, § 1 [2003] (Isr.).



recovery do not stand per se but are bound by the good faith principle (in its objective and subjective meaning)... The debtor should not turn the bankruptcy law into a “city of refuge,” to which all the needy will turn.<sup>100</sup>

Concerning the Law of Promissory Notes, which also takes the general application of the good faith principle as its starting point, the Court stated:

Nothing prevents its application to promissory note rights as well. Nothing is special in the promissory right that could prevent the application of the (objective) good faith principle within the parameters of the promissory right. . . Indeed, as any right, the promissory right must also be exercised in good faith. In its exercise, proper criteria of justice and social morality should be met, which should apply to interpersonal relationships in Israel. In determining the level of the rule’s application, one must take into account the character of the relationship between the parties, and the fact that this relationship was regulated, *inter alia*, through a promissory note. In the past, estoppel laws were broadly applied in regard to promissory notes. A person was often prevented from raising a factual claim due to his behavior. At present, estoppel laws can be replaced by good faith laws. These will also apply in other realms, where estoppel—given its special characteristics—has not been applied.<sup>101</sup>

All of the decisions excerpted above are just some examples of the way that Israeli jurisprudence has endorsed the widespread diffusion of the good faith principle throughout all branches of the

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<sup>100</sup> CA 6416/01 Benvenisti v. The Official Receiver 57(4) PD 197, § 9 [2003] (Isr.) (stating that on the grounds of this principle and the public policy principle, a debtor’s request for receivership was denied because the debt at the basis of his request had been incurred while running an escort business.).

<sup>101</sup> LCA 2443/98 Lieberman v. Israel Discount Bank Ltd. 53(4) PD 804, 811-12, §10 (Opinion of Chief Justice Barak) [1999] (Isr.).

law. However, the good faith principle is not the only contractual principle giving rise to social change. The principle of “public policy” also plays an essential role. There are differences in the ways these principles are applied and in the scope of the responsibilities that each principle imposes on the parties. A broad common denominator unites these two concepts, both draw on an approach that identifies many individual actions with the person’s power and social standing, and also with responsibility for the public sphere and for the other’s justified expectations. The “public policy” principle, to which I will now turn, is the courts’ tool for introducing consideration of, and protection of, the legal system’s basic principles into interpersonal interactions.

*B. The Public Policy Principle: Human Rights as Contract Rights*

Social change, as a general process in Israeli law that supports suitable interpersonal behavior and consideration for the other’s justified expectations, is supported by the contractual principle of “public policy,” in addition to the principle of good faith. The public policy principle is set forth in Section 30 of the Israeli Contract Law: “A contract, the conclusion, contents or object of which are illegal, immoral or contrary to public policy is void.”<sup>102</sup> Traditionally, this principle outlined the borders of contract freedom, but in the era after the enactment of the Basic Laws in the early 1990s, the public policy principle assumed an additional positive and normative emphasis—its application to *all* types of relationships.<sup>103</sup> This emphasis shed even stronger light on the place of human rights *within* daily contractual interactions, thereby sharpening the social role of the legal system’s components and the incorporation of an expectation of consideration for social values, such as equality, freedom of occupation and fair trade. Prior to the enactment of the Basic Laws, the contractual “public policy” principle was understood as a “reflection of world views and life conceptions unique to a given

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<sup>102</sup> The Contracts (General Part) Law, *supra* note 36.

<sup>103</sup> *Eximin*, CA 3912/90 [1993].

social or national context.”<sup>104</sup> “Public policy” was a vehicle through which constitutional and social principles were incorporated into ordinary contractual relationships. These constitutional and social values were subsequently adopted in the Basic Laws. Section 30 of the Contract Law has been described in the post-Basic Laws era as a “main legal instrument—beside other principles, such as good faith—enabling the preservation of general harmony in the legal system. This is the central tool that reflects the foundations of the social order.”<sup>105</sup>

This section focuses on the application of human rights to the relationships between the legal system’s components through the public policy principle in the era following the enactment of the Basic Laws in Israel. This application reflects the continued incorporation of proper interpersonal behavior and consideration for the other’s justified expectations through the good faith principle, except that these expectations now also explicitly include the basic principles related to human rights formulated in the Basic Laws.

The integration of human rights into private law through the contractual principle of public policy, and the responsibility that is thereby also imposed on the relationships between private individuals, was explicitly recognized by the court in *Kastenbaum*.<sup>106</sup> It has since been supported in a series of opinions, cited below, such as *Recanat*,<sup>107</sup> *Sa’ar, On v. Diamond Exchange Enterprises (1965) Ltd.*,<sup>108</sup> and *Niv v. National Labor Court*.<sup>109</sup> Many influential legal articles in Israel have also been written about the place of human

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<sup>104</sup> CA 614/76 *Roe v. Doe* 31(3) PD 85, 94 [1977] (Isr.).

<sup>105</sup> *Kastenbaum*, CA 294/91 [1992] at 531.

<sup>106</sup> *Id.*

<sup>107</sup> *Recanat*, HCJFH 4191/97 [2000]. In this case the HCJ cancelled, on the ground of the public policy principle, a clause in the collective agreement between El Al Airlines and its workers setting sixty years as the retirement age for air stewards and sixty-five years as the retirement age for ground personnel. *Id.* The Court stated that this clause entailed “age-related discrimination,” rejecting El Al’s claim that the difference between the retirement age set for air stewards and ground stewards was required by the conditions and the nature of the job. *Id.*

<sup>108</sup> CA 3414/93 *On v. Diamond Exchange Enterprises* 49(3) PD 196 [1995] (Isr.).

<sup>109</sup> HCJ 6845/00 *Niv v. National Labor Court* 56(6) PD 663 [2002] (Isr.).

rights in private law. The titles of these articles<sup>110</sup> show them to be chiefly concerned with a “theoretical examination of the relationship between protected basic rights and private law”<sup>111</sup> and with the legal policy of “privatizing human rights in private law.”<sup>112</sup> And yet, the focus of these articles on the traditional distinction between “public” and “private” law shows that the authors have overlooked the broader legal context of the social change taking place in Israeli law. Israeli law is consistently shifting toward an approach that ascribes “public” characteristics to *all* the components of society and to legal doctrines—to the point of abandoning the concept of “private” law in its traditional denotation. At most, as a remnant of an obsolete distinction, the term “private law” hints at a quantitative (and not necessarily qualitative) feature of the extent to which the basic principles should apply in interpersonal relationships. The time has come, however, to replace it with a more coherent conception. The nature and scope of the basic principles’ application to interpersonal relationships should be derived according to principles more precise and more sensitive to the purpose of the social change affecting the law, to the integral and harmonious place of “private” traditional law within the realm of “public” law, to the balance between the *a priori* social purpose of the legal interaction at stake, and to other basic principles.<sup>113</sup>

A review of how the public policy principle and its accompanying rhetoric have developed exposes the depth of the social change unfolding in Israeli law and the dissonance involved in the classic distinction between public and private law. As this social change consolidates, we may expect this anachronistic distinction will be abandoned, and we should perhaps anticipate this and consciously dispense with it so as to allow for the conceptual

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<sup>110</sup> Barak, *supra* note 18; Francis Radai, *The Privatization of Human Rights’ and the Abuse of Power*, *HUJI L. REV.* 21, 23 (1994) (Isr.); *Public Law and Private Law: Overlaps and Mutual Influences*, Barak-Erez, 5 *MISHPAT UMIMSHAL L. & GOV.* 95 (1999) (Isr.); *The Applicability of Administrative Law to Private Bodies*, BENVENISTI 2 *MISHPAT UMIMSHAL L. & GOV.* 11 (1994) (Isr.).

<sup>111</sup> Barak, *supra* note 18, at 167.

<sup>112</sup> Radai, *supra* note 110, 23.

<sup>113</sup> *See infra*, Part IV.

integration of public and private law.

The enactment of the Basic Laws created a “supra-legal” constitutional regime, which eased the courts’ application of human rights to the area of “private” law. To this day, this application is, as it was, “indirect” —particularly by means of the public policy principle stated in the Contract Law—and introduces a significant (rhetorical and practical) innovation that affects the development of a social perspective in private law. Unquestionably, the application of human rights to private law influences its formulation and will continue to do so in coming years. Although human rights in the classic perception were rights held by individuals in relationship to the ruling powers, in Israeli law they were applied in the context of individual relationships even before the enactment of Basic Laws, so that constitutional law was enacted in Israel in the absence of a constitution. The question about the general application of basic rights to “ordinary” individual interactions, therefore, as posed after the enactment of the Basic Laws, did not arise directly and explicitly. The enactment of Basic Laws enabled the formulation of a renewed approach in all that concerns private and public law. Justice Barak was one of the prominent instigators of Israel’s social-legal change. In his pioneering study, he suggested that the absence of an explicit distinction between public and private law in the pre-Basic Laws period reflected a perception of public law as derived from private law and from “ordinary” legislation, but also the lack of any supra-legal and normative status for the basic rights.<sup>114</sup> After the legislation of the Basic Laws, conceptions regarding the place of fundamental principles changed, as evidenced in the following passage cited at the opening of this article: “Quite obviously, the fundamental principles of the system in general, and basic human rights in particular, are seemingly not limited to public law. . . Basic human rights are not directed only against the government, but

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<sup>114</sup> See Barak, *supra* note 18 (describing the different paths of development followed by private law (through legislation) and public law (that, like “common law,” developed through jurisprudence)); see also Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL (L. & Gov.) 9, 12 (1993) (Isr.).

extend also to the mutual relationships between private parties.”<sup>115</sup>

The Basic Laws, then, with their constitutional supra-legal standing, ripened and verbalized the deep structure that views interpersonal relationships—and thereby “private” law—as part of the general legal-social web. This holistic approach, which abandons the classic distinction and mutual alienation between public and private law, is also exposed in the use of the *contractual* public policy principle to incorporate basic rights into individual relationships. This formal, “technical” issue, which discusses the *mode* of applying basic principles to private law, is actually essential. The use of doctrines from contract law—and the public policy principle above all—to acknowledge the interpersonal responsibility of the legal system’s components for this system’s basic social and constitutional principles is perceived in the legal literature as an “indirect” technique for the import of basic principles into private law.<sup>116</sup> In fact, it bears a *direct* message concerning the legitimate social and public role of contract law. The use of the public policy principle for the “indirect” application of human rights to private law provides not only a solution and a doctrinal advantage, but also a harmonious advantage, which views private law as the abode of basic rights and principles. In other words, through the public policy principle, *contract law per se* becomes an internal normative framework for taking into account social and public purposes in their broad sense. Rather than the Basic Laws applying “public” law to “private” law, the essential norms set in contract law are those that perhaps best express the public and social standing of contract law.

The theoretical and practical weakness of the “indirect application” technique of basic principles in the context of contract law is thereby exposed. This term has a connotation that removes contract law from its direct and central position of strengthening the social change taking place in Israeli law. Even prior to the enactment of the Basic Laws, with its inherent principle of public policy, the development of contract law shows that its contribution to fostering social responsibility and proper interpersonal consideration

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<sup>115</sup> *Kastenbaum*, CA 294/91 [1992] at 530.

<sup>116</sup> Barak, *supra* note 18, at 178.

is as vital as that of the Basic Laws dealing with human rights. In fact, both normative sources—contract law and the Basic Laws—inform and complement one another directly, and act as mirror images, in the consolidation of Israel’s social change.

Applying human rights in contract law through the public policy principle, therefore, does not validate the distinction between “private” and “public” law; rather it suggests that there is no clear distinction between the two. We also see that applying human rights in contract law through the public policy principle culminates in a ripe conceptual-legal rule that views private law as a “private case” of public law, or at least discards anachronistic conventions concerning these two types of law. In a deeper sense, the “import” of basic principles into the area of contract law through the public policy principle exposes a thought process that *identifies* law as part of a larger human web. Relevant here are Justice Barak’s words concerning the justification of the (as it were) “indirect” model of applying human rights in contracts law:

This conclusion derives from the very essence of private law, which is no more than the legal regime regulating the shared existence of various human rights, showing due consideration for the public interest. Indeed, at the basis of private law are the basic human rights intended toward others. *Private law, to some extent, constitutes a legal framework that determines the legal relationships between basic human rights, and the proper balance between clashing human rights, taking into account the public interest.* Private law is the expression of the limitations imposed on human rights in order to realize human rights while preserving the public interest. Private law is the framework that translates constitutional human rights into a life system of “give and take” between individuals. Indeed, private law includes a comprehensive and complex system of balance and arrangements meant to enable different individuals a communal life, each one enjoying basic human rights. The recognition of one person’s right

toward another, then, must be “filtered” though the “sieve” of private law. This is the true meaning of indirect application.<sup>117</sup>

These are powerful words. And yet, like the application of human rights in a contractual context through the public policy principle as an *internal and essential* principle of contract law, Justice Barak’s words show that public law and human rights neither percolate nor are imported into private law, but are an integral element of it. Essentially, this means that the public policy principle is equivalent to the “flour” rather than to the “sieve.” This does not imply that the power of relevant social values to be considered in every interaction will be the same in every legal and social context. Although the incorporation of the desirable scope and measure of social responsibility into all the system’s components has not been sufficiently clarified, it must be sensitive to considerations derived from the *purpose* of the social change. These considerations touch on, *inter alia*, the exposure and influence of the social elements involved and on the personality (in its double meaning) of the values and rights clashing in the context of every interaction.<sup>118</sup>

To conclude this section, a few words should be devoted to the common denominator between the public policy and the good faith principles—the two main “means” that symbolize the consolidation of social change in the area of mutual individual relationships in Israeli law. Ostensibly, the public policy principle as stated in Section 30 of the Contract Law differs from the good faith principle set forth in Sections 12 and 39. Whereas the good faith principle deals with *proper interpersonal behavior*, the public policy principle is viewed as focusing more on *avoiding injury to social values*. This difference, supported by the wording of these sections, could lead one to conclude that the good faith principle allows for the imposition of positive obligations (such as disclosure and cooperation), whereas the public policy principle deals with negative obligations. In another formulation, whereas the good faith principle

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<sup>117</sup> Barak, *supra* note 18, at 193 (emphasis added).

<sup>118</sup> See *infra*, Part IV dealing with the application and extent of social responsibility imposed in the context of contract law in Israel.



deals with active social responsibility, the public policy principle deals with passive social responsibility.

The mechanism of each doctrine, as noted, is not identical, but both principles are meant to incorporate social responsibility and consideration for the others' justified expectations—and these are the core elements. These principles also share other dimensions. First, like the good faith principle, the public policy principle extends to the parties' *behavior* and to their obligations. Moreover, like the public policy principle, the good faith principle deals with prohibitions and with the avoidance of injury to social values. From Section 30 of the Contract Law—and particularly from the accompanying Section 31<sup>119</sup>—we learn that the “public policy” principle is not only used conservatively. The public policy principle is not confined to drawing the borders of contract freedom and, through it, avoiding injury to other social principles; it also creates obligations to behave in proper ways and promote various social aims. In *Sa'ar*, for instance, the Court left the contract in place, while proclaiming the annulment or restriction of contractual arrangements injurious to the public policy (freedom of occupation in this case).<sup>120</sup> The Court thereby imposed new and actual positive obligations on the parties. In *Zaguri*, the formulation was more explicit, in the context of Section 31, which complements the legal results of Section 30: “[t]he Court is authorized to create a new normative reality, which deviates from the ordinary consequences of the annulment. . . .”<sup>121</sup> We can, therefore, view the human rights protected through Section 30 of the Contract Law as also imposing positive obligations on the parties.

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<sup>119</sup> The Contracts (General Part) Law, *supra* note 36, at art. 30-31. Section 31 of Israeli Contract Law states that “[t]he provisions of §§ 19-21 [mutual restitution] will apply, *mutatis mutandis*, to the avoidance of a contract under this chapter, provided that in the case of an avoidance under Article 30 the court may, if it deems it just to do so and on such conditions as it sees fit, relieve a party of all or part of the duty under Article 21 and, insofar as one party has fulfilled his obligation under the contract, require the other party to fulfil all or part of the corresponding obligation.” *Id.* at § 31.

<sup>120</sup> *Sa'ar*, CA 6601/96 [2000].

<sup>121</sup> HJC 6231/92 *Zaguri v. Israel Nat'l Labor Court* 49(4) PD 749, 781 (Opinion of Chief Justice Barak) [1995] (Isr.).

From another perspective, although public policy includes the obligation to *prevent harm* to certain basic rights (to refrain from certain activity),<sup>122</sup> positive obligations (a duty to engage in certain activity) result from them as well, blurring the border between a “positive” and a “negative” right. Hence, the imposition of social responsibility through both the good faith principle and the public policy principle sometimes involves—to promote a trust culture and to fulfill justified expectations—the erosion of autonomous will and potential harm to subjective individual expectations. The result is that, in this sense, the distinction between positive and negative obligations that concern the aims of social change is almost meaningless.

The good faith principle and the public policy principle are also quite close in all that concerns the social circle protected by them. Indeed, some will say that the good faith principle deals with the parties’ behavior and is therefore viewed as focusing on a limited, “personal” social responsibility, whereas the public policy principle—as its name denotes—is concerned with social responsibility for the public in general. Yet, this distinction between the principles is also not as significant as it appears at first glance. In light of the personal character of most contractual disputes on the one hand, and of the social and normative character of the good faith and the public policy principles on the other, both principles work together to combine the personal and the social, and to bring into human interactions consideration for the basic principles of the legal system.

#### *IV. The Scope and Extent of Social Responsibility Imposed Through Contract Law*

The social responsibility of the legal system’s components and their subordination to the basic principles is already fundamentally acknowledged in the extensive use of the contractual

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<sup>122</sup> See e.g., The Contracts (General Part) Law, *supra* note 36, at art. 30 (invalidating a contract that violated public policy). From this we can understand this principle’s negative character. *Id.*

principles of good faith and public policy. Once this approach was essentially accepted, the “technical” question of *how* to apply these basic principles to private law and through what “*channels*” to apply them to interpersonal relationships became less important. By contrast, the more essential question of the *balance* between the social values committed to by the parties to the interaction, and their *level of commitment* to these values, shifted to the center.

The scope of social responsibility for individuals and private bodies is thus the top concern, and the conceptual and essential obstacles that will emerge as social change unfolds must be overcome. Paradoxically, the distinction between public and private law, which helped in the development of social change, seems to act as a double-edged sword because of its double message. It thereby reminds us of “pushmi-pullyu,” the animal with opposing heads in Hugh Lofting’s book.<sup>123</sup> On the one hand, the private-public distinction helped to build this change, to identify the diversity of the legal elements, and to dim the legal dichotomy between public and private. On the other hand, recourse to the “ambiguous” terms of private and public law to determine the *scope* of the basic principles hinders the development of social change as a uniform and harmonious perception. It is no surprise that an attempt to undermine the qualitative status of the distinction between private and public law, while also preserving its quantitative status, hinders the development of social change and its application to interpersonal relationships between all the legal system’s elements. These approaches, therefore, must be replaced with the deeper social considerations at their basis, which will help set the limits of social responsibility worth imposing on any given interaction.

The distinction between public and private law is not sensitive to the goals of social change, or to legal and social considerations bearing on heterogeneity in the specific social and legal classification of interactions within “private” law. Nor is such distinction sensitive to the status and the social exposure of the values involved or to the parties in the various interactions. However, the desirable criteria for imposing social responsibility

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<sup>123</sup> HUGH LOFTING, *THE STORY OF DOCTOR DOLITTLE* (1988).

through contract law can largely be derived through the social justifications that accompany the application of the good faith and public policy principles.

The development of social change in contract law in Israel and its anchoring in basic principles of good faith and public policy herald a genuine conceptual breakthrough and an evolutionary maturation of the law and its components. And yet, until the direction, the limits, and the scope of the social responsibility incumbent on all components of the system are set, the change remains tentative and fragile. The classic distinction between “public” and “private” law, now blurring, has not proved helpful either. This anachronistic distinction could actually encumber and hinder the identification of coherent guidelines for determining the suitable extent of social obligations incumbent on individuals. The distinction between “private” and “public” law is not entirely meaningless, but it does divert attention from the deeper aims, and the complexity of the social approach within private law, including its different components and the various areas it covers. Public-social characteristics do percolate down to individual relationships,<sup>124</sup> “private” elements percolate down to the relationships between the individual and the government,<sup>125</sup> and human rights are not absolute, neither in the government’s relationship with the individual, nor in an individual’s interpersonal relationships.<sup>126</sup> Nevertheless, preserving and relying on the

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<sup>124</sup> Barak, *supra* note 18, at 194 (stating that “[p]rivate law determines the measure of protection granted to human rights in their relationship with other human rights. Laws of contract, property, and torts determine to what extent a person may act to implement his human rights without breaching the protected human right of the other.”).

<sup>125</sup> Considerations bearing on other individuals may also percolate down to the relationship between the public authority and the individual. Thus, when the government is required to implement a human right, it cannot avoid an implicit and explicit examination of other human rights and of injury to other individuals.

<sup>126</sup> *Cf. Roker*, LCA 6339/97 [1999] at § 6.

Should we not say that the right to property is ‘absolute,’ and thus not subject to the general principle of good faith and leaving no room for discretion in all that concerns remedies for this injury? Should we not fear that the scope of the good faith principle in property laws—regardless of whether they originate

distinction between “private” and “public” law hinders the incorporation of the social approach developing mainly within private law, and acknowledges in principle the standing of *all* social “players”—individuals, corporate bodies, and public authorities. The use of the terms “private” law and “public” law had transformative significance in bringing together these two legal realms, but not necessarily in their qualitative merger. The “private” and “public” law classification captures the cumulative experience reflecting considerations relevant to determining social responsibility in extreme cases, but it is not pertinent when determining social responsibility within private law. Social responsibility follows from the general social aim of acknowledging the responsibility of all the legal system’s components in their interpersonal relationships, and is influenced by the social and interpersonal exposure of any given interaction. It does not derive from the “official” identities or considerations that had traditionally stood behind public law.<sup>127</sup>

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in the Land Law or in another law ensuring proprietary rights—will lead to uncertainty concerning property? The answer is: the right to property, as all other rights, is not absolute. *All rights are relative*. The right to property is not the right to act without good faith. Hence, there is always judicial discretion—within the bounds of the good faith principle—to give remedies for injury to a property right. Nevertheless, the requirements of good faith within the bounds of the right to property are not the same as the requirements of good faith within the bounds of the Law of Obligations. The essence of the right affects the scope of the good faith principle within its bounds. Each right and its protected values and interests; each right and its strength; each right and its balance in its relationship with contrary values and interests; each right and the extent of influence that good faith has upon it. (emphasis added). *Id.*

<sup>127</sup> Cf. H CJ Sarussi v. Nat’l Labor Court 52(4) PD 817, 826-27 (Opinion of Chief Justice Barak) [1998] (Isr.).

We must not be oblivious to legal concepts. We are not required to reinvent the wheel every time. Legal concepts reflect insight and long experience. They ensure stability and certainty. This is their importance. They refine our thought. They ensure that we will take into account all the proper considerations. Indeed, legal concepts are proper points of departure. Hence their importance. They should not become compelling finishing points. Hence their danger. Indeed, jurisprudence develops legal concepts.

Furthermore, social responsibility and consideration for the other's justified expectations derive *ab initio* from contract law, which is also the tool for their inclusion. These aims should be refined to create a synthesis with the aims of social change itself. Only then will it be possible to set the proper doses of freedom and responsibility within contract law as two sides of the same coin, without unduly sacrificing their aims and while facilitating the application, acceptance, and identification with this responsibility and, indirectly facilitating certainty and stability. Ultimately, realizing the justified expectations of those involved in contractual interactions is also the view of the social change reviewed in this article.

Given this context, this discussion does not analyze the central justifications of contract law but focuses instead on what, in my view, are the main considerations in determining the extent of social responsibility imposed in a given case. These considerations examine the extent of the influence and the social "radiation," but also the social purpose of the legal interaction—as opposed to focusing solely on the private or public essence of the player involved. Indeed, and similar to the traditional distinction between

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Each legal tradition and each legal culture has its own legal concepts and its own jurisprudence. These are extremely important. They sum up the cumulative legal experience. The jurist need not begin his analysis from nothing. He is allowed to, and indeed should, continue from where his predecessors ended. No need to begin always from *tabula rasa*. Moreover: the assumption might be that the creators of the norms assumed the existing conceptual framework as the basis of their work. Thereby, stability, security, and the preservation of tradition can also be ensured. Nevertheless, legal concepts are not masters, but only supporting aids. They reflect the weighing and the balance between clashing notions. They are the result of a collision between conflicting values. They are not the values themselves. Hence, we must seek the assistance of jurisprudential concepts. We must see them as the foundation of our actions. But we must also be ready, at all times, to deviate from existing concepts, change them, or build new ones. *We no longer live in a world of concepts. The essence is the social aim that the law was meant to achieve, not the concepts the law dons.* (emphasis added). *Id.*

private and public law, this consideration, too, will lead to the conclusion that, in ordinary circumstances, the public authority's commitment to take into account the legal system's basic principles and the individual's justified expectations will be greater than that of the individual. The reason for this is the exposure and social influence inherent in the government body vis-à-vis those of the individual and the different expectations prevailing in the interaction with an administrative body, contrasted with those prevailing interactions with individuals or corporate bodies. Nevertheless, the approach offered in this article is aware of, and sensitive to, the exposure and the social purpose of the legal action and of the specific interaction. The proposed distinction, then, advances the idea that all of the legal system's components share a social commitment, and this system's fundamental values, as well as the obligation of proper behavior, are evident in personal interactions no less, and perhaps even a great deal more than in the relationships between the government and the individual.

An examination considering the extent of social influence will therefore show that, generally, the exposure and social influence of individuals are limited by comparison to that of the administrative authority (or even that of a large corporation). This is an element justifying a *quantitative* and not necessarily a *qualitative* distinction between the extent of social responsibility required from individuals in their interpersonal relations. And yet, both the administrative authority and the individual—particularly when what is at stake is contract law, which entails cooperation and social interaction—are active social components belonging to their surroundings, being affected through multiple play, and concentrating some measure of power and socio-economic importance.

This “quantitative” test of social exposure and influence, at the level of interpersonal relationships as well, is not divorced from “qualitative” considerations derived from the *legal context*, meaning the contractual context where the social balance takes place. These considerations influence the social components' justified expectations from one another, as well as the desirable level of social responsibility. Thus, contract law—which reflects the social

ascendancy of the trust idea<sup>128</sup>—insists on the *a priori* preference of this social value when determining the scope and contents of the social responsibility imposed within its bounds. This preference derives from the main social purpose of contract law, which is to realize the parties' subjective expectations tied to the contractual interaction, but it is also the justified expectations of the public that rely on the contractual institution and witness this interaction. The test of justified and proper expectations, however, is also sensitive to the social influence of the social component or the specific interaction.

In cases of intensive social exposure, one could speak of greater justification for imposing intensified social responsibility since this is the public expectation. Hence, the contractual expectation from a banking corporation differs from the expectation from an independent service provider, such as a taxi driver, given the exposure and power of the typical interests at stake. Nor is a sweeping injury to freedom of occupation, even if committed by an individual, equal to a trivial one. One caveat is in place in this context—the results of the social exposure test (that, in my view, derive from striving to realize justified expectations from oneself and from the other) resemble the neo-classical economic paradigm, accepted as a justification for intervening in interactions affected by external influences. As the neo-classical economic paradigm acknowledges the imposition of social responsibility in cases of negative externalization, so does the social exposure test. And yet, the social exposure test suggested here gives a broader interpretation of negative external influences as including, for instance, violations of the individual's basic rights and, consequently, of the constitutional dimension of the entire legal system and of the "public policy."

The guiding independent power of the considerations bearing on the social exposure of the interaction or of the specific values involved is, as yet, not directly traceable in the case law dealing with social change in Israel. Over time, this absence could lead to the erosion of the social principles regulated in contract law—where

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<sup>128</sup> *Sarussi*, 52(4) PD [1998].



change is currently taking place—and thereby hamper its continued development. This phenomenon intensifies in light of the excessive imposition of social responsibility (at least rhetorically), as evident in the disregard that several judicial decisions have evinced for the justified expectations pinned on the contractual institution to promote the idea of trust.<sup>129</sup>

An analysis of the argumentation of Israeli case law and its use of the legal principles of “good faith” and “public policy” leads to the conclusion that the desirable direction of the social trend in Israeli law is to impose social responsibility on *all* the company’s components and on all interpersonal relationships. Still, the actual attitude to corporations as bearers of social change evident in the case law implies that, unconsciously, this trend also takes into account social influence, as represented in the exposure of the social components involved. The social exposure test is also derived from the kind of rights involved. A review of the issues where case law acknowledged the application of the basic principles in the relevant interactions suggests that blatant violations of human dignity,<sup>130</sup> equality,<sup>131</sup> and of freedom of occupation<sup>132</sup> were at stake. Significant consideration has thus been given to the social weight of the violated basic principles to which the social purpose and the dominant personality of the legal interaction should be added.<sup>133</sup>

Summing up, it is clear that the identity, the influence, and the exposure of the social component (individual, corporate body, or public authority) are not the only important factors concerning social influence. At times, the inherent social nature of the values and

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<sup>129</sup> Bukspan, *supra* note 6.

<sup>130</sup> *Kastenbaum*, CA 294/91 [1992].

<sup>131</sup> *Recanat*, HCJFH 4191/97 [2000].

<sup>132</sup> *Sa’ar*, CA 6601/96 [2000].

<sup>133</sup> This is the case regarding an apartment where the owner lives. In the current legal situation, the owner could seemingly refuse to lease a room in his apartment to someone else, including on discriminatory grounds (though we may assume that such grounds would be disguised as far as possible), given the interaction’s limited exposure and due to the Lessor’s personal association to the property where he lives. These two reasons greatly lessen the public strength of this interaction. Circumstances would be different if a commercial body were involved, leasing rooms in a commercial, or even residential, building.

rights converging on a given interaction is what affects the level of exposure and influence, and hence the social responsibility related to it. All these considerations draw their justification from the weight of the social component and on the specific social-legal interaction so that their strong mutual ties are not surprising.

Some examples below clarify the application of these considerations in determining the proper scope of social responsibility in different contexts. The first two deal with encounters between individuals; the third with a corporation as a party in a legal interaction; the fourth with a public body; the fifth again concerns individuals, but this time with parties involved in a criminal rather than civil interaction; and the sixth deals with the specific issue of human trafficking which is subject, mainly, to criminal, constitutional and international law but involves, inter alia, civil and controversial contractual aspects. These examples illustrate that the decisive considerations in determining the suitable measure of social responsibility derive mainly from the exposure and social location of the specific social component and/or interaction, and not necessarily from their official or personal standing.

*A. An Ordinary Contract - What is the desirable scope of social responsibility concerning two individuals who signed an ordinary contract, such as one for the sale of a vehicle?*

According to the above considerations, this responsibility is exhausted by the individuals' obligations to fulfill the contract toward one another (unless both later agreed to cancel it). The right involved in this encounter is contractual-voluntary and personal, and since this is a personal encounter of limited scope, the parties' social responsibility begins and ends with the enforcement of consent and with each party's fulfillment of the other's expectations. Such an outcome would also be the optimal advancement of the idea of trust protected through contract law.

*B. A Contract influencing Social Values - What is the application in a case in which two individuals reach a contractual agreement that entails, for instance, the violation of a law or a constitutional principle, such as freedom of occupation, thereby weakening the "personal" aspect of the encounter?*

In such a case both have exposed themselves to a wide circle of values and are also influenced by public aims that transcend the implementation of their own will. In this case, then, the voluntary interaction externalizes, radiates, and affects the *public policy*, that is, the social and business culture around them. Their interaction thus influences not only the fulfillment of their own expectations, but also the strengthening of desirable expectations that stem from the exposure to additional social values. In contrast with the first case, here, the social exposure of the legal interaction followed from the violation of the basic principles. This case illustrates that private law does not necessarily deal only with intimate and autonomous interactions, but also with interactions that may affect the entire system. In such circumstances what is required is to balance the validation of a social interest involving autonomy of will and the realization of the parties' expectations on the one hand, and social interest on the other. This balance between social interests is already in the "public" sphere and, therefore, justifies at least examining the imposition of social responsibility. Such an approach is illustrated, for instance, in *Sa'ar*, where the violation of a social value (freedom of occupation) through the contractual encounter sufficed to color the entire interaction in "public" hues, regardless of the parties' identity and of their quasi-public standing.<sup>134</sup>

A hint of this approach, focused on the *social location* of the basic principles (rather than on the specific social party's identity and activity) in order to justify the imposition of social responsibility, is that of Justice Barak in *Kastenbaum*: "The more I thought about this, I concluded that the fundamental issue in this legal problem is not the action of the burial society in the realm of public law, or even the unfair formulation of its standard contract. The fundamental issue in

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<sup>134</sup> *Sa'ar*, CA 6601/96 [2000].

this problem is the application of principles of public law. . . in the realm of private law.”<sup>135</sup>

*C. An Influential Contractual Party - What about a case in which the contractual party is a large and socially influential corporation?*

Almost automatically, the weight of the consideration dealing with the public exposure of the *social* component is significantly higher towards the imposition of social responsibility. This analysis rests both on the observation that intervention in freedom of contract (through the principles of good faith and public policy) is greater in corporate than in private settings, and on the development of an expanding social approach concerning the purpose, and hence the responsibility, of the modern business company.<sup>136</sup> The consideration regarding the power and strength of the social component, which could have been perceived as justifying the “privatization” of human rights, encroaches on the consideration bearing on the exposure and social influence of the legal element, but does not exhaust it. Naturally, a body of social-economic significance operating vis-à-vis the individual will be required to bear greater social responsibility than that imposed on one individual vis-à-vis another. The “privatization” of human rights, however, is not limited to such bodies, and originates in essential social arguments not only tied to power.

Furthermore, insofar as we speak of a corporate body lacking a human dimension, the consideration touching on the protection of the social principle of “autonomy of will” may still appear as slightly less significant, despite the contractual interaction involved.<sup>137</sup> Given

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<sup>135</sup> *Kastenbaum*, CA 294/91 [1992] at ¶ 18 (Opinion of Chief Justice Barak).

<sup>136</sup> This view is compatible with a larger world trend of developing corporate social responsibility. *See, e.g.*, THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen NcBarnet et al. eds., 2007).

<sup>137</sup> Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577 (1990); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U.

the autonomy of private will, the usual reluctance to apply basic principles of “public” law to “private” law is milder.<sup>138</sup> From another perspective, the legal course that identifies the corporation’s autonomy of will with the will of its members is a complex legal move that can be justified by legal policy considerations, but not by a mental-personal situation.<sup>139</sup> Thus, a health corporation that employs tens of thousands, provides a vital public service, and operates hundreds of medical institutions illustrates this argument. Naturally, the social exposure of a body of this type as a “social component” is extensive and significant. Such a characterization, primarily affecting the considerations dealing with the place and social influence of the legal component, will lean toward the expansion of social responsibility, in the spirit of Justice Cheshin’s statement in *Niv*:

Clalit Health Services is not like other employers. Not only does it employ tens of thousands but also provides—by law—a vital public service to millions of insured (according to its claim, about three and a half million of them) and operates hundreds of medical institutions, including hospitals and clinics. Indeed, Clalit Health Fund is a public body in the full sense of the concept, socially and nationally. The retirement agreement that was concluded was no ordinary agreement either: the government was involved in it and the General Federation of Labor was party to it. In the circumstances, the need to protect basic principles of law becomes much stronger, and the breaching of these principles will be considered particularly wrong and serious. If this is generally true, all the more so when the issue is the

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CHI. L. REV. 1441 (1987); *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>138</sup> Perceiving the corporation as real is actually compatible with imposing responsibility on it. See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. J. 767 (2005).

<sup>139</sup> Cf. MEIR DAN-COHEN, *RIGHTS, PERSONS AND ORGANIZATION: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* (1986).

discrimination of women employees. Who would believe that Clalit Health Services would behave in this fashion? Who could have expected the General Federation of Labor, the protector of working men and women, to behave in this way?<sup>140</sup>

Justice Cheshin also uses the term “public,” but more in the social rather than government sense of the term, strengthening the conclusion that the *social* rather than the governmental importance of the corporate body is the deep reason for imposing social responsibility upon it. The influence of the social component in question is relevant not only because of the potential risk to social values, but also because of its “representative” and public quality. In that sense, and with the Court’s assistance, it can help to incorporate social change into Israeli law. This issue, too, is apparently suggested in Justice Cheshin’s ruling in *Niv*, when he refers to the discrimination against women in Clalit Health Services:

If a respectable body such as the Jewish Agency acted as it did, and if this path was also adopted by Clalit Health Services, a respectable body in its community, then our issue appears to be in the society’s genetic code, a genetic code telling us that a woman is inferior to a man. If this is indeed the society’s genetic code, a mutation appears to be required. We—the courts—will pursue this mutation stubbornly and consistently, until all will know that a woman’s rights are as those of a man, not a hairbreadth less. That is what we will do and will go on doing, and we will not rest.<sup>141</sup>

The justification for imposing greater social responsibility when encountering power gaps is indeed the need to prevent the violation of liberties by whomever can engage in it.<sup>142</sup> No less

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<sup>140</sup> *Niv*, HCJ 6845/00 [2002] at ¶ 48 (Opinion of Justice Cheshin).

<sup>141</sup> *Id.* at ¶ 55.

<sup>142</sup> Michael J. Horan, *Contemporary Constitutionalism and the Legal Relationship Between Individuals*, 25 INT’L & COMP. L.Q. 848, 860 (1976).

The basic assumption shared by most jurists and writers who have dealt with the general subject is that concentrations of

important, however, is that the aim of imposing responsibility is positive and constructive; given that the body's social exposure itself serves to incorporate the basic principles in an efficient way.

*D. A Governmental Contractual Party - What about a case with the contracting party as a government body?*

Here, an examination of the considerations bearing on the determination of its social responsibility will lead to slightly different conclusions. A government body is a social organization charged with acting in the public interest, hence with its social place and influence. Consequently, the tendency will be to endorse a broader view of this component's social responsibility and its subordination to the basic principles than that adopted regarding an individual or a corporate body. Unlike the case of the business company, we do not expect a government body to operate so as to maximize its own interests in detachment from the social ones it is meant to pursue.

*E. A Non-Contractual Interaction Influencing Social Values - Now let us assume that our concern is neither a contractual interaction nor a socially powerful body, but a situation where one person stole from another.*

In this case, too, it is not the identity of the parties—individuals in this case—that will make the interaction “public” but the nature of the value and of the right violated. Rather than a

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economic or political power in large scale private organizations in the twentieth century have created the potential for serious abuse of individual freedoms. These ‘private governments,’ such as large industrial concerns, trade unions and broadcasting networks, possess the means of influencing or controlling the lives of their employees and millions of other persons. It is imperative, therefore, that these organizations, and perhaps any person or group whose ‘power’ grossly overshadows those with whom they enter into legal relations, be compelled to observe the fundamental human rights guaranteed by the institution. *Id.*

personal injury, the duty not to steal is perceived as an injury to a social interest, as the violation of constitutional values in contract law has been perceived of lately. The violation of the social interest is what affects the thief's influence and social responsibility. It is not the government classification, but the social values involved, that are behind the imposition of legal responsibility, even though the official determination could at times be relevant to the definition of various offenses.

*F. Human Trafficking and Contract Law – To what extent does contract law constitute a framework for dealing with the issue of human trafficking and what is the appropriate application and scope of the good faith and public policy principles in this context?*

The phenomenon of human trafficking, in its various appearances, is one of the most severe and harsh phenomena dealt with by humankind. In fact, one almost cannot think of a behavior more harmful to the basic human values than that of human trafficking. This article does not pretend to deal with the topic of human trafficking in detail,<sup>143</sup> a topic that is first and foremost dealt with by means of criminal law, international law and constitutional law. The sole aim of this sub-section is to shed light onto one narrow aspect which is the congruence of the principles of good faith and public policy in contract law with the topic of human trafficking.

First, it must be mentioned that there is no doubt as to the

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<sup>143</sup> See Hila Shamir, *A Labor Paradigm for Human Trafficking*, forthcoming in 60 UCLA L. REV. (2012) (defining human trafficking and the main anti-trafficking policies around the world). For a description of human trafficking in Israel, see [http://www.kavlaoved.org.il/section\\_eng.asp?pid=76](http://www.kavlaoved.org.il/section_eng.asp?pid=76); and [http://www.hotline.org.il/en\\_drupal/english/publications.htm](http://www.hotline.org.il/en_drupal/english/publications.htm); Gilad Natan, *How Israel protects against Human Trafficking in 2010 based on a 2011 U.S. State Department Report (Report 2011)*, The Knesset, Research and Information Center, (18 July 2011), available at <http://www.knesset.gov.il/mmm/data/pdf/m02891.pdf> (Isr.); Rachel Gershuni, *A Bird's Eye View of the Government Battle Against Trafficking in Persons*, (Israel Ministry of Justice, 2010), available at <http://www.justice.gov.il/MOJHeb/YeutzVehakika/NosimMishpatim/Sahar/> (Isr.). Shamir, *id.* at § II. C. (exploring the case of migrant Thai agricultural work in Israel).



high level of social responsibility that must be imposed upon the perpetrators of human trafficking in light of the violation of basic and significant societal values, be it in the framework of contract law (as in the second scenario above) or not (as in the fifth scenario above). Indeed, regarding the treatment of this phenomenon by contract law, the common approach holds that in light of the criminal character and element of coercion (to say the least), it is inherently inappropriate from the outset to view human trafficking from a contractual point of view, at the base of which lies consensual agreement. This approach is based on the assumption that using contract law to deal with the topic of human trafficking constitutes an implicit legitimization of the phenomenon.<sup>144</sup> At least it is believed that contract law is “too gentle” a means to deal with such anti-societal behavior and that it lacks added value compared to all the other various legal tools aimed at treating human trafficking. It appears that it is this approach that lies at the base of the preference to use torts and sometimes unjust enrichment as cause for civil suit—causes that are based on non-willful legal actions—that allow the victims of human trafficking to sue those who violated their rights.<sup>145</sup>

Our approach on this matter differs. When contract law *from within itself*, recognizes the need to consider public policy, which includes the fundamental human rights and the duty to behave in a loyal manner and in good faith, it appears that there is a public and expressive advantage in dealing with human trafficking by means of the public might rooted in contract law.<sup>146</sup> Due to the inherent

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<sup>144</sup> Martha C. Nussbaum, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693 (1998) (focusing on the context of trafficking of women for the purpose of prostitution).

<sup>145</sup> See Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574 (2006) (examining the advantages of a suit in damages in the field of human trafficking). See also Tsachi Keren-Paz, *AT v. Dulghieru – Compensation for Victims of Trafficking, But Where is the Restitution?*, 18 TORTS L.J. 87 (2010). See also CA 3806/06 R. v. D. (not yet published) [2009] (Isr.) (recognizing a suit in damages brought by a victim of human trafficking.).

<sup>146</sup> According to the expressive theory of law, the expression of social values is an important or, possibly, the most important function of the courts. See Cass R. Sunstein, *Symposium: Law, Economics & Norms: On The Expressive Function of*

location of the principles of good faith and public policy in contract law, concealed within it are expressive and coercive remedies that have the power to convey the moral message condemning human trafficking, a message that is swallowed up by the use of tort law.<sup>147</sup>

In other words, when speaking of the civil law and its coping with the phenomenon of human trafficking, it appears that, in fact, the use of contract law—which aims to assimilate a culture of trust in general and for socially and constitutionally desirable agreements specifically<sup>148</sup>—will be effective in its declaration of the distortion and revulsion of the phenomenon of human trafficking, and in its imposing civil social responsibility. While in tort law the harmful behavior is limited to specific civil wrongs, such as assault, conversion, and unlawful imprisonment, the use of the principles of “public policy” and “good faith” found in contract law labels the behavior of human trafficking directly as anti-social behavior and illustrates the intensified social role of contract law in modern law. Additionally, we may also assume that from the point of view of the person harmed, the use of the principles of good faith and public policy have an empowering effect when he or she makes a civil legal claim that relies on the public-social harm that is attached to his or her own personal damage.

The buds of such a use of contract law can be found in a few cases in Israel. Such an example is found in the labor courts in Israel where an innovative approach is developing that, in effect, assumes

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*Law*, 144 U. PA. L. REV. 2021 (1996). Sunstein suggests that the expressive function of the law is closely related to the effects of the law on prevailing social norms, given the rough analogy between the social and legal levels. *Id.* He claims that a society might identify the norms to which it is committed and insist on those norms via the law. *Id.* Accordingly, one of the clearest expressive functions of the “statement” made by the law may be to affect social norms and, thereby, ultimately affect both judgments and behavior: a law that is appropriately framed may influence social norms and thrust them in the right direction. *Id.*

<sup>147</sup> See Baher Azmy, *Unshackling The Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1035-36 (2002) (criticizing tort law as providing “inadequately expressive remedies” that “fail to communicate the appropriately strong message of moral condemnation that the unconstitutionally exploitative activity in [human trafficking] case demands.”).

<sup>148</sup> Bukspan, *supra* note 10.

the contractual model in order to facilitate recognition of the financial rights of the victims of human trafficking (for the purpose of prostitution) by virtue of the cogent Labor Laws.<sup>149</sup> The starting point in this case law is the principle of “public policy,” according to which obligations arising from such a ‘contract’ are indeed declared as void (and in so doing the court avoids giving constitutional, legal, moral and social legitimization to human trafficking). However, in the same breath, the ‘contract’ is acknowledged for the purpose of recognizing the financial rights of the victims of human trafficking, in order to create a new normative reality and in order to impose remedies on the other party and oblige him or her to uphold the void contract. This includes granting increased and penal compensation for distress and the breach of constitutional rights, as the victim of human trafficking himself has already been forced to perform his or her part of the contract.<sup>150</sup>

An additional use of the “public policy” principle as a significant normative tool in the combating of human trafficking in Israel can be found in a case heard before the Israeli Supreme Court in the matter of *Fredo v. Migdal Hevra Lebituah Ba’am*.<sup>151</sup> In this instance, use was made of this principle, found in the Contract Law, but which through Section 61(b) of the Contract Law applies to “legal actions that are not strictly a contract and to obligations that are not derived from the contract,” to bar compensation to pay for a prostitute to a person who was harmed in a car accident. The man brought a claim against his insurance company, arguing that his

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<sup>149</sup> La. A. 56 3-180 Ben-Ami v. Glirsenshi 31 PDA 389 [1996] (Isr.); La. A. 247/07 R v. Kuchick 105 DINIM ARTSI 84 [2009] (Isr.).

<sup>150</sup> The Contracts (General Part) Law, *supra* note 36, at art. 31 (stating that: [t]he provisions of §§ 19-21 [mutual restitution] will apply, *mutatis mutandis*, to the avoidance of a contract under this chapter, provided that in the case of an avoidance under Article 30 the court may, if it deems it just to do so and on such conditions as it sees fit, relieve a party of all or part of the duty under Article 21 and, insofar as one party has fulfilled his obligation under the contract, require the other party to fulfil all or part of the corresponding obligation).

*See Zaguri*, HCJ 6231/92 [1995], for the application of Article 31.

<sup>151</sup> CA 11152/04 Roe v. Migdal Insurance Co. Ltd. 61(3) PD 310 [2006] (Isr.).

sexual functions were harmed by the accident, and therefore that he is entitled to such amounts that will cover his payment for prostitution purposes in the future. The district court accepted an expert opinion suggesting that such an injury can be mitigated by using a prostitute. In this case ruled on by the Chief Justice and Deputy Chief Justice of The Israeli Supreme Court, the court criticized that arrangement on the ground that it contradicts “the public policy” in that it indirectly encourages the phenomenon of human trafficking for the purpose of prostitution.<sup>152</sup>

These examples, including the future possibility of imposing compensation by virtue of the breach of the duty of good faith, which occurs blatantly in the cases of human trafficking, demonstrates the power of these social principles of good faith and public policy, found in Contract Law in the form of a declaration, to deny compensation and obstruct arrangements that contradict, in such a basic way, the fundamental values of the society in which we live.

In sum, the split between “public” and “private” law is narrow, imprecise, and distant from the social and harmonious conception developing in Israeli law. The scope of social responsibility must be examined in light of the *a priori* social purpose of the legal interaction at stake, but also in light of deep and broad social considerations bearing on the measure of social influence, to be determined by the exposure and social standing of the basic principles and the social components at stake.<sup>153</sup> All these

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<sup>152</sup> Migdal Insurance Co., CA 11152/04 [2006] at § 17.

<sup>153</sup> This is my understanding of the parameters and the criteria suggested by Justice Zamir in the case of *On*, concerning the question of whether the Diamond Exchange is a “dual-essence” body.

The answer is related to the question of what are the essence and the role of the Exchange. We should clarify, *inter alia*, who established it and who controls the defendant; what are the relationships between the defendant and the Exchange; what is the role of the Exchange; does it—*de jure* or *de facto*—enjoy monopolistic status; what is the diamond dealer’s dependence on this Exchange; what are the business implications of a decision to prevent the diamond dealer’s entry into the Exchange’s premises. The answers to all these questions, and additional data, will enable to determine whether the defendant is a dual-essence

considerations draw on the proper expectations test that underlies social change and from the trust idea at the base of contract law.<sup>154</sup> The greater the influence of the legal interaction on the basic values, and/or the greater the social influence of the legal component, the greater the inclination to impose social responsibility on the individuals and entities involved.

### *V. Conclusion*

The thesis presented in this article rests on recent changes in Israel in the area of “materialistic” and voluntary business law, that is, the law that applies to contracts. This thesis proposes that incorporating a culture of mutual trust and imposing measured social responsibility and human rights will add a sophisticated, rich, and more basic dimension to the idea of personal freedom, as well as to the goals inherent in contract law shared by many legal systems.<sup>155</sup>

The developments described affect the collapse of the distinction between public and private law, the growing closeness between legal and social norms, and the need for developing new theories justifying and explaining the innovative and complex functioning of contract law. One of the article’s main goals is to illustrate ways of incorporating the approach regarding social responsibility and human rights through contract law. The deliberate use of contract law may emerge as an agent of real social and legal change. By dealing with the most common daily interactions at a time of weakening state and increasingly stronger “private” players, we are witness to a growth in the social stature of contract law even in the area of human trafficking, which has been, up until now, dealt with outside of the contract realm.

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body and, if so, whether it is required by virtue of public law principles to allow the appellant to enter the premises.

*On*, CA 3414/93 [1995] at ¶ 10.

<sup>154</sup> *Bukspan*, *supra* note 10.

<sup>155</sup> *Id.*



# INTERCULTURAL HUMAN RIGHTS LAW REVIEW

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The Intercultural Human Rights Law Review was established in 2005 and published its inaugural issue in the summer of 2006. It strives to provide a forum for dialogue between cultures in the field of human rights and related issues with a view toward arriving at solutions to global problems that approximate a world order of human dignity.

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