

## DISCRIMINATION IN THE PRIVATE SPHERE. A SUBJECTIVE RIGHT OR A LEGAL ABUSE. AN EUROPEAN NORTH AMERICAN LEGAL COMPARATIVE STUDY

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### INTRODUCTION

Human beings love to join with members of their group. People tend to pair up with individuals of similar characteristics. If, in a multi-racial country like the USA, all the population decided to be married irrespective of the race of the partner, in only two generations the racial problems would be solved. Therefore, should the authorities impose interracial marriage? Obviously they couldn't do so because individuals have the right to choose their spouses<sup>1</sup>.

In fact, some scholars affirm that the word "discrimination" has two different meanings, and therefore can be used in a neutral or pejorative sense. Originally it connoted the act of distinguishing between several things, but not necessary to the disadvantage of one of them<sup>2</sup>. The underlying problem is of major importance, and cannot be only simplified to distinguish between moral and immoral behaviours, rather it refers to a collision between two fundamental rights, a collision in which only one can prevail over the other.

### 1.- SPANISH BACKGROUND

- Private autonomy and equality principle

There is a unanimous agreement that the fundamental rights bind the public powers (art. 53 Spanish Constitution) but it is not clear how these fundamental rights can impact

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<sup>1</sup> See Edward, David, "Non-Discrimination as a Legal Concept", in *Non-discrimination in European Private Law*, ed. By. Reiner Schulze, Tübingen, 2011, p.3.

<sup>2</sup> Edward, David, "Non-Discrimination..." p.3.

the relations between individuals. Our private legal system is based on the liberty to choose the person to enter into a contract with. Therefore, it is affirmed that nobody could argue discrimination when or if the landlord chooses another person as a tenant. The reason is simple, the landlord has the right to decide freely with whom he enters into a contract, and with whom not, without giving any reasons. In the same way, it is said that the owner of an apartment could use racist or sexist reasons to deny admission to third parties in his home<sup>3</sup>. The right to privacy would legally protect him. Nevertheless, the law establishes limits to be observed by individuals in their relationships. The question is to determine which could be the limits to this liberty to choose freely the person to contract with.

In this scenario we could find a collision between the right to privacy and the right to equality. Both rights are deemed as superior values by the first article of the Spanish Constitution (SC)<sup>4</sup>. Moreover, article 14 SC considers the right to equality as a principle and the article 18 SC deems the right to intimacy as a fundamental right. In any case, it is not possible to establish a general order of priority between them. On the other hand, private autonomy is not a fundamental right, even though it derives from the of free development of personality contemplated by article 10 SC<sup>5</sup>. However, article 10 SC is projected onto the fundamental rights, in fact respect of dignity is the essence of the fundamental rights.

Private autonomy, as an expression of the right to the free development of the personality, enables us not only to regulate freely our relations with other individuals,

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<sup>3</sup> Not all the scholars agree. Some of them believe that in no circumstances could be alleged racist or sexist reasons to justify a behavior, therefore it all comes down to a problem of evidence. Some scholars affirm that the word "discrimination" has two different meanings, and therefore can be used in a neutral or pejorative sense. Originally it connoted the act of distinguishing between several things, but not necessary to the disadvantage of one of them. Edward, David, "Non-Discrimination as a Legal Concept", in *Non-discrimination in European Private Law*, ed. By. Reiner Schulze, Tübingen, 2011, p.3.

<sup>4</sup> First Article of Spanish Constitution: *Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism*

<sup>5</sup> Art. 10 SC: The human dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.

CODERCH, Salvador, in the introduction of *Asociaciones...*, p.22.

but to choose the person you wish to contract with. As Professor Alfaro has said, individuals do not have the right to require others to contract with them, in spite of the fact that perhaps they could have contracted in advance with another person in the same circumstances. The fact that reasonable available alternatives exist implies that there is a general right to refuse the offer, and from the point of view of certain scholars, determines that the principle of equality is unnecessary between private parties. In fact, it is said that to claim its application between individuals would be unconstitutional<sup>6</sup>.

We must not forget that private autonomy has been described as the active and positive side of the personality; the area where the human being can act independently on his own responsibility, and where the individual is not reduced to a simple mean of achieving collective targets<sup>7</sup>.

- Direct or indirect horizontal application of the fundamental rights?

The next step is to decide how to link the right to equality with the principle of party autonomy. In order to do so it may be useful to apply the so called *Drittwirkung* theory. This German approach to the problem tries to explain how fundamental rights affect the horizontal relations between individuals, therefore it refers to a case of horizontal application of fundamental rights<sup>8</sup>.

We can distinguish two different doctrinal lines within the German scenario where this doctrine was created. Part of the legal opinion considered that fundamental rights only link the public powers and not the relations between private parties. In other words, they affect the vertical relations but not the horizontal ones (this means that the Constitution imposes on authorities to apply the fundamental rights, but not on the

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<sup>6</sup> ALFARO, Jesús, "Libertad e igualdad en el derecho de asociación", AAVV, *Los alardes: una perspectiva jurídica. Libertad e igualdad en las relaciones entre particulares*, 2000, p.129.

Furthermore, CODERCH, Salvador, in the introduction of *Asociaciones, derechos fundamentales y autonomía privada* by Von Münch, Ingo, Coderch, Salvador and Ferrer I Riba, Josep, Madrid 1997, p.23, affirms that currently and historically there is not a real constitutional order that deny the private autonomy.

<sup>7</sup> HESSE, Konrad, *Verfassungsrecht und Privatrecht*, Heidelberg, 1988, p.35

<sup>8</sup> Some scholars prefer to name it the privatization of fundamental rights, what is not really correct as we apply Constitutional law. MÜNCH, Ingo, *Asociaciones...* p.32.

individuals). Only through the action of a judge could indirectly impact the constitutional principles on the concrete case to be solved. On the other hand, it was stated that the fundamental rights generate a direct effectiveness on the private sphere, although in a relative manner. Finally, the position of the German Constitutional Court prevailed over the position of the German Federal Labour Court, and therefore, the indirect *Drittwirkung* prevailed over the direct *Drittwirkung* theory<sup>9</sup>. This indirect *Drittwirkung* theory has been adopted by the Spanish Constitutional Court<sup>10</sup>.

It has been said that the *unmittelbare Drittwirkung* (the direct one) ignores the function of the lawmaker, who is replaced by the judge. Therefore, critics have pointed out that is not the role of a judge to apply directly constitutional rights rules to private relationships. What a judge could do instead is to raise the issue of unconstitutionality before the Constitutional Court<sup>11</sup>.

In accordance with the majority position the role of a Constitutional Court should be to protect individuals when a public authority has undermined one of their fundamental rights. However, these Courts have adopted an active position by considering their actuation also possible when the judge fails to provide adequate protection to an individual whose right has been infringed by another private party. We refer to a right with constitutional significance. However, this action of the Constitutional Court could be only justified when the judge had ignored absolutely the protection guaranteed by fundamental rights. In this point, some Spanish scholars believe that the function of the judge is to channel fundamental rights in the application of the general clauses, which are undetermined concepts of the positive law, to a particular case. If the court fails to do so, they will be considered to have caused an infringement<sup>12</sup>.

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<sup>9</sup> Nevertheless, both approaches to the *Drittwirkung* theorie coincide in affirming that nobody could be obliged to organize his life in accordance with the constitutional principles. This is expression of the right to individual self-determination. BILBAO UBILLOS, 362

<sup>10</sup> SALVADOR CODERCH, Pablo and FERRER I RIBA, Josep, en *Asociaciones, derechos fundamentales...* p.93.

<sup>11</sup> SALVADOR CODERCH, Pablo and FERRER I RIBA, Josep, en *Asociaciones, derechos fundamentales...* p.96.

<sup>12</sup> The general clause is a mechanism used by the legislator to allow the judge to build the norm to be applied to the specific case. MIQUEL GONZALEZ

In conclusion the majority of scholars believe that a direct horizontal application of fundamental rights in the relationships between individuals is not possible. It is said that while the State cannot infringe the equality right, individuals can be married in accordance with their religious beliefs, or make a last will in accordance with their sexual preferences or become members of one political party and not another. However, even those scholars believe that an indirect application of the fundamental rights is possible in some cases, and that the effects of these rights in the private sphere are different depending on the type of private relationship affected. In fact, while labour and consumer laws are areas where fundamental rights have a clear impact, in other cases their influence is poor (e.g.: right to marry). Moreover, we must underline that usually the more socially powerful that one of the parties of the relationship is, the stronger effect of the fundamental rights over such a relationship.

- Should this matter be classified as a collision between rights or as an abuse of right?

In order to set out a rule to channel these types of conflicts between individuals, part of the doctrine affirms that the limit to the private autonomy is not the respect of the equality principle but the respect of human dignity. Therefore, only when a behaviour is contrary to the dignity of a person, in other words when it involves a vexatious conduct against other person, could it be deemed as a discriminatory one. Since this doctrine proposes to address this type of problem as a case of abuse of right, the conduit for challenging this discriminatory act would be article 7.2 of the Spanish Civil Code<sup>13</sup>.

These authors believe that these groups of cases could be analysed from the perspective of human dignity. We refer to such situations in which the renunciation undermines the

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<sup>13</sup> ALFARO, Jesús, "Autonomía privada y derechos fundamentales" *ADC*, 1993-I p.71. and PRIETO, Derechos fundamentales, p.217. He proposes to analyze the following case from the perspective of the abuse of right: If the owner of a discotheque or a bar deny access to a person due to his race, the judge could apply the article 7.2 CC, which from a constitutional interpretation prohibit such degrading behavior, which is contrary to the dignity of the person.

human dignity. They think that these problems can be classified as a collision between the private autonomy and the right to dignity<sup>14</sup>.

Article 10 of the Spanish Constitution refers to dignity, in fact all human rights derive from the dignity and worth inherent in the person as stated by the decision of the Spanish Constitutional Court of 11 of April (STC 53/1985). Human dignity implies the right of the individual to decide freely and consciously his way of life, and to be respected by others. Therefore, it cannot be renounced, or be the object of disposal, and has to be always respected by the Law<sup>15</sup>.

As such, this degrading or vexatious behaviour that consists of treating a person as if he were not a human being cannot be permitted<sup>16</sup>. In this context, we could compare the situation of a majority who by a vexatious behaviour refuses to contract with a minority, with the situation of an individual in a monopolistic situation who refuses to contract with another person. It has been said that the person rejected lacks a reasonable alternative to recover the social status that the rejection provokes<sup>17</sup>. Let us think about the available alternatives of the black population when the white establish an apartheid regime.

These scholars conclude that, as a rule, in the private sphere it is licit to discriminate against anyone, because it is licit to choose the person to contract with. The problem arises when the refusal to contract affects a fundamental right that can be undermined. In fact, normally we have to decide which right should be prioritized in a collision between two fundamental rights.

Notwithstanding, sometimes a discriminatory act which could affect the dignity of one of the contracting parties could be justified by another right, for example the right to

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<sup>14</sup> Article 10 of the Spanish Constitution: The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.

<sup>15</sup> María Merino Norverto, "Síntesis del artículo 10 CE".

<http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=10&tipo=2>

See SSTC 120/1990, of 27 of June, 57/1994, of 28 of February, 242/ 1994, of 20 of June, 107/1984, of 23 of November and 99/1985, of 30 of September.

<sup>16</sup> ALFARO, Jesús, "Autonomía...", p. 107-108

<sup>17</sup> ALFARO, Jesús, "Autonomía..." p.113

privacy could justify not entering into a contract with a person of different gender. Finally, we should analyse a particular case to decide if a discriminatory behaviour should be considered wrong. What we have laid out are the tools to realize such analysis, but these tools can only be used when the collision happens.

I disagree with the above mentioned scholars' opinion for different reasons. First, I do not think that this matter can be reduced to a case of abuse of law. In fact, in these types of cases there are conflicts between two different fundamental rights, or the equality principle and a fundamental right, and after weighing the circumstances it should be decided to give priority to one of them over the other. Secondly, the same type of conduct can be considered as a vexatious one or not in the light of the circumstances involved. For example, the dismissal of an employee due to his exercise of the right to free speech is surely contrary to his dignity, but can be justified in the right to religion or the right to create private educational establishments with "centre-wide ideology". Finally, in spite of the fact that the respect to the human's dignity is reflected in all the fundamental rights, the approach referred to above is wrong. The dignity is too nebulous a concept to be used as the cornerstone of a theoretical construct. In fact, it is extremely difficult to distinguish between a behaviour that goes against the dignity of a person and one that does not. It is too difficult to determine what the principle of dignity is, or the limits that this principle imposes. A better approach would be to focus the study on the concept of equality, which has been examined in depth by the scholars.

Therefore, I believe that it is not correct to use the abuse of a right as a key to study this matter. If we want to find a limit to the exercise of private autonomy it is not article 7.2 SCC we should look at, but articles 1255 and 6.2 SCC which refer to public order and morality as borderlines of the human conduct. However, this is not a simple problem of limits to the exercise of private autonomy, but a problem to decide which one of two fundamental rights prevails in case of collision. The function of the judge should be to weigh the two rights in conflict.

Be that as it may, the Spanish Constitutional Court can only act when the judge does not protect the fundamental rights of a discriminated person<sup>18</sup>. Nevertheless, there are different possible constitutional interpretations of the law; therefore, the Constitutional Court should respect the decision of the judge which has a possible constitutional meaning. As we pointed out previously, in a case where a judge believes that the law to be applied to a specific case is contrary to a fundamental law, he should bring an action of unconstitutionality before the Constitutional Court.

- Effects of the fundamental rights on the relations between individuals

Analyzing the problem, we find that the next step is to evaluate the effects of the fundamental rights on the relations between individuals. We can distinguish between two types of cases. On the one hand, we refer to the freedom to negotiate and decide the content of a contract, and on the other hand to the right to contract.

The first category confronts private autonomy with a specific fundamental right. We can approach this by studying a specific case. Could a prohibition on being married imposed on a tenant in a lease contract be constitutional? The Spanish doctrine underlines that it would not be an absolute prohibition established by the authority<sup>19</sup>, but a condition freely negotiated by the parties. In fact, the tenant could be married whenever he wants, but in such a case he should lease another dwelling. Therefore, in that case such a clause would be lawful and would not be considered as source of wrongful discrimination. Consequently, what must be studied in this type of cases is whether the renunciation of a right in a specific case is acceptable or not; this means that we must look for a solution to a particular case, but not a general or abstract rule.

The second category refers to the right to choose the other contractual party. When one party is in a monopolistic situation, when the other contractual party has no other alternative, when there are no competitors who offer a similar service or good, the refusal to contract is not an option. Therefore, contractual freedom does not work, and this limitation should be corrected by the public powers. If the judge does not do so, a

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<sup>18</sup> ALFARO, Jesús, "Autonomía privada y derechos fundamentales" *ADC*, 1993-I p.71. and PRIETO, Derechos fundamentales, p.217. See the judgment of the Spanish Constitutional Court STC 55/83.

<sup>19</sup> ALFARO, Jesús, "Autonomía..." p.94.



writ of “amparo” could take place before the Constitutional Court. If there is not a monopolistic situation, any contracting party is free to contract with another competitor. Therefore, his fundamental rights would not be affected by a limitation imposed by one of the possible offerors. Nevertheless, the public order sets up other controls. For instance, a contract in which one of the parties accepts to be sold into slavery would not be protected by law.

Another approach is possible if we study the right to admission in the context of associations. When the law is silent, and a monopoly situation is not present, is the association free to decide who is going to be accepted as a new member? Karsten Schmidt emphasises that in such a case it is important to value the economic or social function of the society<sup>20</sup>. This can be also applied in case of the expulsion of a member when the association is not in a monopoly situation. This case was studied by judgment 96/1994 of the Spanish Constitutional Court in which it is stated that the judge can review the decision to expel a member of an association when such an expulsion may cause a significant economic damage to the associate. In this case there was a direct link between the expulsion and the damage suffered by the member due to economic interests linked to the legal relationship existing between associate and association<sup>21</sup>. This is connected with the ruling of the Spanish Supreme Court of February 8th 2001, in which the decision of an association of fishermen to reject the admission of two women as members of the association due to their gender, was considered discriminatory and unacceptable. It was underlined that in fact they were being prevented access to a job<sup>22</sup>. Finally, we refer to a sector of the private relationships in which the State has decided to intervene in order to regulate the limits of private autonomy in relation to the right to discriminate. The first European statute which could be assimilated to the North-American Civil Rights Act of 1964 was the Directive of the European Union 2000/78, of November 27 which established a general framework for equal treatment in

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<sup>20</sup> KARSTEN SCHMIDT, *Gesellschaftsrecht*, Karl Heymanns, Köln, Berlin, Bonn, München, 1991, p.592

<sup>21</sup> CODERCH, Salvador, FERRER I RIBA, Josep, *Asociaciones...* pp. 71-72.

<sup>22</sup> Judgment of the Spanish Supreme Court of 8 of February of 2001. (RJ 2001\544) Reporting judge: Ignacio Sierra Gil de la Cuesta

employment and occupation. In addition to this the Racial Equality Directive of the European Union regulation 2000/43 was adopted on the 29th of June.

The transposition of the former Directive to the Spanish Law was made through two different statutes: law 51 of December 2, of 2003 on equal opportunities, non-discrimination, and universal access of people with disabilities, (now Royal legislative Decree 1/2013 of 29 of November, that rules the Consolidates Text of the General Law on the rights of persons with disabilities and their social inclusion) and law 62 of 30 of December of 2003 on fiscal measures, administrative measures and measures of a social nature which cover all grounds of both referred directives.

Article 27 of law 62/2003 states that the norms of its chapter III (arts. 27-43) will be applied to any individual both in the public and private sectors. Articles 29-33 lay out in detail the equal treatment and non-discrimination measures regarding the racial or ethnic origin of the individual. This section aims to establish measures to guarantee that this type of discrimination will not take place in the education, health and social services sectors, housing, and in general; access to any good or service. The problem is that this regulation can be considered as pragmatic, because in spite of the prohibition of any discrimination regarding housing and access to any good or service, there is no legal sanction for any violation of this prohibition<sup>23</sup>.

Finally, articles 34-43 (Section 3) rule the prohibition of employment discrimination. Which can be considered as a similar article to the one included in the “commercial discrimination” of the United States. Article 34.2 states that any direct or indirect employment discrimination on the grounds of racial or ethnic origin, religion or convictions, disability, age or person’s sexual orientation is prohibited.

Another important Spanish regulation is the Equality Law (Ley Orgánica 3/2007) of March 22, 2007. This matter is directly linked to the case in which the refusal to contract

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<sup>23</sup> The Project of comprehensive Law on equal treatment and non-discrimination of 3 of June of 2011 tried to solve this lack of remedies, but finally was not adopted. See AGUILERA RULL, Ariadna, “El proyecto de ley integral para la igualdad de trato y la no discriminación”, *InDret*, 3/2011, p.3 and 10-12. <http://www.raco.cat/index.php/InDret/article/viewFile/247095/330977>

could be considered as a violation of the dignity of an individual. We analyze now which cases we are referring to, and what reasons could justify such a behavior.

This is an area where Council Directive 2004/113/EC of December 13, 2004, implemented the principle of equal treatment between men and women in the access to goods and services<sup>24</sup>.

The preamble of this Directive explains that differences in treatment could be accepted when they would be justified by a legitimate claim. Precisely, this legitimate claim normally comprises the exercise of a fundamental right that justifies this type of conduct. The Directive offers some examples: the protection of victims of sex-related violence (in cases such as the establishment of single- sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organization of sporting activities (for example single-sex sports events)<sup>25</sup>.

The Directive is also valuable because it establishes an important rule to distinguish between acceptable and unacceptable decisions when selecting the contracting party. It says that the Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex (art.3). Therefore, it considers that when the choice is based exclusively on the sex of the candidate, it has to be deemed as discriminatory. This rule should be applied to any contract concerning the access to goods and services. It is

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<sup>24</sup> In addition, we can refer the anti-discrimination rules of the Draft Common Frame of Reference (DCFR) of the Principles, Definitions and Model Rules of European Private Law, which article II. 2.101 says: "not to be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract or other judicial act the object of which is to provide Access to, or supply, goods, other assets or services which are available to the public".

<sup>25</sup> The Directive adds that any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities.

blatantly obvious that the law considers that those behaviors would violate the dignity of the women involved<sup>26</sup>.

Moreover, the Directive provides that it is necessary to introduce a system to ensure “real and effective compensation or reparation for the loss and damage sustained by a person injured as a result of discrimination within the meaning of the Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation”. The word “dissuasive” could easily create unnecessary confusion, given that it sounds like “punitive damages” (art.8), and the Directive prohibits the State to establish a limit (art. 8.2)<sup>27</sup>. It is added by article 9 that it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

The Spanish Equality Law (Ley Orgánica 3/2007) of 22 of March of 2007 reproduces the principle of article 3 of the Directive in its article 69. Therefore, this article prohibits discrimination based on the person’s sex in the areas of access to and supply of goods and services.

This regulation reflects the work of the State as a mediator. The State is obliged to guarantee fundamental rights and to respect the private autonomy. Consequently, the best way to comply with this double function is to regulate norms where these limits are set out. In respect of the other cases of possible discrimination not regulated directly by

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<sup>26</sup> Nevertheless, the article 4 of the Directive adds that it shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In opinion of GARCIA RUBIO, the article 13 of the Directive should be interpreted in the sense that there is also prohibited any discriminatory clause included in contracts made individually by companies with clients concerning the the access to and supply of goods and services. (“Discriminación por razón de sexo y derecho contractual en la Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombre”, *Derecho Privado y Constitución*, nº21, enero-diciembre, 2007, p.135. If fact any supplier of goods of services which is not a consumer is bound by the Directive as said STORE F. “Comments on the Draft of the New German Private Law Anti-Discrimination Act”, GLJ, vol. 6, nº2, February 2005, pp. 533-548, [www.germanlawjournal.com](http://www.germanlawjournal.com) search Anti-Discrimination\* (GARCIA-RUBIO p.134).

<sup>27</sup> The Spanish Law solves this problem by introducing a new element, “the sanction”. Therefore, distinguish between the damages, that will be always proportionate to the damage suffered, and the sanction, that will be dissuasive (art.10 LO 3/2007).

a specific law, we should apply the criteria abovementioned, and the Court should decide in light of the concurrent circumstances<sup>28</sup>.

## 2- NORTHAMERICAN BACKGROUND

The original text of the Constitution of the United States did not include any reference to human equality. In fact, some of the founding fathers had slaves and ruled their families as patriarchs. It was only after the American civil war, in 1868, that Amendment XIV was adopted, which stated that: "...nor deny any State to any person within its jurisdiction the equal protection of the laws". This meant a first and crucial step in the fight against racism<sup>29</sup>.

The American Supreme Court stated in *Barbier v. Cannolly* 112 US 27, 30-32, 1885, that in accordance with the XIV Amendment "equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights". Moreover, it was interpreted in 1920 as following: "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" (*F.S. Royster Guano Co. v. Virginia* 253 US, 412, 415, 1920). What has been object of doctrinal debate is the interpretation of this so called "Aristotelian approach", because treating people differently when they are not in the same circumstances could be the perfect justification to perpetuate discrimination, when those discriminated against do not have the possibility to improve their status.

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<sup>28</sup> To end this study of the Spanish Law we can refer to an important distinction usually commented by the Spanish scholars. This is the difference between cases of direct and indirect discrimination. It has been observed that while the former are easily identifiable cases, the latter not. If an association decides to deny access to the individuals of a particular race, the discriminatory situation is easily appreciable, but if the landlord decides not to accept tenants with a part-time work, the discrimination may be ignored. The Spanish scholars affirm that due to the fact that most of the persons with part-time contracts are women, it could be considered as an indirect way to discriminate against them. AGUILERA RULL, "Discriminación directa e indirecta" *InDret*, nº 396, enero 2007. [www.indret.com](http://www.indret.com). GARCÍA RUBIO, María Paz, "Discriminación..." p. 139.

<sup>29</sup> Two years earlier the Federal Civil Rights Act of 1866 prohibited any type of racial discrimination in independent contractor relations and bars businesses which were considered as public accommodations from discriminating against customers. HAGGARD, Thomas R., *Understanding Employment Discrimination*, Lexis-Nexis, 3-11 (2001).

The right to equality established by the XIV Amendment is addressed to the States, this means that is designed to protect individuals from discriminatory acts of the public authorities, not to rule the private relations between individuals. This was stated by the American Supreme Court in *United States v. Harris*, 106 US 629 (1883). However, this Court decided in *Shelley v. Kraemer*, 334, US 1 (1948) that private racism could happen, but the courts could not constitutionally enforce it. At issue was not the validity of the racist private agreement, but the validity of the judicial enforcement of those agreements. The Supreme Court held that the States cannot grant judicial enforcement to these discriminatory agreements without denying the petitioners the equal protection of the laws. The facts of this case were that an African-American family bought a residential property, but when they occupied it, they were informed that the property owners of the residential complex had agreed by a covenant to restrict the sale and occupation of property to Caucasians. Consequently, one of the neighbors, Mr. Kraemer took legal action against the black family, the Shelleys, before the state court, to enforce the restrictions imposed by the agreement and, therefore, disposing of the black family. The Court held that in spite of racially restrictive covenants not being unconstitutional, it is unconstitutional for judges to enforce them. It is interesting to note that, in this case the American Supreme Court reaches a similar result to the solutions offered by the Spanish and German Constitutional Courts when they decided the horizontal application of fundamental rights in the relationships between individuals<sup>30</sup>.

When we compare the Constitutions of these countries with the Constitution of South Africa of 1996, we realize that the latter goes even further. In fact it establishes that “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in term of subsection 3. National legislation must be enacted to prevent or

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<sup>30</sup> This judgment produced a deep impact in the evolution of American Jurisprudence. Only a few years before the Supreme Court had decided that this type of covenants no contained state action because were made in the private sphere. *Corrigan v. Buckley*, 271, US 323 (1926). Equally, the 1943 Restatement of Property stated that they were not contrary to the public order.

prohibit unfair discrimination” (Chapter 2 Bill of Rights. Art.9)<sup>31</sup>. From the point of view of the majority doctrine this statement could be considered as contrary to the private autonomy principle, but the word “unfair” could give significance to its content. This could be interpreted in the sense that in private relationships it is legal to lead to an unequal treatment with the only exception of being unfair. This could be easily connected with behaviors that violate the dignity of a person, or that impede his access to a service or good (cases of monopoly) or provoke a severe economic damage.

Turning to the American Law, in *Palmore v. Sidoni*, 466 US 429 (1984) the Supreme Court again stated that private biases may be outside the reach of law, but the law cannot, directly or indirectly, give them effect<sup>32</sup>. In this case it was decided that the fact a white mother had as a partner an African-American, was enough reason to deprive her of the custody of her white daughter. We will return to this issue further on.

The next milestone in the movement for equality in the United States was when Congress passed the Civil right Act of 1964, which stated in Title VII that it would be an unlawful employment practice for an employer: (Sec. 703) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to this compensation, terms, conditions, or privileges of employment, because of such individual’s race color, religion, sex, or national origin; or 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin. It is worth noting that the scope of application of this regulation includes the relations between employer and employees, this is the relations between individuals acting privately. After amendments in 1972 it covers also all government employees. We must underline that the Section 703 does not protect against unjust discrimination due to sexual orientation. However, although federal law does not yet prohibit

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<sup>31</sup> Susection 3, art.9, Chapter 2: 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.

<sup>32</sup> See EYER, Katie, “Constitutional Colorblindness and the Family”, 162, *U.Pa.L.Rev.* 537, pp.557-578, (2014).

employment discrimination on this basis, there are a number of state and local statutes that do so.

Moreover, American scholars refer to an indirect class of discrimination, they normally name it “disparate impact”; which should be distinguished from the direct discrimination or facial one. It is also underlined that while in cases of “disparate impact” it is not necessary to prove the intention to discriminate, in case of “disparate treatment” it is necessary to prove it<sup>33</sup>. One of the most notable examples of indirect discrimination is the case *Yick Wo v. Hopkins*, 118 US at 359, in which due to an Ordinance of San Francisco all the people of Chinese heritage were forbidden to operate laundries. In fact, the Ordinance required an authorization to operate laundries in all the buildings of the city but the stone or brick ones. In 1880 in total there were 310 laundries in wooden houses, 240 of these were owned by people of Chinese ancestry<sup>34</sup>.

Another well-know discrimination case is *Griggs v. Duke Power Co* (Supreme Court of the United States 401 US 424, 1971). The *Griggs* principle states that any arbitrary requirement established by the employer in order to justify a discriminatory preference in favor of a social group is not acceptable. In this case, the employer decided to require his employees to take an intelligence test or have a high school education. These requirements were not linked to the tasks to be carried out by the employees. However, in this way the employer ensured he did not hire black people, who normally had a worse education. Neither the District Court nor the Court of Appeals found those requirements to be discriminatory, as they did not see a clear intention to discriminate, but the Supreme Court said that the enactment of Title VII of the Act of 1964 had to be interpreted to avoid artificial preferences for some social groups, and against other groups<sup>35</sup>.

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<sup>33</sup> BEERMANN, Jack M. “The unhappy history of civil rights legislation, fifty years after”, 34 *Conn. L. Rev.* 981, p. 1023 (2002).

<sup>34</sup> BERNSTEIN, David E. “*Lochner*, Parity and the Chinese Laundry Cases”, 41 *Wm & Mary L. Rev.* 211, 217-269 (1999).

However, in *Washington v. Davis* the Supreme Court required the discriminatory intent as requirement sine qua non to prove the discrimination. (Supreme Court of the United States, 426 US 229, 1976).

<sup>35</sup> See KELMAN, Mark, “Concepts of Discrimination in General Ability Job Testing”, 104, *Harv. L. Rev.* 1158, 1204-45, (1991).



Moreover, the 1991 Act established that “Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivation for any employment practice, even though other factors also motivate the practice” (23 USC § 2000e-2 m). In fact, in *Desert Palace, Inc v. Costa* the application of this rule determined that the different treatment given to a female employee was considered unjustified. Two workers were involved in physical altercation, one of them, who was a woman, was severely disciplined, the other one, who was a man, not. Therefore, the woman filed a lawsuit against the company. However, it was alleged that the difference between both workers was that she had a large disciplinary record, and he a clean one. Consequently, the judge was instructed on a mixed-motive. After this case, could be assumed that a plaintiff only needs to use any relevant direct or circumstantial evidence of one of the discriminatory factors to take legal actions against the employer<sup>36</sup>.

American scholars underline the parallelism between cases of employment discrimination, which are contemplated by the law, and other cases of private discrimination that theoretically are permitted by law, in spite of not being accepted from the moral point of view. In fact, it has been proposed to distinguish between commercial discrimination, which is ruled by law, and private discrimination, which is not regulated by law. The commercial discrimination comprises not only the Civil Rights Act of 1962, but also the Federal Civil Rights Act of 1866, which prohibited racial discrimination in independent relationships, and bar business considered as public accommodations from different types of discrimination against customers. Moreover, the States have ruled different regulations to prohibit labour discrimination. Critics have pointed out that the differences between so called “commercial discrimination” and the

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<sup>36</sup> See HARPER, Michael C. “The Causation Standard in Federal Employment Law: *Gross v.FBL Financial Services, Inc.*, and the Unfulfilled Promise of the Civil Rights Act of 1991”, 58 *Buff. L. Rev.* 112-132, 2010.

“private discrimination” are not justified, and that a whole regulation of both categories should be done<sup>37</sup>.

This different treatment could be founded in the fact that one affects the privacy of a person, his more intimate choices, and the other usually affects economic decisions normally adopted by companies. In addition, this means that the former is difficult to prove and the latter easier, due to the number of persons involved and the way in which such decisions are evidenced (for example, the procedure to hire a new employee). However, American scholars believe that it is necessary to find a stronger argument to justify the different legal treatment of the so called “private” and “commercial” discrimination.

This search for a stronger argument could be achieved if we consider the consequences of the discrimination. It has been said that commercial discrimination may affect the job a person needs for his living, and in case of monopoly may deprive the individual’s access to basic goods.

We could consider whether the factor behind this distinction is the social impact of the commercial discriminatory conducts, due to the economic or social damage inflicted upon the victims.

However, Professor Matt Zwolinski affirms that the value of autonomy is not significantly greater in a private than in a commercial context, therefore he thinks that we should not appeal to interests in autonomy to justify differential regulation<sup>38</sup>. Prof. Donald A. Dripps criticizes this approach. He fears the consequences if a legal system would be to attempt enforcement of a prohibition on private discrimination. He considers that banning private discrimination as a symbolic matter, and waiting for a controversial judicial nomination does not make sense. He concludes that the law

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<sup>37</sup> Zwolinski, Matt, “Why not regulate Private Discrimination?”, 43 *San Diego L. Rev.* P.1043, Fall 2006.

<sup>38</sup> ZWOLINSKI, Matt, “Why not...” p.1068.

should not command the impossible, the law cannot impose a type of husband or wife to anyone<sup>39</sup>.

There is another key element referred to by the American scholars that we must not forget. I refer to the respect for the dignity of the person. It has been said that discrimination involves biases<sup>40</sup>. This type of discrimination happens when somebody considers another individual inferior because they are a member of another group. Conversely discrimination based on prejudice means that a person is deemed to be unworthy for a job due to a specific characteristic that is shared between the members of his group.

Discrimination based on bias seems to be more widespread in the private than in the commercial sphere. This can provoke social isolation, psychological effects and stigmatization. In fact, private discrimination may be more unjust and more harmful than the so called "commercial discrimination"<sup>41</sup>.

Professor Nussbaum offers another approach to the concept of dignity in relation with the collision of fundamental rights. She understands that any case of conflict between two fundamental rights, is in fact a case to be analyzed from the perspective of human dignity. For example, she considers that if we seek to respect dignity, we must guarantee the right of an individual to exercise his religious beliefs and the right of not being unfairly discriminated against by an employer. On both sides human dignity means to protect the right to exercise a fundamental right, but those rights collide. In such a case Nussbaum responds that each case deserves a different solution and that it is not possible to establish a hierarchy between rights<sup>42</sup>.

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<sup>39</sup> DRIPPS, Donald A. Is the Privilege...” p.1065-1067.

<sup>40</sup> ALEXANDER, Larry, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies, 141 U. PA. L. Rev. 141, 158-163 (1992)

<sup>41</sup> LOURY, Glenn C., *The Anatomy of Racial Inequality*, 95, (2002), believes that private discrimination in contract can be very damaging.

<sup>42</sup> NUSSBAUM, Martha C., *Women and Human Development: The Capabilities Approach. Advocating a new approach for how governments should treat the rights of citizens*, 2001, p.72-81 (\*Quoted by Sonu Bedi, p. 1184-1185\*)

Moreover, Professor Dripps explains that the privilege for private discrimination indeed tends to track a widely-felt sense that autonomy has special value in some spheres of human life, also the non-regulated behaviors can be considered as cases of wrongful discrimination. Therefore, these cases should be controlled by the State if not directly, at least indirectly.

He adds that throughout the developed world, freedom of speech, freedom of religion, and sexual privacy enjoy more respect<sup>43</sup>, legally and socially, than the right to contract, to own weapons, or to consume intoxicants. And that this hierarchy of liberties may turn out to be arbitrary, but it prevails so widely that we should assume it<sup>44</sup>.

However, if the prohibition to discriminate can affect not only the commercial sphere but the private one, and if relations between individuals can be controlled even when they are not regulated by the law, what is the mechanism and what are the criteria to decide when those discriminatory actions are wrong?

The first question was answered in *Shelley v. Kraemer*, 334, US 1 (1948) as we have discussed above. In order to answer the second question, Professor Lippert-Rasmussen states that there is a right to engage in private discrimination if and only if it is not the case that there ought, morally speaking, to be a law that prohibits engaging in such activities. He explains that it is a moral approach, this means that the differentiating element should be the qualification of the discriminatory conduct as just or unjust<sup>45</sup>.

However, the concept of justice can be abstract and unattainable in this particular field. Therefore, he distinguishes between private discrimination that is morally wrong, and what is not. In each case, he studies the cases in which there could be a legal duty not to engage. From this standpoint, a legal duty not to engage in a case of wrongful private discrimination, would be when an employer pays women less than men for doing the same job, which is obviously forbidden by law. On the other hand, his opinion is that a

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<sup>43</sup> See *Hudnut v. Am. Booksellers Ass'n*, 771 F.2d 323, 330 (7th Cir, 1985).

<sup>44</sup> DRIPPS Donald A., "Is the Privilege of Private Discrimination an Artifact of an Icon?", 43 *San Diego L. Rev.* 1063, 2006 (1063-1069) p.1064. He sums up that the privileged liberties turn out to protect the same zones of life that enjoy the privilege of private discrimination.

<sup>45</sup> LIPPERT-RASMUSSEN, Kasper, "Private Discrimination: A Prioritarian Desert-Accommodating Account", 43 *San Diego, L. Rev.* 817, 2006. (817-856) p.851.

legal duty not to engage in private discrimination that is not wrongful could be the case of sectarian donations, which are acts that bring about more moral value than would be brought by not donating, but that can fuel social, ethnic or religious tensions. In its view the law should enforce a pattern of nonsectarian donations that would be a collective good from the point of view of all donors<sup>46</sup>.

Finally, the European terminology has been embraced by the American scholars, who use it when they distinguish between horizontal and vertical discrimination. Therefore, it is said that a vertical effect constrains state or governmental power, this means that a right is violated only when a political body acts in a certain way; and a horizontal effect constrains non-state or private sector. This means that an individual may not violate the rights of another<sup>47</sup>. Moreover, North American scholars also distinguish between direct and indirect horizontal effects (since the case *Griggs vs. Duke Power Company*<sup>48</sup>), and they say that a direct effect occurs when the constitutional right is applied directly to the dispute and the indirect one is where it is used to interpret or limit an already existing legal dispute<sup>49</sup>.

### 3- CONCLUSION

In conclusion, we see parallels between American and European Law when they approach the problem of discrimination between individuals. In both cases the starting point is the consideration of a direct impact of fundamental rights in public powers, but

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<sup>46</sup> LIPPERT-RASMUSSEN, Kasper, "Private Discrimination..." p. 855. He adds the following possibilities: Legal duty to engage in wrongful private discriminations, which would be the case in which the State adopts an immoral discriminatory law, such as the one that oblige the majority to discriminate against the minority. Legal right to engage wrongful private discrimination, such as the case of the persons who discriminate in the basis of race or religion in their choice of spouse. Legal duty or permission to engage in private discrimination that is not wrongful, for example the case of affirmative action programs at private universities and companies to lead to a society with less discrimination. This means to redistribute resources to badly-off people.

<sup>47</sup> BEDI, Sonu, "The Horizontal Effect of a Right Non-Discrimination in Employment: Religious autonomy under the US Constitution and the Constitution of South Africa", 95 *B.U. L. Rev. (Boston University Law Review)*, 1181-1204, 1185, 2015. TUSHNET, Mark, *Weak Courts, Strong Rights*, 196-99, 2008. GARDBAUM, Stephen, "The Horizontal Effect of Constitutional Rights", 102 *Mich. L. Rev.* 387, 393, 2003.

<sup>48</sup> *Griggs vs. Duke Power Company*, (1971) 401 US 424 91 S Ct 849.

<sup>49</sup> BEDI, Sonu, "The Horizontal..." p.1187

not in the relations between individuals. Nevertheless, a judge cannot ignore the unjust discrimination against a person when he makes a ruling. If he does so, the victim could ask for the support of the Supreme Court (US) or the Constitutional Court (Spain, Germany), which will be obliged to correct the wrong decision of the judge to guarantee the right of the victim not to be treated wrongfully discriminated. However, in order to define the limits to private autonomy, American scholars are more focused on morality than the European ones, but in both systems the respect for human dignity seems to hold a key position. Moreover, the distinction between the so called “private” discrimination and the “commercial” one affirmed by American scholars has not been contemplated by European scholars, and perhaps it is founded on unstable grounds.

Our conclusion can be summarized in two pivotal points:

First, the issue of whether the determination of wrongful discriminatory behaviors is a matter connected with the abuse of right as a limit of the private autonomy, a matter relating to human dignity or simply is a question to decide which of the two fundamental rights in conflicts takes precedence over the other. As aforementioned this is a question discussed by Spanish Scholars. My opinion is that this is neither a problem of abuse of rights, nor a problem of human dignity. In fact, it is a case of a collision between two fundamental rights in which the court ought to waive which one prevails, as a result of balancing all the interests at stake in the light of the circumstances of each specific case.

Consequently, the key element to decide cannot be the human dignity. Human dignity is too nebulous a concept which can be clouded by individual subjectivity. The problem is the difficulty of framing and delimiting the concept of dignity. We think that the best approach is to focus on the concept of equality. Moreover, the concept of equality has been subject to deep scrutiny by scholars.

In a specific case, if there is conduct in breach of the equal treatment principle, what should be taken into consideration is the fundamental right which should be protected from this behaviour. And only after in-depth examination of the circumstances could it be decided if such a behavior deserves legal protection. As an example, the case in which a private religious educational center hires a teacher that later acts against the center-

wide ideology could be used. The European Court of Human Rights has affirmed that the dismissal of a worker by a church, due to difference in religious ideology from the doctrine of that church, was not a violation of the right to a private life. We refer to the case *Obst v. Germany*<sup>50</sup>, in which the European Court of Human Rights decided that the dismissal of the European director of public relations of the Mormon church for adultery, was not a violation of the right to privacy. The Court said that in consideration with the position held by Mr. Obst, not being fired would adversely affect the credibility of the Mormon church. In fact, adultery is strongly condemned by this church<sup>51</sup>. The European Court considered that the autonomous existence of religious communities is indispensable for pluralism in a democratic society, and affirmed that the right of religious communities to an autonomous existence is at the very heart of the protection that the article 9 of the ECHR affords<sup>52</sup>. Therefore, this example illuminates us about how things work: there is a collision between two fundamental rights, right to religion and right to privacy, and according with the interests at stake, the court decided that in a specific case the right to religion should prevail over the right to privacy, and consequently, that the behavior of the employer seek protection from a fundamental right, in spite of the fact that in other circumstances it could be considered a wrongfully discriminatory conduct.

Secondly, I conclude that to limit the effects of fundamental rights to vertical relations (relations between public authorities and individuals) and not apply them to horizontal ones (relations between individuals) implies to opt for a partial and biased view of our legal system and constitutional order.

The idea of justice and the supremacy of the fundamental principles of the law, that illuminate the whole legal system, should prevail in the application of the law. In fact,

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<sup>50</sup> Judgment of the European Court of Human Rights in *Obst v. Germany* of 23 of September of 2010.

<sup>51</sup> See Gerhard Robbers (2010) "Church Autonomy in the European Court of Human Rights – Recent Developments in Germany" (2010), *Journal of Law and Religion*, 26, pp.281-320.

<sup>52</sup> Art.9.1. ECHR: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

the first article of the Spanish Constitution states that “Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, equality and political pluralism as highest values of its legal system”. Therefore, the first article of the Spanish Constitution imposes the equality as fundamental premise to be always applied in the legal system. This means that not only public authorities, but also individuals are directly linked to this mandatory norm. It is true that article 53 of the Spanish Constitution states that “The rights and freedoms recognised in Chapter 2 of the present part are binding on all public authorities”, but as it has been said by a part of the doctrine<sup>53</sup>, this article only provides an addition to what has been stated by the first article. Consequently, this implies that the application of the fundamental rights are not limited to the relations between the public powers and the individuals, but also to the relations between individuals.

In any case, it does not make sense to deny the horizontal direct effect of the fundamental rights, whilst simultaneously recognising the right of any citizen to effective legal protection if a court infringes his fundamental rights, thereby resulting in discriminatory treatment. We should remember that the majority of European and American scholars affirm that an individual has the right to appeal before the Constitutional or Supreme Court if a judge has not protected his fundamental rights when giving a judgment.

With this approach we hope to offer a reasonable legal explanation about the way in which fundamental rights work in the relations between individuals. This is an approach which does not open dangerous gaps where the right to discriminate might seem unimpeded. Therefore, it is necessary to extend directly the effect of fundamental rights to horizontal relations. In this way, it can no longer be possible to affirm that in the private sphere it is legal to adopt decisions based on racists or macho behaviours, for example when a landlord refuses a person as a tenant saying that he does not want to have a gipsy or an African as a tenant. In any case, if the law protects the conduct of an individual, it should be due to other considerations, but not because such an individual

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<sup>53</sup> NARANJO DE LA CRUZ, Rafael, “Los límites de los derechos fundamentales en las relaciones entra particulares: la buena fe”. Centro de Estudios Políticos y Constitucionales, Madrid, 2000, \*



could have the right to discriminate another person without restriction. To place these horizontal relations under direct judicial control is vital in order to properly protect individuals in their social relations, particularly when there is no contract between the parties. From this perspective it is clear that a good model to follow is the one included in the constitution of South Africa.