

ARTICLES

CONSTITUTIONAL HUMAN DUTIES

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Abstract

Constitutional human duties are simultaneously present and absent. Though many human duties are set forth in many constitutions throughout the entire world, modern scholarship has almost entirely excluded them from legal conceptualization. Liberalism shifted the spotlight to the individual, as an autonomous independent unit, while abandoning society. Furthermore, there is a tendency to frame constitutional human duties as “constitutional interests.” This Article suggests an innovative comparative analysis of constitutional human duties. Founded on that analysis, this Article develops a novel typology through which the characteristics of constitutional human duties are examined. The implications of various constitutional duties are explored in accordance with the proposed typology. This Article further argues that, notwithstanding the differences between various constitutional human duties, all the duties share core characteristics and implications. Finally, this Article proposes that the constitutionalization of human duties is justified as long as their inclusion in the Constitution is essential for protecting fundamental constitutional values.

The true source of rights is duty. . . . If we all discharge our duties, rights will not be far to seek. If leaving duties unperformed we run after rights, they will escape us like will o' the wisp. The more we pursue them, the farther they will fly.
—Mahatma Gandhi¹

I. INTRODUCTION

In 1972, the European Commission of Human Rights (ECHR) rejected an appeal by an Austrian citizen who claimed that the constitutional obligation to vote violated his constitutional rights of freedom of conscience and freedom of speech.²

In 2012, an Irish citizen convicted of offenses involving Social Security fraud was sentenced to 12 years of imprisonment.³ The grounds cited for this cruel and unusual punishment were that the offenses were detrimental to the public interest, as well as to civil equality and integrity, upon which the mechanism of social security is founded.⁴ Therefore, he breached his constitutional duty, as a citizen, of loyalty to the state.⁵

¹ M. K. Gandhi, *Kathiawad Political Conference*, YOUNG INDIA, Jan. 8, 1925, at 1, 15–16.

² *X v. Austria*, App. No. 1718/62, 1965 Y.B. Eur. Conv. on H.R. 168, 172, 174 (Eur. Comm'n on H.R.); see also *X v. Austria*, App. No. 4982/71, 1972 Y.B. Eur. Conv. on H.R. 468, 472, 474 (Eur. Comm'n on H.R.).

³ *DPP v. Murray* [2012] 2 IR 477, 479 (CCA) (Ir.).

⁴ *Id.* at 483–84.

⁵ *Id.* at 483.

In 2016, an Indian court ruled that movie theaters would be required to play the national anthem before showing each film and that while the anthem was playing viewers would be required to stand, the flag would be shown on the screen, and the doors of the theater would be closed.⁶ The Indian court based its decision on the constitutional duty of Indian citizens to respect the flag and anthem.⁷

These three cases occurred at different points in time different countries, and refer to different issues and legal branches. However, each case refers to individuals upon whom a constitutional duty was imposed. Each of the respective duties embodies a social interest representing a constitutional value that conflicted with constitutional rights. Moreover, in all three cases, the courts ruled that the human duty prevailed in the constitutional balance.

Since the mid-twentieth century, constitutional scholarship has focused upon the constitutional rights of individuals on the one hand and on the powers of government on the other. Nonetheless, side by side with constitutional rights and government powers, many constitutions enshrine constitutional duties.⁸

This Article attempts to shed light on those human duties. These are duties that embody constitutional values, and they may not always generate a corresponding right. The entitlement to demand that individuals fulfill their respective duties is that of society as a whole. In most cases, the obligation is imposed only on the citizens of the specific country.

The choice to discuss human duties in the constitutional context gives rise to puzzlement and natural aversion. Nonetheless, according to Hohfeld, a right is always accompanied by an implied corresponding duty.⁹ According to

⁶ Shyam Narayan Chouksey v. Union of India, Writ Petition (Civil) No. 855 of 2016, decided on Nov. 30, 2016. (SC), 2–3.

⁷ *Id.* at 3–4. For subsequent reporting on the court's later clarifications to this order, see Priyanka Mittal, *Playing of National Anthem in Movie Halls Not Mandatory: Supreme Court*, MINT (Jan. 10, 2018), <https://www.livemint.com/Politics/ciXE1nfdt3CxJwFTX5p7XJ/Supreme-Court-says-playing-of-national-anthem-not-mandatory.html>.

⁸ Erensu Altan & Mila Versteeg, *Constitutional Duties*, 71 AM. J. COMPAR. L. (forthcoming 2023) (on file with author).

⁹ Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld (1913)]; Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld (1917)]. A right that is enjoyed by an individual against another individual is that the second shall do or refrain from doing something for the first. Thus, X has a right against Y with regard to act A, if and only if Y has a duty to X with regard to act A. See Mark Andrews, *Hohfeld's Cube*, 16 AKRON L. REV. 468 (1979). Hohfeld's analysis principally refers to relationships in the field of civil law, and it is not easy to impose his concepts upon public and criminal law. See JULIUS STONE, *LEGAL SYSTEMS AND LAWYERS' REASONING* 160, 198 (1964).

that theory, human rights, by their very nature, generate corresponding obligations,¹⁰ which may violate other rights.

Academic study with respect to individual obligations and personal responsibilities has emerged in recent years, both on the international level and within domestic law.¹¹

For example, in 2001, the United Nations Economic and Social Council (ECOSOC) appointed Miguel Alfonso Martínez as a Special Rapporteur with respect to this issue, establishing the global responsibility movement.¹² In 2009, a British bill that constituted an attempt at constitutionally enshrining human rights and duties in an official document was drafted.¹³

In the second half of the 20th century, the individualistic nature of liberal ideology was attacked by communitarian thinkers. Communitarianism holds that legal regulations governing human interaction must consider not only individual rights, but also the special relationships that exist between individuals, their community affiliation, existing social institutions, and the generally accepted social norms in the context of those institutions.¹⁴ Thus, communitarianism contends that the autonomous self is not an isolated factor. Rather, it is inseparably connected to and shaped by the community in which the individual grew up, as well as by the community's values and the interpersonal relationships that he or she developed within it.¹⁵

Nonetheless, although the applicability of constitutional norms to individuals is a fundamental aspect of constitutional and political theory, the legal implications of communitarianism and of establishing constitutional human duties are unclear. Social science experts have often limited themselves to the demand for the resurrection and enforcement of social morality while neglecting the legal implications of such a demand. This Article examines those implications.

This Article examines a wide range of constitutions and the case law that addresses them: first, to illustrate the wide phenomenon of “constitutional duties;” second, to examine and construct a common typology among existing

¹⁰ Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565, 571 (2001) (“chart[ing] the rise of an international ‘human duties and responsibilities’ movement”).

¹¹ Pavlos Eleftheriadis, *On Rights and Responsibilities*, 2010 PUB. L. 33, 36; Liora Lazarus et al., *The Relationship Between Rights and Responsibilities* (Ministry of Just. Rsch. Series 18/09, Dec. 6, 2009) (U.K.).

¹² Miguel Alfonso Martínez (Special Rapporteur on the Promotion and Protection of Human Rights), *The Pre-Draft Declaration of Human Social Responsibilities*, U.N. Doc. E/CN.4/2003/105, annex I (Mar. 17, 2003). This primal Draft was eventually rejected by a small majority in a vote held at the U.N. Socio-Economic Conference in 2005.

¹³ MINISTRY OF JUSTICE, RIGHTS AND RESPONSIBILITIES: DEVELOPING OUR CONSTITUTIONAL FRAMEWORK, 2009, Cm 7577 (U.K.).

¹⁴ SHAHAR LIFSHITZ, SPOUSAL PROPERTY 33 (2016) (Isr.).

¹⁵ ZYGMUNT BAUMAN, LIQUID MODERNITY 168–201 (2000).

constitutional duties; and third, to identify the legal implications of constitutional duties with respect to the law in general and legal discourse in particular. While it is true that not all countries are liberal western countries, the comprehensive nature of the study and the fact that it does not focus on a single state made it possible to create that typology and to examine those implications in depth.

A review of various national constitutions shows that 70% of the world's constitutions specify at least one such duty.¹⁶ 64% of those constitutions explicitly noted at least one constitutional human duty, while 58% explicitly noted two or more.¹⁷

Individual human beings are subject to many legal duties and prohibitions. This Article exclusively examines human duties that are enshrined in various constitutions. I will, however, emphasize that, although this Article refers to those duties as “constitutional human duties,” as a paraphrase of “constitutional human rights,” not many such duties apply to all individuals. In most cases, these duties are imposed upon citizens of the respective State.

Furthermore, few constitutional human duties are “horizontal”—that is, duties between one individual and another.¹⁸ The majority of constitutional duties are “vertical”—duties between an individual and the state. The closer the relationship between the individual and the state, the greater the number of duties, vis-à-vis the state, to which individuals are subject. Thus, citizens are bound not only by their duties as citizens, but also by those that apply to

¹⁶ Altan & Versteeg, *supra* note 8, manuscript at 4.

¹⁷ *Id.* For a theoretical overview of duties in international law and domestic law, see DOUGLAS HODGSON, *INDIVIDUAL DUTY WITHIN A HUMAN RIGHTS DISCOURSE* (Routledge Press 2003). For a comparative analysis of duties, see Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 L. & CONTEMP. PROBS. 223, 238–41 (2002); see also Guy Powles, *Duties of Individuals: Some Implications for the Pacific of Including 'Duties' in 'Human Rights' Documents*, 22 VICT. U. WELLINGTON L. REV. 22, 49 (1992). Government agencies, including the United Kingdom's Ministry of Justice, have devoted more attention to understanding how these duties relate to rights. See Lazarus et al., *supra* note 11, at i (analyzing “whether responsibilities can be incorporated into the existing human rights framework of the United Kingdom (UK) without [jeopardizing] fundamental human rights safeguards”). For a more analytical contribution, see John Boli-Bennett, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870–1970*, in *GLOBAL HUMAN RIGHTS: PUBLIC POLICIES, COMPARATIVE MEASURES, AND NGO STRATEGIES* 93–173 (Ved. P. Nanda ed., Routledge Press 1981); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003); Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, in *EUROPEAN AND U.S. CONSTITUTIONALISM* 131 (George Nolte ed., 2005).

¹⁸ For example, S. AFR. CONST., 1996, art. 9(4)—alongside the constitutional right to equality in art. 9(1) and the constitutional duty of equality incumbent upon the State, enshrined in art. 9(3)—sets forth a constitutional duty of equality that is incumbent upon all of the citizens of the State.

residents of and tourists in their specific territory. On the one hand, the broadest basic duty to which an individual becomes subject by the mere fact of his presence within a certain territory is the duty to obey the law.¹⁹ This duty is incumbent upon every individual, merely because he is present within a certain territory under a certain sovereignty. On the other hand, the bond of citizenship imposes additional duties.

Legal literature suggests that human obligations enshrined in constitutions are purely declarative provisions, which are meant to inspire.²⁰ This Article argues that, in addition to its declarative implications, the enshrining of human duties as a constitutional duty has many substantive implications.

Granting supremacy to the duty: The constitutional armor protects the duty itself from changes. It protects the duty from change by lower norms—that is, from any change made by a random majority of the legislature.²¹ In addition, it protects it from infringement by lower norms, as any conflict caused by a non-constitutional norm is examined in light of constitutive tests.²² Lastly, it protects it from infringement, change, or violation by another constitutional value.

Defining the duty as a symbolic or educational value: The constitution unites the basic values upon which the State is founded.²³ The purpose of this incorporation is to outline the nature of the state. In addition, on the public level, its very existence provides a symbolically educational value and may

¹⁹ Even in ancient Greece, “a person who enjoyed civic rights was . . . entered wittingly into a contract to obey the laws.” See HODGSON, *supra* note 17, at 165.

²⁰ See Sadurski, *supra* note 17, at 223, 239–40.

²¹ See HODGSON, *supra* note 17, at 246 (“The practical effect of an individual duty receiving constitutional status is that any ordinary legislation, administrative act or judicial pronouncement which purports to derogate from the true meaning and effect of the constitutional provision enshrining the duty will be null and void to the extent of any inconsistency.”).

²² In Israel, for example, all of the Basic Laws of the State of Israel have a supra-legal standing; they can only be amended by the special process by which a Basic Law is passed, and any offense against them will be examined according to the formal and material protections set forth in them. Even Basic Laws that make no reference to protection are protected by a material protection, according to the interpretation of the courts. With respect to Basic Law: The Knesset, see HCJ 92/03 Mofaz v. Chairman of the Central Elections Committee for the Sixteenth Knesset, 67(3) PD 793 (2003) (Isr.); see also CA 3007/02 Yitzhak v. Moses, 56(6) PD 592 (2002) (Isr.); HCJ 2208/02 Salama v. Minister of the Interior, 56(5) PD 950 (2002) (Isr.); HCJ 212/03 Herut – The National Jewish Movement v. Chairman of the Central Elections Committee for the Sixteenth Knesset, 57(1) PD 750 (2003) (Isr.); HCJ 3511/02 Forum for Coexistence in the Negev v. Ministry of Infrastructures, 57(2) PD 102 (2003) (Isr.); HCJ 1384/98 Avni v. Prime Minister, 52(5) PD 206 (1998) (Isr.).

²³ The constitution determines what the State’s constitutive principles are. See 1 AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 53 (6th ed. 2005) (Isr.).

sharpen awareness of the existence of agreed restrictions on government powers. Thus, it encourages the public to demand that constitutional norms be respected.

Imposes on the legislator a duty to legislate: Constitutional duties subject the legislature to positive duties regarding the enactment of laws, which will make it possible to apply and enforce the respective constitutional duty in private law as well.²⁴ Thus, this duty imposes upon government authorities the obligation to maintain a normative system, which will ensure the complete fulfillment of the underlying purposes of constitutional provisions.²⁵

Obscure the traditional distinction between private and public law: Constitutional duties apply to individuals directly or indirectly. In most legal systems, including in international law, individuals may violate rights, and states have the power to prevent them from doing so—and, with respect to certain duties, so do other individuals. Thus, enshrining human duties in a constitution infuses values from public law into private law.²⁶

Legal recognition of citizens' obligations vis-à-vis the community: The concept of rights recognizes the fact that an individual is part of his community and sets limitations on rights. For example, the right to human dignity limits freedom of expression and the right to privacy limits freedom of movement—the right inevitably focuses on the individual. In contrast, the focal point of the discussion on human duties is society rather than the individual. The concept of human duties is on the continuum between an individual's

²⁴ Dieter Grimm, *The Protective Function of the State*, in EUROPEAN AND US CONSTITUTIONALISM 137 (Georg Nolte ed., 2005); SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008); DIMITRIS XENOS, POSITIVE OBLIGATIONS OF THE STATE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS (2012).

²⁵ This theory is frequently found in comparative law, in all legal systems with a similar constitutional structure of human rights and their restrictions. See, e.g., AHARON BARAK, THE CONSTITUTIONAL RIGHT AND ITS VIOLATION: THE THREE-STAGE THEORY 120 (2018) (Isr.) (illustrating the theory in Israel); Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007) (Germany); STU WOOLMAN & HENK BOTHA, LIMITATIONS: CONSTITUTIONAL LAW OF SOUTH AFRICA (Stuart Woolman et al., eds., 2d ed. 2012) (South Africa); GERHARD VAN DER SCHYFF, LIMITATION OF RIGHTS: A STUDY OF THE EUROPEAN CONVENTION AND THE SOUTH AFRICAN BILL OF RIGHTS (2005) (same); Guy Davidov, *Separating Minimal Impairment from Balancing: A Comment on R. v. Sharpe (B.C.C.A.)*, 5 REV. CONST. STUD. 195 (2000) (Canada). This is in dispute in American law. See Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789 (2007); see also Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391 (2008). This theory also customary in international courts of human rights. See Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and the European Court of Human Rights*, 7 INT'L J. CONST. L. 619, 640 (2009).

²⁶ Altan & Versteeg, *supra* note 8, manuscript at 10; Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUD. 218 (1996).

rights and public interests. Constitutional duties enable the simultaneous protection of individual rights and of basic core social values.²⁷

This Article proceeds as follows: In Part II, I discuss constitutional human duties from a comparative legal standpoint.²⁸ I examine which duties are imposed upon individuals and how those duties have been outlined in law in order to construct a typology for discourse and research on human duties. Additionally, I examine who is required to uphold constitutional duties; this examination focuses on citizenship status and the privileges for individuals that arise from their subjection to duties of citizenship. In Part III, I explore the implications of constitutional obligations. I outline the supremacy of constitutional human duties over sub-constitutional norms—a supremacy that invites judicial review and constitutes an interpretative basis for the adaptation of sub-constitutional norms. I clarify how the stability of constitutional duties affects the rules of choice of law horizontally, vis-à-vis sub-constitutional norms, and vertically, vis-à-vis other constitutional norms. I outline the impact of constitutional duties on the scope of constitutional rights and discuss the imperative requirement for the legislature to enact laws outlining means of implementation and procedure for the accomplishment of human duties and as a gateway to the application of constitutional values to private law. I examine the impact and assimilation of constitutional duties as a symbolic educational value. I set forth their role in protecting constitutional core values, in cases where rights fail to do so. Finally, in light of the foregoing, I discuss the common denominator of liberalism and communitarianism.

II. CONSTITUTIONAL HUMAN DUTIES IN A COMPARATIVE PERSPECTIVE

Constitutional law is perceived as being directed at government authorities.²⁹ Thus, legal discourse only seldom discusses the constitutional

²⁷ Oren Gazal-Ayal & Amnon Reichman, *Public Interests as Constitutional Rights?*, 41 MISHPATIM 97 (2011) (Isr.).

²⁸ The purpose of this work is to provide a descriptive analysis of constitutional human duties. Some scholars posit that legal issues that are common to all societies are basically identical, their solutions are basically universal, see KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 36 (Tony Weir trans., 2d ed. 1987), and that the principles of constitutional law are identical throughout the world, see DAVID M. BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE (1995). Other scholars disagree. *E.g.*, Michel Rosenfeld & András Sajó, *Introduction*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1, 12–13 (Michel Rosenfeld & András Sajó eds., 2012) [hereinafter OXFORD HANDBOOK]. For this reason, I performed my research on a very broad range of constitutions, in order to illustrate the frequency of constitutional duties throughout the world, to indicate the phenomenon, to construct a typology, and to point out the similarities and differences between the various duties.

²⁹ Jack Goldsmith & Daryl J. Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009) (conceptualizing constitutional

obligations imposed upon individuals and often limits itself to a discussion of the powers granted to the various government authorities and of human rights. In practice, however, over two-thirds of current national constitutions explicitly outline at least one duty that applies to its citizens.³⁰

Individuals are subject to a wide range of constitutional duties. These duties have different characteristics and stem from a variety of constitutional implications. Nonetheless, they also share similarities.

In this section, I will discuss constitutional human duties from a comparative legal standpoint. Thus, I will review and describe the human duties enshrined in the various national constitutions and will examine the way in which they are outlined in the respective constitutions. In light of my findings, I will construct a typology for discourse on human duties. Additionally, I will examine which individuals bear constitutional duties, as well as the significance of bearing them.

A. What Are Constitutional Human Duties?

Comparative legal research shows that a multitude of human duties are enshrined in various national constitutions. At the same time, a group of duties incumbent upon individuals constitutes the core of constitutional human duties. This core, which recurs in most constitutions, includes the duties of military service, supporting one's family members, working, acquiring an education, complying with the provisions of the constitution and of applicable law, paying taxes, safeguarding cultural values, contributing to the public good, exercising rights responsibly and maintaining accountability, preserving and protecting human rights, and maintaining or defending a specific ideology (usually democracy).³¹

For example, the constitutional duty of serving in the military is explicitly outlined in the constitutions of Germany, Italy, Greece, Portugal, China, Poland, Cuba, Thailand, Morocco, Spain, and other countries.³² The wording

law as law for states); *see also* ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 9 (1999) (“Constitutionalism is the restriction of state power in the preservation of public peace.”).

³⁰ Altan & Versteeg, *supra* note 8, manuscript at 1; Sadurski, *supra* note 17; Powles, *supra* note 17; Tushnet, *supra* note 17; Michelman, *supra* note 17.

³¹ *See* HODGSON, *supra* note 17, at 139–40. Most common is the duty to “defend the country” (found in 57% of all current constitutions), followed by the duty to “respect the constitution” (40%), to “respect the laws/legitimate authorities” (40%), to “pay taxes” (38%), to “protect the environment” (37%), to “educate/raise your children” (32%), and to “work” (27%). *See* Altan & Versteeg, *supra* note 8, manuscript at 4.

³² *E.g.*, Grundgesetz [GG] [Basic Law], art. 12(a), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (Ger.); Art. 52 COSTITUZIONE [COST.] (It.); 1975 SYNTAGMA [SYN.] [CONSTITUTION] art. 4(6) (Greece); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], English translation available at <https://dre.pt/dre/geral/en/relevant->

that sets forth the duty of military service is general; in most cases, it includes legislative authority to supply further context and to determine ways of enforcement. In some of these constitutions, including those of Greece and Germany, this duty only applies to men.³³

Some constitutional duties are often presented alongside their complementary rights. Thus, for example, freedom of occupation is presented alongside the obligation to work in Portugal, Spain, Costa Rica, Russia, and Peru.³⁴ Furthermore, the right to vote is presented alongside the obligation to vote in the constitutions of: Argentina, Australia, Belgium, Bolivia, Brazil, Bulgaria, Costa Rica, Ecuador, Egypt, Gabon, Greece, Honduras, Lebanon, Liechtenstein, Luxembourg, Mexico, Nauru, North Korea, Panama, Paraguay, Peru, Samoa, Singapore, Thailand, Turkey, and Uruguay.³⁵

Similarly, the constitutions of Germany and Italy enshrine, alongside the constitutional right to education that is granted to every child, a constitutional duty for parents to care for their children, including, *inter alia*, by providing them with an education.³⁶

The duty of providing education for children is not the only duty that, simultaneously with its nature as a duty vis-à-vis the state (like all other duties), also applies vis-à-vis another individual.³⁷ For example, in the South African constitution, the duty of treating others equally is directly imposed

legislation/constitution-of-the-portuguese-republic, art. 276 (Port.); XIANFA art. 55, § 1 (1982) (China); CONST. OF THE POLISH PEOPLE'S REPUBLIC, Oct. 17, 1997, art. 85; CONSTITUTION OF THE REPUBLIC OF CUBA, Feb. 24, 1976, art. 4; CONSTITUTION OF THE KINGDOM OF THAILAND, Aug. 24, 2007, § 73; CONSTITUTION OF THE KINGDOM OF MOROCCO, July 30, 2011, art. 38; CONSTITUCIÓN ESPAÑOLA § 30, B.O.E. n. 311, Dec. 29, 1978 (Spain).

³³ Thus, in those countries, the constitutional duty contradicts the constitutional right to equality. In an interesting judgment by the German Constitutional Court, it was ruled that the State had the democratic right to enshrine in the Constitution the duty of protecting itself—applied to men only—and to leave the inequality unchanged. *See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court]*, Apr. 13, 1978, 48 BVerfGE 127 (Ger.); *see also* MARTIN TRYBUS, EUROPEAN UNION LAW AND DEFENCE INTEGRATION 279–80 (2005) (“The Federal Constitutional Court, the Federal Administrative Court, and the majority of academic writers interpreted the provision as an outright ban for women to render services involving the use of arms. This ban understood as an exemption from the freedom of profession.”).

³⁴ HODGSON, *supra* note 17, at 160.

³⁵ *E.g.*, Art. 37, CONSTITUCIÓN NACIONAL [CONST. NAC.] (“Suffrage is universal, equal, secret and mandatory.”) (Arg.). Of these countries, thirteen are considered free countries according to the 2021 Freedom in the World Report. *See* FREEDOM HOUSE, *Countries and Territories: Global Freedom Scores*, <https://freedomhouse.org/countries/freedom-world/scores?sort=desc&order=Total%20Score%20and%20Status> (last visited Mar. 6, 2023).

³⁶ Art. 30 COSTITUZIONE [COST.] (It.); Grundgesetz [GG] [Basic Law], art. 6 (Ger.).

³⁷ *See infra* Part II(C)(ii) for a discussion of horizontal and vertical duties.

upon all individuals, and it appears alongside the value of equality and the constitutional right to equality.³⁸

On the other hand, some duties are unique to specific countries. Thus, for example, the duty of honoring the national flag and anthem is outlined in the Indian Constitution.³⁹ In Ecuador, the Constitution explicitly outlines the duties of not being lazy and not lying.⁴⁰

Some constitutional restrictions are worded as “responsibilities” stemming from constitutional rights. To illustrate, the constitutions of South Africa, Italy, and Germany include a constitutional responsibility to uphold the public interest, which is incumbent upon individuals and stems from their constitutional right to own property.⁴¹

While the vast majority of constitutions impose duties upon their citizens alone, some constitutions set forth duties that apply to every person in their territories. For example, anyone within Italian or Ecuadorian territory is required by these states’ constitutions to obey the law.⁴² The duty to treat others equally is enshrined in the South African and Indian constitutions.⁴³

B. Methods of Enshrining Human Duties in the Constitution

The manner in which constitutional obligations are enshrined in a country’s constitution varies from one country to the next. Thus, in some constitutions, constitutional human duties are explicitly recognized in a variety of ways. However, in others, the recognition of those duties may be implicit.

One form of recognition is conceptual recognition, which refers to recognizing the existence of constitutional duties through a title or an introductory sentence, with no further context. An example of this can be found in the Australian Constitution, which briefly mentions individual responsibilities.⁴⁴ Further context for conceptual recognition is offered in the preamble to the Australian Capital Territory (ACT) Human Rights Act: “This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others.”⁴⁵ It is also seen in the preamble to the Victorian Charter of Rights and Responsibilities (2006).⁴⁶

³⁸ S. AFR. CONST., 1996, art. 9.

³⁹ India Const., art. 51A, cl. (a).

⁴⁰ ECUADOR CONST., Sept. 28, 2008, art. 83(2).

⁴¹ S. AFR. CONST., art. 25(2)–(4); Art. 42 COSTITUZIONE [COST.] (It.); Grundgesetz [GG] [Basic Law], art. 14(2) (Ger.).

⁴² ECUADOR CONST., Sept. 28, 2008, art. 83(1); Art. 54 COSTITUZIONE [COST.] (It.).

⁴³ S. AFR. CONST., 1996, art. 9(4); India Const. art. 51A(e).

⁴⁴ *Australian Constitution*, Overview by the Australian Government Solicitor.

⁴⁵ Australian Capital Territory (ACT) Human Rights Act (Act No. 5/2004).

⁴⁶ Charter of Human Rights and Responsibilities Act 2006 (Vict.) pmb. (Austl.). The Victorian Equal Opportunity and Human Rights Commission stated that these declarations

Victorians sought to build a society in which both the government, Parliament, the courts, and the people themselves understood and respected rights and responsibilities.

One of the many ways that the community views had a direct impact upon the *Victorian Charter of Rights* was the inclusion of the term “responsibilities” in its title. For many people, responsibilities were a more powerful way of addressing community problems than what they perceived to be more individualistic conceptions of human rights. For example, some argued in favour of both a right to cast a vote and a responsibility to vote as recognised in Australia’s system of compulsory voting. People across the community spoke positively about the idea of a document that recognised, even in symbolic terms, the interrelated nature of their human rights and responsibilities.⁴⁷

In fact, to this day, the discussion of the constitutional limitations that are imposed upon individuals in Australia is phrased in general terms and is principally of a symbolic or educational nature.⁴⁸

Another form of recognition is that of declarative paragraphs. In some constitutions, vague and generalized paragraphs setting forth declarations of human duties appear. Declarative paragraphs vary from one constitution to the next with respect to both their general content and the duties specifically outlined in them.⁴⁹ For example, the South African Constitution requires all citizens to obey it and declares them accountable by virtue of their citizenship.⁵⁰ The Portuguese Constitution states that all citizens hold constitutional rights and are subject to constitutional duties.⁵¹ The former Cuban Constitution outlined a general obligation of “caring for public and social property,

had no material normative significance in the immediate stage. Nonetheless: “over time the Charter will help to change attitudes so that we all understand that rights come with responsibilities – including the responsibility to respect other people’s rights.” Lazarus et al., *supra* note 11, at 20 (quoting THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES: WHAT IS IT?, VICT. EQUAL OPPORTUNITY & HUM. RTS. COMM’N (2006)).

⁴⁷ George Williams, *The Victorian Charter of Human Rights and Responsibilities: Origins and Scope*, 30 MELBOURNE U.L. REV. 880, 892 (2006).

⁴⁸ Lazarus et al., *supra* note 11, at 21.

⁴⁹ *Id.* at 21–22.

⁵⁰ S. AFR. CONST., 1996, art. 3(2)(b) (“All citizens are . . . equally subject to the duties and responsibilities of citizenship.”).

⁵¹ C.R.P., art. 12(1) (Port.) (“Principle of Universality: . . . Every citizen shall enjoy the rights and be subject to the duties enshrined in this Constitution.”).

observing work discipline, respecting the rights of others, observing standards of socialist living and fulfilling civic and social duties.”⁵²

The third and most common form of recognition is that of explicit recognition, in which specific duties incumbent upon individuals are enshrined in the constitution. This recognition is also implemented in liberal democracies. Some constitutions, such as that of Germany, outline a number of specific duties (e.g., mandatory army service, parental duties).⁵³ Constitutions of other countries—such as Ecuador, Italy, Poland, Spain, Peru, and Portugal—also include a list of duties in their constitutions.⁵⁴

In most cases, explicit recognition is sporadic—meaning that duties may be distributed throughout a constitution in no particular order. This applies, for example, to the German Basic Law and the Belgian Constitution.⁵⁵ In other countries, duties are outlined in a chapter of the constitution entitled “Rights.” One example of this is the Peruvian Constitution, which contains a chapter full of duties entitled “Social and Economic Rights.”⁵⁶ In a few instances, explicit recognition is even clearer, and an entire chapter is devoted to “duties and rights.” Examples of this include a chapter of the Italian Constitution, which is entitled “Rights and Duties of Citizens,”⁵⁷ and a chapter of the Peruvian Constitution, which is entitled “Political Rights and Duties.”⁵⁸ Rarely, a constitution will devote an entire section exclusively to duties. The Ecuadorian Constitution, for example, contains a chapter entitled “Responsibilities.”⁵⁹ According to Article 83 of that Constitution, “Ecuadorians have the following duties and obligations, without detriment to others provided for by the Constitution or by law.”⁶⁰ Another example is Article 51A of the Indian Constitution, which declares: “It shall be the duty of every citizen of India . . .”⁶¹

⁵² CONST. OF THE REPUBLIC OF CUBA, 1992, art. 64. The new Cuban Constitution, approved by referendum in 2019, enumerates a list of specific “duties of Cuban citizens.” CONST. OF THE REPUBLIC OF CUBA, Feb. 24, 2019, art. 90. See *infra* Part II(C)(iii) for discussion of the constitutional responsibility that results from property rights.

⁵³ Grundgesetz [GG] [Basic Law], art. 6, § 2 (Ger.).

⁵⁴ ECUADOR CONST., Sept. 28, 2008, art. 83; Tit. IV COSTITUZIONE [COST.] (It.); CONST. OF THE POLISH PEOPLE’S REPUBLIC, Oct. 17, 1997, ch. 2; CONSTITUCIÓN ESPAÑOLA div. 2, B.O.E. n. 311, Dec. 29, 1978 (Spain); CONSTITUCIÓN PARA LA REPÚBLICA DEL PERÚ [CONSTITUTION] JULY 12, 1979, ch. III (Peru); C.R.P., pt. 1 (Port.).

⁵⁵ See 1994 CONST. (Belg.); Grundgesetz [GG] [Basic Law] (Ger.).

⁵⁶ CONSTITUCIÓN PARA LA REPÚBLICA DEL PERÚ [CONSTITUTION] JULY 12, 1979, tit. 1, ch. II (Peru).

⁵⁷ Pt. 1 COSTITUZIONE [COST.] (It.).

⁵⁸ CONSTITUCIÓN PARA LA REPÚBLICA DEL PERÚ [CONSTITUTION] JULY 12, 1979, ch. III (Peru).

⁵⁹ ECUADOR CONST., Sept. 28, 2008, ch. 9.

⁶⁰ *Id.* at art. 83.

⁶¹ India Const. art. 51A.

Finally, there is a fourth form: the implicit recognition of a duty or a responsibility. This is the deduction of an implicit constitutional duty from the explicit constitutional text. I will elaborate on this fourth way below.⁶²

Each of these ways of recognition ensures that the duty is enshrined as a constitutional duty. However, there is merit to the claim that the form of recognition of a duty reflects its status in relation to human rights. Thus, there is an argument in the Indian legal literature that the separate enshrinement of duties—after the chapter on rights—indicates that setting forth constitutional duties in a separate section reduces their value and significance and renders them non-binding until primary legislation enables them to become operative.⁶³

C. *Typology of Constitutional Human Duties*

Comparative analysis of human duties shows that discourse with respect to duties, much like that with respect to rights, is not uniform. An individual can have duties vis-à-vis himself, vis-à-vis others, and vis-à-vis the state.⁶⁴ It is therefore appropriate to differentiate between the various types of constitutional obligations that are incumbent upon individuals, and between the various terms relevant to this discourse.

i. *Duty, Obligation, or Responsibility*

The South African Constitution refers to constitutional duties as “responsibilities,”⁶⁵ while the Indian Constitution calls them “fundamental duties.”⁶⁶ A wide array of terminology is used to designate a constitutional limitation or obligation imposed on individuals;⁶⁷ nonetheless, the principal terms used are “duty” and “responsibility.” Responsibilities are often worded in general terms, as a secondary rule.⁶⁸ Whereas the primary rule will be specific and will provide the content of the obligation, which is often referred to as a “duty,” secondary rules will determine which individuals are required to obey

⁶² See discussion *infra* Part II(C)(iii).

⁶³ Abantika Ghosh, *Explained: What Fundamental Duties Mean*, INDIA EXPRESS (Dec. 4, 2019), <https://indianexpress.com/article/explained/explained-what-fundamental-duties-mean-6145712>; Tanya Khan, *Fundamental Duties In India: Article 51(A)*, LEGAL SERV. INDIA: E-J., <https://www.legalserviceindia.com/legal/article-5780-fundamental-duties-in-india-article-51-a-.html> (last visited Mar. 6, 2023).

⁶⁴ MULFORD Q. SIBLEY, *POLITICAL IDEAS AND IDEOLOGIES* (1970).

⁶⁵ See generally S. AFR. CONST., 1996.

⁶⁶ India Const., art. 51A.

⁶⁷ The words “duty,” “responsibility,” and “obligation” all appear in this context in English documents.

⁶⁸ H. L. A. HART, *THE CONCEPT OF LAW* 314 (3d ed. 2012).

the primary rules,⁶⁹ as well as the division of responsibilities among them.⁷⁰ For example, the general parental responsibility for children is secondary to the specific parental duty of providing children with an education. Article 20 of the African Charter on the Rights and Welfare of the Child of 1990 is titled “Parental Responsibilities,” and it explains in detail the nature of parental duties in this context.⁷¹ Whereas the duty is specific, the responsibility is general, and content is required in order to understand its scope. Hence, the consequences of choosing one term over the other—i.e., “duty” or “responsibility”—may differ.

The term “responsibility,” in certain contexts, renders the individual responsible for others. Thus, for example, the constitutional responsibility for others that exists in some countries is an integral part of the constitutional right to own property. Article 14(2) of the German Basic Law states that the right to own property is subject to “social responsibility,”⁷² and Article 42 of the Italian Constitution asserts that ownership of property has a “social role.”⁷³ This responsibility establishes a spectrum of direct duties vis-à-vis other individuals. Thus, the choice of the vague term “responsibility” allows the German legislature to inject additional content in order to clarify the nature of that responsibility as it applies to individuals.⁷⁴

A similar provision exists in the Spanish Constitution,⁷⁵ which recognizes the right to own property and states that its content will be determined

⁶⁹ JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 74 (2002).

⁷⁰ *Id.*; André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT'L L. 359 (2013); TOMER SHADMY, *THE RISE OF HUMAN RIGHTS RESPONSIBILITIES R2P AND CSR—DIFFERENT FORMS OF THE SAME NEW DIALECT* 5 (2016), <http://globaltrust.tau.ac.il/wp-content/uploads/2016/12/16-06-Tomer-Shadmy.pdf>.

⁷¹ Org. of African Unity [OAU], African Charter on the Rights and Welfare of the Child art. 20, *adopted* July 1, 1990, CAB/LEG/153/Rev.2 (“Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development the child and shall have the duty . . .”).

⁷² Grundgesetz [GG] [Basic Law], art. 12(a) (Ger.).

⁷³ Art. 42 COSTITUZIONE [COST.] (It.).

⁷⁴ Thus, for example, a tenant protection law was passed in Germany by virtue of the constitutional responsibility incumbent upon the individual. Van der Walt writes that, according to that social responsibility, if the right to property is violated, according to planning and construction laws, individuals will not be entitled to compensation. A. J. VAN DER WALT, *CONSTITUTIONAL PROPERTY CLAUSES* 133 (1999); VAN DER SCHYFF, *supra* note 25, at 133.

⁷⁵ CONSTITUCIÓN ESPAÑOLA § 33, B.O.E. n. 311, Dec. 29, 1978 (Spain).

according to the social function that it fulfills. Similar provisions also exist in the constitutions of Colombia⁷⁶ and Chile.⁷⁷

In contrast to “responsibility,” the term “duty” refers to a specific task or the appropriate timeframe for its execution. The test of fulfillment or non-fulfillment of a duty is binary. In order to be released from such a duty, the individual will require either immunity or an exemption set forth in binding legislation. For example, Article 12a of the German Basic Law imposes a clear and specific duty of military service upon all men at age 18.⁷⁸ The legislature is required to define the scope of each duty, as well as the exemptions from each, to the extent that such exemptions are consistent with the constitutional duty.⁷⁹

ii. Vertical vs. Horizontal Duties

“Human duties” in a constitution are divided into two categories. The first of these, “vertical” duties, are duties that apply to individuals in their relationships with the state and its organs. On the other hand, “horizontal” duties are those that apply to individuals in their relationships with other individuals.⁸⁰

Most constitutional duties are vertical. These include, for example, mandatory military service, paying taxes, voting, and so forth.⁸¹ These are duties owed by individuals to a collective, rather than to any specific individual; as such, they are enforced by the various administrative authorities on behalf of society as a whole. The purpose of vertical duties is to protect fundamental values of society or constitutional interests of the State. Thus, mandatory military service is meant to ensure the continued safety of the country, or perhaps, in some instances, its existence. Paying taxes is meant to financially enable the ongoing operations of government. Finally, the duty to vote defends the essence of democracy as it ensures representation, political equality, legitimacy of government, and so forth. The variations in the relationship between

⁷⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58.

⁷⁷ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, § 24. For more information, see Aharon Barak, *The Constitutional Right to Property: Economic Freedom and Social Responsibility Law*, in THE NILI COHEN BOOK 479 (Ofer Grosskopf & Shai Lavi eds., 2017) (Isr.).

⁷⁸ Grundgesetz [GG] [Basic Law], art. 12a (Ger.). This article was suspended and its future is unclear. Jenny Gesley, *60 Year Anniversary of the German Compulsory Military Service Act*, Libr. of Cong. (July 21, 2016), <https://blogs.loc.gov/law/2016/07/60-year-anniversary-of-the-german-compulsory-military-service-act>.

⁷⁹ Grundgesetz [GG] [Basic Law], art. 12a (Ger.).

⁸⁰ 3 AHARON BARAK, INTERPRETATION IN LAW: CONSTITUTIONAL INTERPRETATION 366 (1994) (Isr.). For a discussion of horizontal balance vs. vertical balance, see John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT’L L. 1 (2008).

⁸¹ For a discussion of each of those duties, see BARAK, *supra* note 80, at 139–92.

an individual and the state directly affect the scope of that individual's duties vis-à-vis the state.⁸²

In some legal systems, explicit horizontal duties are enshrined in the system's respective constitution. For example, Article 9 of the South African Constitution, which addresses the constitutional status of equality, asserts that, alongside the constitutional right to equality and the constitutional duty of the state to ensure said equality, every individual in the state is obligated to treat other individuals equally.⁸³ Hence, horizontal duties apply, not only vis-à-vis the state, like vertical duties, but also vis-à-vis other individuals.⁸⁴ According to Hohfeld's principles, human rights and human duties constitute the two sides of the same coin.⁸⁵ Hence, it is possible to directly apply close or correlative horizontal duties that are implied by rights explicitly set forth in a constitution.⁸⁶

iii. *Implicit Duties*

At times, constitutional duties implicitly arise from the text of a state's constitution.⁸⁷ In cases where the implication is a "positive" arrangement, the

⁸² See *infra* Part II(D), which pertains to the question: "To whom do the constitutional duties apply?"

⁸³ S. AFR. CONST., 1996, art. 9:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

⁸⁴ This issue raises fascinating questions and problems. In this regard, compare the discussion regarding the applicability of constitutional law to private law. See BARAK, *supra* note 80, at 348–49; Aharon Barak, *Constitutional Rights and Private Law—The Application in Labor Law*, in *ESSAYS IN HONOR OF ELIKA BARAK-USSOSKIN* 363, 368–78 (Stephan Adler et al. eds., 2012) (Isr.).

⁸⁵ See Hohfeld (1917), *supra* note 9, at 710.

⁸⁶ See BARAK, *supra* note 80, at 357. This approach is known as the "direct application" approach. See *id.* at 367, 654.

⁸⁷ Aharon Barak, חוקי-היסוד של פרשנותם של [Interpretation of the Basic Laws], 22 MISHPATIM 31 (1992) (Isr.). Some states have enshrined the supreme legal norm in a

interpretation will begin with the explicit text and will naturally go on to fill in the gaps where the text remains silent.⁸⁸

In most liberal states, human duties are perceived as an inherent part of the respective rights.⁸⁹ According to that concept, it can be claimed that implicit duties arise: (a) horizontally, when two constitutional rights collide (for example, the right to privacy and the right to freedom of expression); (b) in cases where the constitutional text grants a horizontal constitutional right to one human being vis-à-vis another, as an example of the right to equality; or (c) the individual holder of the rights is also subject to a social responsibility entailed within those rights. An interesting approach in this final context may be cited from a judgment by the German Constitutional Court, which ruled as follows: “The image of man under the Basic Law is not that of the isolated sovereign individual; rather, the Basic Law resolves the conflict between the individual and the community by binding the citizen to the community without detracting from his intrinsic value.”⁹⁰ Thus, for example, consider the constitutional responsibility that devolves upon an individual, under property law, as part of his constitutional right to property. Section 14(2) of the German Basic Law expressly states that “[p]roperty entails obligations [*verpflichtet*].

document in writing, which is a “formal” constitution; others have only a “material” (unwritten) constitution. Aharon Barak, *על ההשמעות בהוקה הכתובה* [*On the Implication of the Written Constitution*], 45 MISHPATIM 573 (2018) (Isr.). This Article does not deal with the latter group of states.

⁸⁸ Barak, *On the Implication of the Written Constitution*, *supra* note 87, at 582–83. In his article, Professor Barak indicates three solutions for the silence of the constitutional text: extraconstitutional resolution, supplementation, and implied meaning. *Id.* Under the extraconstitutional resolution approach, absent an arrangement in the constitutional text, the solution will be found outside the Constitution itself—in common law, subconstitutional legislation, and the like. Thus, for example, in many constitutions there is no explicit arrangement that pertains to remedies for unconstitutional harm to constitutional rights. See Felix Frankfurter, *Some Reflections on the Readings of Statutes*, 47 COLUM. L. REV. 527, 533 (1947). And, as stated, the interpretation of a constitution is no different. See Jeffrey Goldsworthy, *Constitutional Implications Revisited*, 30 U. QUEENSL. L.J. 9 (2011). When using supplementation, the absence indicates a lacuna, which should be filled in pursuant to the laws governing supplementation that apply to the matter. See *Austl. Cap. Television Proprietary Ltd. v. Commonwealth* (1992) 177 CLR 106 (Austl.). For the companion case, see *Nationwide News Proprietary Ltd. v. Wills* (1992) 177 CLR 1 (Austl.). Applying the implied meaning solution, the implied meaning can be deduced from the express meaning. In other words, there is no lack, and there is no need for external supplementation. The silence speaks. See *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). For *Roe*’s companion case, see *Doe v. Bolton*, 410 U.S. 179 (1973).

⁸⁹ Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433 (2013); HODGSON, *supra* note 17; Saul, *supra* note 10; Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 203–04 (2012).

⁹⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Apr. 13, 1978, 48 BVerfGE 127, 179, 189 (Ger.)

Its use shall also serve the public good.”⁹¹ In other words, the holder of the right to property has a constitutional responsibility vis-à-vis the public when he exercises his right to property. Property has a social function. It is intended to serve the public good. This is the source of the concept reflected in Section 14(2) of the German Basic Law. Moreover, this is the source of the concept reflected in the Italian Constitution, that private property rights have a “social function” (*funzione sociale*) of serving the interest of the public good.⁹² Israel’s Basic Law confers the constitutional right to property in the context of responsibility, and the courts have pointed out the implicit “social responsibility” of the individual holder of the property right.⁹³ All this, because the ownership of real estate is perceived not only as a source of rights, but also as the basis for a special responsibility vis-à-vis the community and its members, and, therefore, it is possible to infringe property rights in order to secure the interest of the public good.⁹⁴

iv. *Correlative Duties vs. Non-Correlative Duties*

An additional division of duties in the literature, which arises from Hohfeldian theory, is that between correlative (perfect) and non-correlative (imperfect) duties.⁹⁵ As stated above, in the Hohfeldian sense, there is only one constitutional coin, and rights and duties are the two sides of that coin.⁹⁶ This approach is consistent with moderate liberal positions, which hold that “[h]uman duties should be derived from human rights, and their sole purpose

⁹¹ Grundgesetz [GG] [Basic Law], art. 14(2) (Ger.).

⁹² Art. 42 COSTITUZIONE [COST.] (It.).

⁹³ See CA 3901/96 Raanana Local Planning and Construction Committee v. Horowitz, 56(4) PD 913 (2002) (Isr.). There, Chief Justice Barak stated: “Property has a social role. It should serve the general good.” *Id.*; see also CA 7394/03 R.A.R.D. Construction Co. Ltd. v. Betterment Tax Director, Rehovot, 62(1) PD 57 (2006) (statement by Justice Hayut).

⁹⁴ Council of Eur., Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, E.T.S. No. 9. For more information, see Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1460 (1996); Hanoach Dagan, שיקולים חלוקתיים בדיני נטילה שלטונית, 21 IYUNEI MISHPAT 491, 503–04 (1998) (Isr.); Hanoach Dagan, קניין, אחריות חברתית וצדק חלוקתי, [Property, Social Responsibilities and Distributive Justice], in DISTRIBUTIVE JUSTICE IN ISRAEL 97 (Menachem Mautner ed., 2000) (Isr.); HANOCH DAGAN, קניין על פרשת דרכים, [PROPERTY AT A CROSSROADS] 15, 20–26, 66–72 (2005) (Isr.). For criticism on his approach, see Stephen R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed., 2001); Alon Harel, קניין על פרשת דרכים: הערות ביקורתיות על ספרו של [Book Review: Property at a Crossroads (by Hanoach Dagan)], 30 IYUNEI MISHPAT 435 (2007) (Isr.).

⁹⁵ PAVLOS ELEFThERiADIS, LEGAL RIGHTS, ch. 6 (2008).

⁹⁶ Hohfeld (1913), *supra* note 9.

should be to strengthen the respect and protection of human rights.”⁹⁷ All this is because, if duties are not correlatives of rights and are not seen as subject to established rights, they in essence imply a rejection of liberalism (according to the legal theory, which focus on the individual and persistence that state coercion be justified).⁹⁸

For example, by making murder and theft crimes, the legal norm aims to safeguard that life and property are respected and that individuals recognize that they have a duty not to infringe upon them. Therefore, the right to life and the right to property are rights that give rise to correlative duties and would lack meaning unless the legal norm imposed and enforced them.⁹⁹

Moreover, when a duty arises from a correlative right, it can be argued that the main reason for enforcing the duty as a legal norm is to confirm that the individual's right is protected. Therefore, correlative right will define the scope of the duty. Furthermore, since a right may itself be limited by other rights, the resulting duties will be rights-oriented.¹⁰⁰ For example, the right to freedom of expression has its limitations by the right to privacy and the right to dignity. The duties that outcome from these rights will therefore be defined by such rights-oriented limitations.

However, the inherent constraints on that duty disappears in the case of non-correlative duties in the absence of underlying rights. Non-correlative duties do not depend on a specific right, or, alternatively, their scope is wider than the scope of the rights to which they relate. The justification for imposing non-correlative duty is a constitutional value, which is either unrelated to rights or is broader than merely ensuring the protection of an individual right. Hence, this vertical duty is always vertical and owed to the state. Nevertheless, it gives rise to the right of individuals to claim that the state enacts legal norms and enforce the duty.

Examples of a non-correlative duty unrelated to any rights is enshrined in Article 29(2) the African Charter on Human and People's Rights, which states that an individual must “serve his national community by placing his physical and intellectual abilities at its service.”¹⁰¹ And Article 51A in the constitution of India, which states: “It shall be the duty of every citizen of India (a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem.”¹⁰²

⁹⁷ KAREL VASAK, FEDERICO MAYOR VASAK AMICORUM LIBER: HUMAN RIGHTS AT THE DAWN OF THE TWENTY-FIRST CENTURY (1999).

⁹⁸ Lazarus et al., *supra* note 11, at 27.

⁹⁹ *Id.* at 27–28.

¹⁰⁰ *Id.*

¹⁰¹ Org. of African Unity [OAU], African Charter on Human and Peoples' Rights art. 29(2), *adopted* June 1, 1981, 1520 U.N.T.S. 217.

¹⁰² India Const. art. 51A.

Nevertheless, non-correlative duties may have a relationship to human rights. Two examples are compulsory voting and the duty to defend one's country through military service. The duty to serve in the army is not an individual duty that is directly correlative with an individual right, but it might be argued that by imposing such a duty the state fulfils its positive duty to protect individuals' right to life. Similarly, compulsory voting protects political equality. However, the defense is of the collective; the non-fulfillment of this duty by a single individual does not directly threaten the life or equality of any other specific single individual. In other words, the bearer of the duty is the focus of the discussion.

Some non-correlative duties are problematic to confer to rights at all. For example, a freestanding duty might be the "duty to work"¹⁰³ or the duty to "respect institutions, the national Flag and the National Anthem."¹⁰⁴ The justifications for imposing such duties are constitutional values. On the one hand, an approach to be found in the literature states that a non-correlative duty is merely a declaratory duty, and that such a duty should not be allowed to restrict the scope of a right.¹⁰⁵ On the other hand, courts in India enforce them under some circumstances, whether under private international law or otherwise.¹⁰⁶ Situations also exist in which a right may emerge without a corresponding duty or a duty without a corresponding right; the latter may be termed an "imperfect obligation."¹⁰⁷ In *Minerva Mills Ltd.*, the Indian Supreme Court observed:

It is the function of the Judges, may [sic] their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled.¹⁰⁸

When "rights and duties [are] correlative in broader sense a duty without a remedy can also be considered as writ in water."¹⁰⁹ Therefore, enshrining the constitutional duty gives rise to an individual's right to demand that the state allow him to fulfill the duty. For example, the duty to vote gives rise to

¹⁰³ See, e.g., Constitución Española § 35, B.O.E. n. 311, Dec. 29, 1978 (Spain).

¹⁰⁴ See India Const. art. 51A.

¹⁰⁵ Lazarus et al., *supra* note 11, at 28–29.

¹⁰⁶ R.L. Koul & Meenakshi Koul, *Jurisprudential Aspects of Fundamental Duties and Their Enforceability: A Study*, 2 AMITY INT'L J. LEGAL & MULTIDISCIPLINARY STUD. 38, 40 (2018) (citing *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715 (2016) (India)).

¹⁰⁷ *Id.*

¹⁰⁸ *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789 (1980) (India).

¹⁰⁹ Koul & Koul, *supra* note 106, at 40.

an individual's right to demand that the various authorities create a normative system that will enable the individual to vote.¹¹⁰

The foregoing has implications for the legal field in general and for constitutional discourse in particular. Among the questions that arise are: (1) What is the status of duties, relative to rights; (2) what effect do constitutional duties have; (3) and how do they trickle down into the other branches of law? I will discuss all this in the next Part, after I examine who is subject to these duties.

D. Typology of Constitutional Human Duties

The principal difference between the “conceptualization of rights” and the “conceptualization of duties” pertains to the question of the identity of the individual (the subject) on whom the conceptualization is centered. In the “conceptualization of rights,” the discussion is centered on the holder of the right, and those vis-à-vis whom his right applies are principally instrumental to the fulfillment of his right.¹¹¹ On the other hand, in the “conceptualization of duties,” the focus is on the bearer of the duty, who has an independent obligation to act, irrespective of the matter, or the very existence, of the former (the holder of the right).¹¹² Furthermore, in most cases, the entity facing the bearer of the duty is not a specific individual, but, rather, the State and its various organs, on behalf of constitutional values that society is seeking to protect; i.e., vertical duties.

Let us consider, for example, the duty of military service. This is a free-standing duty and is not necessarily related to the right of any individual within the state, or of some of the individuals within the state, to life, or to security. Similarly, the duty of voting is intended to protect constitutional values such as majority rule, representation, and the like. Apparently, from the practical standpoint, focusing on the actor who bears the duty, rather than on the recipient of the act, the holder of the right, may more effectively secure the constitutional interests that we wish to protect.

Constitutional duties reject the libertarian approach and bind the individual to the community in which he lives, through the bond of citizenship.

¹¹⁰ Thanks to Prof. Barak for this important idea.

¹¹¹ See ONORA O'NEILL, *TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING* 152 (1996) (distinguishing between universal and special duties or obligations).

¹¹² See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 29 (Jens Timmermann, ed. & Mary Gregor ed. & trans., German-English ver., Cambridge Univ. Press 2012) (“[D]uty is the necessity of an action out of appreciation of the law.”).

i. The Bond of Citizenship

Whereas constitutional rights are constitutional human rights—that is, the majority of those rights are attributed to every human being—most constitutional duties are constitutional civic duties. Hence, the majority of constitutional duties are exclusively attributed to citizens of the State.¹¹³

Modern citizenship has constructed an ongoing legal relationship between the individual and his state.¹¹⁴

Every citizen, even when he is traveling a far, continues, by virtue of his citizenship, to be indissolubly bound to his country, and he is not exempt from its laws The state is therefore entitled to instruct its citizens abroad to return to their country in order to be drafted into the Armed Forces, to require them to pay taxes to it, to demand that they stand trial, and the like.¹¹⁵

Habermas believes that every citizen should show loyalty to the basics of the constitution and to the fundamental principles of the state.¹¹⁶ This loyalty is translated into constitutional duties, which are incumbent upon citizens. Furthermore, there are constitutions that expressly establish a duty of loyalty. Thus, for example, Habermas' article opens with a mention of the duty set forth in Article 9 of the Irish Constitution, which states: "Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens."¹¹⁷

The initial assumption is that there is a minimal shared burden which must be borne by all citizens. One such burden, for example, is the duty of preserving the state as a prerequisite for the protection of liberty. Derived from this approach are various duties, which are required for the protection of the state and the regime as well as the functioning of its authorities: military service,

¹¹³ CARL SCHMITT, *VERFASSUNGSLEHRE* 175 (1928); VOLKMAR GÖTZ & HASSO HOFMANN, *GRUNDPFLICHTEN ALS VERFASSUNGSRECHTLICHE DIMENSION* [BASIC DUTIES AS A CONSTITUTIONAL DIMENSION] 114 (1982) (Ger.).

¹¹⁴ See RUBINSTEIN & MEDINA, *supra* note 23, at 401.

¹¹⁵ YORAM DINSTEIN, *THE INTERNAL JURISDICTION OF THE STATE* 23 (1972) (Isr.).

¹¹⁶ Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, in *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 58 (Max Pensky ed., 2001) [hereinafter Habermas (2001)]; Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *MULTICULTURALISM* 107 (Amy Gutmann ed., Shierry Weber Nicholsen trans., 1995); JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* (Stud. in Contemp. German Soc. Thought Ser., Ciaran Cronin & Pablo De Greiff eds., 1998); Liav Orgad, *Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe*, 58 *AM. J. COMPAR. L.* 53, 100 n.240 (2010).

¹¹⁷ Constitution of Ireland 1937 art. 9(3); see also Habermas (2001), *supra* note 116, at 58.

payment of taxes, active political participation, and commitment to basic principles.¹¹⁸

There are several justifications for citizens' commitment to their state. First is an instrumental justification, which assumes that only liberal democratic states can protect individual liberties, and, therefore, that the existence of a state is a necessary condition for the preservation of individual liberties.¹¹⁹ Second is the presumption of consent—a presumption that citizenship entails a commitment to the state of citizenship. This concept is not trivial in the case of a citizen who, by virtue of his birth in a country, is presumed to have agreed to be loyal to it. On the other hand, it can be argued that, purely by preserving the status of citizenship, the citizen has chosen not to renounce his citizenship and to emigrate to another country.¹²⁰ Concomitantly arising from this is the legitimacy of the consent. A person is not entitled to assume commitments that fundamentally limit his liberty. His basic liberty is not conferred as a result of his consent, and, therefore, cannot be revoked for the sole reason of his consent. In other words, there are rights that also entail a duty to preserve them.¹²¹ Third is the existence of a contract—this Lockean approach holds that an explicit or implicit loyalty contract exists between the citizen and the state.¹²² “Integration contracts,” which required a person accepting naturalization to assume commitments such as learning the language, obeying the law, and loyalty to the state were common in some European countries.¹²³ At the same time, citizens are perceived as having undertaken to be part of the “social

¹¹⁸ Liav Orgad, *The Riddle of Loyalty: Who Owes What to Whom and Why?*, 14 IDC L. & BUS. REV. 723 (2012).

¹¹⁹ *Id.* at 729; ANNA STILZ, LIBERAL LOYALTY: FREEDOM, OBLIGATION, AND THE STATE 28–53 (2009).

¹²⁰ On the other hand, there are states in which it is difficult, if not impossible, to renounce one's citizenship. In the State of Israel, for example, renunciation of citizenship requires the approval of the Minister of the Interior. § 10, Nationality Law, 5712-1952; HCJ 2934/07 Israel Law Center v. Speaker of the Knesset High Court of Justice (Sept. 16, 2007) (Isr.); Orgad, *supra* note 118, at 730.

¹²¹ This was ruled, for example, in Germany and France in the context of the right to human dignity (*Menschenwürde*), in a case that pertained to dwarf-throwing. CE Ass. [Administrative Court Assembly], Oct. 27, 1995, Rec. Lebon 136727 (Fr.); *see also* MARCEAU LONG ET AL., LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE [THE GREAT DECISIONS OF ADMINISTRATIVE CASE LAW] 790 (1996) (Fr.); BVerwG [Federal Administrative Court], Dec. 15, 1981, 1 C 232.79, BVerwGE 64, 274 (Münster) (Ger.). A similar judgment was issued in Germany with respect to peep shows. The German Court of Appeals denied the appeal and relied on the duty of the authorities to protect human rights. BVerwG, *supra*, at 64, 274, 279–80 (Ger.).

¹²² *See generally* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (J. W. Gough, ed., Basil Blackwell & Mott Ltd. 1956) (1689).

¹²³ Orgad, *supra* note 116, at 63–83.

contract.”¹²⁴ The justification for this is founded on a shared narrative as well as on a shared history and destiny.¹²⁵ Loyalty and the obligations resulting from it are part of the shared nature of the group and apply to all of its members.¹²⁶ They stem from the gratitude experienced by people living within a group in which they enjoy protection and benefits (security, welfare, and the like). Fourth is the gratitude that imposes a responsibility.¹²⁷ In the feudal system, the gratitude to the feudal lord, who gave the vassal land, protection, and money, was expressed as services and loyalty to the lord on the vassal’s part.¹²⁸ Under common law, the kingdom gave its subjects protection and fulfilled their needs; in return, the subjects owed a duty of loyalty to “the Crown.”¹²⁹

Basic obligations classically defined the *status passivus* of the citizen.¹³⁰ In contrast to individuals’ basic rights, the basic obligations of individuals shape the basic rights of the political community with respect to the individuals that comprise it.¹³¹ Basic obligations are constitutionally mandated compulsory contributions to the common good. They are a constitutionally activated enlistment of the freedoms and interests of the holders of basic rights in order to ensure the common good, thereby binding the individuals to respect

¹²⁴ Social contract is a theory in moral and political philosophy. According to the “social contract theory,” people group themselves for self-interested reasons, which leads them to limit their freedom according to the decisions of the will of the majority or the ruler. The theory emphasizes that people are the source of a ruler’s authority; people live together in society in accordance with an agreement that establishes moral and political rules of behavior. The first modern philosopher to articulate a detailed social contract theory was Thomas Hobbes in his book *Leviathan*. THOMAS HOBBS, *LEVIATHAN* (Richard Tuck, ed., Cambridge Univ. Press 1991) (1651). Later, others developed and qualified the theory. See, e.g., LOCKE, *supra* note 122; JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* [THE SOCIAL CONTRACT] (1762); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997); JOHN RAWLS, *POLITICAL LIBERALISM* 147–48, 164–68 (1993).

¹²⁵ GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 61–64 (1993).

¹²⁶ *Id.*

¹²⁷ SIMON KELLER, *THE LIMITS OF LOYALTY* 101–15 (2007); cf. ISRAEL DEMOCRACY INST., *VOTER TURNOUT IN ISRAELI GENERAL ELECTIONS* 91 (Nir Atmor & Chen Friedberg eds., 2015) (noting that certain critics find it necessary for citizens to vote because of its contribution to the common good).

¹²⁸ FLETCHER, *supra* note 125, at 11–12; Orgad, *supra* note 116, at 63–83.

¹²⁹ Calvin’s Case (1608), 77 Eng. Rep. 377, 390 (1608); WILLIAM BLACKSTONE, *COMMENTARIES*, *357, *369–70. In the *Crito* dialogue, Socrates’ good friend Crito comes to visit him in prison and seeks to rescue him from the death sentence that had been pronounced against him. Socrates refuses to escape from prison and insists on his right to obey the law, arguing that escape would constitute ingratitude vis-à-vis the laws; by escaping, he would harm them. PLATO, *Crito*, in *THE TRIAL AND DEATH OF SOCRATES: FOUR DIALOGUES* 58–62 (Benjamin Jowett trans., 2008) (c. 365 B.C.E).

¹³⁰ GÖTZ & HOFMANN, *supra* note 113, at 30–53.

¹³¹ *Id.*

and act in such a way as to maintain the state.¹³² As the Supreme Court of India put it: “Every citizen of India is fundamentally obligated to develop a scientific temper and humanism. He is fundamentally duty-bound to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievements.”¹³³

ii. Civic Duties as a Status

Modern citizenship gives rise to a status and an identity. It embodies the principle of equality between the citizens themselves. It establishes rights and duties, which distinguish between an individual who is a citizen and one who is not. Thus, citizens take an active role in the public arena—whether by military service, by voting, or by jury duty. And this is what fulfills the Aristotelian definition of citizenship: “a citizen is one who rules and is ruled in turn.”¹³⁴ This is what preserves the superiority of citizens over non-citizens,¹³⁵ in the form of rights derived from duties.¹³⁶ For example, the duty to vote and the duty to serve on a jury invoke the ability to influence the public sphere, and the duty to pay taxes invokes a recognition of various of rights (e.g., social rights, the right to vote, etc.).

The core of citizenship, according to Kerber, is participation in the management of the state—duties that stem from the primordial connection to the direct democracy of ancient Greece.¹³⁷ There, duties and rights were simultaneously imposed upon citizens—men with wealth.¹³⁸ They had a superior status and a direct effect on the management of the state. The duties of voting and serving on a jury are part of the remains of administrative duties that are still borne by every citizen of a representative democracy in modern times. As such, they give rise to a status and an identity. The rights and duties distinguish between an individual who is a citizen and one who is not.¹³⁹ Moreover, they preserve the superiority of citizens over non-citizens.

For this very reason, the struggles of the feminist revolution first passed through the stage of equal duties, equal burdens: the struggle to pay taxes to the authorities, which would confer upon them recognition as separate legal

¹³² *Id.*

¹³³ *AIIMS Students’ Union v. AIIMS*, (2002) 1 SCC 428, 458 (India).

¹³⁴ Linda K. Kerber, *The Meanings of Citizenship*, 84 J. AM. HIST. 833, 834 (1997).

¹³⁵ RITA SIMON & ALISON BROOKS, *THE RIGHTS AND RESPONSIBILITIES OF CITIZENSHIP THE WORLD OVER (GLOBAL PERSPECTIVES ON SOCIAL ISSUES)* 2–3 (2009). The State distributes the burdens and obligations on all those, who use the state and its services. See GÖTZ & HOFMANN, *supra* note 113, at 30–53.

¹³⁶ GÖTZ & HOFMANN, *supra* note 113.

¹³⁷ Kerber, *supra* note 134, at 833–34.

¹³⁸ LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES* 11–13 (1999).

¹³⁹ *Id.*; SIMON & BROOKS, *supra* note 135, at 1–2.

personae and property owners; and the struggle to vote, which would enable them to influence the public sphere.

For hundreds of years, women were excluded from the public arena, in the guise of “protecting” their dignity and privacy.¹⁴⁰ This pretext of protection was a mere façade for the deliberate exclusion of women from the public sphere. Men were subjected to various types of duties: the duty to vote, the duty to pay taxes, the duty to serve on a jury, and more.¹⁴¹ On the one hand, these duties detracted from their property, their time, and their freedom. On the other, these burdens recognized their preferential status and gave them decisive influence in the public sphere. In this way, the *de jure* denial of duties for women in the public sphere led to their *de facto* exclusion from public life and the preservation of their inferiority.

Thus, for example, the duty of military service gives citizens the possibility of advancement within the military system, training, benefits from the state, and influence in the public sphere. Similarly, the duty to vote enables the enfranchised population to influence the political sector. The candidates’ attention is naturally drawn to the holders of voting rights, the undertakings and promises by the former will be directed to the latter.

As we have seen, basic obligations are therefore not inherent to all human beings. They are, in fact, justified by the need to organize and maintain the state and to protect fundamental values or interests. In addition, constitutional duties, by their very nature, confer upon individuals a burden that may well detract from their constitutional rights—and yet, at the same time, they also entail privileges: preferential status for the bearers of those duties, and the ability to influence the public sphere. This is only one implication of enshrining human duties in a constitution. I will discuss the legal implications of human duties for constitutional discourse in the next section.

III. THE SIGNIFICANCE AND IMPLICATIONS OF THE CONSTITUTIONALISM OF HUMAN DUTIES

The field of law is rich in human duties. Criminal law establishes a stringent code of prohibitions, accompanied by penalties for their violation. Administrative law imposes limits and requirements upon individuals—the need to obtain permits and licenses in order to construct a building, open a business, and so forth. Private law sets forth a series of duties: the duty of care in tort law, the duty of good faith in contract law, and the like. In addition to these explicit human duties, other duties are implicit. Hohfeld taught us that a right

¹⁴⁰ See KERBER, *supra* note 138, at 15 (“[T]he system was generally described as privileging women rather than oppressing them. Married women were understood to be shielded from the stresses of public life, from the need to risk property and reputation in political encounter.”).

¹⁴¹ *Id.* at 11–13.

will always be accompanied by a duty.¹⁴² As a result, human rights, by their very existence, give rise to implicit horizontal human duties.¹⁴³ Obviously, human duties may detract from human rights.¹⁴⁴ Moreover, if legal human duties are enshrined at the sub-constitutional level, the discourse will take place in accordance with the scope of protection of the constitutional right. But what is the legal significance of enshrining human duties at the constitutional level? This section will address that question.

Adopting the constitutional strategy stems from the wish to protect constitutional values against harm by a random majority. Sapir refers to such hazardous situations of possible harm as “state of intoxication”—situations in which proper judgment is lost.¹⁴⁵ Moreover, Sapir defines the constitutional enshrinement strategy as an undertaking in advance by the majority to protect itself against itself.¹⁴⁶ In principle, enshrining a human duty at the constitutional level does not increase the scope of the duty or provide more ways of enforcing it. A duty is a duty. Therefore, upgrading the formerly sub-constitutional status of a duty will leave its scope unchanged. In addition, in most cases, the ways of enforcing duties in sub-constitutional law (for example, in criminal law) are generally more stringent. Nonetheless, enshrining duties in a constitution has several significant implications with respect to various matters. First, constitutional duties are supreme relative to sub-constitutional norms, and thus will be supervised through judicial review and constitute an interpretive basis for adapting the sub-constitutional laws to the “spirit of the duty.” Second, enshrining duties in a constitution creates stability and influences rules of choice of law—horizontal balance, relative to sub-constitutional norms, and vertical balance, relative to other constitutional norms. Constitutional duties also affect the scope of the constitutional right (restriction and expansion). Fourth, they also influence the execution and legal procedures that will be required in order to exercise the constitutional duties. Specifically, the legislature may be subjected by the court to the duty of enacting laws, and the constitutional duties will become a channel for the direct application of constitutional values to the content of private law. Fifth, constitutional duties have symbolic and educational value. Lastly, duties enshrined in a constitution benefit from their perception as a constitutional value.

¹⁴² Hohfeld (1913), *supra* note 9, at 32; Hohfeld (1917), *supra* note 9, at 717.

¹⁴³ HODGSON, *supra* note 17, at 25; Saul, *supra* note 10, at 618.

¹⁴⁴ Lazarus et al., *supra* note 11, at 19.

¹⁴⁵ Gideon Sapir, שלושה מודלים של חוקה [Three Models of a Constitution], 37 MISHPATIM 349, 352 (2007) (Isr.).

¹⁴⁶ *Id.*; see also JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36–111 (1979); BEAU BRESLIN, FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY 5 (2009); Ariel Bendor, *The Legal Status of Basic Laws*, in 2 JUSTICE BERENSON BOOK 119, 129–30 (Aharon Barak & Chaim Berenson eds. 2010) (Isr.).

I will discuss these implications in extensive detail in this Part from the standpoint of comparative law, citing examples from constitutions and case law.

A. Supremacy of the Constitution over Ordinary Laws

The first unique aspect of a duty that is enshrined as a constitutional norm results from its supremacy.¹⁴⁷ In a democratic state, law is based on the principle of constitutionalism¹⁴⁸—a principle that confers upon the constitutional document a status above that of ordinary law, thus protecting it from the ordinary political process.¹⁴⁹ All of the administrative authorities in the democratic state are subject to the supreme norm, which enshrined the constitutional-democratic principles, while at the same time empowering the courts to invalidate primary legislation that conflicts with the supra-legal principles. Thus, the constitution sets the rules of the game¹⁵⁰ in a way that has several implications.

i. Counter-Majoritarianism

In the balance between a constitutional duty and a sub-constitutional norm, the constitutional duty will prevail. The constitutional norm is the norm

¹⁴⁷ The constitution sets limitations on the rights of the regime—in the present context, human duties, supra-legal constitutional values, the refutation of which will only be possible to a limited extent. The same applies when the position of the administrative authorities is different from that set forth in the Constitution. This *prima facie* involves a contradiction of the concept of formal (or procedural) democracy. For more details, see Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766 (2001). Habermas, in his article, wonders which are to prevail: individual liberties in modern society, which, by nature, do not change, or, alternatively, the rights of individuals in a democratic society to participate in that society's political process of free determination of its laws. *Id.*

¹⁴⁸ See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 212 (3d ed. 2014); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637 (1991).

¹⁴⁹ Stephen Holmes, *Constitutions and Constitutionalism*, in OXFORD HANDBOOK, *supra* note 28, at 189.

¹⁵⁰ A constitution compiles the principles and rules that apply to the administration, Mark Tushnet, *Constitution*, in OXFORD HANDBOOK, *supra* note 28; establishes the institutions of the State, Holmes, *supra* note 149; determines the form of government of the State, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *CONSTITUTIONS IN OECD COUNTRIES: A COMPARATIVE STUDY* 65–87 (2022); governs the relationships between the institutions of government themselves, and between them and the citizens, Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605, 1619–20 (1999); and, in some cases, as I demonstrate in this Article, between the individuals themselves—such as through horizontal duties, for example.

that defines the manner in which it can be attacked. This situation has been described as “counter-majoritarian.”¹⁵¹ Nonetheless, a constitution originates in the people’s will and constitutes an expression of the people’s authority. It is an expression that transcends time and is external and superior to the head of state at any given moment. “In order for this to work, the constitution had to be distinguished from ordinary law. As an act that constituted legitimate public power in the first place, the constitution could not emanate from the ruler himself. It needed a different source . . . this source was found in the people.”¹⁵²

This limitation was primarily intended to protect against the improper exercise of administrative discretion, in cases where the majority does not trust an uncertain future majority and fears for the basic core values of the respective society.¹⁵³ This principle, which is known as “constitutionalism,” has a secondary purpose of remedying inherent “market failures” in the procedure of democratic decision—such as, for example, the existence of a “build in majority,” which *de facto* negates the influence of a specific minority group.¹⁵⁴ The more ethnic or religious rifts that exist within the State and the more minorities it has with slim chance of becoming a majority and coming to power, the greater the need to establish protective mechanisms that will take the basic values out of the political game.¹⁵⁵

For these very reasons, the duty of voting—parallel to a universal right to vote—was enshrined in the Belgian Constitution in 1893.¹⁵⁶ The duty of voting was founded on a double purpose: to act as a “careful counterpoise” moderating the effect of extreme votes, and to create a pluralistic vote:

Plural voting was thus intended as a careful counterpoise,
and not as a check to democratic reforms; and statistics show

¹⁵¹ The term “democracy” is a combination of two Greek words—*demos* (the people) and *kratein* (to rule)—government by the people. The principle of equality confers “one vote to one person” in electing the leadership, and the determining factor is the majority of votes (because all votes are equal). See HCJ 98/69 Bergman v. Minister of Finance, 23(1) PD 693 (1969) (Isr.). This is democracy in the “formal” sense.

¹⁵² See Dieter Grimm, *Types of Constitutions*, in OXFORD HANDBOOK, *supra* note 28, at 101.

¹⁵³ Sapir, *supra* note 145, at 352; see also Bendor, *supra* note 146, at 129–30; ELSTER, *supra* note 146, at 36–111; BRESLIN, *supra* note 146, at 5.

¹⁵⁴ See JOHN RAWLS, A THEORY OF JUSTICE (1971).

¹⁵⁵ The court should represent what the public would adopt in the framework of a unanimous decision, because general principles and a long-range viewpoint are involved. This is actually the definition of law provided by Ronald Dworkin. See RONALD DWORKIN, LAW’S EMPIRE (1986); see also Ruth Gavison, *The Constitutional Revolution—A Description of Reality or a Self-Fulfilling Prophecy?*, 28 MISHPATIM 69, 113–15 (2018) (Isr.); Bendor, *supra* note 146, at 129.

¹⁵⁶ 1893 CONST. (Belg.); see also Maurice Vauthier, *The Revision of the Belgian Constitution in 1893*, 9 POL. SCI. Q. 704, 726 (1894). In 1948, the duty was imposed upon women in Belgium as well. See 1948 CONST. (Belg.)

clearly that it has worked as a balancing-pole or ballast to public opinion, not to impede its progress, but to steady its movements and make them less hazardous, less fitful and less dangerous to the welfare of the country.¹⁵⁷

For similar reasons, the duty of equality was enshrined in the South African Constitution.¹⁵⁸ States that had suffered in the past from profound discrimination and apartheid policy chose to strengthen the value of equality as a constitutional norm, and enshrined it as a constitutional value, a constitutional duty incumbent upon the administrative authorities, and a constitutional duty incumbent upon individuals.¹⁵⁹

ii. *Judicial Review*

The approach of judicial review supports the idea that, as part of the checks and balances in the democratic regime, the judiciary branch is competent to decide on the question of whether an administrative act is unconstitutional. According to this approach, a direct result of the supremacy of the constitution is that the accomplishment of the values that are enshrined in the supreme norm should be enforced upon the administrative authorities through the mechanism of judicial review.¹⁶⁰ In other words, a legal norm at a lower level, such as a law or an administrative act, which runs counter to a constitutional duty, should be deemed null and void, and a court is competent to enforce the cancellation of the norm that contradicts the constitution.¹⁶¹

¹⁵⁷ A. Nerinx, *Compulsory Voting in Belgium*, 18 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 87 (1901).

¹⁵⁸ Kristin Henrard, *Post-Apartheid South Africa: Transformation and Reconciliation*, 166 WORLD AFF. 37, 41 (2003).

¹⁵⁹ S. AFR. CONST., 1996, art. 9; *see also* India Const., art. 15, cl. 2.

¹⁶⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *see also* CA 6821/93 United Mizrahi Bank V. Migdal Cooperative Village, 49(4) PD 221 (1995) (Isr.); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 77–78 (2006); Larry Alexander & Fredrick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000).

¹⁶¹ This approach was reflected in United States constitutional law as early as 1803, in the celebrated judgment in *Marbury v. Madison*, which determined that the court is competent to invalidate an unconstitutional law. *Marbury*, 5 U.S. 137; *see also* HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 157 (Anders Wedberg trans., Lawbook Exch. Ltd. 2009). Among the prominent works supporting the judicial review approach—notwithstanding significant differences between them—are, *inter alia*, the following: RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *LAW'S EMPIRE* 356 (1986); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION* (1996); RAWLS, *supra* note 154; JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter RAWLS (1993)]; JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1998); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1981). Note that Ely developed a theory

Accordingly, for example, the Constitutional Court in South Korea interpreted the constitutional “duty to pay taxes under the conditions as prescribed by Act” as a principle of “statutory taxation,” which includes the court’s authority to invalidate a legal norm that addresses the subject of taxation if it is unclear.¹⁶² The court decided that the statute violated the principles expressed in Articles 38 and 59 of the South Korean Constitution because it was too vague and could lead to arbitrary interpretation.¹⁶³

iii. Non-Contradiction Presumption

The non-contradiction presumption that imposes upon the legislature and entities that act by virtue of constitutional or sub-constitutional norms the duty of adapting and interpreting lower norms in light of constitutional duties. This is because a legal norm does not exist in a vacuum. Each norm is part of the fabric of a system. In every legal system, rules and values coexist.¹⁶⁴ The principles represent basic values and criteria for appropriate conduct.¹⁶⁵ The constitutional human duties can be used to interpret ambiguous statutes.¹⁶⁶

According to this presumption, a harsher sentence was imposed upon the Irish citizen, with whom this Article begins, in light of the constitutional duty of loyalty to the state.¹⁶⁷ Murray was sentenced to over 12 years of imprisonment by the Circuit Criminal Court after pleading guilty to having a false passport and 25 sample counts of social welfare fraud.¹⁶⁸

Murray appealed this grave sentence. The Court of Criminal Appeals agreed that the sentence was especially grave.¹⁶⁹ Nonetheless, the court also

that restricts the role of judiciary review. According to that theory, judiciary review should be exclusively limited to situations in which the majority is harming the rules of Democratic processes or the minority and is preventing the minority from participating in the democratic process. In his approach, Ely relied on “a famous footnote” in American constitutional law, which was cited in a United States Supreme Court judgment, *United States v. Carolene Products Co.* Footnote 4 to that judgment states that the most stringent judicial review will be applied in cases where legislation is harmful to “discrete and insular minorities.” *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁶² 98 Hun-Ka 11 [Const. Ct.] (March. 25, 1999) (S. Kor.).

¹⁶³ *Id.*

¹⁶⁴ See Kathleen M. Sullivan, *Foreword: The Justice of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

¹⁶⁵ See AHARON BARAK, *PURPOSIVE INTERPRETATION OF THE LAW* (2003).

¹⁶⁶ See *In re Ramlila Maidan Incident Dt.4/5.06.2011 v. Home Secretary* (2012) 5 SCC 123 (India).

¹⁶⁷ Duties are found in the Irish Constitution, which states that “[f]idelity to the nation and loyalty to the State are fundamental political duties of all citizens.” CONSTITUTION OF IRELAND 1937 art. 9. These same duties are repeated in Section 15 of the Irish Nationality and Citizenship Act (Act No. 26/1956) (Ir.).

¹⁶⁸ See *DPP v. Murray* [2012] 2 IR 477 (CCA) (Ir.).

¹⁶⁹ *Id.* ¶¶ 12–13.

noted that crimes involving the loss of public revenue “strike at the heart of the principles of equity, equality of treatment and social solidarity on which the entire edifice of the taxation and social security systems lean. This is especially so at a time of emergency so far as the public finances are concerned.”¹⁷⁰ Therefore, “[a]s an Irish passport holder, the Appellant owed ‘fidelity to the nation and loyalty to the State.’”¹⁷¹ To support that claim, the court referred to Article 9, Section 3 of the Constitution and observed that “[e]specially in a time of fiscal emergency, that fidelity and loyalty demanded that this social solidarity be respected.”¹⁷² By defrauding the State, Mr. Murray had “set that fidelity and loyalty at naught.”¹⁷³

In this case, the Court of Criminal Appeal decided how a sentencing court should treat those convicted of tax evasion or welfare fraud: “We therefore suggest for the future guidance of sentencing courts that significant and systematic frauds directed upon the public revenue—whether illegal tax evasion on the one hand or social security fraud on the other—should generally meet with an immediate and appreciable custodial sentence.”¹⁷⁴

Similarly, in the judgment in *Subramanian Swamy v. Union of India*, the Indian Supreme Court ruled that the human duties set forth in the Constitution have an interpretive force:

The fraternal ideal finds resonance also in Part IVA of the Constitution. Article 51-A of the Constitution, which deals with the fundamental duties of a citizen, makes it a duty “to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women”. In fact, this Court has held that Part IVA could be used as an interpretative tool while assessing the constitutional validity of laws, especially in the context of restrictions imposed on rights. Judged on the anvil of the aforesaid constitutional norms, the provisions pertaining to criminal defamation withstand scrutiny.¹⁷⁵

¹⁷⁰ *Id.* ¶ 17.

¹⁷¹ *Id.* ¶ 20.

¹⁷² *Id.*

¹⁷³ *Id.*; see also Mason Hayes & Curran LLP, *Court Takes into Account Duty of “Fidelity To The Nation and Loyalty to the State”. . . “in a Time of Fiscal Emergency” When Imposing Sentence*, LEXOLOGY (Apr. 27, 2012), <https://www.lexology.com/library/detail.aspx?g=18172854-9cf2-41c3-aa00-933869de8bc3>; Mary Rogan, *Prison Policy in Times of Austerity: Lessons from Ireland*, 207 PRISON SERV. J. 9, 12, 15 (2013).

¹⁷⁴ DPP v. Murray [2012] 2 IR 477, 479, ¶ 22 (CCA) (Ir.).

¹⁷⁵ *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221, ¶ 15(vi) (India).

Furthermore, in *AIIMS Students' Union v. AIIMS*, the Indian Supreme Court ruled as follows:

Fundamental duties, though not enforceable by a writ of the court, yet provide valuable guidance and aid to interpretation of constitutional and legal issues. In case of doubt or choice, people's wish as manifested through Article 51A, can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the courts.¹⁷⁶

B. Stability of Constitutional Human Duties and the Rules of Choice of Law

Upgrading a human duty from the sub-constitutional to the constitutional level affects the choice of law rules. The constitutional norm drafts the rules of the democratic game, which explains the need to maintain the stability of constitutional norms and to preserve them from frequent changes.¹⁷⁷ In most cases, the stability of the constitution is secured by reinforcing all or some of its provisions in such a way as to make them more difficult to amend against the background of “political convenience” or “in order to overcome political hurdles.”¹⁷⁸

¹⁷⁶ *AIIMS Students' Union v. AIIMS*, (2002) 1 SCC 428, ¶ 58 (India).

¹⁷⁷ JACKSON & TUSHNET, *supra* note 148, at 226–30; *see also* Ariel Bendor, *Flaws in the Enactment of the Basic Laws*, 2 MISHPAT UMIMSHAL 443, 446 (1995) (Isr.) (stating that, at times, the stability of the constitutional norm is even more important than its content).

¹⁷⁸ H CJ 8260/16 Academic Center for Law and Business v. Knesset, § 33, Nevo Legal Database (Sept. 6, 2017) (Isr.). The securing of the Constitution is expressed in three ways. The first is that of “eternal clauses”—constitutional provisions that are secured against any change or amendment. Thus, for example, Article 79(3) of the German Basic Law determines that no constitutional amendment that affects the rights of the states in the Federation, or that affects Article 1 of the Basic Law (which determines the right to human dignity) or Article 20 of the Basic Law (which determines the democratic-constitutional principles of Germany), will be valid. Grundgesetz [GG] [Basic Law], arts. 20, 79(3). Another example is the determination, in the United States Constitution, that no amendment to the Constitution can deprive a state, without its consent, of the right of equal voting in the Senate. U.S. CONST. art. V. The second is that of a rigid procedural process for amending the Constitution. Thus, for example, Article V of the United States Constitution determines that, in order to amend the Constitution, the consent of a two-thirds majority of each house of Congress is required; in addition, the amendment must be ratified by the legislatures of three-quarters of the states. U.S. CONST. art. V; *see also* Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 928–56 (2014). Some of Israel's Basic Laws also set forth provisions that provide procedural protection, by requiring a certain majority of the Knesset in order to amend the Basic Law. *See, e.g.*, Basic Law: The Government, 5761 – 2001, § 44 (as amended) (Isr.); Basic Law: The

From the vertical standpoint, a constitutional duty is immune to any change affected by a sub-constitutional norm, and itself defines whether and how a sub-constitutional norm can deviate from it. All this is because “[t]he practical effect of an individual duty receiving constitutional status is that any ordinary legislation, administrative act or judicial pronouncement which purports to derogate from the true meaning and effect of the constitutional provision enshrining the duty will be null and void to the extent of any inconsistency.”¹⁷⁹

As a rule, constitutional duties will be relative provisions, and their violation will be examined in light of a specific limitation clause. Nonetheless, the obligation to obey the law—regardless of it being explicitly written or not—could not be lifted by any law without bringing the state of law to fall. Accordingly, the constitutional duty to obey the law is arguably an absolute duty.¹⁸⁰

From the horizontal standpoint, the balance between a constitutional duty and other constitutional values will be horizontal and will be subject to the rules of choice of law: a general norm versus a specific norm; a norm formulated as a rule versus a norm formulated as a principle.¹⁸¹ Two approaches

Knesset, 5718 – 1958, §§ 44–45 (as amended) (Isr.); Basic Law: Freedom of Profession, 5754 – 1994, § 7 (as amended) (Isr.). The third is that of the material securing of the entire Constitution, or of some of its provisions—for example, the “limitation clauses” that appear in some constitutions. These clauses set forth material conditions under which a lower-level norm is allowed to detract from a constitutional provision. Thus, for example, Section 1 of the Canadian Charter determines that a restriction of the rights set forth in the Charter will only be possible under conditions of “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to The Canada Act, 1982, § 1 (U.K.). Similarly, Section 8 of the Israeli Basic Law: Human Dignity and Liberty states that it is not possible to derogate from rights protected under the Basic Law “save by means of a law that corresponds to the values of the State of Israel, which serves an appropriate purpose, and to an extent that does not exceed what is required, or on the basis of a law, as aforementioned, by force of an explicit authorization therein.” Basic Law: Human Dignity and Liberty, 5752 – 1992, § 8 (as amended) (Isr.).

¹⁷⁹ HODGSON, *supra* note 17, at 246 n.56; *see also* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 371–72 (Liberty Classics, 8th ed. 1982); RAWLS (1993), *supra* note 161, at 231–33.

¹⁸⁰ GÖTZ & HOFMANN, *supra* note 113.

¹⁸¹ The distinction between legal principles and legal rules was discussed by Robert Alexy in his book. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002). Constitutional principles are legal norms that require something to be accomplished in the best possible way, taking into account the factual and legal possibilities—in other words, taking into consideration the rules of constitutional proportionality. Their interpretation is broad, and they can include anything that has a trait characteristic of rights. *Id.* at 210. This means that considerations of the general good or of another’s right need not affect the comprehensive interpretation of a constitutional right formulated as a principle. Constitutional rules are legal norms with a fixed point in the field of legal and factual

exist in this regard. On the one hand, Bendor holds that the constitutional rule that “a specific norm prevails over a general norm” will apply.¹⁸² On the other hand, Barak has determined that—whereas enshrining a human duty as a constitutional tool will, in fact, obviate the need to address the tests of the limitation clause¹⁸³ as a means of resolving the collision between the constitutional duty and other constitutional values—it may be possible, in this context, to make use of an interpretive balance that utilizes the laws of balance with respect to proportionality in the narrow sense.¹⁸⁴ The remaining tests of balance, however, will not be applicable.¹⁸⁵ But what is to be done if the interpretive attempt fails? What is to be done if the constitutional right that is formulated as a rule is interpreted as a norm intended to affect—and, in fact, to limit—the constitutional right that is formulated as a principle? The answer is that, in such a collision, the ordinary rules of choice of law will generally apply. This being so, the constitutional duty may affect the scope of other constitutional values—for example, the scope of the constitutional right.

In fact, it will be necessary to find a balance between the human right and the human duty that encompasses the public interest, in a way that seeks, to the fullest extent possible, to achieve both of these competing constitutional values. Alexy does not distinguish between a balance between a constitutional right and a public interest and a balance between two constitutional rights.¹⁸⁶ In contrast, Barak analyzes each of these two situations differently.¹⁸⁷ Thus, for example, if the purpose of the violation of the constitutional right is to protect another constitutional right, this, by definition, will be a “worthy purpose.” The same cannot be said of the “general good,” which is required to prove itself as worthy. According to Barak, the authorities are subject to a constitutional duty of protecting human rights but are not subject to a constitutional duty of protecting the general good.¹⁸⁸ The danger pointed out by Kremnitzer is this:

possibilities—meaning that they can either be upheld or not be upheld. *Id.*; see also Aharon Barak, *Limiting Constitutional Rights by Law*, in *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 62, 106 (2010) (Isr.).

¹⁸² Bendor, *supra* note 146, at 129–30.

¹⁸³ Or, in other tests established by the founders of the Constitution, in the event of a deviation from a constitutional norm by means of a subconstitutional norm.

¹⁸⁴ BARAK, *supra* note 165, at 152.

¹⁸⁵ *Id.* at 154.

¹⁸⁶ Robert Alexy, *The Construction of Constitutional Rights*, 4 L. & ETHICS HUM. RTS. 20 (2010).

¹⁸⁷ Barak, *supra* note 181, at 225–62.

¹⁸⁸ *Id.*; see also Mordechai Kremnitzer, *Constitutional Proportionality: (Appropriate) Guidelines*, in *ISRAELI CONSTITUTIONAL LAW: IN THE MAKING* 223 (Aharon Barak et al. eds., 2013).

If every public interest is a worthy purpose and efforts should be made to accomplish it as fully as possible, the significance of a violation of rights is extremely far-ranging. . . . If every public interest, no matter how trivial its importance (when there is no impediment to promoting it by ways that do not involve a violation of rights), is a possible competitor against a human right for the scope of that right and may well give rise to its restriction—the eventual risk to the protected area of rights is clear. Furthermore, merely placing a right in a position where it is required to defend itself against attack by a trivial public interest implies the devaluation of the right.¹⁸⁹

Nonetheless, when the public interest is protected by a constitutional right, the discussion with respect to the importance of the protected public interest has already been resolved, as I will illustrate in the following examples.

The freedom of profession versus the duty of protecting the environment: In 2005, in *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*, the Indian Supreme Court considered the argument that the law prohibiting the slaughter of cows, which existed in several Indian states, was unconstitutional because it disproportionately restricted the constitutional right to “practise any profession or to carry on any occupation, trade or business” under Article 19(g) of the Indian Constitution.¹⁹⁰ The Indian Supreme Court denied the petition and ruled that the law prohibiting the slaughter of cows did not constitute a disproportionate restriction of the constitutional right to the freedom of profession,¹⁹¹ because, *inter alia*, it was consistent with the constitutional duty “to protect and improve the natural environment including forests, lakes, rivers, and wild life and to have compassion for living creatures.”¹⁹²

The duty of military service versus the right to equality: Similarly, it was argued before the German Constitutional Court that the constitutional duty of military service, which was obligatory for men alone,¹⁹³ disproportionately violated women’s constitutional right to equality.¹⁹⁴ The German court drew

¹⁸⁹ Kremnitzer, *supra* note 188, at 24–23.

¹⁹⁰ *Compare* *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jama* (2005) SCA 4937-4940 (India), *with* *Lochner v. New York*, 198 U.S. 45 (1905). The facts of the *Gujarat* case are a bit like *Lochner*. The biggest difference is that the right asserted in the *Gujarat* case is specifically enumerated in the Indian Constitution and not derived from a vague liberty interest in the U.S. Constitution, as interpreted in *Lochner*.

¹⁹¹ *State of Gujarat*, SCA 4937-4940.

¹⁹² *Id.* (emphasis added).

¹⁹³ Grundgesetz [GG] [Basic Law], art. 12(a) (Ger.).

¹⁹⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Apr. 13, 1978, 48 BVerfGE 127 (Ger.)

a horizontal balance between the duty and the right, and ruled that, notwithstanding the fact that the duty was only obligatory for men, the state had the authority to enshrine the duty of protecting itself in the German Constitution and the court allowed the inequality to stand.¹⁹⁵

The freedom of expression versus the duty of preserving dignity: In *Subramanian Swamy v. Union of India*,¹⁹⁶ the petitioner argued that the Penal Code and Sections 199(1) to 199(4) of the Indian Code of Criminal Procedure disproportionately violated the freedom of expression, as they prohibited defamatory expressions. The Indian Supreme Court examined the argument, while drawing a horizontal balance between the constitutional right to the freedom of expression and the duty of preserving dignity.¹⁹⁷ According to its ruling, these rights also include the right to life and the right to a good reputation, which is enshrined in Article 51A of the Indian Constitution.¹⁹⁸ The court ruled that the freedom of expression does not include defamatory expressions, thereby restricting the scope of the right to the freedom of expression.¹⁹⁹

The freedom of thought and conscience versus the duty of voting: The Constitutional Austrian court denied a petition in which it was argued that the constitutional duty of voting conflicts with the constitutional right to the freedom of thought and conscience.²⁰⁰ An appeal from the judgment to the European Court of Human Rights was also denied.²⁰¹ The ECHR ruled that the duty of voting does not conflict with Article 9 of the European Convention on Human Rights²⁰² (which addresses the freedom of thought and conscience) or with Article 3 of Protocol 1 to the Convention²⁰³ (which deals with free elections). It also ruled that, because citizens have the possibility of abstaining,

¹⁹⁵ *Id.*

¹⁹⁶ *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221 (India).

¹⁹⁷ *Id.* ¶ 15.

¹⁹⁸ *Id.* ¶¶ 39, 46, 159–60; India Const. art. 51A.

¹⁹⁹ *Subramanian Swamy*, 7 SCC ¶¶ 140, 186; see also *Subramanian Swamy v. Union of India*, GLOB. FREEDOM OF EXPRESSION: COLUM. UNIV. (May 13, 2016), <https://global-freedomofexpression.columbia.edu/cases/subramanian-swamy-v-union-india>; *A Setback to Free Speech*, NEW INDIA EXPRESS (May 20, 2016), <http://www.newindianexpress.com/editorials/A-setback-to-free-speech/2016/05/21/article3443294.ece>; Gautam Bhatia, *A Blow Against Free Speech*, THE HINDU (Oct. 18, 2016), <http://www.thehindu.com/opinion/lead/a-blow-against-free-speech/article8604014.ece>; Bhairav Acharya, *Criminal Defamation and the Supreme Court's Loss of Reputation*, THE WIRE (May 14, 2016), <http://thewire.in/36169/criminal-defamation-and-the-supreme-courts-loss-of-reputation>.

²⁰⁰ *X v. Austria*, App. No. 1718/62, 1965 Y.B. Eur. Conv. on H.R. 168, 174 (Eur. Comm'n on H.R.).

²⁰¹ *Id.*

²⁰² *Id.* at 172, 174.

²⁰³ Council of Eur., Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, E.T.S. No. 9.

the freedom of conscience is preserved even when the duty of voting is constitutionally enshrined.²⁰⁴

C. Effect of Constitutional Human Duties on the Limits of Constitutional Rights

The supremacy of constitutional duties affects the rules of choice of law and the balance between them and other constitutional values—*inter alia*, constitutional rights. When a constitutional duty conflicts with a constitutional right, the task of drawing a balance between them falls to the court. The balance is a horizontal balance; in cases where the constitutional duty prevails over the right, the scope of the right will be restricted, and *vice versa*.

i. Restriction of Constitutional Rights by Constitutional Human Duties

The examples in the previous section indicate that, in the balance between the freedom of profession and the duty of protecting nature, in the context of slaughtering cows, the Indian court gave preference to the duty of protecting nature.²⁰⁵ In the balance between the freedom of expression and the duty of preserving dignity, in the context of defamatory expressions, the Indian court gave preference to the duty of preserving dignity.²⁰⁶ As for the German court, in the balance between the duty of military service, which is compulsory for men alone, and the right to equality, it decided in favor of the discriminatory duty.²⁰⁷ Similarly, in the balance between the freedom of conscience or the freedom of expression and the duty of voting, an Austrian court decided—and the ECHR confirmed the decision—in favor of the duty of voting.²⁰⁸

In the same way, in South Korea, the duty of military service is enshrined as a constitutional duty.²⁰⁹ Details with respect to this constitutional duty are set forth in the Military Service Act, which contains a provision punishing those who evade military service.²¹⁰ In a judgment that addressed the matter of a person who sought exemption from military service for reasons of

²⁰⁴ X v. Austria, App. No. 1718/62, at 174.

²⁰⁵ State of Gujarat v. Mirzapur Moti Kureshi Kassab Jama (2005) SCA 4937-4940 (India).

²⁰⁶ Subramanian Swamy v. Union of India, (2016) 7 SCC 221 (India).

²⁰⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Apr. 13, 1978, 48 BVerfGE 127 (Ger.).

²⁰⁸ X v. Austria, App. No. 1718/62, at 172-74.

²⁰⁹ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 39(1) (S. Kor.) (“All citizens shall have the duty of national defence under the conditions as prescribed by law.”).

²¹⁰ Byeongyeokbeob [Military Service Act] art. 88 (S. Kor.).

conscience, a court denied the appeal and ruled that the duty of protecting the state was “the most basic duty” because of its importance to protecting Korea’s “political independence and territorial integrity,” especially considering the country’s “special realities of security circumstances of division into the North and the South with military confrontations, and of insecurity and unpredictability.”²¹¹ The court went on to rule that there was no “justifiable cause” not to enlist under Article 88(1) of the Military Service Act.²¹² With respect to the relationship between rights and duties, the court ruled that the purpose of military service is the defense of human rights:

The duty of national defense, as a constitutional duty, imposed on the citizens in a modern democratic state is justified in the sense that t [sic] national defense is a necessary thing for citizens as sovereigns. In other words, the imposition of a duty of national defense as a constitutional duty is justified by the fact that the citizens should contribute to the existence and security of a state that serves as a premise for the realization and protection of their basic rights by shouldering this constitutional duty.²¹³

The court ultimately held that the constitutional duty of national defense outweighed a conscientious objector’s freedom of conscience:

Since it is obvious that if military duty is not observed and the national security is not ensured, the dignity and value of citizen, as human beings, would not be guaranteed, military duty is ultimately for guaranteeing the dignity and value of the whole citizens as human beings. Because the defendant's freedom of conscience is not superior to the above benefit of the Constitution in its value, the limitation of the freedom of conscience of the defendant, in favor of the above legal benefit, under the Article 37(2) of the Constitution is constitutionally justified.²¹⁴

Moreover, in the 1986 judgment in *Bijoe Emmanuel & Ors v. State of Kerala*,²¹⁵ the Indian Supreme Court ruled that the suspension of a group of Jehovah’s Witnesses from an educational institution, because they stood while the national anthem was played but did not sing, constituted an unreasonable

²¹¹ Violation of the Military Service Act [S. Ct.], July 15, 2004, 2004Do2965 (2 Jip 556, 563) (S. Kor.).

²¹² *Id.* at 564.

²¹³ *Id.* at 563.

²¹⁴ *Id.* at 563–64.

²¹⁵ *Bijoe Emmanuel & Ors v. State of Kerala*, AIR 1987 Del 748 (India).

violation of their constitutional right to freedom of religion.²¹⁶ In its decision, the court interpreted the scope of the constitutional duty of respecting the national anthem as including the duty to stand in honor of the anthem, but not including the duty to sing it.²¹⁷

On the one hand, the Indian Supreme Court restricted the scope of the duty to honor the anthem, and, in that way, attributed important weight to human rights.²¹⁸ On the other, the court only considered the right to freedom of religion as one that conflicts with the duty of honoring the anthem. Thus, in the end, the court did not determine what would have become of the students had they refused to stand while the anthem was played.

In fact, this issue was brought before the Indian Supreme Court in 2016, in a challenge to a law that made interfering with singing the national anthem a criminal offense in order to preserve national honor.²¹⁹ The judgment referred to an incident in which the anthem was played in a cinema hall and one of the viewers refused to stand.²²⁰ The court was asked to “specify what would [constitute] disrespect and abuse of the national anthem.”²²¹ In that case, although “there [was] not a single positive prescription in the statute,”²²² the court ruled that “[a]ll the cinema halls in India shall play the National Anthem before the feature film starts and all present in the hall are obliged to stand up to show respect to the National Anthem.”²²³

The court judgment provoked lively discussion in the press and on social media.²²⁴ In January 2018, the Indian Supreme Court overturned its own decision and ruled that cinemas were not obligated to play the national anthem at the beginning of every film.²²⁵ “Chief Justice Dipak Misra, however, clarified that if a cinema chose to play the national anthem, people would have to

²¹⁶ *Id.* at 749.

²¹⁷ *Id.* at 748.

²¹⁸ See *India's Landmark Supreme Court Case Upholds Free Speech for Almost 30 Years*, JW.ORG (Nov. 11, 2014), <https://www.jw.org/en/news/legal/by-region/india/supreme-court-national-anthem-free-speech>.

²¹⁹ *Shyam Narayan Chouksey v. Union of India*, (2017) 1 SCC 422 (India); see also *Prevention of Insults to National Honour Act, 1971*, § 3 (“Whoever intentionally prevents the singing of the Indian National Anthem or causes disturbances to any assembly engaged in such singing shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both.”).

²²⁰ *Chouksey*, 1 SCC 422.

²²¹ *Id.* ¶ 1.

²²² Arun Sagar, *Law, Honour, Violence: The Supreme Court's Legal and Nonlegal Voice*, 2 INDIAN L. REV. 119, 122 (2018).

²²³ *Chouksey*, 1 SCC 422, ¶ 9.4.

²²⁴ Anurag Verma, *Twitter Is Having a Field Day Railing Against Supreme Court's National Anthem Judgement*, HUFFPOST INDIA (Nov. 30, 2016), https://www.huffpost.com/archive/in/entry/believe-it-or-not-twitter-is-actually-cracking-up-over-supreme_a_21617130.

²²⁵ Mittal, *supra* note 7.

stand up to show respect.”²²⁶ Moreover, “the Court offers no explanation for why playing the national anthem must be made compulsory in a venue for entertainment.”²²⁷

The Indian Supreme Court has since provided further clarification on the matter, including exemptions for people with certain disabilities.²²⁸ Note, however, that standing is indeed coerced.²²⁹

An additional example is provided in a judgment issued by the Ugandan Supreme Court, which interpreted the constitutional duty of paying taxes as one that requires the individual to pay the tax imposed upon him before being entitled to his day in court.²³⁰ This interpretation was given in 2010 in *Uganda Projects Implementation v. Uganda Revenue Authority*:

The issue of collection of taxes in spite of objection . . . is not an issue for constitutional interpretation. It may be hardship on the taxpayer but according to Article 17 of the Constitution a citizen has a duty to pay taxes and to do so promptly, so that government business can go on. . . . The tax payer has to pay his tax then argue later.²³¹

ii. *Expansion of Constitutional Rights by Constitutional Human Duties*

The enshrinement of constitutional duties also has a positive effect on the scope of constitutional rights—for example, on the scope of standing in court.

²²⁶ *Id.*

²²⁷ Sagar, *supra* note 222, at 123.

²²⁸ See Praveen Shekhar, *Disabled People Need Not Stand for National Anthem, Says Supreme Court*, INDIA TODAY (Apr. 18, 2017), <http://indiatoday.intoday.in/story/supreme-court-disabled-people-national-anthem/1/932305.html>.

²²⁹ In the Indian Supreme Court’s decision, the Court required further action to determine what next steps should be taken to possibly amend the law. Shyam Narayan Chouksey v. Union of India, (2017) 1 SCC 422 (India) (“It has been decided to constitute an Inter-Ministerial Committee under the Chairmanship of Additional Secretary (Border Management), Ministry of Home Affairs . . . to give recommendations regarding regulation of playing/singing of National Anthem and to suggest changes in the Prevention to Insults to National Honour Act, 1971 or in the Orders Relating to the National Anthem of India.”).

²³⁰ See *Uganda Projects Implementation & Mgmt. Ctr. v. Uganda Revenue Auth.* [2010] UGSC 17 (Uganda). Compare this to the Tax Anti-Injunction Act in U.S. law, which provides that, with some exceptions, “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” 26 U.S.C. § 7421.

²³¹ *Uganda Revenue Auth.*, [2010] UGSC 17.

The Tanzanian High Court ruled that Articles 25 through 28 of the Tanzanian Constitution, which enshrine constitutional human duties, grant individuals in Tanzania standing in public interest and human rights cases:

[E]very person in Tanzania is vested with a double capacity: the capacity as an individual and the capacity as a member of the community. In his former capacity he enjoys all the basic rights set out in Art. 12 to Art. 25; in the latter capacity he is bounden to discharge duties towards the community as indicated in Art. 25 to Art. 28 . . . I hold Art. 26 (2) to be an independent and additional source of standing which can be invoked by a litigant depending on the nature of his claim.²³²

The ruling by the Tanzanian High Court with respect to the doctrine of public interest litigation also appears in additional judgments.²³³

In Uganda as well, some of the constitutional duties were interpreted by the court as conferring “standing” upon individuals. For example, the Ugandan High Court ruled that Article 17(1) of the Ugandan Constitution, which states, “[i]t is the duty of every citizen of Uganda [. . .] (d) to protect and preserve public property,” confers standing in cases involving the fight against corruption as well.²³⁴ Furthermore, in contrast to the situation in Tanzania, the Ugandan court also ruled that no explicit constitutional right is required in order for citizens to be able to petition with respect to that duty.²³⁵ The constitutional right of standing is implied by the constitutional duty.²³⁶

D. Constitutional Human Duties: Enforcement and Remedies

Generally speaking, a constitutional duty will be worded as a supreme principle, the accomplishment and enforcement of which will require the enactment of laws and regulations. This necessity calls for a discussion with respect to the availability of the legislature to legislate in this regard and gives rise to two essential questions. The first of these is: does the existence of a constitutional duty, which is worded as a principle, subject the legislature to a positive duty of enacting laws that will enable its accomplishment? On the

²³² Rev. Christopher Mtikila v. Att’y Gen., Civil Case No. 5 [1994] (Tanz.).

²³³ See Legal & Hum. Rts. Ctr. v. Att’y Gen., [2006] 1 EA 141 (Tanz.); Felix Joseph Mavika v. Dar-es-Salaam City Comm’n, CN 316/2000 (unreported case) (Tanz.); Ballonzi v. Reg. Tr. of Chama Cha Mapinduzi, [1995] TLR 203 (Tanz.).

²³⁴ Kikungwe Issa v. Standard Bank Inv. Corp. [2004] UGCommC 20 (Uganda).

²³⁵ See *id.* (“[W]hat is in issue in this application is the application of a constitutional duty. . . . Article 17 (1)(d) is silent as to how this duty is to be carried out.”).

²³⁶ Note that the right of standing depends on the general approach to the right of standing in a given country.

one hand, constitutional duties can be viewed as provisions that impose upon the legislature a positive duty of passing laws that accomplish the duty. On the other, this approach may violate the principle of separation of powers and may confer excessive power upon the judiciary branch. And the second question is: do constitutional duties affect the other branches of law in general, and private law in particular? In other words, how are constitutional duties applied in private law?

i. A Duty to Legislate

Whereas many human rights and other constitutional arrangements may be accomplished on the sole basis of constitutional provisions, the accomplishment of constitutional duties, in most cases, will only become possible through the enactment of sub-constitutional norms: laws and regulations. The constitutional value will be vaguely worded, as a “principle,” and the legislature will be subjected to the duty of enacting laws that make it possible to apply and enforce the constitutional duty.²³⁷ The laws also ensure a normative framework that will accomplish the positive aspect of the constitutional provision to the fullest.²³⁸ The legislature’s duty of legislation is one that has been recognized, *inter alia*, in countries such as Austria, Belgium, and Germany.²³⁹

It could be argued that the imposition of a positive duty upon the legislative branch by the judiciary branch is tainted with “hyper-adjudication” and violates the principle of separation of powers, a basic principle in any constitutional democracy.²⁴⁰ Nonetheless, a substantive interpretation of this principle actually emphasizes the cooperation among the branches of government, and not the separation between them. This interpretation reflects a “dialogic approach,” which is founded on the insight that each of the branches exercises a combination of powers.²⁴¹ Therefore, there is no absolute separation

²³⁷ Grimm, *supra* note 24, at 137; FREDMAN, *supra* note 24; XENOS, *supra* note 24. The duty of a citizen has been extended to the collective duty of the State. To elaborate, it becomes the duty of the State to provide for opportunities and not to curtail the opportunities. See Charu Khurana v. Union of India, (2015) 1 SCC 192 (India).

²³⁸ BARAK, *supra* note 25, at 40.

²³⁹ ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY 160, 161, 163 (2017) (discussing Austria, Belgium, and Germany); see also CONSTITUTIONAL COURT OF SPAIN, THE PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE (2008), https://www.confeuconstco.org/reports/rep-xiv/report_Spain_en.pdf (representing Spain’s written contributions to the Venice Conference Report).

²⁴⁰ Waldron, *Separation of Powers in Thought and Practice?*, *supra* note 89.

²⁴¹ Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1405, n.263 (1991) (“[E]ach branch of government necessarily exercises a mix of functions under our constitutional scheme.”); Thomas O. Sargentich, *The Contemporary Debate*

between the judiciary branch and the legislative branch. This interpretation of the principle of separation of powers is consistent with theories of dialogic constitutionalism, according to which the court plays an important role in promoting political and public discourse.²⁴²

Thus, for example, the Supreme Court of India ruled that the duty to “protect and improve the natural environment”²⁴³ imposes upon the administration a requirement to provide the public with environmental education—“all the educational institutions throughout India [must] teach at least for one hour in a week lessons relating to the protection and the improvement of the natural environment.”²⁴⁴ This is because, although duties are directed towards citizens, they might still be used to guide and constrain government behavior.

The South Korean Constitutional Court interpreted the constitutional “duty to pay taxes under the conditions as prescribed by law”²⁴⁵ as one that also includes a principle of “statutory taxation,” which empowers the court to declare that a vague tax law is unconstitutional.²⁴⁶ In 1999, in its judgment in the *High Class Entertainment Facility Enhanced Assessment Case*, the Constitutional Court invalidated “the Local Tax Act provisions that imposed enhanced property taxes on ‘high class entertainment facilities’ and enhanced land taxes on ‘land used for luxurious purposes’” on the ground that they violated the principle of “no taxation without the law.”²⁴⁷ The court’s grounds for its decision were that the statute was too vague and could lead to arbitrary interpretation and administration, which violated the principles expressed in Articles 38 and 59 of the Constitution.²⁴⁸

About Legislative-Executive Separation of Powers, 72 CORNELL L. REV. 430, 433–34 (1987).

²⁴² Sapir, *supra* note 145, at 372–74, 391–92; Kent Roach, *Dialogic Judicial Review and Its Critics*, 23 SUP. CT. L. REV. 49, 55 (2004); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 579 (1993); J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 66–67 (2004); Peter W. Hogg & Allison A. Bushnell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 79–80 (1997). The definitive representative of this interpretation in Israel is described by Prof. Aharon Barak. Aharon Barak, *Speech in the Supreme Court upon My Retirement*, 38 MISHPATIM 3 (2008) (Isr.); BARAK, *supra* note 160, at 231; AHARON BARAK, JUDICIAL DISCRETION 210 (Yadin Kaufmann trans., 1989); Aharon Barak, *Partnership and Dialogue Between the Legislative and Executive Branches and the Judiciary Branch*, 51 MOZNEI MISHPAT 54 (2005); see also Sapir, *supra* note 145, at 349, 391–92.

²⁴³ India Const. art. 51A(g).

²⁴⁴ M.C. Mehta v. Union of India, (1988) 2 SCR 530 (India).

²⁴⁵ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 38 (S. Kor.).

²⁴⁶ 98 Hun-Ka 11 [Const. Ct.] (March. 25, 1999) (S. Kor.).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

The Indian Supreme Court, on two different occasions, also interpreted constitutional human duties as imposing duties upon public authorities. The first of these, which is incumbent upon public universities, is the duty to demand fair admissions—which, in turn, results from the constitutional duty “to develop a scientific temper and humanism.”²⁴⁹ The second, which is incumbent upon the government, is to educate citizens to preserve the environment—which results from the constitutional duty of protecting the environment.²⁵⁰

ii. *The Applicability of Constitutional Law to Other Branches of Law*

The basic approach with respect to the applicability of constitutional values to private law, as reflected in the various constitutions, is vague and can be interpreted in different ways.²⁵¹ Moreover, a review of case law in comparative law does not clearly indicate the customary approaches to the application of constitutional rights or other constitutional values to private law in the various legal systems.

Four models for the application of values from public law to private law are described in the literature.²⁵² The first is the “no application” model, pursuant to which the constitutional values belong exclusively to public law.²⁵³ Thus, for example, Section 32(1) of the Canadian Charter determines that the constitutional rights *prima facie* extend only to the relationship between the State and individuals.²⁵⁴ The second is the model of application to the judiciary branch, pursuant to which the constitutional values belong exclusively to public law. Nonetheless, because the judiciary branch is also a public branch,

²⁴⁹ *AIIMS Students' Union v. AIIMS*, (2002) 1 SC 438 (India); *see also* India Const. art. 51A(h) (“It shall be the duty of every citizen of India . . . to develop the scientific temper, humanism and the spirit of inquiry and reform.”).

²⁵⁰ *M.C. Mehta v. Union of India*, (1988) 2 SCR 530 (India); *see also* India Const. arts. 48A, 51A(g).

²⁵¹ *See* HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY (Dawn Oliver & Jörg Fedtke eds., 2007); Eli Bukspan & Asa Kasher, *Universal Direct Application of Human Rights*, 40 *IYUNEI MISHPAT* 45 (2017) (Isr.).

²⁵² For a review of the various approaches, *see* Aharon Barak, *Constitutional Human Rights and Private Law*, 3 *REV. CONST. STUD.* 218 (1996).

²⁵³ *Id.* at 225–26.

²⁵⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 32(1) (U.K.) (governing the application of the Charter to the Canadian Parliament and Government). At the same time, from the material standpoint, case law reflects doctrines that moderate the dominance of this model and tend toward a model that favors a gradually increasing influence for human rights among individuals as well. *See* Lorraine E. Weinrib & Ernest J. Weinrib, *Constitutional Values and Private Law in Canada*, in *HUMAN RIGHTS IN PRIVATE LAW* 43 (Daniel Friedmann & Daphne Barak-Erez eds., 2002).

values from public law will be infused into its rulings. Thus, for example, under American law, the Constitution is directed toward administrative authorities. Nonetheless, the central approach emphasizes that the judiciary system is part of the administration, to which the Constitution applies, and therefore, rights in American law are applied via the judiciary branch.²⁵⁵ The third is the “indirect application” model, which determines that the constitutional values will apply in private law, but not directly; rather, they will apply indirectly, with the help of legal doctrines rooted in private law.²⁵⁶ Thus, for example, this application was used in German law in the judgment in the Lüth Case,²⁵⁷ which determined that human rights apply in private law. The fourth is the “direct application” model, which is enshrined in the Greek Constitution, in which an explicit clause directly applies human rights to private law:

The rights of the human being as an individual and as a member of society and the principle of the welfare rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply to the relations between individuals to which they are appropriate.²⁵⁸

Similarly, the South African Constitution also determines the direct application of constitutional rights to private law.²⁵⁹

The various models—except the “direct application” model—assume that the legal field should be divided into a public sector and a civil/private sector. Nonetheless, few constitutions explicitly clarify which model pertains to the application of human rights to private law.

With respect to constitutional duties, in some countries, the courts interpret the duties in accordance with the “no application” model so that the

²⁵⁵ Mattias Kumm & Victor Ferreres Comella, *What Is So Special About Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Effect*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 241, 268 (András Sajó & Renata Uitz eds., 2005). Moreover, nearly all of the parts of the United States Bill of Rights explicitly address the relationship between the State and the citizen. Nonetheless, in the 13th Amendment to the Constitution, the American legislature established, in a wording that deviates from the general trend, implicit direct application of a specific constitutional right—freedom from slavery—between individuals as well.

²⁵⁶ HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY, *supra* note 251, at 484–93.

²⁵⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Apr. 13, 1978, 48 BVerfGE 127, 198.

²⁵⁸ 1975 SYNTAGMA [SYN.] [CONSTITUTION] 25(1) (Greece).

²⁵⁹ S. AFR. CONST., 1996, art. 8(2) (“A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”).

implications of human duties are directed toward the organs of the State. Thus, some courts interpret constitutional duties as an additional source of rights. For example, a court in Tanzania interpreted the duty to obey the Constitution and the laws as conferring standing in cases that pertain to public interests,²⁶⁰ and a court in Uganda interpreted the duty to protect public property as conferring standing upon citizens in actions that pertain to corruption.²⁶¹ But unlike in the Tanzanian constitution, this duty does not have any language about an individual right to sue.²⁶² In *Issa v. Standard Bank Investment*, decided in 2004, the High Court of Uganda held that individual duties provided a source of standing.²⁶³ An additional example is that of cases in which the courts have used human rights in order to impose a duty precisely upon the administrative authorities. For example, the South Korean Constitutional Court ruled that because citizens' duty to pay taxes is enshrined in the law, the legislature is subject to a duty of enacting tax laws that are not unclear.²⁶⁴

In other cases, when the application of constitutional duties pertains to criminal law, the courts interpret constitutional human duties in accordance with models in which those duties also apply to individuals. For example, in Ireland, the constitutional duty of being loyal to the State was an influential factor in imposing a lengthy sentence in a criminal case.²⁶⁵ In India, duties figured in a decision that criminalizing the defamation of a person does not contradict the basic right to expression because every citizen is subject to the duty of respecting his fellow citizen's good name.²⁶⁶ In Uganda, a foundation has been constituted for requiring citizens to pay their taxes before appealing to the court against the amount of the tax.²⁶⁷ Thus, also in India, the constitutional duty of honoring the anthem was used as justification for arresting a

²⁶⁰ Rev. Christopher Mtikila v. Att'y Gen., Civil Case No. 5 [1994] (Tanz.); Altan & Versteeg, *supra* note 8, manuscript at 3, 33. Other cases have subsequently confirmed this. See *Legal and Human Rights Centre v. Attorney General* [2006] 1 EA 141 (Tanz.); *Felix Joseph Mavika v. Dar-es-Salaam City Commission*, CN 316/2000 (unreported case) (Tanz.).

²⁶¹ *Kikungwe Issa v. Standard Bank Inv. Corp.* [2004] UGCommC 20 (Uganda).

²⁶² Compare CONST. OF THE UNITED REPUBLIC OF TANZANIA, 1977, art. 30(3) ("Any person alleging that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court."), with CONST. OF THE REPUBLIC OF UGANDA, 1977, art. 17.

²⁶³ *Issa*, [2004] UGCommC 20; Altan & Versteeg, *supra* note 8, manuscript at 33.

²⁶⁴ 98 Hun-Ka 11 [Const. Ct.] (March 25, 1999) (S. Kor.).

²⁶⁵ *DPP v. Murray* [2012] 2 IR 477 (CCA) (Ir.).

²⁶⁶ *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221 (India).

²⁶⁷ *Uganda Projects Implementation & Mgmt. Ctr. v. Uganda Revenue Auth.* [2010] UGSC 17 (Uganda).

person who refused to stand while the national anthem was being played in a cinema.²⁶⁸

In South Korea, the duty of protecting the State was found to detract from the right to resist for reasons of conscience.²⁶⁹ In all of these cases, the constitutional values applied not only to the administrative authorities, but to individuals as well. It can therefore be argued that the constitutional human duties have changed the nature of constitutional law by imposing supra-legal obligations not only upon the State, but also upon individuals.

Nonetheless, with respect to private law in India, the “indirect application” model has been adopted. “[T]he judiciary time and again made clear that its hands are tied and that the Legislature must initiate measures for enforcement through the enactment of laws”; in other words, without appropriate legislation, it will not be possible to enforce the constitutional duties.²⁷⁰

On the other hand, Germany has held that “[b]asic obligations require specification and sanctioning by the regular legislator: they are *leges imperfectae*.”²⁷¹ Nevertheless, according to Hofmann, the loyalty obligation and the obligation to maintain peace are immediately applicable.²⁷²

An in-depth examination of case law in various countries identifies a clear trend that seeks to apply human rights to private law.²⁷³ It is rooted, as Mark Tushnet puts it, in the recognition that “corporations and nongovernmental actors can threaten human rights” just as much as the government itself, and that private actors “exercising ‘private’ power are actually exercising power conferred on them by laws creating and regulating market behavior.”²⁷⁴ Therefore, constitutional human duties can be seen as a radical next step on this same continuum.²⁷⁵

²⁶⁸ Shyam Narayan Chouksey v. Union of India, Writ Petition (Civil) No. 855 of 2016, decided on Nov. 30, 2016. (SC).

²⁶⁹ Daebeobwon [S. Ct.], July 15, 2004, 2004Do2965 (S. Kor.).

²⁷⁰ Rajesh Singh, *Fundamental Rights, Yes. What About Fundamental Duties?*, VIVEKANANDA INT'L FOUND. (Feb. 26, 2019), <https://www.vifindia.org/article/2019/february/26/fundamental-rights-yes-what-about-fundamental-duties>; see, e.g., *AIIMS Students' Union v. AIIMS*, (2002) 1 SCC 428 (India).

²⁷¹ GÖTZ & HOFMANN, *supra* note 113, at 30–53.

²⁷² *Id.*

²⁷³ Bukspan & Kasher, *supra* note 251, at 64.

²⁷⁴ Tushnet, *supra* note 17, at 79; see also Michelman, *supra* note 17.

²⁷⁵ LOUIS HENKIN ET AL., *HUMAN RIGHTS* 217 (2009); Michelman, *supra* note 17 (describing how the State Action Doctrine is an outlier in comparative perspective international human rights); see also U.N. Secretariat, *Compilation of Gen. Comments and Gen. Recommendations Adopted by Hum. Rts Treaty Bodies* 179, HRI/GEN/1/Rev.9(1) (May 17, 2008). “The Committee considers that states have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life . . . The Committee considers that states parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces . . . states parties should also take specific and effective measures to prevent

Constitutions that contain duties move from possible indirect horizontal application to direct horizontal application of rights, as constitutional duties require private individuals to take certain actions, such as paying their taxes or honoring the national anthem.

Therefore, constitutional duties turn constitutional law from “law for states” into law for both the state and its citizens. In doing so, they blur the boundary between constitutional law and other bodies of law such as criminal law, torts, and contracts. This is because the very establishment of constitutional human duties collapses the methodical barrier between the various branches of law—public, criminal, and private—and directly or indirectly applies values from public law to criminal law and, at times, to private law as well.

E. Symbolic and Educational Value of Constitutional Human Duties

A constitution is a compilation of the basic values and rules on which a society is based. It governs the activity of the administrative authorities, the relationships between the authorities, and human and civil rights and duties.²⁷⁶ This compilation is intended to outline the character of the State; in addition, at the public level, its existence confers a symbolic and educational value upon it. The constitution itself facilitates internalization and learning of, and identification with, the values set forth in it. In addition, it may increase awareness of the existence of limitations on the administrative powers and may encourage a public demand to honor constitutional norms.²⁷⁷

As we have seen, in addition to its normative and operative significance, the enshrining of a value as a constitutional value also has a declarative significance, which trickles down into the local culture. The constitution adopts specific values with a view toward establishing the nature of the respective

the disappearance of individuals . . . The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures.” Knox, *supra* note 80.

²⁷⁶ See BARAK, *supra* note 80, at 67. The constitution, in fact, determines what its constitutive principles are. See RUBINSTEIN & MEDINA, *supra* note 23, at 53.

²⁷⁷ With respect to the various purposes of the Constitution, see BRESLIN, *supra* note 146; RUBINSTEIN & MEDINA, *supra* note 23, at 54; AMNON RUBINSTEIN & RAANAN HAR ZAHAV, BASIC LAW: THE KNESSET 1, 11 (Yitzhak Zamir ed., 1993); Bendor, *supra* note 146, at 119, 128–30; Gavison, *supra* note 155, at 21, 61. Justice Cheshin wrote in MCM 537/95 Ganimat v. State of Israel, 49(3) PD 355, 395 (1995) (Isr.): “Basic Law: Human Dignity and Liberty . . . contributed to an increased awareness of human rights . . . and reminded us that we are required to keep human rights before our eyes at all times: always, every day and every hour and every minute. We have always known all these things, but now the Liberty Law has set a royal seal on the doctrine of earliest childhood, which we learned by rote at school.”

society and indicating common public purposes.²⁷⁸ Therefore, the text of the constitution has an important and real symbolic value for the collective identity.²⁷⁹ All this is because the constitution is also an idea, an inclusive and complex worldview of the way in which life should be conducted in a modern state.²⁸⁰ It is, in fact, an embodiment of the people's sovereignty and constitutes a tangible expression of the social contract under which the modern state came into being.²⁸¹

This means that enshrining human duties in a constitutional norm may inspire us to inculcate in ourselves a sense of social responsibility in general, and, in particular, may constitute a signal for a specific social value—a social value that, in most cases, will penetrate our culture even without mechanisms of enforcement and execution.

Thus, the duty to vote, which is enshrined in dozens of constitutions all over the world, will often not be accompanied by enforcement.²⁸² Nonetheless, the percentage of actual voters in countries with a constitutional duty of voting will always be higher than in countries where no such constitutional duty is set forth.²⁸³

Studies have proven that the enshrinement of the duty of voting as a constitutional norm has a decisive effect on the number of voters.²⁸⁴ The proof of this lies in the fact that, in countries where that duty has been abolished, the percentage of voters has decreased dramatically.²⁸⁵ For example, in Holland, in 1970, the duty to vote was canceled several weeks before the elections, and the percentage of voters dropped by 10%.²⁸⁶ On the other hand, in countries such as Austria and Belgium, after that duty was enshrined in the constitution,

²⁷⁸ BARAK, *supra* note 80, at 83.

²⁷⁹ *Id.*

²⁸⁰ See Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

²⁸¹ Walter F. Murphy described the “constitutional order” as “the nation’s constitutional text, its dominant political theories, the traditions and aspirations that reflect those values, and the principal interpretations of this larger constitution.” See WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 13 (2007).

²⁸² See *Compulsory Voting*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <https://www.idea.int/data-tools/data/voter-turnout/compulsory-voting> (last visited Mar. 9, 2023).

²⁸³ *See id.*

²⁸⁴ See, e.g., Galen Irwin, *Compulsory Voting Legislation: Impact on Voter Turnout in The Netherlands*, 7 COMPAR. POL. STUD. 292 (1974).

²⁸⁵ *Id.*

²⁸⁶ G. Bingham Powell, Jr., *Voting Turnout in Thirty Democracies: Partisan, Legal and Socio-Economic Influences*, in *ELECTORAL PARTICIPATION: A COMPARATIVE ANALYSIS* 5, 10 (Richard Rose ed., 1980); see also Irwin, *supra* note 284, at 294 (“The large drop in turnout only a few weeks after the repeal of [compulsory voting] legislation leaves little doubt that the change was due to the change in the law and not to external factors.”).

the percentage of voters increased dramatically.²⁸⁷ Moreover, the very cancellation of the duty to vote—albeit that duty had not actually been enforced—led to a drastic drop in the number of voters.²⁸⁸

An additional example is the duty of honoring the flag and the anthem in India. Cinemas in India used to be required to play the Indian national anthem before films were shown because of the duty to honor the flag and anthem.²⁸⁹ The Indian court, however, changed its mind and canceled that duty, leaving the playing of the anthem to the discretion of the cinemas.²⁹⁰

The Court affirms that the anthem should be respected *whenever it is played or sung*. Here the Court steps back from the doors of the cinema hall, no more insisting on the performance of honour. . . . Immediately after the order, it appeared likely that cinemas would not take the active step of discontinuing the practice of playing the anthem; while there is no data available, anecdotal evidence suggests that the anthem is still being played in cinemas across the country today. . . . the choice to play the anthem is now repeated thousands of times a day throughout the country. The perpetual repetition of the scene of the anthem playing while people stand gains even greater symbolic power through the fact of its not being directly coerced.²⁹¹

The practice of playing the anthem continued regardless of the court's interpretation because of tradition; the value had become ingrained in society and no longer needed legal enforcement.

²⁸⁷ Marc Hooghe & Koen Pelleriaux, *Afschaffing Van De Kiesplicht – Een Simulatie*, 4 SAMENLEVING EN POLITIEK 5, 8 (1997) (Belg.); Simon Jackman, *Compulsory Voting*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 16,314 (2001).

²⁸⁸ Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 135 (2007).

²⁸⁹ Shyam Narayan Chouksey v. Union of India, (2017) 1 SCC 422 (India).

²⁹⁰ Mittal, *supra* note 7.

²⁹¹ Sagar, *supra* note 222, at 133; *see also* Express News Service, *Cinemas Still Playing Anthem in Chennai*, NEW INDIAN EXPRESS (Jan. 14, 2018), <https://www.newindianexpress.com/cities/chennai/2018/jan/14/cinemas-still-playing-anthem-in-chennai-1753246.html>; Arsh Behal, *Post SC Order, Cinema Halls Still Play National Anthem*, TIMES OF INDIA (Jan. 11, 2018), <https://timesofindia.indiatimes.com/city/chandigarh/post-sc-order-cinema-halls-still-play-national-anthem/articleshow/62454591.cms>; *Will Cinema Halls Continue to Play the National Anthem?*, TIMES OF INDIA ETIMES (Jan. 17, 2018), <https://timesofindia.indiatimes.com/entertainment/tamil/movies/news/will-cinema-halls-continue-to-play-the-national-anthem/articleshow/62524396.cms>.

F. A Constitutional Human Duty as a Constitutional Value

In enshrining a human duty as a constitutional duty, the law recognizes the constitutional duty of every citizen vis-à-vis the community in which that citizen resides. Although the concept of the right recognizes the fact that a person is part of his environment, and therefore establishes limitations on the rights, it inevitably focuses on the individual, the person, the human being. On the other hand, where human duties are concerned, the focus of the discussion is not on the person, but rather, on the society, the community, and the family. Constitutional duties simultaneously protect both the rights of individuals and constitutional values.²⁹² This means that the concept of “human duties” is actually on the continuum between the concept of rights and that of public interests.

Thus, the duty of military or civilian service is perceived, in certain countries,²⁹³ as a national interest, and, at times, even as an existential necessity. This led to the enshrinement of the duty of military service as a constitutional value, which is protected against a random majority in the legislature and is horizontally balanced against other constitutional rights—a basic value that is not merely symbolic and educational but, rather, that embodies many shades of social and even economic significance. Accordingly, the duty of military service is intended to protect the rights to life and security, on the one hand, and the physical existence of the State, on the other.

Similarly, there are countries that have enshrined the payment of taxes as a constitutional duty.²⁹⁴ In those countries, paying taxes is perceived as a constitutional value. This is because establishing the duty of paying taxes at the constitutional level ensures the protection of social rights. By the very act of paying, citizens participate and pay their share of the expenses of the community in which they live.

Mandatory military service or taxation cannot be defined as limitations on only one basic right. The connection to the freedom of job choice and

²⁹² Gazal-Ayal & Reichman, *supra* note 27.

²⁹³ A constitutional duty of military service exists, for example, in China, XIFANA, art. 55 (1982); Cuba, CONST. OF THE REPUBLIC OF CUBA, art. 65; Spain, CONSTITUCIÓN ESPAÑOLA (C.E.), B.O.E., § 30(1), Dec. 29, 1978; Portugal, C.R.P., arts. 276, §§ 1–2; South Korea, DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 39, § 1; Poland, CONST. OF THE POLISH PEOPLE'S REPUBLIC, Oct. 17, 1997, art. 78; Italy, Art. 52 COSTITUZIONE [COST.]; Thailand, CONST. OF THE KINGDOM OF THAILAND, Aug. 24, 2007, § 69; and North Korea, CONST. OF THE REPUBLIC OF KOREA, Dec. 27, 1972, art. 86.

²⁹⁴ The constitutional duty of paying taxes exists, for example, in the Spanish Constitution, which defines the obligation to pay tax, as a constitutional obligation: “Everyone shall contribute to sustain public expenditure according to their economic capacity, through a fair tax system based on the principles of equality and progressive taxation, which in no case shall be of a confiscatory scope.” C.E., B.O.E., § 31(1) Dec. 29, 1978 (Spain).

property are definitely touched on by these obligations. However, the obligations go further than these rights.

The multiple consequences on different areas of life and of the sphere of freedom of the citizen lead to the understanding of certain basic obligations not as a limitation on basic rights, but as an institutionalization of freedom. Not only rights of defense against actions of the state are limited by obligations. These also require positive action from citizens. An example of this is taxation, which requires a citizen to actually pay the tax and therefore forces the citizen to do the transaction.

This argument, which perceives constitutional duties as a tool protecting both rights and constitutional values, is strengthened in light of other constitutional duties that prevail in a number of countries, such as the duty to vote and the duty of protecting the environment.²⁹⁵ The violation of such a duty is not merely the violation of another individual's right; rather, it also violates the basic values of the society in which it was established. This means that an examination of a breach of those duties must be independent, irrespective of the constitutional right. Moreover, the duties must be protected from possible harm by other legal norms.

Thus, the duty to vote strengthens each of the groups in that community, and especially minority groups.²⁹⁶ The importance of voting is reinforced in legal systems in which a high percentage of voters is required in order to establish a representative majority in the legislative body.²⁹⁷ In defining the duty to vote as a constitutional duty, the law recognizes every citizen's constitutional duty vis-à-vis the community in which that citizen resides. Although the concept of a "right" recognizes the fact that a person is part of his environment, and therefore establishes limitations on the right, it inevitably focuses on the individual, the person, the human being. On the other hand, where human duties are concerned, the focus of the discussion is not on the person, but rather, on the society, the community, or the family.

The concept of "human duties" is on the continuum between the concept of rights and that of public interests. By means of constitutional duties, we

²⁹⁵ A constitutional duty exists in: Thailand, CONST. OF THE KINGDOM OF THAILAND, Aug. 24, 2007, § 69; Portugal, C.R.P., art. 65; Spain, C.E., B.O.E., art. 45, Dec. 29, 1978; Japan, BASIC LAW FOR ENVIRONMENTAL POLLUTION CONTROL (RESPONSIBILITY OF CITIZENS), art. 9 (1976).

²⁹⁶ Minority groups in which the percentage of voters is low may remain below the election threshold, and, in the end, may not be represented. On the importance of voting, see TAMAR HARMAN, GOVERNMENT AND POLITICS IN THE STATE OF ISRAEL (1990) (Isr.).

²⁹⁷ In Israel, for example, in recent years, the Knesset election threshold was raised from 2% to 3.25% (which is equivalent to approximately four Knesset seats). Thus, in elections in Israel, if a minority party wishes to obtain representation, it will have to recruit a greater number of voters in order to enable them to be represented in the Knesset. Knesset Elections Law (Consolidated Version), 5729-1969, LSI 23 140 (1968-69), as amended (Isr.).

succeed in simultaneously protecting the rights of individuals and safeguarding constitutional principles. The duty of voting, for example, protects a number of basic values, and primarily the principle of majority decision. This value encompasses an entire range of concepts: government by the people, the legitimacy of the administration, the purity of the administration, and so forth. This basic value has been eroded in modern democracies, in light of the drastic drop in the number of voters²⁹⁸—it no longer pertains to the majority of citizens, but, rather, to the majority of voters.²⁹⁹ The erosion of this basic value—the principle of majority decision—may lead to a lack of legitimacy, underrepresentation of minority groups, and de facto harm to an additional material value, government by the people, thereby undermining the very foundations of democracy. No remedy for this can be found in the concept of “right,” which focuses on the individual.³⁰⁰ In contrast to that concept, the concept of “duty,” which focuses on the basic value and the burden that every citizen must bear in order to keep society democratic, provides a protection.

²⁹⁸ JASON BRENNAN & LISA HILL, *COMPULSORY VOTING: FOR AND AGAINST* 3, 112, 134, 137 (2014); Sofie Marien, *Is Compulsory Voting a Good Idea? The Consequences of Compulsory Voting in Belgium* 3 (Partirep Research Network Working Paper); Lisa Hill, *On Reasonableness of Compelling Citizens To ‘Vote’: the Australian Case*, 50 *POL. STUD.* 80–101 (2002); SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995); Kevin Swaddle & Anthony Heath, *Official and Reported Turnout in The British General Election of 1987*, 19 *BRITISH J. POL. SCI.* 537 (1989); SIDNEY VERBA ET AL., *PARTICIPATION AND POLITICAL EQUALITY: A SEVEN NATION COMPARISON* (1987); LESTER W. MILBRATH & M. L. GOEL, *POLITICAL PARTICIPATION: HOW AND WHY DO PEOPLE GET INVOLVED IN POLITICS?* (1977); Richard A. Brody & Paul M. Sniderman, *From Life Space to Polling Place: The Relevance of Personal Concerns for Voting Behavior*, 7 *BRITISH J. POL. SCI.* 337 (1977). In the literature, arguments can be found to the effect that the democratic system may lead to unrealistic results, see BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007), or that there are other systems that may give rise to a more appropriate policy than representative democracy, see DAVID ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* (2008). Nonetheless, representative democracy, based on the people’s choice, is the customary system today and in the foreseeable future.

²⁹⁹ In the last three decades, the rate of participation in Western democratic elections has dramatically declined. Whereas between 1940 and 1980, the worldwide percentage of voters was approximately 80%, between 2011 and 2015, the percentage of voters reached an unprecedented low of 66%. The downward trend continues. ABDURASHID SOLIJONOV, *INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, VOTER TURNOUT TRENDS AROUND THE WORLD* 24 (2016), <https://www.idea.int/sites/default/files/publications/voter-turnout-trends-around-the-world.pdf>; ANDREW ELLIS ET AL., *INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, ENGAGING THE ELECTORATE: INITIATIVES TO PROMOTE VOTER TURNOUT FROM AROUND THE WORLD INCLUDING VOTER TURNOUT DATA FROM NATIONAL ELECTIONS WORLDWIDE 1945–2006*, 10 (2006), <https://www.idea.int/sites/default/files/publications/engaging-the-electorate-initiatives-to-promote-voter-turnout-from-around-the-world.pdf>.

³⁰⁰ Note, *The Case for Compulsory Voting in the United States*, 121 *HARV. L. REV.* 591 (2007).

Analyzing the problem of the percentage of voters from the standpoint of a legal duty may yield different results from those that exist today. The harm that arises from a low percentage of voters is not harmful to a single individual; rather, it is harmful to the basic values of the society and to a collection of anonymous individuals. This means that this duty is closely related to the state in which it was established and should be protected against possible harm by a random majority. Therefore, if it is appropriate to establish a duty to vote, that duty should be given supra-legal, constitutional protection in order to prevent manipulations according to the forecast results of the elections and to prevent the transformation of the duty into a political tool.

Moreover, the constitutional values entailed in human rights vis-à-vis the State—paying taxes, military service, jury duty, and the obligation to vote—which constitute the foundation of the democratic system, are a classic “public good” and are, therefore, subject to the phenomenon of parasitism or “free riders.”³⁰¹ For example, in election times, all of those tens of percentage points who stay home and do not invest their time in voting benefit, in the end, from the results of the elections without having invested anything in the actual process.³⁰² Every citizen benefits from the advantages of free life in a democratic society without being required to expend the “costs” of voting, i.e., the time spent on traveling to the polls and waiting in line, and the expenses involved in obtaining information on whom to vote for.³⁰³ In the same way, citizens who evade paying taxes nonetheless benefit from goods funded by the public, such as infrastructures, free education, and other services. Similarly, citizens who dodge National Service benefit from the protection of the territory in which they reside and are able to exercise their basic right to life.

This argument also applies to horizontal duties, such as the duty of compulsory education, which is incumbent upon parents. By forcing an action, parents are not allowed to make use of their negative parental education right. They must send their children to school or enable them to get an education in some other way. Simply not educating their children at all is not an option. This also applies with regard to property. Owners can be forced to act or do something on or with their property, for example, in the case of public necessity. Basic obligations can touch on subjects that are protected by numerous basic rights. They are, therefore, not the exact counterweight to any one specific basic right.

³⁰¹ MARK N. FRANKLIN, VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945, 37–38 (2004); *The Case for Compulsory Voting in the United States*, *supra* note 300, at 591; Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996).

³⁰² Katherine M. Swenson, *Sticks, Carrots, Donkey Votes, and True Choice: A Rationale for Abolishing Compulsory Voting in Australia*, 16 MINN. J. INT’L L. 549 (2007).

³⁰³ *The Case for Compulsory Voting in the United States*, *supra* note 300, at 591.

G. Republicanism, Communitarianism, and Liberalism—The Common Factor

Even back in ancient Greece, it was understood that a person who keeps to himself and does not take part in the community is a loss to all of human society.³⁰⁴ The basic starting point for any political theory was held to be the existential fact that human beings live together. Thus, Socrates believed that the fact that a person lives in a certain community for a protracted period of time is sufficient to create a presumption that he must respect its demands.³⁰⁵

Nearly 2,000 years later, Alasdair MacIntyre, in his book *After Virtue*, made similar statements.³⁰⁶ According to MacIntyre, our lives today are in a state of grave disorder, which is rooted in the liberal individualism of the Enlightenment.³⁰⁷ As a result, present-day discourse and moral action are hollow—and although the language and appearance of morality remain, its content no longer exists.³⁰⁸ MacIntyre considers the moral person to be primarily a person who is in a social context. He believes that people must invest themselves in social practices and should adopt roles within those contexts, and persons should not be alienated from social institutions, and especially not from the State.³⁰⁹

In the mid-19th century, Western liberal–democratic ideology determined the concept of the discourse of rights. Human freedom was given first place, and the discourse of duties was pushed aside. “It is from this matrix of the liberal ideal that there stems the further notion of the ‘right of individual’ as, *prima facie*, rights against society rather than as rights exercised by individual members of the civic order to which they belong.”³¹⁰

Still, even the most extreme libertarians agree that, in certain (exceptional) cases, there is no other choice than to impose duties upon individuals.³¹¹ The individual’s duties to the State of which he is a citizen continue to exist for even the strictest of libertarians, such as Nozick.³¹² This is because the liberal approach does not ignore the social part inherent to the individual. Thus, for example, in *A Theory of Justice*, Rawls recognized the importance

³⁰⁴ HODGSON, *supra* note 34, at 7; *see also* AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA* 257 (1993).

³⁰⁵ FLETCHER, *supra* note 125, at 55–57.

³⁰⁶ ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984).

³⁰⁷ *See id.*

³⁰⁸ *Id.*

³⁰⁹ *See id.*

³¹⁰ DAVID SELBOURNE, *THE PRINCIPLE OF DUTY* 30 (1994).

³¹¹ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 151 (1974).

³¹² Nozick himself left a narrow opening to cases, which he called “catastrophic cases,” in which it would be obligatory to specify the duty toward others. *Id.* at 151. In his book, Weinreb presents several examples to the contrary. *See* ELAZAR WEINREB, *PROBLEMS IN MORAL PHILOSOPHY* (2d ed. 2008) (Isr.).

of what he referred to as “social organizations” and wrote that “only in a social union is the individual complete.”³¹³ In addition, the community, according to Rawls, is measured—in the context of the preservation of human liberties—in a broader way. Thus, Rawls writes with respect to the duty of military service: “Conscription is permissible only if it is demanded for the defense of liberty itself, including here not only the liberties of the citizens of the society in question, but also those of persons in other societies as well.”³¹⁴

This means that communitarianism does not necessarily contradict moderate trends in liberalism. Communitarianism emphasizes the need to balance the human rights of individuals against the interests of the entire community, based on the necessary belief that the autonomous self is not an isolated, atomistic entity, but, rather, is shaped by and inseparably connected to the community in which he grew up, the values of that community, and the interpersonal relationships that he developed within it.³¹⁵

Communitarians, relying on Aristotelian and Hegelian theory, claim that the concept of “good” must include society, and that a community cannot be a neutral arena from the normative standpoint “[u]nless there is a social formulation of the good, there can be no normative foundation upon which to draw to settle conflicts of value between different individuals and groups.”³¹⁶

This approach abandons the commitment to human rights. Republicans add that this is also the reason why republicanism is a more complete theory than liberalism—due to its recognition of the importance of individual autonomy, on the one hand, along with the importance of the existence of a developed political space, on the other.

In fact, the many constitutional duties that I have reviewed in this Article show that many constitutions have chosen a phrasing of basic values, which are given constitutional protection as civic duties alongside human rights.

IV. CONCLUSION

Notwithstanding the paucity of academic discussion of constitutional human duties, many constitutions throughout the world have enshrined those

³¹³ RAWLS, *supra* note 154. “Most discussions of Rawls’s philosophy tend to neglect the strong communitarian strand of his theory: so much so that in the debate between liberals and communitarians Rawls’s account of community has been for the most part intriguingly absent.” Roberto Lejandro, *Rawls’s Communitarianism*, 23 CANADIAN J. PHIL. 75, 75 (1993).

³¹⁴ RAWLS, *supra* note 154, at 380.

³¹⁵ ZYGMUNT BAUMAN, *LIQUID MODERNITY* 149–78 (2000).

³¹⁶ Amitai Etzioni, *Communitarianism*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/communitarianism/A-synthesis-Rights-and-responsibilities> (last visited Mar. 9, 2023); *see also* AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA* 4 (1993).

duties. Constitutional human duties are enshrined in various ways, referred to by various terms, and possess of a wide variety of content. Nonetheless, constitutional discourse that is focused on duties reveals that constitutional duties have significant core legal implications; all of them enshrine a supreme constitutional value selected by the founders of the State, a value that is given the normative power to overcome primary and secondary legislation, and that is horizontally balanced against human rights and other constitutional values. This value is directly infused into public and criminal law, and, in some of the cases, indirectly into civil law. Moreover, all the constitutional duties have an interpretive power, which imposes upon the legislature of some countries a mandatory duty to ensure that they are carried out in practice and to determine methods of enforcement, and which substantially affects other normative provisions.

Moreover, if we examine the three cases with which this Article begins, we will see that each of them relates to an explicit vertical constitutional duty which was horizontally balanced against the constitutional rights of the individual and prevailed over them. In all three cases, the constitutional human duty protected constitutional basic values, on which the court expressly insisted—values that, without the protection of the constitutional duty, might well have taken a back seat to the constitutional right.

The ECHR determined that, in Austria, the balance between the explicit constitutional duty to vote and human rights such as freedom of conscience and freedom of expression would be implemented horizontally—duty versus right. In the balance drawn by the court, the duty of voting prevailed.³¹⁷

In Ireland, enshrining the duty of loyalty as a constitutional duty affected the interpretation of penal legislation. In the horizontal balance between that duty and human rights, the basic values that underlay the duty of loyalty prevailed.³¹⁸ The court emphasized that the fraud had violated the public good, and the imposition of a more severe penalty resulted from the protection of the collective national interest.³¹⁹ This was because the offenses committed by the accused had harmed the integrity and equality on which the social system was founded—the constitutional values encompassed by the constitutional duty of loyalty.³²⁰

And in India, the court ruled that the duty of standing when the anthem was played before every film in cinemas was a part of the constitutional duty of protecting the honor of the anthem and the flag—a duty that prevails over

³¹⁷ X v. Austria, App. No. 1718/62, 1965 Y.B. Eur. Conv. on H.R. 168, 172, 174 (Eur. Comm'n on H.R.).

³¹⁸ DPP v. Murray [2012] 2 IR 477, 479 (CCA) (Ir.).

³¹⁹ *Id.*

³²⁰ *Id.* at 7; see also PUNISHMENT IN EUROPE: A CRITICAL ANATOMY OF PENAL SYSTEMS (Vincenzo Ruggiero & Mick Ryan eds., 2013).

the freedom of expression and of conscience, and that is backed not by a right, but rather, a constitutional value.³²¹

Each of these three duties is an imperfect obligation duty that is not coupled with a right. These duties are backed instead by values and social interests. As I commented before, most of the constitutional duties are civic duties; without the help of the legislature, they are not enforceable, but are considered constitutional values.

Many additional questions arise with respect with respect to all constitutional human duties, both to each duty individually and to the duties as a whole. These questions will require separate study and writing. This Article has sought to declare the fact that these duties exist, to indicate their characteristics, to construct a typology for them, to analyze the many material implications of the constitutional duties for the field of law and all of its branches, and to declare that they should be recognized as an integral part of constitutional study.

³²¹ *Shyam Narayan Chouksey v. Union of India*, Writ Petition (Civil) No. 855 of 2016, decided on Nov. 30, 2016. (SC).