

Neither Angels nor Wolves

• • • *Evolving Principles of Social Responsibility in Israeli Private Law*

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ABSTRACT: This article describes an emerging trend in Israeli private law that strives to incorporate a culture of social responsibility into everyday life. Implemented through the legal principles of ‘good faith’ and ‘public policy’ in contracts, this applies mainly to the social responsibility of corporations. The adoption of such concepts in interpersonal relationships emphasizes that this approach aims to include all components of the legal system. The basic Israeli social and constitutional principles are analyzed, along with the role that individuals and business participants, not only government authorities, play in the structuring of a freedom-seeking society. The article concludes that this new trend also corresponds to the social discontent that was evident in Israel during the summer of 2011, as well as to a new way of thinking about the concept of capitalism in the business literature.

KEYWORDS: contract law, corporate law, good faith, human rights, private law, public policy, social responsibility

In 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.¹

Although Israel lacks a written constitution, ‘constitutional revolution’ has become a mainstream concept in recent years,² following the enactment of two Basic Laws in the early 1990s—Basic Law: Human Dignity and Liberty (1992) and Basic Law: Freedom of Occupation (1994).³ This ‘revolution’, however, also marks the culmination of a deep and long-standing social transformation that has been taking place in Israeli law, one that fundamentally emphasizes individual liberties but also individual responsibility

for proper interpersonal behavior. This comprehensive approach came to the fore clearly in Chief Justice Barak's statement in the *Kastenbaum* case,⁴ which is considered a landmark in Israeli law: "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 intended only against the government, but extend also to mutual relationships between private parties."⁵

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 unfolds mainly in three ways: (1) in the area of contractual disputes; (2) on the back of corporations in general and business companies in particular; and (3) through 'open' legal doctrines anchored in contract law (principles of 'good faith' and 'public policy'). These areas are strongholds of classic private law that traditionally viewed relationships between 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 while disregarding the interests of the other.

Contrary to the traditional approach, then, it appears that contracts and corporations in Israel—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. Contractual and corporate institutions are extremely powerful bodies that are suited to the assimilation of the 'social revolution' in law mainly because of their close ties to every individual and every social component of everyday life, as well as their association with comprehensive and diversified social values. The main purpose of these institutions is to enable individuals, as 'social animals', to create various kinds of relationships, to realize themselves, and to provide most of their needs voluntarily through coordination, cooperation, and mutual concessions (Benn and Peters 1959: 279). In this sense, it is clear that responsibility and freedom are not mutually contradictory; instead, they draw on one another. Recognizing the power and responsibility of individuals in the context of interpersonal relationships improves the protection of basic liberties and acknowledges that all components of the legal system, not only government authorities, are essential in structuring a freedom-seeking society.⁶

In this regard, the social unrest that took place in Israel during the summer of 2011 is not an indication that the social transformation discussed in this article is not moving in the right direction. Rather, it signifies that

such a transformation needs to be amplified and substantiated. As can be inferred from the declaration of “The Protester” as *Time Magazine’s* 2011 “Person of the Year,”⁷ the Israeli social discontent is not isolated from other incidents of social activism that have taken place globally, including the Arab Spring, the UK riots, and Occupy Wall Street. Such activism reflects the collective power of private individuals when they no longer trust principal social institutions—governments and businesses alike. The fact that some of the primary triggers of the global crisis have been corporations and other members of the business realm justifies increasing discourse about the social responsibilities of these entities when the lines between states and business corporations diminish (Mautner 2008a: 325–326). In other words, social protest and social processes parallel the conceptual legal change in business law and will likely continue to shape its goals and justifications in the near future.

Good Faith and Public Policy

This section explores the social processes taking place in Israeli contract and corporate law. At the core of these processes are the good faith and public policy principles as applied to contract law and to the corporate institution as a social agent with heightened obligations.

The Good Faith Principle: Incorporating Proper Interpersonal Behavior and Consideration for the Other’s Justified Expectations

Incorporation of the social outlook began with the broad application of the good faith principle in contract law before the enactment of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation in the 1990s and before the principle was also incorporated into mutual individual relationships. The good faith principle, which systematically influenced the entire legal system, sets forth consideration for the justified expectations of others and of society as a whole as a standard.

The principle of good faith and its scope are regulated in Israel in Sections 12, 39, and 61(b) of the Contracts Law of 1973. According to Section 12: “(a) In negotiating a contract, a person will act in customary manner and in good faith. (b) A party who does not act in 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.” Section 39 states: “An obligation or right arising out of a contract will be fulfilled or exercised in customary manner and in good faith.” Section 61(b) states: “The provisions of this law will, as 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.”

Strong evidence of the widespread acceptance of this principle is its inclusion in a proposed codification of civil law, in Section 2 of the chapter dealing with “basic principles,” immediately after the section that sets out the purposes of the law: “When exercising a right, performing a legal action, and fulfilling an obligation, good faith should be observed.” In this section, the good faith principle is formulated as a general normative criterion, calling for consideration for the other’s justified expectations. Thus, the good faith principle emerges as the essential link in the synthesis between the perception of contractual interaction—indeed any legal interaction, as shown in Section 61(b) of the Contracts Law—as personal and private and its perception as interpersonal, social, and public.

The public perception of the good faith principle is also evident in its universal standing. In fact, the good faith principle colors every behavior and every contractual and legal interaction with social-economic-humane hues. As Chief Justice Shamgar concluded: “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.”⁸ Although this statement concerns a social-communal context of neighborly relations in a condominium, it expresses a general truth about life in any shared social context. The good faith principle has been recognized as a social, unconditional, and objective principle, which sets a proper behavioral standard of trust and fairness between individuals,⁹ constitutes a “criterion for ‘inter-contractual’ or ‘interpersonal’ behavior,”¹⁰ 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” (Barak 1993c). The good faith principle validated the importance of mutual responsibility and social commitment—even before the constitutional revolution—in all contractual and pre-contractual interactions, in legal actions that are not contracts, and in obligations that do not follow from a contract.¹¹ Indeed, although the original and natural anchoring of the good faith principle is in contract law, which sets the standards for the most frequent voluntary interactions, that this principle has also spread widely to other legal areas emphasizes its centrality in Israeli law and highlights the role it has played in the attempt to enhance proper interpersonal behavior by taking into account the other’s justified expectations in all legal actions (Bukspan 2007: 51–59).

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 out in Israel's Basic Laws—in all human interactions. The incorporation of these principles has been 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 serves as a norm that is easy to identify with and as a central channel for the assimilation of consideration and social responsibility, particularly because it rules *all* mutual interactions. The fairness principle is no longer limited to public law. Within private law, it has attained very significant recognition in the context of the good faith principle.

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”¹²—is already latent in the contractual institution and was not a new addition introduced “following Section 39 of the Contracts Law,” as then Justice Barak noted.¹³ Indeed, as Israel's Basic Laws and their application to private law later showed,¹⁴ the explicit enactment of the good faith principle helped to focus the social lens on contract law. This is not a conceptual revolution, however, but an evolutionary development in our view of private law, including contract law.

We have dealt elsewhere with the potential influence of contract law on social norms through its “expressive” and “coercive” functions (Bukspan 2006: 239–245). For the purpose of this article, we will only say that, in our view, the good faith principle can be viewed as the ‘missing link’ between the aims of contract law and the aims of social change. The good faith principle, like the essence of social change, is concerned with the integration between personal freedom and 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.¹⁵

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 that surrounds pre-contractual proceedings and contractual relationships and is sweepingly imposed “on any individual in Israel performing legal actions.”¹⁶ The dominant standing of the good faith principle is aided 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*.¹⁷ Although this opinion preceded the enactment of the good faith principle, it defined the principle as “universal.” The importance of this principle was strengthened in the

1980s, about 10 years after the legislation enacting it. The Israeli Supreme Court in *Public Transport* stated:

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 39 of the Contracts 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.¹⁸

Today, 32 years after the benchmark set forth in *Public Transport*, the rhetoric concerning the good faith principle still resounds and has grown even stronger. The following statements, which reflect only the tip of the iceberg concerning the Court’s attitude toward the good faith principle, expose the Court’s view that this principle is the most basic and normative meeting point for the internalization of the norms that dominate human and social culture. Thus, for instance, Justice Cheshin notes in *Kal Biniyan*:

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 Contracts 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 is meant to prevent a situation of *homo homini lupus*. It seeks to introduce a normative framework whereby *homo homini—homo*.¹⁹

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.”²⁰

The good faith principle quickly attained a position of unprecedented prominence in Israeli law (compared to Anglo-American law) in an attempt to incorporate a message 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, it had been assumed that behavior expected from contracting parties derives from the nature of the encounter between such parties, who were viewed as naturally selfish and as seeking to maximize their individual profits. 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 consideration for the interest of the other.”²¹ The principle thereby sharpened the importance and the benefit of integrating personal interest and the social interest of consideration for the other. Even though it does not require altruistic behavior, it adds a sense of solidarity and cooperation among individuals:

These obligations [the obligation of good faith and the prohibition on 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 ... 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 ... 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.²²

The good faith principle has been broadly applied beyond contract law through expansion to other areas of Israeli law. These include real and personal property, intellectual property, family and inheritance, procedural civil law, the law of promissory notes, and laws concerning companies. All of these legal areas have applicable provisions that are explicitly set forth in the Contracts Law. Moreover, and although this article focuses on private law, it is worth noting that the good faith principle is not unique to the private sphere. It is akin to the fairness principle, which imposes an extensive duty of loyalty upon the government toward its citizens. In that sense, the good faith principle is a comprehensive norm that affects the legal system as a whole.

To summarize, the social implications of the good faith principle, its formulation as a general standard, its corollary proposition that takes into account the other's justified expectations, and its broad implementation—all

have made it the most essential element in laying the groundwork for integrating other social and public principles (such as human rights) into law, in general, and into contract law, in particular.

The Public Policy Principle: Incorporating Human Rights into Interpersonal Relationships

Social change, as a general process in Israeli law that supports appropriate interpersonal behavior and consideration for the other's justified expectations, unfolds not only through the good faith principle but also through another open contractual principle—public policy, as provided in Section 30 of the Israeli Contracts Law.²³ Traditionally, this principle outlined the borders of freedom of contract, but in the era following the enactment of the Basic Laws of the 1990s, the public policy principle assumed an additional dimension, that is, it was applied to all types of relationships. This emphasis sheds even stronger light on the place of basic principles within daily contractual interaction, thereby emphasizing the legal system's social role and the incorporation of an expectation of consideration for fundamental principles in non-contractual relationships as well.

Prior to the enactment of the Basic Laws, the conceptualization of the public policy principle as a “reflection of worldviews and life conceptions unique to a given social or national context”²⁴ turned it into a natural source for anchoring the constitutional and social principles later formulated in the Basic Laws in ordinary contractual relationships. Section 30 of the Contracts Law has been described in the post-Basic Laws era as a “main legal instrument—besides 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.”²⁵

The application of human rights in private law through the contractual principle of public policy, along with the responsibility that is thereby also imposed on the relationships between private individuals, was explicitly recognized in *Kastenbaum* and has since been supported in a series of opinions.²⁶ Many influential legal articles published in Israel have related to this phenomenon. The titles of these articles—such as “Protected Human Rights and Private Law” (Barak 1993c), “‘The Privatization of Human Rights’ and the Abuse of Power” (Radai 1994), “Public Law and Private Law: Overlaps and Mutual Influences” (Barak-Erez 1999), and “The Applicability of Administrative Law to Private Bodies” (Benvenisti 1994)—show them to be chiefly concerned with a “theoretical examination of the relationship between protected basic rights and private law” (Barak 1993c: 167) and with the legal policy of “privatizing human rights in private law” (Radai 1994: 23).

Israel's enactment of Basic Law: Human Dignity and Liberty (1992) and Basic Law: Freedom of Occupation (1994) created a 'supra-legal' constitutional regime that facilitated the courts' application of human rights to the area of private law. This application is 'indirect'—particularly by means of the public policy principle stated in the Contracts 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 in private law influences its formulation and will continue to do so in coming years (Barak, forthcoming). Although human rights, as traditionally understood, served to shield individuals from the ruling powers, in Israeli law such rights were applied (even before the enactment of Basic Laws) in the context of individual relationships by application of specific doctrines within private law, such as the Privacy Law and the Labor Law. In this way, constitutional law was enacted in Israel despite the absence of a written constitution.

The enactment of Basic Laws led to a new approach to all that concerns private and public law. Justice Barak was one of the prominent proponents of Israel's social-legal change. In his pioneering study, he suggested that the absence of a fixed and definitive distinction between public and private law in the period prior to the enactment of the 1992 and 1994 Basic Laws reflected a perception of public law as derived from private law and from 'ordinary' legislation, but it also reflected a perception that there was no supra-legal and normative status for the basic rights (Barak 1993c). Following the enactment of the Basic Laws, the understanding of fundamental principles regarding the application of basic human rights to relationships between private parties changed, as evidenced by the quotation from *Kastenbaum* at the outset of this article.²⁷

This holistic approach, which abandons the traditional distinction between public and private law, is also fruitful when applying the contractual public policy principle to incorporate basic rights into individual relationships. The use of doctrines from contract law to articulate the connection between interpersonal relationships and the legal system's basic principles is perceived in the legal literature as an 'indirect' technique for the import of basic principles into private law (Barak 1993c). In fact, however, such doctrines, particularly the public policy principle, convey a direct message about the legitimate social and public role of contract law. 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 public law being applied to private law through Basic Laws, the essential norms set forth in contract law are those that perhaps best express the public and social standing of contract law. In fact, both normative sources—contract law and Basic

Laws—inform and complement one another directly and both contribute to Israel's legal development.

The Corporation: A Lever in the Development of the Social Revolution

A cursory review of key rulings in Israeli jurisprudence dealing with the good faith principle²⁸ and the public policy principle²⁹ shows that, in a clear majority of cases, at least one of the parties was a corporate body. In most cases, social responsibility was imposed on (or at least contemplated for) corporate bodies but not on individuals, suggesting that we expect more from corporations than we do from individuals regarding consideration of an opposing party's justified expectations. Although the actual scope of this phenomenon is less absolute than its rhetoric, which submits *all* components of the legal system to the basic principles, this appears to be a transitional stage in the importance of a possible social change in Israeli law.

The discussion about corporations' role in strengthening the social change unfolding in Israel relates to an age-old question in corporate law: should the purpose of business companies be exclusively 'economic' (focused on profits), or should it include broader social causes? This (quite artificial) question and its consideration in Israeli law do not concern me here. I will also not focus on the question of whether corporations indeed obey the courts' rulings, or on the fascinating meta-legal issue regarding whether (and how) courts and legal actors can serve as agents of social change (Barzilai 2007, 2010; Mautner 2008b: 47–55). Instead, my discussion focuses on those concrete characteristics of corporations that illuminate the course of potential social change. The development and implementation of social-legal change as it applies to corporations do not occur randomly. Rather, progress in social change proceeds naturally from factors related to corporations' prevalence in the socio-economic context and on essential considerations related to corporations' power, which is usually greater than that of individuals. These considerations include corporations' socio-economic exposure, their position as social-legal mediators, and their lack of human characteristics, which facilitates interference with freedom of contract and personal autonomy.

The Corporations' Prevalence as a Social Component

It is no exaggeration to state that most of society rests on the activities of companies or corporate bodies (Chandler 1977; Parkinson 1993). Chief Justice Barak's statement on imposing criminal responsibility on corporations

is very pertinent in this regard: “In modern society, the corporation is the main basis of human activity. In some countries, there are more corporations than people.”³⁰ In fact, today some corporations are larger than states. One statistic even holds that among the largest 100 organizations in the world, 52 are corporations and 48, less than half, are states (Anderson and Cavanagh 2005). Since most business deals are conducted by corporations, their activity not only dominates contractual interactions but also affects other human and legal dimensions.

The business corporation’s routine contractual activities involve countless arenas, including the realms of capital, labor, property, products, and services. It is fitting that the corporation’s relationship with other entities and communities is described as a ‘nexus of contracts’, a particularly apt description as regards mega-corporations involved in tangled webs of seemingly endless contracts. Thus, we see why the corporation plays a crucial role in beliefs about social responsibility that are developing in Israeli law in the realm of contractual interactions. In modern society, self-realization by individuals depends to a great degree on an individual’s success in negotiating the corporate world. It is thus critical that values concerning social change, human rights, and concern for ‘the other’ apply to corporations as well as to individuals.

The Corporations’ Power and Socio-economic Exposure

The significance of corporations as social agents strongly affects the change unfolding in Israeli law primarily due to the simple fact that corporations are widespread throughout the country. These corporations’ separate and independent legal personalities, their size, and the separation they have instituted between ownership and management justify imposing social responsibility duties on them. For example, the business company (the most common corporate model) has a legal personality that is independent and separate from that of its investors, who have limited responsibility for the corporation’s actions, omissions, and debts. As such, the business company has the incentives and the capability to project responsibility for its actions and omissions onto the non-corporate world, for example, as in the Union Carbide disaster at Bhopal, India, and the *Exxon Valdez* oil spill in Prince William Sound, Alaska (Bainbridge 2000–2001). Here, the ‘agent’s dilemma’, known as the fundamental problem of company law, comes into play.

This concept highlights the separation between ownership and control and the ensuing externalization incentives. The agent’s dilemma justifies and explains corporate and securities law and imposes responsibilities on the company’s officers toward those who are subject to their decisions (Berle and Means [1932] 1991).³¹ The agent’s dilemma also intensifies the

demand to impose social responsibility on business companies and their agents, due to their inherent incentives to focus on their own interests at the expense of other corporate constituencies, including, *inter alia*, the realms of capital, environment, and humankind (both labor and customers). The Court in *Penider* stated: "Apparently, the modern emerging trend is that the company and the executives acting for it must take into account not only the shareholders' welfare ... but also that of its employees, its consumers, and the public in general."³² Along the same lines, the Court in *Cohen v. State of Israel* noted: "Administering a corporation is a serious matter. An executive role in a corporation involves a heavy responsibility, meant to ensure the interests of the corporation, its shareholders, and its creditors, but also those of the public."³³

The corporation's public dimension and public standing are greater than those of the individual; indeed, the corporation's public nature is evidenced by its similarities to a state in terms of structure and socio-economic power.³⁴ Chief Justice Barak relied on these grounds in dismissing the notion that human rights are "not applicable" to private law: "Human rights are endangered not only by governments ... We must acknowledge that human rights are greatly endangered by *non-governmental bodies*. Indeed, some even claim that, in democratic regimes, human rights face greater danger from other individuals than from the government" (Barak 1993c: 171; emphasis added).

The greater the public exposure and consequences of an interaction, the greater its accompanying responsibility because of the potential wide-scale influence and risks imposed on many constituencies. Thus, the social responsibility toward investors of public companies with marketable investments and publicly traded shares will exceed the social responsibility incumbent on a small family firm, with its limited social exposure and small number of investors. Similarly, the social responsibility (mainly toward consumers) of a banking corporation, an insurance company, or even a business that deals in a more specific trade, for instance, musical instruments, will not be equivalent to that of an artist who occasionally builds violins for sale, regardless of whether she or he has incorporated as a business firm.

The gradual imposition of social responsibility according to the corporation's potential level of exposure rests on both utilitarian and functional grounds. Acknowledging the social responsibility of the corporation 'simultaneously' acknowledges the effects on a relatively large number of 'beneficiaries'. The time to abandon this approach appears to be drawing closer, however, and we should isolate the considerations underlying the social responsibility imposed on corporations and also apply it, in the relevant contexts, to individuals as well.

The argument that an entity's level of social exposure or interaction should be considered in the imposition of stronger social responsibility may gain support from specific Israeli legislation dealing with the application of basic values to private interactions. Such legislation takes into consideration the measure of public exposure affecting private contexts. Relevant provisions include:

1. The definitions of "public place," "public service," and "public" in Section 1 of the Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000.
2. The definition of "employer" as one who hires more than 25 employees in Section 9(d) of the Equal Rights Law for People with Disabilities, 5758-1998, concerning their proper representation.
3. The obligation to "prescribe a code of practice which shall include the principal provisions of this Law concerning sexual harassment and adverse treatment in the labor relations sphere and which shall detail the procedures prescribed by the employer for filing complaints in respect of sexual harassment or adverse treatment" according to Section 7(b) in the Prevention of Sexual Harassment Law, 5758-1998, as it applies to an employer of more than 25 employees.

The test of socio-economic exposure as a consideration in imposing social responsibility is also supported in jurisprudential rulings. For example, in *Ibrahim Naamana v. Kibbutz Kalia*,³⁵ at the Jerusalem Magistrate's Court, the plaintiffs claimed that they were denied entry to a water park because they are Arabs. The defendants claimed that the plaintiffs were denied entry due to a terrorist attack in the area. The attack had raised fears that park patrons would try to injure the plaintiffs, making the defendants liable for the plaintiffs' injury. Such an incident involved a risk of losing potential clients and, in the long run, of diminishing the overall functioning of the park, affecting also the readiness of Arab families to come to the park.³⁶ The Court examined the situation and the application of the equality principle in the circumstances of the case through contract law and through the plaintiffs' justified expectations, as derived from the park's nature as a body open to the public:

People coming to the park must travel and invest time and fuel reaching it ... When, *ex post facto*, the plaintiff excludes part of the public from the offer it had extended to come to the park, this public's investment was in vain ... Cancelling the offer to this public is, *prima facie*, unfair ... Principles of contract law set the context for the realization of freedom of contract. In their light, as noted, cancelling the offer after the plaintiffs' arrival is incompatible with the contractual principle of good faith. The defendant cannot rely

on freedom of contract in a way that contradicts or overrides the principles that the legal system determined for the exercise of this freedom. *The defendant called the general public, Arabs and Jews, to come and amuse themselves at the water park. If the defendant changed its mind and cancelled the offer after the plaintiffs had already accepted it and had arrived, it thereby failed to abide by the principles of contract law. The right to equality, therefore, overrides all.*³⁷

The Corporations' Position as Social-Legal Mediators

The prevalent social exposure of corporations as opposed to that of individuals suggests another possible explanation for the development of social change as it applies to them. Currently, our lives are significantly affected by the existence, the actions, and the views of large companies.³⁸ A corporation, whether small or large, is a community composed of a nexus of contracts. All corporations can guide the surrounding society and help in the adoption of social norms. The nature of corporations as comprising many participants (and as largely collective) enables them to act as 'mediators' in the adoption of social norms (cf. Cooter and Eisenberg 2001).³⁹ The functional use of the corporation for the purpose of adopting a norm of social responsibility is manifest, for instance, in the grounds for imposing criminal liability on a corporation in *Modi'im*. In this opinion, the criminal mechanism of enforcement and prevention was 'privatized' through the imposition of criminal—and thus social—liability on the corporation, as a deterrent to further offenses:

[This case] deals with the propriety of applying to a corporation a norm that requires human characteristics in the realm of criminal law. The question is whether the legal policy that criminal law is meant to realize is compatible with the imposition of personal criminal liability on the corporation ... *When a behavior within the company is perceived as lawbreaking—tax evasion, breaching zoning and building laws, engaging in actions opposed to public morality (pimping), and so forth—society advances the values it wishes to protect by imposing personal criminal liability on the corporation. It thereby promotes the goals of deterrence and preventing recidivism. A company liable for the actions of its organs will engage in actions—mainly through the shareholders—to remove those who have acted illegally ... Obviously, the corporation's personal criminal liability will not replace the personal liability of the organs ... The corporation's personal criminal liability is its own.*⁴⁰

The influence of the corporation, then, is not only 'local'—affecting only the human elements close to it, such as its officials and employees—but also extends to a broader public that includes the corporation's clients, its suppliers, and its shareholders (however small and scattered). Indeed, it is common—particularly when environmental liability is at stake—for the

corporation's actions to influence the general public. The goal is to create mechanisms that take into account social considerations arising from the company's actions and the company's relationships with communities attached to it.

A good example of this type of mechanism is the adoption by business firms of ethics programs.⁴¹ Initial signs of this phenomenon are evident in Israel.⁴² Ethics programs and ethics codes usually include systematic visions of constitutive legal, social, and business validity, which represent and explain compulsory ethical rules, *inter alia*, on the basis of the organization's constitutive features and of democratic values. The codes relate to such topics as responsibility, trust, credibility, honesty, professionalism, and sensitivity to the organization's negative image. They are also concerned with the organization's commitment to the protection of human dignity, especially with regard to quality of life and health; to its clients, creditors, suppliers, and employees, as well as the general public; and to environmental issues. In this way, the ethics code is a link that serves to mediate between the economic goals of the corporation and its social ones. It also functions as an identity card that is unique to the company and can reflect the company's context and its sense of responsibility toward society (Bukspan and Kasher 2005: 161–165).

The Corporations' Lack of Human Characteristics: The Autonomy of Personal Will in a Corporate Context

Because of the characteristics of corporations, the typical corporation can further the development of social change processes more effectively than individuals can. Besides their greater social exposure and potential power, the corporations' lack of natural human characteristics—as opposed to their legal personality—eases their categorization as significant 'social actors' and explains their relative dominance in the process of social change affecting Israeli law. Social responsibility is currently imposed mainly through contract law that, traditionally, rests on the autonomy of will. The legal personality of corporations may explain why jurisprudence has shown a greater readiness to interfere with corporations' freedom of contract (through the principles of good faith and public policy) than with that of individuals. The corporation serves here as an instance of a broader phenomenon. Although corporations enjoy constitutional protection and are acknowledged as legal personalities, individual liberties do not fully apply to them (Horwitz 1985; Mark 1987; Mayer 1990).⁴³

The corporation is an artificial creation, and interference in its affairs touches on financial issues rather than personal rights. Given the autonomy of private will, the usual reluctance to apply basic principles of public law

to private law is milder.⁴⁴ Intuitive and legal sensitivity to the constitutional right (the autonomy of personal will) is thus lower when the subject is a corporation as opposed to a person. This fact can also explain the jurisprudential inclination, even if unconscious, to encourage the adoption of social responsibility as it applies to corporations through the erosion of the traditional laws of autonomy—that is, contract law.

A more qualified protection of corporate freedom of contract may rely on an approach, suggested in the literature and in judicial opinions, whereby not all the rights held by people are held by corporations. Thus, for instance, an Israeli court ruled:

A corporation enjoys liberties enabled by its character as a corporation. Freedom of occupation, property rights, defendant's rights, and other rights for which the existence of a physical ("flesh and blood") entity is not vital (such as the right to a family) are the lot of every legal personality. Hence, a corporation enjoys freedom of expression, as does any flesh and blood creature.⁴⁵

The existence of a physical entity does not necessarily lead to the protection of the autonomy of personal will. At stake is a liberty that protects, above all, the 'human in people', and, as such, its application to a corporation is not immediate and unquestionable. Ascribing the autonomy of will of the corporation's components to the corporation per se is incompatible with the basic stance of corporate law regarding the separation between the corporation's legal personality and that of its components. This separation is normatively and practically enhanced due to 'rational apathy' and to the separation between ownership and control, which shows sensitivity to the heterogeneity of the corporation's components. The claim that the corporation's will reflects that of its components is not immediately obvious—at least, not in judicial opinions that interfered directly with the corporation's will.

Conclusion

This article has described the new trends in Israeli law, which operate to incorporate a culture of social responsibility into daily life. The adoption of social responsibility to consider the justified expectations of the other in interpersonal relationships (including consideration for the Israeli basic social and constitutional principles), particularly when it unfolds through contracts and corporations, emphasizes that this trend aims to include all the components of the legal system in everyday life. The attempt, then, is not confined to government bodies or functions, nor is it meant to stop at them. Today, this social responsibility is implemented in practice through

contractual doctrines and applies mainly to corporate bodies, exposing their significant social implications. It also corresponds to new thinking in the business literature about the concept of capitalism (Porter and Kramer 2011). Although private corporations—unlike government bodies—were established voluntarily to promote the interests and liberties of their members, their characteristics and their potential social exposure cannot be ignored.

These phenomena do not take place in a vacuum. They are part of new developments in Israel and throughout the world in areas such as fair trade and human rights in the private sector, and they also reflect new views about the purpose of business companies in the twenty-first century and corporations' growing commitment to their employees, their clients, the environment, and, indeed, the public as a whole. The use of contract and corporate law is not accidental. Contract and corporate law may emerge as agents of real social and legal change, both because they deal with the most common daily interactions and because of their growing social stature. In these circumstances, we may expect the idea of social responsibility not to remain confined to contract and corporate law but to spread—like the ripples of a stone in water—to other human interactions.

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NOTES

1. Civil Appeal 6601/96 *AES System Inc. v. Sa'ar* (2000) 54(3) IsrSC 850, 878 (henceforth *Sa'ar*). All translations from the Hebrew are my own.
2. On the coining of the term 'constitutional revolution' and its meaning, see Barak (1993a, 1993b).
3. This 1994 Basic Law repeals and replaces the former Basic Law: Freedom of Occupation that was enacted in 1992 (Sefer Ha-Chukkim of 5752, 114).
4. Civil Appeal 294/91 *Hevrah Kadisha Jerusalem Community v. Kastenbaum* (1992) 46(2) IsrSC 464 (henceforth *Kastenbaum*), and also in HCJ Further Hearing 4191/97 *Recanat v. The National Labor Court* (2000) 54(5) IsrSC 330, 362

(henceforth *Recanat*): “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.”

5. *Kastenbaum*, 502.
6. The application of fundamental social principles to interpersonal relations is not unique to the Israeli legal system. In Israeli law, however, this topic seems to have evolved independently and with great impetus. See, for instance, Adams and Brownsword (2000: 112–113), Clapham (1993), and Horwitz (1992: 206–208). This topic is related to the development of an increasingly significant trend in legal literature touching on the connection between social and legal norms. See, for example, and only as an illustration, McAdams (1997) and Sunstein (1996).
7. <http://www.time.com/time/person-of-the-year/2011/> (accessed 1 May 2012).
8. Civil Appeal 2896/90 *Trotsky v. Alfonso* (1992) 46(5) IsrSC 454, 460 (henceforth *Trotsky*).
9. HCJ 59/80 *Public Transport Services of Beer Sheva v. National Labor Court* (1980) 35(1) IsrSC 828 (henceforth *Public Transport*).
10. Chief Justice Barak in Leave for Civil Appeal 6339/97 *Rocker v. Solomon* (1999) 55(1) IsrSC 199.
11. Sections 12, 39, and 61(b) of the Israeli Contracts Law.
12. *Public Transport Services*, note 9, 834.
13. *Ibid.* For an approach that views cooperation as an inherent value in contract law, see Adams and Brownsword (1995: chap. 9).
14. See below for further discussion of the incorporation of human rights in human interactions through the public policy principle.
15. Chief Justice Barak in *Kastenbaum*, note 4, 531.
16. Civil Appeal 610/94, 1989/94 *Buchbinder and Sussman v. the Official Receiver as Liquidator of the North America Bank* (2003) 57(4) IsrSC 289.
17. Civil Appeal 230/68 *Shimon Adani v. Shimon Cohen* (1969) 23 (1) IsrSC 142.
18. *Public Transport*, note 9, 834.
19. Civil Appeal 6370/00 *Kal Binyan Ltd v. A.R.M. Ra'anana Building and Leasing Ltd* (2002) 56(3) IsrSC 289, 297.
20. Justice Cheshin in Leave for Civil Appeal 1407/94 *Credit Lyonnais Suisse S.A. v. Mediterranean Shipping Co. S.A.* (1994) 48(5) IsrSC 122, 131–132. Indeed, Justice Cheshin immediately added: “Precisely for this reason, and given that the good faith doctrine is what it is, I think it would be proper to resort to it only when ordinary tools fail us.” Whether this “warning” is currently heeded seems questionable.
21. Civil Appeal 2643/97 *Gans v. British and Colonial Ltd* (2003) 57(2) IsrSC 385, 400.
22. HCJ 164/97 *Kontram Ltd v. Treasury Ministry* (1998) 52(1) IsrSC, § 5 of Justice Barak’s opinion. Cf. Eisenberg (1982: 744): “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.”
23. Section 30 states: “A contract, the conclusion, contents or object of which are illegal, immoral, or contrary to public policy, is void.”

24. Civil Appeal 614/76 *Roe v. Do* (1977) 31(3) IsrSC 85, 94.
25. *Kastenbaum*, note 4, 531.
26. See *Recanat*, note 4; Civil Appeal 3414/93 *On v. Diamond Exchange Enterprises (1965) Ltd* (1995) 49(3) IsrSC 196 (henceforth *On*); and HCJ 6845/00 *Niv v. National Labor Court* (2002) 56(6) IsrSC 663 (henceforth *Niv*).
27. *Kastenbaum*, note 4, 530.
28. See Further Hearing 7/81 *Penider Investment Co. v. Castro* (1983) 37(4) IsrSC 673 (henceforth *Penider*); Further Hearing 22/82 *Beth Yules v. Raviv* (1989) 43(1) IsrSC 441; Civil Appeal 846/76 *Atiah v. Ararat* (1977) 31(2) IsrSC 780; Civil Appeal 6370/00 *Kal Binyan Ltd v. A.R.M. Raanana Ltd* (2002) 56(3) IsrSC 289; Civil Appeal 4819/92 *Eliyahu Insurance Co. v. Yashar* (1995) 49(2) IsrSC 749; Civil Appeal 5893/91 *Tefahot v. Sabah* (1994) 48(2) IsrSC 572.
29. *Kastenbaum*, note 4; *Recanat*, note 4; *Niv*, note 26; *On*, note 26; *Sa'ar*, note 1.
30. Criminal Appeal 3027/90 *Modi'im Building and Development Ltd v. M.I.* (1991) 45(4) IsrSC 364 (henceforth *Modi'im*).
31. See also Civil Appeal 817/79 *Kosoy v. Bank Feuchtwanger* (1984) 38(3) IsrSC 253.
32. *Penider*, note 28.
33. Criminal Appeal 4148/03 *Cohen v. State of Israel* (2004) 58(2) IsrSC 629, 632.
34. The regime of a business company is very similar to that of a democratic state. Thus, for instance, the structure of rights and voting in a business company, from which 'control' of the company also derives, is usually set up democratically as one vote per share. The institutional structure and the typical corporate government of the business company also resemble a state. Like a government, a business company has a small and elected implementing body (the board and the executive) that holds control through the delegation of authority. The social attitude of the business company, as with a state, is illustrated in the vigorous discussion of its social purposes, which are seen to go beyond the maximization of the shareholders' wealth. The considerable social change currently evident in the corporate context attests to the social significance of corporations.
35. Civil Suit 11258/93 *Ibrahim Naamana v. Kibbutz Kalia*, Jerusalem Magistrate's Court, issued on 1 September 1996.
36. *Ibid.*, Section 4.
37. *Ibid.*, Sections 4–5 (emphasis added).
38. See, for instance, the discussion in Parkinson (1993: chap. 1). See also various chapters in Mullerat (2005).
39. This article deals with the way a company can encourage trust and good character among its agents in ways that overcome the agency problem and encourage others to cooperate. See also Eisenberg (1999) and Friedman (2006: 297), who states: "[Global corporations] are going to command more power, not only to create value but also to transmit values, than any transnational institutions on the planet."
40. *Modi'im*, note 30, 382–1383 (emphasis added).
41. For more discussion on the adoption of ethics programs and the motivation behind it, see Bukspan and Kasher (2005). See also "Growing the Carrot:

- Encouraging Effective Corporate Compliance," *Harvard Law Review* 109, no. 7 (1996): 1783–1800; "The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior," *Harvard Law Review* 116, no. 7 (2003): 2123–2141.
42. The essence of these programs, which include ethical codes assimilated through internal and effective compliance programs, has been my concern elsewhere. See Bukspan and Kasher (2005).
 43. See also *Lochner v. New York* (1905) 198 US 45.
 44. Perceiving the corporation as real is actually compatible with imposing responsibility on it. See Avi-Yonah (2005).
 45. Justice Barak, in Civil Appeal 105/92 *Re'em Engineers and Constructors Ltd v. The Nazareth Ilit Municipality* (1993) 47(5) IsrSC 189, 213–214.

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