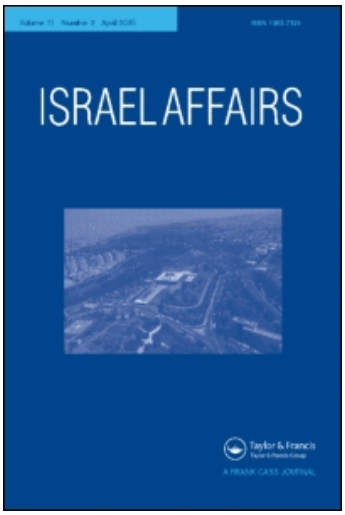


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# The Case for Judicial Review over Social Rights: Israeli Perspectives

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# The Case for Judicial Review over Social Rights: Israeli Perspectives

YORAM RABIN AND YUVAL SHANY

Despite voluminous judicial and political rhetoric adopted by jurists and politicians from around the world, proclaiming the importance of social rights and their indivisibility from civil and political rights, social rights remain the unprivileged child of the human rights movement. Some view social rights as utopian or counter-productive;[1] others view them as inferior to civil and political rights or as non-rights.[2] Even those who accept their importance often regard them as non-justiciable—i.e., not amenable to meaningful judicial supervision—citing both practical and legitimacy concerns.[3] Furthermore, when viewed from a positive law prism, social rights are often under-protected and under-enforced. Indeed, the constitutions of many Western states do not explicitly protect social rights as constitutional rights; and international treaties introduce only a weak obligation to protect social rights (obligations of a progressive or programmatic nature).[4]

Taken together, these obstacles in the path of the realization of social rights indicate deep scepticism over the ability of legal systems in general, and courts in particular, to promote the redistributive agendas and policies underlying social rights through constitutional means.

However, a number of voices in the legal profession and others walks of life have become increasingly critical of this sceptical approach and its opposition to the constitutionalization of social rights.[5] In particular, critics have exposed the hidden biases and political agendas underlying the positions of many objectors to the incorporation of social rights into constitutional law.[6] Some of the aforementioned scepticism might not really be directed against the intrinsic shortcomings of social rights, but rather against their specific distributional policy implications.

This article seeks to introduce an Israeli perspective into the debate over the appropriate constitutional status of social rights. Specifically, it addresses the question of the desirability and feasibility of judicial review on the basis of constitutionally protected social rights, which is a major

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source of contention in contemporary Israeli constitutional discourse. Indeed, the question of the constitutionalization of social rights in Israel and the ensuing bestowal of judicial review powers upon courts has two practical projects in sight—explicit incorporation of social rights into the future constitution (or Basic Laws) or reinterpretation of existing constitutional rights in a manner consistent with the protection of social rights. Consequently, the article describes the main contours of the Israeli debate over constitutional judicial review, as applied to social rights, and reviews both potential incorporation projects; though it ultimately focuses on the pros and cons of a policy of explicit incorporation of judicially enforceable social rights in a manner comparable to the way in which civil and political rights enjoy constitutional protection.

Although many of the questions raised here are universal and common to many societies, we feel that the Israeli example is particularly instructive for several reasons. First, a constitution writing project is currently underway in Israel and various alternative modes of reference to social rights are being considered. Furthermore, the expansive nature of some constitutional interpretation doctrines adopted by the Israeli Supreme Court raises the possibility that existing constitutional protections will be extended in the foreseeable future to several social rights, by way of judicial interpretation. Hence, in the Israeli context, the theoretical questions raised in this article might have immediate practical application. Second, the contrast between Israel's socialist heritage[7] and extensive social legislation,[8] on the one hand, and the reluctance of constitution drafters and judges to fully constitutionalize social rights, on the other, provides convenient background conditions for discussing the constitutional status of social rights. Arguably, it is harder to discuss modalities of the constitutionalization of social rights in societies where there is strong resistance to the very existence of these rights (either as ordinary or constitutional rights). Third, the Israeli debate over the constitutional status of social rights is conducted in the shadow of a wider debate over judicial activism, especially in the field of constitutional law.[9] This too helps to focus the debate on the question of the desirability and feasibility of authorizing courts to exercise judicial review over legislation which might compromise social rights.

Following these introductory remarks, this article will briefly survey the main developments since the early 1990s in the Israeli project of constitutionalizing human rights. It will also assess the status of social rights in the project. The second part will explore the main alternative strategies for constitutionalizing social rights—declarative incorporation in the constitution, partial or full incorporation and reinterpretation of existing constitutional provisions. We contend, in this context, that it is more likely than not that the drafters of the constitution would incorporate within it some reference to social rights (even a symbolic reaffirmation

thereof), and that courts are expected, in all events, to continue their policy of extending some constitutional protections towards social rights. The third section, which is the main part of this article, critically examines the central arguments against the grant of powers of constitutional judicial review to courts over social rights (in contrast to judicial review over civil and political rights), focusing mainly on the possible grant of such powers through a future constitution. We then demonstrate several possible modalities for such review—corresponding to distinct elements comprising social rights. We conclude by arguing that a host of policy considerations and theoretical arguments generally support, in the Israeli context, the full incorporation of social rights in the nascent Israeli constitution, and a concomitant effective, yet cautious, exercise of judicial review by the judiciary.

Before embarking on a discussion of the constitutional status of social rights in Israel, it could be useful to propose a working definition of the term 'social rights'. Numerous writers have made different proposals to that effect, alluding sometimes to the positive nature of social rights (i.e. requiring positive governmental action or expenditure), to their distributive attributes (i.e. transfer of resources from the 'haves' to the 'have nots')[10] or to their welfare characteristics (i.e. providing public services which might otherwise be inaccessible to large parts of the population). In previous publications we offered a flexible definition of social rights,[11] which cumulatively incorporate three principal elements: a) dominant positive characteristics—social rights typically introduce considerable positive obligations of conduct upon governments and entail significant costs; b) non-affluent constituency—the principal beneficiaries of social rights are less-well-off individuals who would not have been able to obtain these services in the free market; and c) historical context—social rights were mostly developed within the context of the welfare state project from the late nineteenth century onwards. The rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) meet as a rule most, if not all, of the three proposed elements. Hence, they serve as convenient indicia for the scope of coverage of the term social rights.

It should be noted, however, that social rights, as commonly understood nowadays, encompass a panoply of obligations and relationships: negative obligations (the right of parents to choose educational facilities for their children); direct positive obligations upon the government (the duty to provide health services); obligations incumbent upon private parties (the duty of employers to pay decent wages); core obligations (the right to be free from hunger) and penumbral obligations (the right to university education). Hence, discussion of the appropriate constitutional status of social rights must be sensitive to the complex and diverse nature of these rights: as the various social rights aspects differ in their definitiveness,

relativity and costs. Clearly, judicial review might be more apposite with regard to some right components than others.

## THE ISRAELI PROJECT OF CONSTITUTIONALIZING HUMAN RIGHTS

After the failure of the constitutional assembly and the first Knesset to adopt a comprehensive constitution in the formative years following Israel's independence, Israeli constitutional law developed along two parallel avenues. Pursuant to the terms of the 1950 Harari Resolution,[12] the Knesset adopted between 1958 and 1992 nine basic laws, which laid out the organizational structure of the State's political and legal system and demarcated the powers of its principal institutions.[13] These basic laws did not however contain specific human rights protections (with the exception of the right to vote and be elected). At the same time, the Supreme Court moved to identify several human rights as 'fundamental principles of the Israeli legal system',[14] which derive from the democratic nature of the state, its 'national spirit' and the prevalent 'social consensus'. These rights included, inter alia, the right to personal liberty;[15] freedom of occupation;[16] freedom of speech;[17] freedom of religion and conscience;[18] the right to equality;[19] and certain procedural due process rights (normally referred to in Israeli jurisprudence as 'rules of natural justice').[20] Notably, only a few social rights were recognized through this methodology: the right to education (pronounced by the Supreme Court as a fundamental right only in 2002)[21] and some social dimensions of the right to equality.[22] In all events, the limits of this constitutionalization methodology ought to be acknowledged: judicially pronounced human rights can never lead to the revocation of primary legislation, but may only influence their interpretation.[23]

This state of affairs underwent a fundamental transformation in the 1990s. In 1992, the Knesset adopted two new basic laws designed to protect human rights: Basic Law: Human Dignity and Liberty[24] and Basic Law: Freedom of Occupation.[25] These two laws established for the first time in Israel's constitutional history the normative supremacy of a range of important human rights: the right to life, the right to bodily integrity, the right to human dignity, the right to property, the right to personal liberty, the right to leave the country and the right of citizens to re-enter it, the right to privacy and the freedom of occupation.[26] From 1992 onwards, subsequent legislation[27] infringing upon protected constitutional rights had to meet the terms of a limitation clause in order to retain their validity. In particular, infringing legislation must be compatible with Israel's basic values as a Jewish and democratic state; it should promote a worthy purpose and it cannot introduce excessive restrictions upon constitutionally protected rights.[28]

The introduction of limitation clauses in the two 1992 basic laws changed the basic constitutional configuration of the Israeli legal system

from a British-type system based on the notion of parliamentary supremacy (epitomized by the maxim that 'Parliament cannot bind itself or future parliaments') to a legal system governed by a supreme constitutional instrument, protecting human rights, which the judiciary is empowered to enforce. Indeed, prominent Israeli jurists referred to the 1992 basic laws as the harbinger of a 'constitutional revolution'.[29] This theoretical proposition was soon to become official policy: despite certain reservations offered by some judges,[30] the Supreme Court, under the leadership of President Barak, asserted its powers of judicial review over legislation,[31] and repealed in the following years five 'unconstitutional' statutory provisions.[32]

However, the 'constitutional revolution' of 1992 was incomplete. Three additional government-sponsored draft basic law bills which were submitted to the Knesset in the early 1990s have not been adopted until now[33]—Draft Basic Law: Social Rights being among these abandoned bills.[34] Still, the failure of the constitution drafters to constitutionalize many fundamental human rights, such as the right to equality, freedom of expression and the right of access to court, seem to have been partly remedied throughout the years by way of expansive interpretation of the rights enumerated in the 1992 Basic Laws. So, for example, the right to human dignity (article 2 of Basic Law: Human Dignity and Liberty) was construed in the case law in a way that encompasses the prohibition against discrimination,[35] freedom of speech,[36] freedom of religion,[37] (including freedom from religion),[38] and freedom of contracts.[39] Two caveats should be noted, however. First, no law was ever nullified on the basis of these non-enumerated human rights; hence, their constitutional status has so far been supported only by *obiter dicta*.[40] Second, and more relevant to our topic, social rights have been largely excluded from this 'judicial constitutionalization' project—the exception being the right to minimal conditions of subsistence[41] and the free choice of employment,[42] which the Supreme Court proclaimed in a few early twenty-first century cases to be part of the constitutional right to human dignity (and, in one case, part of the right to bodily integrity).[43]

In sum, the major constitutional transformation which Israel underwent from the 1990s has resulted in the direct and indirect constitutionalizion of numerous human rights. However, social rights were, by and large, left out of the process: They were not explicitly incorporated into the new Basic Laws; and the Supreme Court showed until recently limited interest[44] in promoting their full constitutionalization through interpretation of the existing basic laws or by way of recognizing them as 'fundamental principles of the legal system'. This has led, in turn, to the emergence of a constitutional imbalance—some human rights (civil and political rights) have become more protected than others (social rights). Such imbalance has given rise to speculation that in future conflicts between rights belonging to the two distinct categories, protected rights might trump

unprotected rights (the right to property of the factory owner might trump the right to adequate work conditions of the workers).[45]

The unsatisfactory record of the Knesset and Supreme Court in constitutionalizing social rights, at a time in which economic developments in Israel have resulted in deteriorating economic and social conditions, has spurred a barrage of academic criticism.[46] There have also been numerous political initiatives to augment the constitutional status of social rights through the introduction of several draft basic laws on social rights and numerous court petitions. At present, the main focus of these efforts seems to revolve around attempts to integrate social rights within a comprehensive constitutional text currently drafted by the Knesset Constitution, Legislation and Law Committee—a project supported by several NGO initiatives. The next part maps out the various policy alternatives available to the constitution drafters in relation to the incorporation of social rights in the draft constitution, whereas the final part discusses key policy arguments relating to the choice between these alternatives. Although the discussion focuses on constitution drafting, analogous considerations would govern the desirability of extending existing constitutional protection to social rights by way of judicial interpretation.

## ALTERNATIVE STRATEGIES FOR CONSTITUTIONALIZING SOCIAL RIGHTS

Recent initiatives to promote the Israeli constitution writing project with a view to finalizing a comprehensive constitution present the constitution drafters with a choice between three principal alternative strategies for addressing social rights within the future constitution. These alternatives generally conform to the three principal models of constitutionalizing social rights accepted around the world:

a) Exclusion of social rights from the constitution—this is the model applied in the United States[47] and in the more recent Canadian Charter of Rights and Freedoms.
b) Declarative commitment to social rights, not entailing, as a rule, judicial review over legislation—this is the model presented in various degrees of explicitness in the Irish[48] and German Constitutions,[49] and in the text of the Indian Constitution[50] (though not necessarily in the practice of the Indian courts).[51]
c) Incorporation of some or all social rights in the constitution in a manner entailing judicial review—this is the model introduced, for instance, in the recent South African[52] and Finish Constitutions.[53]

In actuality, the choice seems however to be narrower, as selection of the first alternative is highly unlikely in the Israeli context. The historical

configuration of Israel as a socialist state whose laws and government were designed to promote social welfare[54] seems to undercut the relevance of the North American model, which was shaped by a different historical experience and a particular political theory of the role of government in society. Moreover, the tendency of many of the new constitutions adopted or reformed in the late twentieth and early twenty-first century to embrace some or all social rights as constitutional rights[55] is perhaps indicative of the outmoded nature of the exclusionary model.

Indeed, exclusion of social rights from a contemporaneously drafted Israeli constitution seems politically and legally untenable, in the light of the growing awareness of the importance of social rights in Israel (demonstrated, inter alia, through a number of recent successful public campaigns for the expansion of social benefits).[56] In the words of Yoram Aridor (a former Minister of Finance, and a member of the Steering Board of the Israel Democracy Institute 'Constitution by Consensus' campaign): 'In this day and age in Israel, no constitution would be adopted without social rights.'[57]

Aridor's view on the non-viability of the first alternative is largely confirmed by an examination of the main positions taken in various Israeli think-tank discussions over the constitutionalization of social rights, parliamentary deliberations and academic writing and conferences. The record of these discussions seems to establish a general consensus that social rights *should* be included in the future Israeli constitution. The increasing willingness of the Supreme Court to partly constitutionalize some social rights also demonstrates growing acceptance in Israel of the need to protect such rights through constitutional means. Hence, the question seems to be no longer whether social rights should be constitutionalized in Israel but rather how, or to what degree, they should be constitutionalized—i.e., in accordance with the declarative or fully incorporative model.

Indeed, all versions of the draft constitution currently pending before the Knesset refer to social rights as constitutional rights. However, the various alternatives proposed by the Knesset Committee on Constitutional, Legislative and Legal Affairs differ significantly in their approach to the 'bindingness' of constitutional social rights. Whereas some alternative versions use strict right formulations, parallel to those used in relation to civil and political rights, some other alternatives use declarative 'non-right' formulations, which generally require the state to promote social rights and shield their implementation from judicial scrutiny.[58]

The uncertainty over the constitutional status of social rights is also reflected in the 'Constitution by Consensus' campaign organized by a politically influential NGO—the Israel Democracy Institute (IDI). A thorough comparative research paper, written by two prominent IDI experts, originally leaned towards the declarative model and concluded

that: 'the preponderance of arguments leans in favour of selecting an option, according to which the constitution shall include a declaration on social-economic rights, without judicial review over primary legislation in the field of budgetary resource allocations'.[59]

However, the latest IDI draft constitution takes a more nuanced approach: article 39, the general limitation clause, which entails judicial review, encompasses both civil and political and social rights.[60] Still, articles 33–36 which enumerate the right to social security, health, education and work-related rights, and article 32, which governs the application of these social rights, are drafted in loose language,[61] which stands in contrast to the language used in the draft constitution for civil and political rights (and two 'singled out' social rights—the right to strike and children's social rights).[62] So, while article 39 subjects the enforcement of social rights to judicial review, the diluted content of these rights might render such review rather meaningless.[63]

A radically different position to that of the IDI was taken by a number of prominent academics and politicians,[64] who have advocated the full incorporation of social rights—formulated in strong 'rights language'—in any future Israeli constitution. Such incorporation should, in particular, authorize courts to review the constitutional lawfulness of legislation in ways comparable to those exercised by the courts under the two 1992 basic laws. A number of non-government-initiated draft bills, embracing this justiciable model, have been submitted in the Knesset in recent years.[65]

Finally, one should perhaps note a third, interim, approach advocated in Israel mainly by Gavison. She suggests that social rights should be protected in a comparable manner to civil and political rights (embracing the 'equal importance' and 'indivisibility' rhetoric of the proponents of the incorporative model), but that courts should not review legislation infringing both sets of rights (adopting the positions of advocates of the declarative model on the non-justiciability of social rights).[66]

So, at the end of the day, one is left with a choice between a constitution including or excluding the power of judicial review over legislation conflicting with protected social rights. The policy considerations underlying that choice are addressed in the final part of this article.

## SHOULD THE COURT REVIEW LEGISLATION INFRINGING UPON CONSTITUIONALLY PROTECTED SOCIAL RIGHTS?

Two principal arguments have been directed against the empowerment of courts in a way that would enable them to uphold social rights and strike down infringing legislation (or even incompatible government programmes), in a manner comparable to their powers in relation to civil and political rights. This section reviews these arguments and presents counter-arguments, which we believe ultimately tilt the balance in favour

of the full constitutionalization of social rights. Arguments by Nozick and others, which challenge the very justification for recognizing social rights per se,[67] are not addressed here, as they exceed the scope of the present article, and run contrary to our assessments that non-incorporation of social rights no longer presents a viable option in the Israeli context. In the same vein, Gavison's arguments which challenge the general justifications for constitutional judicial review (with respect to all human rights),[68] will not be discussed here either, since constitutional judicial review in Israel is by now a fait accompli.

*The Anti-majoritarian Argument*

The distributional implications of social rights call for two principal policy choices: a) substantive choice—*how* should societal resources be allocated among diverse needs; b) procedural choice—*who* should decide upon the manner of allocation. The question before us on the propriety of judicial review over constitutional social rights goes to the identity of the decision-makers: whether or not the legislator and the executive should enjoy exclusive decision-making power with relation to the implementation of social rights. While such questions are relevant in all constitutional review cases, it may be alleged that decisions over resource distribution relating to social rights represent particularly sensitive areas of policy-making, entailing a series of value choices, which courts are ill-placed to make.

Those who argue against the full incorporation of social rights in the constitution often believe that the ideological nature of the substantive choices implicit in the implementation of social rights (whether to spend available resources on health or education) requires that elected politicians, representing the popular will, should take the necessary decisions—i.e. that anti-majoritarian objections to constitutionalization apply with greater force to social rights.[69]

A related argument is that the exclusion of social rights from the constitution shields the courts from the political fray. By contrast, expecting courts to embrace or reject certain distributive policies would transform them into political actors (in a more pronounced fashion than in cases relating to civil and political rights, which have fewer across-the-board societal implications). Arguably, the constitution, and courts acting pursuant thereof, ought not to promote any particular social policy.[70] Instead, they should rather maintain a considerable degree of neutrality, and leave appropriate room for the political process to select between competing substantive policies.

An even more forceful argument against constitutional review of social rights advocates a democratic process-oriented vision of constitutionally protected human rights. According to this vision, developed in Israel by writers such as Yoav Dotan,[71] constitutional judicial review should mainly focus upon the proper functioning of the democratic process through their

powers of constitutional review. Hence, only the constitutional protection of human rights associated with the political process is justified: the right to vote and be elected, freedom of speech, freedom of association and freedom of movement. Such rights ensure the application of neutral 'rules of the game', which facilitate a legitimate political process. However, social rights are fundamentally different: their full incorporation in the constitution would limit the majority's freedom of determining substantive distributional outcomes. In other words, whereas political rights are a prerequisite for adopting a fair decision-making methodology within a given society, social rights pertain to the actual decisions adopted at the end of that process. Dotan thus posits that the constitutionalization of social rights (beyond an indispensable core) is undesirable and inefficient.[72] Questions relating to social rights should not be excluded from the ordinary political process through entrenching social rights as constitutional rights; rather they should remain part and parcel of the political process.

Despite the elegance of the distinction between process-oriented and substantive human rights, we believe that Dotan's position is misguided as it represents an excessively narrow conception of the role of a constitution in a liberal democracy. First, even according to Dotan, some social rights support the democratic process no less than their civil and political counterparts. For example, it is hard to envision meaningful participation in the democratic process of the hungry, homeless or uneducated.[73] Hence, even democratic process-oriented arguments should support the protection of core social rights.[74]

More importantly, the democratic process-oriented stance proposes an instrumentalist reduction of human rights to tools for guaranteeing majority rule in societal decision-making. This position ignores the potential minority-protection attributes of social rights, which are designed to serve as a counterbalance to majority rule and to protect the minority from the 'tyranny of the majority' in relation to distribution-related decisions. Indeed, the human rights movement seeks to subject *all* societal policies, including policies couched in democratically taken decisions, to substantive, pre-political human rights standards.[75]

So, if we were to accept the proposition that social rights protect important and recognizable interests of the weaker strata in society, which merit legal protection, then the lawfulness of societal decisions affecting those rights should be subject to some form of checks and balances. In particular, it is unclear why majority decisions over resource allocation which affect the economically or socially disempowered deserve less scrutiny than other majority decisions which affect the politically disenfranchised—prison conditions, rights of aliens or minority groups. Viewed from this majority–minority perspective, the non-representative nature of the judiciary constitutes an *advantage*, since it balances the

majoritarian trends of the political system against the pre-political values enshrined in the constitution (or international human rights law instruments). This basic observation seems to hold true for social rights, as much as it holds true for civil and political rights.

Furthermore, we believe that the democratic process-oriented approach to human rights has been implicitly rejected in Israel (and in many other jurisdictions), as the domestic legal system recognizes human rights, such as the right to privacy,[76] the right to property,[77] the prohibition against torture,[78] whose relevance to the democratic process is limited or non-extant. Instead, another rationale—human dignity—underlies the constitutionalization of these human rights.[79] Significantly, the same human dignity rationale has also been cited in favour of constitutionalizing many social rights.[80] It would therefore be, in our minds, inconsistent to reject the constitutionalization of social rights on the basis of instrumentalist arguments, while at the same time retain the constitutionality of non-instrumental civil and political rights.

Indeed, empowering courts to review legislation necessarily entails a certain degree of politicization of the judiciary—i.e. the power to take essentially political decisions—and thus warrants judicial prudence.[81] Still the decision *not* to empower the courts might be equally political, as it could tilt the societal equilibrium of power in favour of the majority, at the expense of disenfranchised segments of society. It thus enables powerful interest groups to exert considerable influence over the political process, without introducing necessary checks and balances against such an exercise of power.[82] In other words, the decision whether or not to invest courts with powers of constitutional judicial review in cases involving social rights necessarily affects the distribution of political power between the majority and minority, and is therefore inevitably political in nature.

Finally, it may be noted that the decision to exclude social rights from the scope of constitutional judicial review might lead to under-enforcement of social rights (especially when limitations of social rights are justified by reference to constitutionally protected civil and political rights, such as the right to property). This might, in turn, bring into question the state's compliance with its international obligation to give full effect to those social rights it is materially capable of providing.[83]

### *The Professional Expertise Argument*

Another line of argument, directed against the exercise of judicial review over legislation affecting social rights, highlights the institutional constraints of courts as decision-makers. Unlike the aforementioned anti-majoritarian arguments, the professional expertise argument does not question the need for implementing constitutional social rights, but challenges the methodology of their implementation.[84]

Arguably, courts lack professional expertise for undertaking decisions having significant long term distributional implications, as such decisions often require sophisticated practical expertise and might have unforeseeable spill-over effects, which might compromise other distributional agendas (e.g. a decision to increase welfare spending might require cuts in health benefits). These concerns also derive from the nature of the judicial decision-making methodology: courts take decisions on a case-by-case basis and lack a broader perspective on social issues.[85] This form of decision-making is also inauspicious to political compromises or 'package deals', which could represent a pragmatic way of promoting social agendas and balancing between conflicting social needs.

These criticisms against judicial decision-making, which apply to many judicial decisions that have distributional implications, apply with greater force to social rights given their vague nature (e.g., the right to an adequate standard of living) and significant effects in terms of government spending. In other words, courts might lack the capacity to efficiently manage the distribution of society's resources (and, as suggested above, they might also lack legitimacy to undertake the value choices implicit in these decisions). Consequently, it might be imprudent to authorize Israeli courts to oversee the constitutionality of legislation providing or depriving of material resources needed for the full implementation of social rights. Instead, such decisions arguably should be taken by the state bureaucracy, which is better placed to evaluate across-the-board and over time the implications of implementing social rights.

Once again we question the accuracy of these sweeping assertions. First, the distinction between 'positive' social rights and 'negative' civil and political rights is being increasingly viewed both inside and outside Israel as anachronistic.[86] Instead, a competing vision of human rights, comprising of a combination of positive and negative features, seems to be gaining ground with relation to both groups of rights.[87] Differences between social rights and civil and political rights may thus be quantitative, not qualitative. So, if one is ready to acknowledge the expediency of constitutional judicial review over the distributional implications of civil and political rights (e.g. affirmative action or land redistribution), considerations of coherency support comparable powers of review over social rights.

In the same vein, the argument that social rights are inherently uncertain loses much of its persuasive force when these rights are juxtaposed against the no-less-vague civil and political rights such as the right to privacy or access to court (or commonly used vague legal standards such as reasonableness or good faith), which invite a comparable degree of concretization by way of judicial interpretation. These remarks apply with particular force in relation to *positive* civil and political rights, such as the right to life or due process (which may entail obligations to maintain law

and order and provide legal aid) that seem to be as uncertain as any social right. At the same time, there seems to be an uncontroversial core of social rights, such as the right to elementary education or to emergency medical treatment, which could be readily applied by courts.[88] In fact, it may be argued that reluctance to authorize courts to apply social rights perpetuates their uncertainness, as it debars courts from developing judicial practice which could elucidate their content. The differences between social and civil and political rights thus seem overblown and hardly call for radically different configurations of judicial supervision (unless one disputes the proposition that both groups of rights protect equally important human rights).

*How Should Israeli Courts Oversee the Constitutional Protection of Social Rights?*

We are by no means oblivious to the problems associated with judicial supervision over legislation affecting constitutionally protected social rights. While the aforementioned democratic legitimacy and professional expertise concerns are not prohibitive in our minds, they should certainly be accorded due consideration. Consequently, the model for judicial supervision we propose seeks to take care of some of these concerns, yet preserve a core essence of judicial supervision.

The first and foremost aspect that should be acknowledged when discussing the desirable scope of judicial review is the multi-faceted nature of social rights. They comprise negative and positive obligations (i.e. duties not to interfere and duties to act); direct and indirect obligations (i.e. obligations directly incumbent on the state and obligations on the state to regulate relations between private individuals); and hard-core and penumbral obligations. These distinct elements entail varying costs, and are characterized by different degrees of relativity and normative ambiguity. Thus, we believe that the intensity and methodology of judicial supervision over these distinct aspects should vary accordingly.

We submit that intensive judicial supervision is fully justified with relation to three right components:

a) *Negative obligations*—many social rights include important negative features which forbid excessive governmental interference in their application. These may include the right to establish private schools (not funded by the state), the right not to be excluded from medical treatment, the right not to be barred from certain professions, the right not be arbitrarily disconnected from utility infrastructures (e.g. water, electricity, etc.). In our view, there is no reason why courts should not be able to constitutionally oversee the protection of these negative rights from infringing legislation, as they do not generally have major distributional implications.[89] In fact, the Israeli legal system has

demonstrated in the past its willingness to afford legal protection, including sometimes constitutional protection, to some negative aspects of social rights.[90]

b) *Private obligations*—there is growing support for the proposition that human rights require states to regulate relations between individuals in a manner compatible with their protection.[91] Hence, social rights might require states to prevent abusive employment practices, oversee educational standards in private schools and prohibit discrimination by landlords.[92] Here, too, the societal distributional implications of the constitutional review are minor or indirect; again, comparable non-constitutional powers of review already exist in Israel.[93] So, if one accepts the proposition that constitutional social rights include a private obligation component, it makes little sense not to authorize courts to review the constitutionality of legislation defining and regulating these private obligations (e.g. working hours or private health care legislation).

c) *Hard-core social rights*—an increasingly influential theory identifies a hard-core of social rights, which underpin minimal conditions for dignified human subsistence, such as the right not to be hungry, the right to emergency medical treatment, minimal shelter and clothes. The distinction between hard-core and penumbral social rights has been applied by international bodies,[94] and was adopted by President Barak in a number of court decisions.[95] Arguably, the preponderant importance of hard-core elements of social rights, and the social consensus surrounding the need to allocate the resources needed to fulfil them, supports judicial review over legislation compromising this hard-core. The willingness of the Israeli Supreme Court to construe the right to human dignity as encompassing a hard-core of social rights is indicative of the compatibility of judicial powers of review over legislation impinging upon hard-core elements of social rights with existing theories and practices of judicial review in Israel.[96]

Thus, we maintain that judicial review over the constitutionality of legislation affecting some elements of social rights is supportable by virtue of the limited distributional implications of such review, the social consensus surrounding these elements and their sheer importance. Both the democratic legitimacy and professional expertise arguments do not support, in our view, the exclusion of Israeli courts from engaging in constitutional review of these elements, especially in light of their power to exercise no less consequential powers in relation to civil and political rights.

As for the remaining social right elements—positive obligations, directly imposed upon the state and covering more controversial penumbral components (i.e. situated outside the hard-core of social

rights)—we propose that the general benefits of judicial review—mainly the effective protection of important minority interests from the tyranny of the majority—generally outweigh, as a matter of desirable policy, the negation of any form of judicial review. Still, such judicial review should proceed carefully by reason of the judiciary's democratic deficit and relative lack of expertise in undertaking major distributional decisions.[97]

First, the state should be granted by the courts a wide margin of appreciation in devising policies relating to positive social rights, and courts should apply considerable judicial restraint.[98] Intervention in legislation should be resorted to only in extreme situations of manifest unconstitutionality, and not in borderline cases. Second, in cases relating to administrative decisions, courts should focus more on the executive's decision-making procedures than on their substantive outcomes—whether data had been collected or proper consultation had been resorted to by the relevant administrative agencies.[99] Of course, in evaluating the propriety of the procedure no expertise gap exists. Third, courts should develop a host of non-intrusive remedies in cases where violation of constitutionally protected social rights had been identified, in order to minimize inter-governmental–branch conflicts. These may include inter alia the adoption of 'second-look' doctrines,[100] redirecting questions pertaining to the implementation of social rights to the legislator or executive;[101] suspended remedies, providing the state with lavish adjustment periods,[102] and declarative remedies.[103]

In addition, if courts were accorded powers of judicial review over legislation and executive acts affecting social rights, they would have to expound appropriate decision-making methodologies to overcome their relative lack of expertise—i.e. develop a suitable constitutional 'tool box'. Such methodologies may include, inter alia, the invitation of inter-disciplinary expert opinions (as in the 'Brandeis brief'), admission of *amicus curia* briefs[104] and insisting that the state elaborates social goals and benchmarks—determine what constitutes constitutionally protected standards of health, housing or education.[105]

## CONCLUSIONS

The role of social rights in the Israeli constitutional project will probably be determined in the coming years. It seems that contemporary political and intellectual trends lean towards supporting the inclusion of social rights in any future constitutional instrument, albeit in a weak form, without substantive judicial review. We have made the argument in this article that this position merits reconsideration.

We submit that despite the difficulties associated with the judiciary's non-representative composition and its limited capacity to undertake decisions with major long term distributional implications, the importance

of social rights, their minority protection purpose, and, most significantly, the existence of analogous judicial decision-making powers with relation to civil and political rights, support judicial review over legislation and administrative acts incompatible with protected social rights. However, such review must be exercised carefully, especially in relation to positive social rights, which impose a direct obligation on the state to protect the penumbral, and less certain, elements of social rights. Hence, the difficulties associated with constitutionalizing social rights should not lead to an abdication of the court's role in enforcing such rights, but rather to a policy of judicial restraint in exercising constitutional supervision.



## NOTES

1. See Linda M. Keller, 'The American Rejection of Economic Rights as Human Rights and the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?', *N.Y.L. Sch. J. Hum. Rts*., Vol. 19 (2003), pp. 557, 561.
2. See Maurice Cranston, 'Human Rights, Real and Supposed', in D.D. Rapheal (ed.), *Political Theory and the Rights of Man*, London, 1967, pp. 43, 49.
3. See Michael J. Dennis and Dennis P. Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', *Am. J. Int'l. L*., Vol. 98 (2004), pp. 462, 472.
4. See International Covenant on Economic, Social and Cultural Rights, 16 December 1966, art. 2(1), 993 U.N.T.S. 3 (hereinafter, ICESCR).
5. Louis Henkin, 'Revolutions and Constitutions', *La. L. Rev.*, Vol. 49 (1989), pp. 1023, 1054–1055; Herman Schwartz, 'Do Economic and Social Rights Belong in a Constitution?', *Am. U.J. Int'l L. & Pol'y*, Vol. 10 (1995), p. 1233.
6. Andrei Marmor, 'Bikoret Shiputit Be-Yisrael' (Judicial Review in Israel), *Mishpat U-Mimshal*, Vol. 4 (1997–1998), p. 133; Ali Zaltzberger and Alexander Kedar, 'Ha-Ma'hapecha Hashketa—Od Al Bikoret Shiputit Lefi Hukei Hayesod Hahadashim' (The Silent Revolution—More on Judicial Review under the New Basic Laws), *Mishpat U-Mimshal*, Vol. 4 (1997–1998), pp. 489, 504.
7. Ran Hirschl, 'Israel's Constitutional Revolution: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order', *Am. J. Comp. L*., Vol. 46 (1998), pp. 427, 432.
8. See National Insurance Law (Consolidated Version), 1995; Compulsory Education Law, 1949; National Health Insurance Law, 1994; Work and Leisure Hours Law, 1951; Annual Leave Law, 1951. One should note in this regard that Israel ratified in 1991 the ICESCR and that some notable Supreme Court decisions reaffirmed the importance of social rights. See e.g. H.C.J. 164/97, *Contram Ltd. v. Ministry of Finance—Custom and VAT Department*, 52(1) P.D. 289; H.C.J. 4905/98, *Gamzu v. Yeshayau*, 55(3) P.D. 360; H.C.J. 2599/00, *YATED—Association for Parents of Downs Syndrome Children v. Minister of Education*, 56(5) P.D. (2002) 843; H.C.J. 6973/03, *Marciano v. Minister of Finance*, 58(2) P.D. 270.
9. Ruth Gavison, Mordechai Kremnitzer and Yoav Dotan, *Activism Shiputi—Be'ad Ve-Neged* (Judicial Activism—For and Against), Jerusalem, 2000.
10. Yoav Dotan, 'Beit Hamishpat Ha-Elyon Ke-Magen Zchuyot Hevratiot' (The Supreme Court as the Protector of Social Rights), in Yoram Rabin and Yuval Shany (eds.), *Zchuyot Kalkalyot*, *Hevratiot Ve-Tarbutiot Be-Yisrael* (Economic, Social and Cultural Rights in Israel), Tel Aviv, 2004, pp. 69, 72–73 (hereinafter *Rights in Israel*).
11. Yoram Rabin and Yuval Shany, 'The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?', *Is. L.R*., Vol. 38 (2005), p. 299; Yoram Rabin and Yuval Shany, 'Zchuyot Hevratiot—Ra'ayon She-higia Zmano' (Social Rights—An Idea Whose Time has Come), in Rabin and Shany, *Rights in Israel*, pp. 11, 18.
12. 5 DK 1743 (1950).

13. Basic Law: The Knesset, 12 LSI 85 (1958); Basic Law: The Government, 22 LSI 257 (1969); Basic Law: The President of the State, 18 LSI 111 (1964); Basic Law: The Judicature, 38 LSI 101 (1984); Basic Law: The State Comptroller, SH 1988, No. 1237, p. 30 (1988); Basic Law: Israeli Land, 14 LSI 48 (1960); Basic Law: State Economy, 29 LSI 273 (1975); Basic Law: The Armed Forces, 30 LSI 150 (1976); Basic Law: Jerusalem, the Capital of Israel, 34 LSI 209 (1980).
14. See H.C.J. 292/83, *Mount Temple Faithful Association v. Chief of the Jerusalem District Police*, 38(2) P.D. 449, 454; H.C.J. 680/88, *Shnitzer v. Chief Military Censor*, 42(4) P.D. 617, 627.
15. See H.C.J. 7/48, *Al-Karbutli v. Minister of Defence*, 2 P.D. 5.
16. See H.C.J. 1/49, *Bejerano v. Minister of Police*, 2 P.D. 80.
17. See H.C.J. 73/53, *Kol Ha'am v. Minister of Interior*, 7 P.D. 871. For an English version, see *Selected Judgments of the State of Israel*, Vol. 1 (1953), p. 90.
18. See H.C.J. 262/62, *Peretz v. Local Council of Kfar Shmaryahu*, 16 P.D. 2101. For an English version, see *Selected Judgments of the State of Israel*, Vol. 4 (1962), p. 191.
19. See H.C.J. 509/80, *Younes v. Director General of the Office of the Prime Minister*, 35(3) P.D. 589; H.C.J. 953/87, *Poraz v. Mayor of Tel Aviv-Yaffo*, 42(2) P.D. 309, 332–333.
20. See H.C.J. 3/58, *Berman v. Minister of the Interior*, 12 P.D. 1493. For an English version, see *Selected Judgments of the State of Israel*, Vol. 3 (1958), p. 29. Judge-made rights have sometimes been also referred to as the Israeli 'judicial bill of rights'. See H.C.J. 112/77, *Fogel v. Israel Broadcasting Authority*, 31(3) P.D. 657, 664.
21. H.C.J. 2599/00, *YATED*.
22. See H.C.J. 6488/02, *National Committee of Heads of Arab Municipalities in Israel v. Committee of Ministry Directors for Specific Action in Municipalities* (not yet published); H.C.J. 2814/97, *Supreme Supervisory Council for Arab Education in Israel v. Ministry of Education, Culture and Sport*, 54(3) P.D. 233; H.C.J. 727/00, *National Committee of Heads of Arab Municipalities in Israel v. Minister of Construction and Housing*, 56(2) P.D. 79. One could also claim that the court's affirmative jurisprudence contributes to the closing of social gaps. See e.g. H.C.J. 2671/98, *Israeli Woman's Network v. Minister of Labour and Welfare*, 52(3) P.D. 630; H.C.J. 6924/98, *Association for Civil Rights in Israel v. Government of Israel*, 55(5) P.D. 15. For a theoretical discussion of the right to economic equality, see Andrei Marmor, 'The Intrinsic Value of Economic Equality', in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge (eds.), *Rights, Culture and the Law—Themes from the Legal and Political Philosophy*, Oxford, 2003, p. 127.
23. See C.A. 6871/99, Rinat v. Rom, 56(4) P.D. 72, 92; 482; V.C.P 4459/94, *Salmonov v. Sharbani*, 49 P.D. 479, 482; C.A. 524/88, *Pri Ha'Emek—Agricultural Cooperative Association Inc. v. Sde Ya'akov—Workers Cooperative Village*, 48(4) P.D. 529, 561; H.C.J. 693/91, *Efrat v. Population Registry Supervisor, Ministry of the Interior*, 47(1) P.D. 749, 763; Yoram Rabin, *Hazchut Lehinuch* (The Right to Education), Jerusalem, 2003, p. 339.
24. Basic Law: Human Dignity and Liberty, 1992, S.H. 150, translated in *Is. L.R.*, Vol. 31 (1997), p. 21.
25. Basic Law: Freedom of Occupation, 1992, S.H. 114, translated in *Is. L.R.*, Vol. 31 (1997), pp. 21–25.
26. A prior example of a constitutional supremacy arrangement may be found in article 4 of the Basic Law: The Knesset, which pronounces, among other things, the right to equality in voting to the Knesset. This article contains a so-called 'entrenchment clause' providing that its provisions shall not be amended except by a special majority vote in the Knesset. In 1969, the Supreme Court invalidated legislation conflicting with the entrenchment provision since it was not adopted by the requisite majority. See H.C.J. 98/69, *Bergman v. Minister of Finance*, 23 P.D. 639, translated and abridged in *Isr L.R.*, Vol. 4 (1969), p. 577.
27. Basic Law: Freedom of Occupation even subjected antecedent legislation to its provisions. Basic Law: Freedom of Occupation, art. 8.
28. Basic Law: Human Dignity, article 8; Basic Law: Freedom of Occupation, article 4. Basic Law: Freedom of Occupation also contains in article 7 a 'procedural entrenchment clause', which requires an absolute majority in the Knesset in order to amend the Basic Law.
29. The term 'constitutional revolution' had been coined by Professor Aharon Barak—then a Justice of the Israeli Supreme Court and subsequently the President of the Supreme Court—in an article published in 1992. Aharon Barak, 'Ha-Ma'hapecha Ha-Hukatit: Zchuyot Adam

Muganot' (The Constitutional Revolution: Protecting Human Rights), *Mishpat U-Mimshal*, Vol. 1 (1992), p. 9. See also Aharon Barak, 'The Constitutionalization of the Israeli Legal System as Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law', *Is L.R.*, Vol. 31 (1997), p. 3. But see Ruth Gavison, 'A Constitutional Revolution?', in Antonio Gambaro and Mordechai Rabello (eds.), *Towards a New European Ius Commune*, Jerusalem, 1999, p. 517.

30. See CA 6821/93 *Bank Hamizrachi Hameuhad Ltd. v. Migdal Cooperative Village*, 49(4) P.D. 221, 567 (Heshin, J., dissenting).
31. ibid., pp. 352–355.
32. H.C.J. 1715/97, *Israeli Investment Managers Bureau v. Minister of Finance*, 51(5) P.D. 367; H.C.J. 6055/95, *Tsemach v. Minister of Defence*, 53(5) P.D. 241; H.C.J. 1030/99, *Oron v. Chairman of Knesset*, 56(3) P.D. 640; *Gaza Beach Regional Council v. Knesset of Israel*, 59(2) P.D. 481; H.C.J. 8276/05 *Adalah—Legal Centre for Arab Minority Rights v. Minister of Defence*, judgment of 12 December 2006.
33. This could be attributed to the opposition of powerful Jewish religious parties in the Knesset to the competence of post-'constitutional revolution' courts to strike down legislation protecting religious interests. See Lili Galili, 'Benizri: Nitnaged Gam Le-Aseret Ha-Dibrot Ke-Hok Yesod' (Benizri: We Will Also Oppose the Ten Commandments as a Basic Law), *Ha'aretz Online*, (available at www.haaretz.co.il), 3 July 1997.
34. Draft Basic Law: Social Rights, 1994, S.H. 326.
35. H.C.J. 453/94, *Israel Women's Network v. Government of Israel*, 48(5) P.D. 501 (per Maza, J.); H.C.J. 4541/94, *Miller v. the Minister of Security*, 49(4) P.D. 94 (per Dorner, J.).
36. H.C.J. 2481/93, *Dayan v. Vilk*, 48(2) P.D. 456.
37. H.C.J. 5016/96 *Horev v. Minister of Transportation*, 51(4) P.D. 1; H.C.J. 4298/93, *Jabbarin v. Minister of Education*, 48(5) P.D. 199; H.C.J. 3261/93, *Menning v. Minister of Justice*, 47(3) P.D. 282.
38. C.A. 6024/97, *Shavit v. Hevra Kadisha GHSA Rishon Le Zion*, 53(3) P.D. 600, 649; H.C.J. 6111/94, *Committee of Tradition Protectors v. Israel Supreme Rabbinical Council*, 49(5) P.D. 95, 106.
39. C.A. 239/92, *Egged—Israel Transportation Cooperative Union Ltd. v. Mashiah*, 48(2) P.D. 66, 72; Gabriela Shalev, *Dinei Hozim* (*The Law of Contracts*), 2nd edition, Jerusalem, 1995, p. 25.
40. See e.g. Hillel Sommer, 'Mi-Yaldut Le-Bagrut: Sugiot Ptuchot Be-Yisuma Shel Ha-Ma'hapecha Ha-Hukatit' (From Childhood to Adulthood: Open Questions in the Application of the Constitutional Revolution), *Mishpat Ve-Asakim*, Vol. 1 (2004), pp. 59, 66.
41. See H.C.J. 4905/98, Gamzu; H.C.J. 4128/02 *Adam, Teva Va-Din v. Prime Minister of Israel*, 58(3) P.D. 503; H.C.J. 1384/04, *B'tsedek—American–Israel Centre for Promotion of Justice in Israel v. Minister of the Interior*, at para. 14 (not yet published); H.C.J. 5578/02 *Manor v. Minister of Finance*, 59(1) P.D. 729; H.C.J. 494/03, *Physicians for Human Rights v. Minister of Finances*, 59(3) P.D. 322; H.C.J. 366/03, *Association for Commitment to Peace and Social Justice v. Minister of Finance* (not yet published).
42. H.C.J. 4542/02, *Hotline for Workers v. Government of Israel* (not yet published). Note that the free choice of employment may also be covered by Basic Law: Freedom of Occupation.
43. H.C.J. 494/03, *Physicians for Human Rights*, at para. 18.
44. We have discussed elsewhere some possible explanations for the court's relative lack of interest in promoting social rights. Rabin and Shany, 'The Israeli Unfinished Constitutional Revolution'.
45. However, there is little evidence in practice that the Supreme Court has been reluctant until now to limit civil and political rights in order to further social interests. See H.C.J. 450/97, *Tnuffa Manpower and Maintenance Services Ltd. v. Minister of Labour and Social Affairs*, 52(2) P.D. 433. See also Dotan, 'Supreme Court as Protector', pp. 113–119.
46. See Ruth Ben-Israel, 'Dinei Avoda' (Labour Laws), *Israel Yearbook of Law* (1992–1993), p. 433; Aeyal Gross, 'Ha-Huka Ha-Yisraelit: Kli Le'Tzedek Halukati o Kli Negdi?' (The Israeli Constitution: A Tool for Distributive Justice, or A Tool Which Prevents It?), in Menachem Mautner (ed.), *Tsedek Halukati Be-Yisrael* (Distributive Justice in Israel), Tel Aviv, 2000, pp. 79–96.
47. See Frank E.L. Deale, 'The Unhappy History of Economic Rights in the United States and Prospects for their Creation and Renewal', *How. L.J.*, Vol. 43 (2000), p. 281; Cass

R. Sunstein 'Why Does the American Constitution Lack Social and Economic Guarantees?', *Chicago Public Law and Legal Theory Working Paper* (2003), p. 36, available at www.law.uchicago.edu/academics/publiclaw/resources/36.crs.constitution.pdf.

48. Constitution of Ireland, article 45.
49. German Basic Law, article 20(1) ('The Federal Republic of Germany is a democratic and social federal state'). For discussion of the status of social rights under the German Basic Law, see Peter E. Quint, 'The Constitutional Guarantees of Social Welfare in the Process of German Unification', *Am. J. Comp. L*, Vol. 47 (1999), p. 303.
50. Indian Constitution, art. 36–51.
51. Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?', *Am. J. Comp. L.*, Vol. 37 (1989), p. 495; Guy Seidman, 'Zchuyot Hevratiot: Mabat Hashva-ati Le-Hodu Ve-Le-Drom Africa' (Social Rights: A Comparative Look at India and South Africa), in Rabin and Shany, *Rights in Israel*, pp. 347, 356–374.
52. Constitution of the Republic of South Africa, article 23–30. See discussion in Pierre De Vos, 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution', *South Africa Journal of Human Rights*, Vol. 13 (1997), p. 67; Albie Sachs, 'The Creation of South Africa's Constitution', *N.Y.L. Sch. L. Rev.*, Vol. 41 (1997), p. 669.
53. Constitution of Finland, art. 16–20.
54. Declaration on the Establishment of the State of Israel ('The State shall maintain complete equality in *social* and political rights to all of its citizens, without distinction . . . It shall ensure freedom of religion, conscience, language, education and culture') (emphasis added).
55. In addition to the South African and Finnish Constitutions, one may note, for example the following instruments: Charter of Basic Rights and Fundamental Freedoms (Czech Republic), art. 26–35; Constitution of Poland, art. 64–78; Interim Iraqi Constitution, art. 14; Constitution of the Democratic Republic of East Timor, ss. 50–61.
56. See Judy Siegel, 'Health Basket Expanded by NIS 150m, but Won't get Automatic Yearly Update', *Jerusalem Post*, 22 March 2005.
57. Israel Democracy Institute, *Sugiyat Ha-Igun Shel Zchuyot Hevratiot Ba-Huka: Hakinus Ha-Tshiy'i* (The Question of Incorporation of Social Rights in the Constitution: Proceedings of the 9th Session of the Public Council), Jerusalem, 2003, 76.
58. See Committee on Constitutional, Legislative and Legal Affairs, *Huka Be-Haskama Rehava* (Constitution by Wide Consensus), Jerusalem, 2006, art. 17–20, available through www.knesset.gov.il/huka/.
59. Avi Ben-Bassat and Momi Dahan, *Zchuyut Hevratiot Ba-Huka Ve-Mediniyut Kalkalit* (Social Rights in the Constitution and Economic Policy), Jerusalem, 2004, p. 102. It should be noted however that Ben-Bassat and Dahan are of the view that there is no direct link between constitutionalization of social rights and government spending on social programmes. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, Chicago, 1991, p. 336.
60. Israel Democracy Institute, *Hatza'a Le-Huka Be-Haskama* (Proposal for a Constitution by Consensus), (2005), Chapter Two: Fundamental Human Rights, http://www.e-q-m.com/clients/Huka/huka_01.html (hereinafter IDI Draft Constitution). The full article provides: 'Rights protected by the Constitution shall not be impaired, but through legislation compatible with the values of the State of Israel, designed for a worthy purpose, and not excessive, or through by-laws specifically authorized by such legislation, which preserves, to the largest possible degree, the essence of the right' (unofficial translation).
61. IDI Draft Constitution, chapter 2, art. 32 provides that: '(a) The State of Israel shall endeavour to promote the personal and economic welfare of its citizens and residents out of recognition of human dignity. b) The scope of the social rights enumerated in articles 33–36 shall be specified in legislation or secondary legislation.' Article 33 provides that 'The State of Israel shall act to promote social security'; article 34 provides that: 'The State of Israel shall ensure public health and shall guarantee the provision of health service'; article 35 provides that: '(a) The State of Israel shall diligently advance education out of recognition of its value and importance to the development of human spirit and talent and to ensure equal opportunities to all of its residents; (b) ensure thirteen years of free education, the first eleven being compulsory'; article 36 provides: 'The State of Israel shall act to maintain decent conditions of work out of recognition of the value of work.'

62. IDI Draft Constitution, chapter 2, art. 15(a) ('everyone has the right to life, body integrity and dignity'). See also chapter 2, art. 31 (the right to strike); chapter 2, art. 37(a) (children's right to basic subsistence and development).
63. Significantly, the position of the IDI echoes a 1998 government-sponsored draft Basic Law: Social Rights, which also included mere hortatory reference to the need to protect social interests. Draft Basic Law: Social Rights, article 3, in Ministry of Justice, Basic Laws Memorandum, 25 January 1998 (copy with authors) ('The State of Israel shall diligently promote and develop the conditions necessary to ensure its residents' subsistence in human dignity, including in the fields of labour, education, health, social welfare and environmental protection. All as determined in law, or according to law or governmental decisions').
64. See Guy Mundlak, 'Zchuyot Hevratiot-Kalkaliot Ba-Siah Hachukati Ha-Hadash: Mi-Zchuyot Hevratiot La-Meimad Ha-Hevrati Shel Zchuyot Ha-Adam' (Socio-Economic Rights in the New Constitutional Discourse: From Social Rights to the Social Dimension of Human Rights), *Shnaton Mishpat Ha-Avoda*, Vol. 7 (1999), p. 65; Ruth Ben-Israel, 'Hashlachot Hukei Ha-Yesod Al Hukei Ha-Avoda' (The Impact of the Basic Laws on Labour Law), *Shnaton Mishpat Ha-Avoda*, Vol. 4 (1994), pp. 27, 31; Gross, 'The Israeli Constitution: A Tool for Distributive Justice'; Michael Atlan, 'Zchuyot Ha-Adam Ve-Haezrach Be-Yisrael—Mikra'a' (Human and Civil Rights in Israel—A Text Book), *Mishpatim*, Vol. 22 (1993), p. 251; Anat Maor, 'Hor Paur Be-Sefer Hahukim: Hatza'at Hok Yesod Zchuyot Hevratiot: Chronika Shel Kishlon Ha-Hakika' (A Gaping Hole in the Law Gazette: Draft Basic Law: Social Rights—Chronicle of a Legislative Failure), in Rabin and Shany, *Rights in Israel*, p. 195; IDI, *Question of Incorporation*, pp. 67–68, 70–72, 78–79, 99–100, 105–106.
65. See Draft Basic Law: Social Rights (P1634) (submitted 1 December 2003); Draft Basic Law: Social Rights (P2581) (submitted 5 March 2001).
66. Ruth Gavison, 'Al Ha-Yahasim Bein Zchuyot Ezrahiot-Mediniot U-Bein Zchuyot Kalkaliot-Hevratiot' (On the Relations between Civil-Political Rights and Socio-Economic Rights), in Rabin and Shany, *Rights in Israel*, pp. 25, 66. For similar positions, see Jeremy Waldron, *Law and Disagreement*, Oxford, 1999, pp. 255–312; Mark Tushent, *Taking the Constitution Away from the Courts*, Princeton, NJ, 1999, pp. 129–176.
67. See Robert Nozick, *Anarchy, State and Utopia*, New York, 1974. According to Nozick, taxation could be justified only if it is designed to sustain the state's function as a 'night watchman'; taxation designed to serve re-distributional agendas violates fundamental human rights—because it compels taxed individuals to labour for the welfare of others, it constitutes a form of slavery. For support, see Samuel Scheffler, 'Natural Rights, Equality and the Minimal State', in Paul Jeffrey (ed.), *Reading Nozick: Essays on Anarchy, State and Utopia*, Oxford, 1981, p. 148; Chandran Kukathas and Philip Petit, *Rawls—A Theory of Justice and its Critics*, Stanford, CA, 1990, p. 76. Naturally, the Nozikian model has also attracted considerable criticism. G.A. Cohen, *Self-Ownership Freedom and Equality*, Cambridge, 1995, pp. 19–37. In addition, it had been argued that the provision of public services and the empowerment of weak groups, facilitated by taxation, could promote the general welfare, including that of the taxpayers (it might be more efficient to fight crime through welfare programmes than through policing). See also John Rawls, *A Theory of Justice*, Cambridge, 1971, p. 303 (the 'maximin' moral principle supports a policy of assisting society's least favoured segments); Ronald Dworkin, *Taking Rights Seriously*, London, 1977, p. 227 (Liberal thought should protect some notion of equality).
68. Gavison, 'On the Relations Between Rights'. See also Waldron, *Law and Disagreement*; Tushent, *Taking the Constitution Away*.
69. Tim Murphy, 'Economic Inequality and the Constitution', in Tim Murphy and Patrick Twomey (eds.), *Ireland's Evolving Constitution*, Oxford, 1988, pp. 163, 169 ('The main reason … why the Constitution should not Confer [such rights] is that these are essentially political matters which, in a democracy, it should be the responsibility of the elected representatives of the people to address and determine. It would be a distortion of democracy to transfer decisions on major issues of policy … from the government … elected to represent the people and do their will, to an unelected judiciary').
70. Aharon Barak, 'Ha-Huka Hakalkalit Shel Medinat Yisrael' (The Israeli Economic Constitution), *Mishpat U-Mimshal*, Vol. 4 (1998), p. 357 ('The Constitution is not a political manifesto … Market economy or centralized economy may find living space within

it . . . From this perspective, one may refer to the neutrality of our Constitution') (unofficial translation); Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), at para. 8 ('the [ICESCR] is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laisser-faire economy, or upon any other particular approach').

71. John H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge, MA, 1980, p. 103.
72. Dotan, 'Supreme Court as Protector', pp. 85–87.
73. ibid., p. 84.
74. ibid., p. 84
75. Gavison, 'On the Relations Between Rights', p. 29.
76. Basic Law: Human Dignity and Liberty, art. 7.
77. Basic Law: Human Dignity and Liberty, art. 3.
78. H.C.J. 5100/94 *Public Committee against Torture v. Government of Israel*, 53(4) P.D. 817.
79. See Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy', *Harv. L. Rev.*, Vol. 116 (2002), pp. 16, 44–45 ('Most central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole'); Margaret J. Radin, *Reinterpreting Property*, Chicago, 1993.
80. John Rawls, 'Distributive Justice: Some Addenda', in Samuel Freedman (ed.), *Collected Papers*, London, 1999, pp. 154, 166.
81. Mundlak, 'Socio-Economic Rights in the New Constitutional Discourse', p. 100.
82. See Daphne Barak-Erez, 'Dunam Po Ve-Dunam Sham: Minhal Mekarke'ei Yisrael Be-Zvat Ha-Interesim' (A Dunam Here and a Dunam There: Israel's Land Administration Caught between Interests), *Iyunei Mishpat*, Vol. 21 (1998), pp. 613, 617–620; Barak Medina, 'Hovata Shel Hamdina Lesapek Zrahim Bsisi'yim: Mi-Siah Shel Zchuyot Le-Teoria Shel Mimun Ziburi' (The State's Duties to Provide Basic Needs: From a 'Discourse of Rights' to a 'Public Finance Theory'), in Rabin and Shany, *Rights in Israel*, pp. 131, 144–146. However, it has been argued that conflicts between competing interest groups may introduce sufficient checks and balances. Einer R. Elhauge, 'Does Interest Group Theory Justify More Intrusive Judicial Review?' *Yale L. Rev.* Vol. 101 (1991), p. 31.
83. ICESCR, art. 2(1) ('Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'); Committee on Economic, Social and Cultural Rights, General Comment 9, The domestic application of the Covenant, (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), at para. 10.
84. Mundlak, 'Socio-Economic Rights in the New Constitutional Discourse', p. 91 ff.
85. H.C.J. 240/98, *Adalah—The Legal Centre for the Rights of the Arab Minority in Israel v. Minister of Religious Affairs*, 52(5) P.D. 167, 190 (per Cheshin, J.) ('[N]ullifying budgetary legislation and ordering the redistribution of the budget total—and this is the petition of the petitioners—might lead to a kaleidoscope-like activity: the shifting of one sand-stone results in the automatic shifting of other sand-stones and to a radical change of the total picture. . .') (unofficial translation). See also H.C.J. 3472/92, *Brand v. Minister of Communication*, 47(3) P.D. 143, 153.
86. See Waldron, *Law and Disagreement*, p. 233; Michael MacMillan, 'Social Versus Political Rights', *Canadian Journal of Political Science*, Vol. 19 (1986), pp. 283, 303; Mathew C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford, 1995, p. 15. See also Rabin, *The Right to Education*, pp. 60–64; Yuval Shany, 'Beiti Eino Mivzari: Alimut Ba-Mishpaha Ke-Sug Shel Inuy Asur Al-Pi Hamishpat Ha-BeinLeumi' (My Home is Not My Castle: Domestic Violence as a Form of Torture under International Law), *Hamishpat*, Vol. 7 (2002), pp. 151, 165–167. For a survey of Israeli case law on positive aspects of civil and political rights, see Mundlak, 'Socio-Economic Rights in the New Constitutional Discourse', pp. 94–96.

87. Jeremy Waldron, 'Liberal Rights—Two Sides of the Coin', in Jeremy Waldron, *Liberal Rights— Collected Papers*, Cambridge, 1993, pp. 339, 343 ('Reflection on the rights of the citizen also undermines the other claim about individualism—the claim that first generation rights call only for inaction, rather than collective intervention, by the state. In fact, rights to democratic participation require much more than mere omissions by the state. They require officials to approach their task in a certain spirit, and they require the establishment of political structures to provide a place for popular participation and to give effect to people's wishes, expressed by voting and other forms of pressure … Even with regard to those first generation rights which are not participatory, it is seldom merely *inaction* that is called for. As I argued … we set governments up according to traditional liberal theory, not only to *respect* our rights (what would be the point of that?), but to protect, uphold, and vindicate them. That involves positive collective action, action which makes use of scarce manpower and resources. It involves the operation of police force, law courts, and so on, which are certainly not inconsiderable expenditures on the part of the state and of society collectively'). See also ibid., p. 344.
88. Mundlak, 'Socio-Economic Rights in the New Constitutional Discourse', p. 99.
89. Medina, 'The State's Duties to Provide Basic Needs', p. 133.
90. See e.g., Basic Law: Freedom of Occupation; H.C.J. 4363/00 *Upper Puria Committee v. Minister of Education*, 56(4) P.D. 203.
91. Shany, 'My Home is Not My Castle'.
92. Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (22nd session, 2000), U.N. Doc. E/C.12/2000/4 (2000), at para. 35.
93. Equal Opportunities in Employment Law, 1988; Prohibition of Discrimination in Products, Services and Entry to Entertainment and Public Places, 2000.
94. Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), at para. 10 (establishing a 'minimum core' which states must comply with, in almost all circumstances).
95. H.C.J. 4905/98, *Gamzu*; H.C.J. 4128/02, *Adam*, *Teva Va-Din*; H.C.J. 366/03, *Association for Commitment to Peace*.
96. Aharon Barak, 'Hakdama' (Introduction), in Rabin and Shany, *Rights in Israel*, pp. 5, 8.
97. See Medina, 'The State's Duties to Provide Basic Needs', pp. 154–157.
98. C.A. 6281/93 *Bank Hamizrachi Hameuhad Ltd. v. Migdal Cooperative Village*, 49(4) P.D. 221, 331 (per Shamgar, C.J.) ('the court does not nullify economic or other legislation because it deems it unwise or if its contours seem to entail in the eyes of the court undesirable economic implications. The court examines the constitutional aspect, i.e., the human rights aspect … I support the position of the German Constitution interpreters, according to which no intervention is warranted unless the approach taken is clearly and obviously erroneous, so that it may not be considered a reasonable basis for legislative action'); H.C.J. 389/80 *Dapei Zahav Ltd. v. Israel Broadcasting Authority*, 35(1) P.D. 425, 443; *Handyside v. UK*, 1976 Eur. Ct. H.R. (Ser. A), No. 24.
99. H.C.J. 987/94, *Euronet Golden Line (1992) Ltd. v. Minister of Communication*, 48(5) P.D. 412; 5042/96, *Cohen v. Israel Land Administration*, 53(1) P.D. 743. See also Yoav Dotan, 'Shnei Musagim Shel Svirut' (Two Reasonableness Concepts), *Sefer Shamgar: Ma'amarim (Liber Amicorum Shamgar: Articles)*, Vol. 1, Tel Aviv, 2003, p. 417. It remains to be seen whether in the future courts would assert their authority to also supervise the legislative decision-making process, e.g. whether the Knesset accorded due consideration to legislation compromising constitutionally protected social rights. Cf. H.C.J. 3106/04, *Association for Civil Rights in Israel v. The Knesset* (not yet published) (identifying serious deficiencies in budgetary legislation, though refusing to nullify the legislation).
100. Dan T. Coenen, 'A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue', *Wm. and Mary L. Rev.*, Vol. 42 (2001). 1575.
101. Cf. H.C.J. 3267/97, *Rubinstein v. Minister of Defence*, 52(5) P.D. 481 (court referred to the Knesset the decision on the legality of the exemption given to ultra-orthodox youth from military service). In H.C.J. 161/94, *Attari v. State of Israel*, 94(1) *Takdin-Supreme* 1283, the court recommends that the Minister of Health regulate by way of regulations or the introduction of legislation legal limits on trade in body organs.

102. H.C.J. 3239/02, *Mar'ab v. IDF Judea and Samaria Commander*, 57(2) P.D. 349 (published) (delaying for six months the entry into force of a decision annulling a military ordinance). Cf. *Baker v. Vermont*, 774 A.2d 864, 889.
103. See declarations of incompatibility under Human Rights Act, 1998.
104. The original 'Brandeis Brief' was submitted in 1908 to the US Supreme Court and surveyed the social implications of minimum-hours legislation governing women's work. *Muller v. Oregon*, 208 U.S. 412 (1908). For discussion, see e.g. Mundlak, 'Socio-Economic Rights in the New Constitutional Discourse', pp. 100–101.
105. H.C.J. 366/03, *Association for Commitment to Peace and Social Justice v. Minister of Finance*, interim decision of 5 January 2004 (not yet published) (ordering the state to specify dignified subsistence standards). The interim order was revoked on 16 March 2004 and replaced by a general order instructing the state to provide a detailed response to the petition against welfare benefit cuts.