THE ISRAELI UNFINISHED CONSTITUTIONAL REVOLUTION: HAS THE TIME COME FOR PROTECTING ECONOMIC AND SOCIAL RIGHTS?

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Abstract

This article addresses the constitutional discourse surrounding the status of economic and social rights in Israel. It examines the principal interpretive strategies adopted by the Supreme Court with regard to the 1992 basic laws (in particular, with respect to the right to human dignity) and criticizes the Court's reluctance to apply analogous strategies to incorporate economic and social rights into Israeli constitutional law. Potential explanations for this biased approach are also critically discussed. The ensuing outcome is a constitutional imbalance in Israeli law, which perpetuates the unjustified view that economic and social rights are inherently inferior to their civil and political counterparts, and puts in question Israel's compliance with its obligations under the International Covenant of Economic, Social and Cultural Rights. At the same time, encouraging recent Supreme Court decisions, particularly the *YATED* and *Marciano* judgments, indicate growing acceptance on the part of the Court of the role of economic and social rights in Israeli constitutional law, and raise hopes for a belated judicial change of heart concerning the need to protect at least a 'hard core' of economic and social rights. Still, the article

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The authors would like to thank Prof. Daphna Barak-Erez, Dr. Ilias Bantekas and Dr. Barak Medina for their comments on earlier versions of this paper.

posits that the possibilities of promoting the constitutional status of economic and social rights through case-to-case litigation are limited and calls for the renewal of the legislation procedures of draft Basic Law: Social Rights in the Knesset.

I. *Introduction: "Economic and Social Rights as Constitutional Rights"*

One of the major achievements of international law in the last century has been the development of an extensive bill of human rights, enunciated in international treaties[1] and declarations,[2] and implemented through the decisions of international courts and tribunals.[3] Unlike many

1 Among the most important of these treaties are the International Covenant on Civil and Political Rights, 16 Dec. 1966, UN GA Res 2200 A (XXI), GAOR, 21st Sess, Supp. No. 16 (A/6316) 52, UN Doc A/CONF. 32/4 (Hereinafter: "ICCPR"); the International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, GA Res 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3 (Hereinafter: "ICESCR"); the International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, GA Res 2106A (XX), UN GAOR, 12th Sess, Supp. No. 14 (A/6014) 47, UN Doc A/CONF. 32/4; the Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, GA Res 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc A/34/46; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, GA Res 39/46. 39 UN GAOR Supp. (No. 51), UN Doc A/39/51, at 197 (1984), 23 I.L.M. (1984) 1027 ; the Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc A/44/49 (1989)(Hereinafter: "CRC"); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec. 1990, GA Res 45/158, annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc A/45/49 (1990); the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222 (Hereinafter: "ECHR"); the American Convention on Human Rights, 27 Nov. 1969, 1144 UNTS 123; the European Social Charter, 18 Oct. 1961. ETS 35; and the African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM (1982) 58.

2 See eg, Universal Declaration of Human Rights, 10 Dec. 1948, GA Res 217A (III), UN Doc A/810 at 71 (1948) (Hereinafter: "UDHR"); Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14–25 June 1993, UN Doc A/CONF.157/24 (Part I) at 20 (1993),

3 The two most active international human rights courts are the European Court of Human Rights and the Inter-American Court of Human Rights. However, quasi-judicial procedures also operate under the auspices of the UN Human Rights Committee, the

comparable domestic constitutions, which were primarily designed to protect individuals from arbitrary governmental encroachment upon their civil and political liberties and contained negative right formulations,[4] the Universal Declaration on Human Rights, the quintessential instrument of the international human rights movement, adopted a more comprehensive approach towards human rights protection. The 1948 Declaration included beside a list of civil and political rights a number of economic and social rights (ESR), which were formulated as positive State obligations requiring affirmative duties of action.[5] The espousal of ESR by widely ratified international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on Elimination of Discrimination against Women and the Convention on the Rights of the Child (CRC), further stress the importance that members of the international community attribute to the promotion of such rights.

These developments at the international level had considerable impact upon the constitutional discourse within numerous national legal systems. Such interaction is of exceptional importance since many existing constitutions fail to grant ESR full constitutional protections. For example,

UN Committee against Torture, the UN Committee on the Elimination of Racial Discrimination, the UN Committee on the Elimination of Discrimination against Women, the Inter-American Commission on Human Rights, the African Commission on Human Rights and the European Committee on Social Rights.

4 An obvious example is the United States Bill of Rights (adopted in 1791 as a series of Constitutional Amendments), which contains mostly negative provisions: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances' (US Const., 1st Amendment); 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …' (*Ibid.,* 4th Amendment.); No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (*Ibid.,* 14th Amendment.).

5 UDHR, article 22–27. These rights include the right to social security (article 22), the right to work and to just and favourable work conditions (article 23–24), the right to an adequate standard of living (article 25), the right to health (article 25), the right to education (article 26) and the right to participate in cultural life and to enjoy the benefits of scientific progress (article 27).

some constitutions lack explicit reference to many ESR (e.g., the U.S. Constitution and the Canadian Charter of Rights and Freedoms); some contain a loose declarative commitments to social goals (e.g., the Irish Constitution[6] and the Indian Constitution[7]); and others merely declare the existence of a 'social state' (e.g., German Constitution[8]). As a result, questions have been raised with increasing frequency, concerning the adequacy of existing constitutional norms and the desirability and feasibility of reforming constitutional law so to incorporate within it the effective protection of ESR.[9] In response, different reforms have been suggested, in various legal, academic and political circles, ranging from calls for constitutional amendments to proposals for a reinvigorated judicial approach to the interpretation of existing constitutional provisions in a manner that will encompass ESR.[10] This new discourse seems to have actually encouraged some legislators and judges to improve the protection of ESR at both the domestic and international level.[11]

6 Constitution of Ireland, article 45.

7 Indian Constitution, article 39. For discussion of the role of social rights in the India order, see Granville Austin *Working a Democratic Constitution – The Indian Experience* (New Delhi, OUP, 1999); Vijayashri. Sripati, "Towards Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead" (1998) 14 *Am. U. Int'l L. Rev.* 413, 420–423; J. Cooper "Poverty and Constitutional Justice; The Indian Experience" (1993) 44 *Mercer L. Rev.* 611, 612.

8 German Basic Law, article 20. 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" (1999) 47 *Am. J. Comp. L.* 303.

9 See e.g. Herman Schwartz, "Recent Development: Do Economic and Social Rights Belong in Constitutions" 10 *Am U.J. Int' L & Pol'y* (1995) 1233; Frank E.L. Deale, "The Unhappy History of Economic Rights in the United States and Prospects for their Creation and Renewal" (2000)43 *How. L.J.* 281; Cass R. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?" *Chicago Public Law and Legal Theory Working Paper* (2003) 36.[http://www.law.uchicago.edu/academics/publiclaw/resources/36.crs.constitution.pdf]

10 See e.g. Jeanne M. Woods, "Justiciable Social Rights as a Critique of the Liberal Paradigm" (2003) 38 *Tex Int'l L.J.* 763; Sandra Liebenberg, "The Protection of Economic and Social Rights in Domestic Legal Systems" in Asbjirn Eide, Catarina Krause and Allan Rosas, eds. *Economic, Social and Cultural Rights: A Textbook* (Dordrecht, Martinus Nijhoff, 2nd ed, 2001) 55.

11 For a survey of domestic developments, see Liebenberg, *ibid*. For a discussion of international developments, see Martin Scheinin, "Economic and Social Rights as Legal

The new constitutional discourse regarding the constitutional status of ESR has been particularly powerful in the context of new constitution-making processes. Political developments which took place in recent years have inspired several countries to draft new constitutions,[12] a development which facilitated societal debates concerning the proper role of ESR in the new constitutional order.[13] Indeed, the incorporation of social rights into the 1996 South African Constitution,[14] and the impressive case law of the South African Constitutional Court in implementing these rights,[15] aptly demonstrates the potential to enhance the realization of ESR through the vehicle of a new constitution.

This article addresses the constitutional discourse surrounding the status of ESR in Israel. The fluid nature of the newly-created Israeli constitutional order, the ongoing nature of the constitution-writing project and the deteriorating social conditions in Israel in recent years amplify the centrality of the discourse in Israeli constitutional law. Actually, discussions on social rights are prevalent these very days in litigation

Rights" in Asbjrn Eide, Catarina Krause and Allan Rosas, eds. *Economic, Social and Cultural Rights: A Textbook* (Dordrecht, Martinus Nijhoff, 2nd ed, 2001) 29.

12 New constitutions have been adopted in recent years in former Communist-bloc East European countries, in former Republics of the Soviet Union, in the States comprising the former Federal Republic of Yugoslavia, in South Africa and in a number of new states (eg, Eritrea, East Timor). In 2004, an interin constitution was adopted om Iraq. For the debate over including social rights in new Eastern European Constitutions see Vicki C. Jackson and Mark Tushent, *Comparative Constitutional Law* (New York, Foundation Press, 1999) 1436, 1452; Jean-Marie Henckaerts and Stefaan Van der Jeught, "Human Rights Protection Under the Constitutions of Central Europe" (1998) 20 *Loy. LA. Int'l & Comp. L. Rev* 475, 491–496; Ryszard Cholewinski, "The Protection of Human Rights in the New Polish Constitution" (1998) 22 *Fordham Int'l L.J.* 236, 269.

13 See e.g. Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992)141 *U. Pa. L. Rev.* 1.

14 Constitution of the Republic of South Africa, articles 23–30. See discussion in Piet De Vos, "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution" (1997) 13 *South Africa Journal of Human Rights* 67; Albie Sachs, "The Creation of South Africa's Constitution" 41 *N.Y.L. Sch. L. Rev.* (1997) 669.

15 See eg, *Soobramoney v. Minister of Health*, 1997 (12) BCLR 1696 (CC); *South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC); *Minister of Health v. Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC).

before Israeli courts, in the Knesset (the Parliament), in the academia, in the press and in other public fora. Still, the contours of the Israeli debate conform to parallel constitutional discussions conducted elsewhere: An incomplete constitutional text, lacking reference to ESR; a judiciary torn between conservatism and acknowledgement of the need for social reform; legal scepticism regarding the justiciability of the positive components of ESR[16] and the utility of constitutional protection of ESR; and political and academic bickering on the economic repercussions of recognizing ESR. As a result, we are of the view that one can use interesting universal insights to inform the Israeli debate and draw universally-relevant conclusions from the Israeli experience. In particular, there is considerable comparative value in recent developments indicating greater receptiveness on the part of the Israeli legal system to the idea of the judicial enforceability of ESR and increased willingness to issue specific remedies in response to violations of ESR by the State. It should be noted however that the historical development of Israeli Constitutional Law comprise some idiosyncratic features which must be taken into consideration when drawing analogies from the Israeli example (e.g., a piecemeal constitution-making process and a socialist founding ethos that led to taking ESR for granted).[17]

Before examining the protection of ESR within the Israeli legal system, we wish to clarify at the outset a key term used throughout the article – ESR. There have been many attempts to define economic and social rights, and to distinguish them from civil and political rights, and from group rights (or third generation rights).[18] While the existing definitions contain

16 For recent discussion of the subject, see e.g. Frank I. Michelman, "The Constitution, Social Rights and Liberal Political Justification" (2003) 1 *Int'l J. Const. L.* 13.

17 For comparison between the status of ESR in Israel and South Africa, see Aeyal Gross, "The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel" (2004) 40 *Stan. J. Int'l L.* 47.

18 Several attempts have made to define what constitute ESR. One approach views ESR as predominantly protected via positive rights, compared to the predominantly negative nature of civil rights. See e.g. Asbjrn Eide and Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Asbjrn Eide, Catarina Krause and Allan Rosas, eds. *Economic, Social and Cultural Rights: A Textbook* (Dordrecht, Martinus Nijhoff, 2nd ed, 2001) 3, 5. Another approach highlights the historical context of the emergence of ESR, and accordingly divides human rights into temporal generations (ESR constituting a

useful guidelines, no authoritative formula has so far emerged (perhaps reflecting the impossibility of the task of distinguishing between ESR and civil and political rights).[19] Since the task of defining and deconstructing ESR exceeds the scope of this paper, we will use a flexible characterization, which we believe is suited to delineate the main outlines of the Israeli debate concerning the status of ESR: For our purposes then, ESR are human rights which – (a) normally require extensive governmental involvement in order to secure their full realization (recognizing, however, that ESR also have negative features);[20] (b) pertain to the attainment and development of basic human needs and capabilities;[21] (c) benefit, in particular, economically underprivileged individuals and groups; (d) have developed, by and large, in tandem with

second generation of rights). See e.g. Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: Perspective on Its Development* (Oxford, Clarendon Press, 1998) 8; Jeremy Waldron, "Liberal Rights – Two Sides of the Coin" in *Liberal Rights – Collected Papers, 1981 – 1991* (Cambridge, CUP, 1993) 1. A third approach considers ESR as rights to fundamental services and goods, underlying basic human capabilities, which are inaccessible to the economically underprivileged (often tying ESR to more comprehensive distributive justice projects). See Gunter Frankenberg, "Why Care? The Trouble with Social Rights" (1996) 17 *Cardozo L. Rev.* 1365; Burns H. Weston "Human Rights" in Richard Pierre Claude & Burns H. Weston, eds. *Human Rights in the World Community, Issues and Actions* (Philadelphia, University of Philadelphia Press, 2d ed, 1992) 14, at 9.

19 For example, it is now widely accepted that civil and political rights have dominant positive obligation components. See Alastair Mowbray, *The Development of Positive Obligations on Human Rights by the European Court of Human Rights* (Oxford, Hart, 2004).

20 There is extensive literature on the nature of the positive obligation to implement ESR. It is generally agreed that the positive duty to secure ESR can be broken down into two specific obligations: to *protect* from violation by private entities and to actively *fulfil* the rights. The latter obligation can be broken down again into a duty to directly *provide* services and to *facilitate* individual attainment of social services and resources. See e.g. Asbjrn Eide and Allan Rosas, *supra* n. 18 at 9, 23–24; Linda M. Keller, "The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?" (2003)19 *N.Y.L. Sch. J. Hum. Rts.* 557, 586–613. For the sake of completion one should note that ESR also introduce a negative obligation to *respect* the right.

21 On the theory of human capabilities as underlying human rights, see Amartya Sen, "Capability and Well-Being" in Martha C. Nussbaum and Amartya Sen, eds. *The Quality of Life* (Oxford, Clarendon Press, 1993) 30; Martha C. Nussbaum, "Capabilities and Human Rights" (1997) 66 *Fordham L. Rev.* 273.

the rise of socialism from the late 19th century onwards, as part of the modern 'welfare state' project. Since there is good correlation between rights possessing all or most of these attributes and the list of rights recognized by the ICESCR, we will use the text of the Covenant as a convenient yardstick to assess which human rights should qualify as ESR.

We now move to discuss the status of ESR under Israeli constitutional law. The discussion focuses on the *recognition* of ESR as constitutional rights and deals only cursorily with sub-constitutional implementation of ESR (via the rather extensive body of ordinary legislation and administrative action) and many concrete legal questions that ensue from endowing ESR with constitutional status – e.g., the margin of appreciation afforded to governmental agencies in implementing positive ESR, available constitutional remedies etc. These issues deserve extensive discussion in separate articles. In all events, these specific issues cannot be developed satisfactorily before the legal status of ESR in Israel is determined.

The **second section** describes, in brief, the main features of Israeli constitutional law and analyzes the principal interpretive strategies adopted by the Supreme Court with regard to the 1992 basic laws (in particular, with respect to the right to human dignity). **Part three**, of the article introduces the debate over the status of social rights in Israel in the wider context of dramatic changes in Israel constitutional law, which have taken place since the 1990s. In **the fourth section** we highlight the inadequate constitutional status of ESR in Israel. Here, we will argue that the Supreme Court's interpretative moves within the existing constitutional law framework are highly selective and reveal a hidden bias against ESR. We will also argue that the existing legal situation in Israel is incompatible with Israel's obligations under the ICESCR, to which it is a party. In the **fourth part** we examine a shift in the Supreme Court's attitude towards ESR – moving from open hostility to the idea of their incorporation into constitutional law (most notably in the *Friends of GILAT* case) to increased willingness to give effect to ESR, to endow them with some constitutional status and to consider appropriate legal remedies (most notably, in the recent *YATED* and *Marciano* cases). We evaluate this trend in the light of growing international consensus over the justiciability of ESR and their indivisibility from civil and political rights. In the **concluding part** of the article, we offer several observations

relating to the limits of promoting economic and social rights through litigation and call for the renewal of the legislation procedures of draft Basic Law: Social Rights in the Knesset.

II. *A Brief History of Israeli Constitutional Law*

A. *The Basic Laws*

When Israel was founded in 1948, after thirty years of the British Mandate, its founders assumed that a constitution and a bill of rights would be forthcoming in the near future.[22] Indeed, the Declaration on the Establishment of the State of Israel (also known as the Declaration of Independence) contained an explicit pledge to draft a written constitution. However, soon after the Declaration was proclaimed events took a different course. Internal political squabbles regarding the content of the future constitution rendered it impossible to agree upon a text which would gain broad-based support in a heterogeneous Israeli society, comprised of immigrants coming from diverse cultural backgrounds with strongly-held opposing ideologies – nationalist, socialist and religious.[23] In 1950, it became apparent that MAPAI – the ruling party at the time (an antecedent of the current Israel Labour Party) was unwilling to draft a constitution over the opposition of the religious parties, which formed part of the coalition government.[24] Consequently, the First Knesset adopted a historical compromise – the 'Harari Resolution' (named after its sponsor). This resolution stated the following:

22 For this history see in general: Daphna Barak-Erez, "From an Unwritten to a Written Constitution: the Israeli Challenge in American Perspective" (1995) 26 *Colum. Hum. Rts. L. Rev.* 309; M. Hofnung, "The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel" (1996) 44 *Am. J. Comp. L.* 585.

23 Barak-Erez, *ibid.*, at 312.

24 Hofnung, *supra* n. 22, at 588. See also: Asher Maoz, "Constitutional Law" in Itzhak Zamir and Sylviane Colombo, eds. *The Law of Israel: General Surveys* (Jerusalem, Sacher Institute, 1995) 5, at 7. There are also speculations that Prime Minister Ben-Gurion was reluctant to restrict, through the enactment of a constitution, his freedom of political manoeuvring. See Barak Cohen, "Empowering Constitutionalism with Text from an Israeli Perspective" 18 *Am. U. Int'l L. Rev.* (2003) 585, 629.

> "The first Knesset charges the Constitutional, Legislative and Judicial Committee with the duty of preparing a draft Constitution for the State. The Constitution shall be composed of individual chapters in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset as the Committee completes its work, and all the chapters together will form the State Constitution" (unofficial translation Y.R. and Y.S.).[25]

The wording of the Harari Resolution represents a political compromise which has enabled the Knesset to evade the obligation articulated in the Declaration of Independence to produce a formal constitution, while at the same time preserving its legal competence to enact one.[26] Although it was questioned in academic circles whether the First Knesset's authority to enact a constitution was validly delegated to subsequent elected Knessets,[27] in practice, the Knesset (from the Third Knesset onwards) enacted a series of eleven basic laws.[28]

The first nine Basic Laws enacted until 1992 addressed the structure of the State's political and legal system and the powers of its principal institutions. Some basic laws defined the powers of the legislative,[29] the executive,[30] the president,[31] the judiciary[32] and the State comptroller.[33] Other basic laws contained essential principles concerning the

25 5 DK 1743 (1950).

26 Hofnung, *supra* n. 22, at 588.

27 Maoz, *supra* n. 24, at 7. See also Amnon Rubinstein "Israel's Piecemeal Constitution" (1966) 16 *Scripta Hierosolymita* 201; Melville B. Nimmer, "The Uses of Judicial Review in Israel's Quest for a Constitution" (1970) 70 *Colum. L. Rev.* 1217.

28 This practical custom received a legal approval by the majority opinion in C.A. 6821/93 *Bank Hamizrachi Hameuhad Ltd. v. Migdal Cooperative Village* 49(4) P.D. 221.

29 Basic Law: the Knesset, 1958, 12 L.S.I. 85.

30 The original Basic Law: the Government, 1969, 22 L.S.I. 257, was replaced by two new Basic Laws: first in 1992 (Basic Law: the Government, S.H. 1396, 1992 and then again in 2001 (Basic Law: the Government, 2001, S.H. 1780.

31 Basic Law: the President of the State, 1964, 18 L.S.I. 111.

32 Basic Law: The Judicature, 1984, 38 L.S.I. 101.

33 Basic Law: the State Comptroller, 1988, S.H. 30.

management of State lands,[34] the State economy,[35] the armed forced[36] and the designation of Jerusalem as the national capital of Israel.[37] However, until 1992 the basic laws did not, by and large, protect human rights.[38] As a result, the pre-1992 'Israeli constitution' was described as a 'body without a soul' – an institutional and political legal framework lacking meaningful safeguarding of substantive values.[39]

This state of things changed dramatically in 1992 when the Knesset adopted two new basic laws designed to protect human rights: Basic Law: Human Dignity and Liberty[40] and Basic Law: Freedom of Occupation[41] – establishing the constitutional supremacy of several important human rights: the right to life, the right to body 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. Most significantly, both basic laws included 'entrenchment clauses' (or supremacy clauses) – i.e., specific language prohibiting infringement upon these protected rights, including by way of legislation, unless it meets four basic conditions (contained in 'limitation clauses'): (1) it is prescribed by law, (2) it is compatible with Israel's basic values as a Jewish and democratic State, (3) it promotes a worthy purpose;

34 Basic Law: Israeli Land, 1960, 14 L.S.I. 48.

35 Basic Law: State Economy, 1975, 29 L.S.I. 273.

36 Basic Law: The Armed Forces, 1976, 30 L.S.I. 150.

37 Basic Law: Jerusalem, the Capital of Israel, 1980, 34 L.S.I. 209.

38 An exception could be found in article 4 of the Basic Law: the Knesset, which pronounce, among other things, the right to equality in voting to the Knesset. This article contain 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 has recognized the validity of this entrenchment clause and invalidated legislation conflicting with the entrenchment provision since it was not been adopted by the requisite majority. See H.C.J. 98/69 *Bergman v. Minister of Finance* 23 P.D. 639, translated and abridged in (1969) 4 *Is. L.R.* 577.

39 Barak-Erez, *supra* note 22, at 315 ('The constitutional project could not be completed without an agreement on the heart of every modern constitution: a definition of individual rights and the form of their protection').

40 Printed in (1997) 31 *Is. L.R.* 21–25.

41 Basic Law: Freedom of Occupation, 1992, S.H. 1454, 114. This Basic Law was replaced in 1994 by Basic Law: Freedom of Occupation, 1994, S.H. 1454, 90. The full text of this Law is also reprinted in (1997) 31 *Is. L.R.* 21–25.

(4) and it does not introduce excessive restrictions.[42] Hence, the effect of these basic laws has been to subject subsequent Knesset legislation to their provisions (Basic Law: Freedom of Occupation even subjected antecedent legislation to its provisions).[43]

B. *The Israeli Constitutional Revolution of the 1990s*

The enactment of the 1992 basic laws underlies the claim that Israeli has undergone a 'constitutional revolution', transforming it from a parliament-supremacy type democracy (similar to the UK) to a constitutional democracy (like most other Western democracies) where human rights serve as powerful 'trumps'.[44] Indeed, the President of the Israeli Supreme Court, Aharon Barak, a main proponent of the 'constitutional revolution' theory,[45] has argued that the cumulative effect of these provisions had provided the State of Israel with a *de facto* constitution, albeit of a limited

42 Basic Law: Human Dignity, article 8; Basic Law: Freedom of Occupation, article 4. This language was clearly inspired from comparative constitutional law and international law. See eg, Canadian Charter of Rights and Freedoms, Constitution Act, 1982, article 1; ICCPR, article 12, 18–19, 21–22; ECHR, article 10–11. It may be noted that Basic Law: Freedom of Occupation also contains in article 7 a "procedural entrenchment clause", which requires absolute majority in the Knesset in order to amend the Basic Law. While it is not completely clear what Parliamentary majority is needed to amend other basic laws, the dominant view is that any majority will suffice. Hofnung, *supra* n. 22, at 594, 598.

43 David Kretzmer, "Israel's Basic Laws on Human Rights" in Alfredo Rabello, ed. *Israeli Reports to the XV International Congress of Comparative Law* (Jerusalem, Sacher Institute, 1999) 293, at 302 ff. Article 10 of the Basic Law: Freedom of Occupation did however provide that review of antecedent legislation would only be possible 10 years after its entry into force. This period had expired on 14 March 2002.

44 Ronald Dworkin, "Rights as Trumps" in Jeremy Waldron, ed. *Theories of Rights* (Oxford, OUP, 1984) 153–167; Ruth Gavison, "On the Relationships between Civil and Political Rights and Social and Economic Rights" in Jean-Marc Coicaud, Michael W. Doyle and Anne-Marie Gardner, eds. *The Globalization of Human Rights* (New York, New York University Press, 2003) 23.

45 In fact, the term 'constitutional revolution' had been coined by Professor Aharon Barak – then a Justice of the Israeli Supreme Court and now its President of the Supreme Court – in an article published in 1992. Aharon Barak, "The Constitutional Revolution: Protecting Human Rights" (1992) 1 *Mishpat U-Mimshal* 9 [in Hebrew]. Barak has used the same term in the landmark *Bank Hamizrachi* case, in which the Court formally accepted the normative supremacy of Basic Laws over ordinary legislation. CA 6821/93

scope, encompassing the power of judicial review over primary legislation.[46]

While criticism has been levelled against Barak's ideas and the use of the term 'constitutional revolution' – citing both substantive and tactical concerns[47] – the Supreme Court accepted in 1995 Barak's approach (in the majority opinion of the *Bank Hamizarachi* case). Acting thereupon, the Court moved since 1997 to strike down three statutory provisions perceived to conflict with constitutionally protected human rights:[48] a provision mandating practicing investment consultants to take a new licensing exam;[49] a military law provision authorizing the 96-hour detention without judicial review of soldiers suspected of committing felonies;[50] and the grant of a broadcasting license to a number of pirate radio stations – adversely affecting thereby the commercial interests of pre-existing licensees.[51]

Bank Hamizrachi, *supra* n. 28, at 352–355. For an English version of President Barak's opinion in this case see Aharon Barak, "C.A. 6821/93 Bank Hamizrachi Hameuhad Ltd. v. Migdal" in Antonio Gambaro and Alfredo Rabello, eds. *Towards a New European Ius Commune* (Jerusalem, Sacher Institute, 1999) 381.

46 See Aharon Barak, "The Constitutionalization of the Israeli Legal System as Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law" (1997) 31 *Is. L.R.* 3 ("We became a constitutional democracy. We joined the democratic, enlightened nations in which human rights are awarded a constitutional force, above the regular statutes… We have the central chapter in any written constitution, the subject-matter of which is Human Rights; we have restrictions on the legislative power of the legislator; we have judicial review of statutes which unlawfully infringe upon constitutionally protected human rights; we have a written constitution, to which the Knesset in its capacity as legislator is subject and which cannot alter").

47 See eg, C.A. 6821/93*, supra* n. 28, at 567 (Heshin, J. dissenting). For summary of President Barak's opinion and major opponent commentators views see Ruth Gavison, "A Constitutional Revolution?" in Antonio Gambaro and Alfredo Rabello, eds. *Towards a New European Ius Commune* (Jerusalem, Sacher Institute, 1999) 517.

48 There have also been several lower court decisions, which invalidated primary legislation. See e.g. Cr.C. (Tel Aviv) 4696/01 *State of Israel v. Handelmann,* judgment of 14 April 2003 (First Instance Court) (not yet published) (invalidating a broad law prohibiting tax consultancy services by non-registered consultants); C.C. (Tel-Aviv) 2252/91 *Commercial Credit Services (Israel) Ltd. v. Givat Yoav – Workers Cooperative Village Ovdim* 54(3) PM 243 (Court of Appeals invalidating private debt-relief legislation; the decision was reversed in *Bank Hamizarachi*).

49 H.C.J. 1715/97 *Israeli Investment Managers Bureau v. Minister of Finance* 51(5) P.D. 367.

50 H.C.J. 6055/95, *Tsemach v. Minister of Defense* 53(5) P.D. 241.

51 H.C.J. 1030/99 *Oron v. Chairman of Knesset* 56(3) P.D. 640.

In the light of these developments, it is now well-established in Israeli law that the enactment of basic laws serves as a substitute for the conclusion of a formal constitution and the practice of judicial review is now a legal, as well as a political reality[52]. Indeed, basic laws have often been described as a 'piecemeal constitution'[53] and the eleven basic laws that had been passed until 1992 cover many subjects which are traditionally found in national constitutions (although they provide for only very limited judicial review).[54]

However, since 1992 the process of creating a constitution through the enactment of basic laws has come to a halt. While numerous basic law bills had been introduced to the legislative process by the government and by private members of Knesset (MKs), none of them had been adopted.[55] In part, 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.[56]

The immediate 'victims' of the growing opposition to the 'constitutional revolution' have been three government-sponsored draft basic law bills that had been first introduced to the Knesset in 1993 – Basic Law: Rights

52 See Gary Jeffrey Jacobsohn, "After the Revolution" (2000) 34 *Is. L.R.* 139, 140.

53 See Ran Hirschl. "Israel's Constitutional Revolution: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order" (1998) 46 *Am. J. Comp. L.* 427, 430.

54 For discussion of the eleven basic laws, see *supra* at part II A.

55 For discussion of this drafts, see *infra* at part III A.

56 In 1993, several months after the passing of the Basic Laws, the Supreme Court stroked down Ministry regulations limiting the importation of non-Kosher meat products into Israel, as they infringed freedom of occupation. H.C.J. 3872/93 *Meatrael v. Prime Minister* 47(5) P.D. 485. The activist approach taken by the Court towards the protection of human rights, at the expense of religious edicts, spurred a prominent member of the Shas religious party, MK Shlomo Benizri, to proclaim that his party would even object to the enactment of the Ten Commandments as basic law, since the interpretation that the secular courts might give to them will render them unacceptable to his constituency. Lilly Galili, "Benizri: We Will Also Oppose the Ten Commandments as Basic Laws" *Ha'aretz Online,* 3 July 1997 [in Hebrew]. The intense criticism directed against the *Meatrael* judgment led to the amendment of the Basic Law: Freedom of Occupation and the introduction of an 'overriding clause' permitting derogation from the Basic Law by way of explicit legislation backed by an absolute majority of Knesset members (61 out of 120 members of Knesset).

in the Judicial Process; Basic Law: Freedom of Expression and Association; and, most significant to our present topic – Basic Law: Social Rights[57]. All three draft bills have encountered strong political opposition and while, technically they are still 'on the table' of the legislator, their prospects of passage in Knesset anytime in the near future are unclear. In any event, the momentum for completing the constitutional project, which existed in the early 1990s, has been lost.

The ensuing state of affairs is that Israeli constitutional law offers constitutional protection to a limited number of rights. While some basic civil and political rights are protected (though, some important rights, such as the right to equality have not been explicitly protected by the basic laws), ESR generally do not enjoy similar protection. This is not only unfortunate in terms of the need to protect the latter of group of rights – especially in light of the deteriorating economic and social conditions in Israel.[58] It also establishes, as will be discussed below, a problematic equilibrium between privileged civil and political rights and unprivileged ESR: whenever rights, such as the right to property (which is a protected constitutional right), clash with ESR, such as the right to equitable wage, the latter rights tend to yield. In this respect, the post-1992 status of ESR in Israel is worse than it had been before the enactment of the 1992 Basic Laws, when all human rights roughly enjoyed the same degree of protection.[59]

57 Draft Basic Law: Social Rights, 1994, S.H. 2253, 326.

58 According to Israel's Central Bureau of Statistics, Israel's GDP fell in 2001 by 0.6%, exports fell by 11% and imports by 4.4%. [http://www.cbs.gov.il/israel_in_figures/indict1e_mar02.htm]. Simultaneously, unemployment has soared to 10.7% (almost double than the average unemployment rate of the mid-1990s); Yaacov Fisher, "Worse than it Looks" *Jerusalem Post Online,* 28 Nov. 1998 [http://pqasb.pqarchiver.com/jpost/abstract/471727041.html?]. According to an official National Insurance report, 21.1% of Israeli population now lives below poverty line. National Insurance Institute, *Dimensions of Poverty and Inequality in Economic Income Allocation* (Jerusalem, 2003) [http://www.btl.gov.il/pdf/oni2002.pdf] [in Hebrew].

59 Ruth Ben-Israel, "Labour Law" *Israel Yearbook of Law* (1992–1993) 433 [in Hebrew]; Aeyal Gross "The Israeli Constitution: A Tool for Distributive Justice, or A Tool Which Prevents It?" in Menachem Mautner, ed. *Distributive Justice in Israel* (Tel Aviv, Ramot, 2000) 79–96 [in Hebrew]; Yoram Rabin and Yuval Shany, eds. *Economic, Social and Cultural Rights in Israel* (Tel-Aviv, Ramot, 2004) [in Hebrew].

The failure of the Knesset to remedy this legal situation and to pass the remaining draft basic law bills, has led to increasing pressures by activists and academics on the courts – especially on the Supreme Court – to incorporate ESR into Israeli constitutional law by method of legal interpretation and through the development of judge-made law.

C. *The Interpretation of the New Constitutional Rights*

Once the Supreme Court affirmed in *Bank Hamizrachi* the position of President Barak regarding the implications of the 1992 basic laws, the constitutional discourse within Israel turned to focus on the interpretation of the two new basic laws. If basic laws endow protected human rights with supreme legal status, then the question of the precise scope of the rights protected by them becomes crucial. The shortness of the explicitly enumerated catalogue of rights and the open ended language of some human rights articulated in the basic laws – most notably, the right to human dignity[60] and the right to human liberty, generated significant pressures upon the Supreme Court to expand, by way of interpretation, the list of protected rights.

Influenced no doubt by President Barak's seminal volume on constitutional interpretation,[61] the majority of judges in the Court seem to have embraced the view that the explicitly enumerated human rights can be construed to implicitly protect other human rights, which are sufficiently related to them in substance and purpose. Such rights may include the right to equality,[62] freedom of speech,[63] freedom of

60 Kretzmer, *supra* note 43, at 300–302.

61 Aharon Barak, *Interpretation in the Law*, Volume III, *Constitutional Interpretation* (Jerusalem: Nevo, 1994) 411–433. Barak's treatise on constitutional interpretation is part of a six volume treatise on interpretation also including volumes on interpretation theories, statutory interpretation, contract interpretation, testament interpretation and particular interpretive problems.

62 H.C.J. 453/94 *Israel Women's Network v. Government of Israel* 48(5) P.D. 501 (Opinion of Maza, J.). For an English version, see H.C.J. 453/94 *Israel Women's Network v. Government of Israel* (1992–94) *Is. L.R.* 425; H.C.J. 4541/94 *Miller v. the Minister of Security* 49(4) P.D. 94 (Opinion of Dorner, J.).

63 H.C.J. 2481/93 *Dayan v. Vilk* 48(2) P.D. 456. For an English version, see H.C.J. 2481/93, *Dayan v. Vilk* (1992–94) *Is. L.R.* 324.

religion,[64] (including freedom from religion),[65] and freedom of contracts[66]. Some controversy regarding the precise scope of protection still remains,[67] since the Supreme Court has never actually invalidated Knesset legislation conflicting with one of the non-enumerated rights.[68] However, it is remarkable that even judges embracing a creative approach towards developing the catalogue of basic law rights have largely excluded ESR from this process. One single exception that will be discussed below is the right to minimum standard of living, which has been proclaimed by some Supreme Court Justices.[69]

D. *A Judicial Bill of Rights*

It is important to note that basic laws represent only one part of Israel's constitutional scheme and that notable jurisprudence concerning human rights protection was generated by Supreme Court even *before* 1992. In fact, promotion of human rights by Supreme Court judgments[70] could be viewed as a reaction on the part of the Court to the prolonged inaction on the part of the Knesset's in promoting human rights through enacting basic laws.[71]

64 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; Barak, *supra* note 61, at 430.

65 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.

66 C.A. 239/92 *Egged – Israel Transportation Cooperative Union Ltd. v. Mashiah,* 48(2) P.D. 66, 72; Gabriela Shalev, *The Law of Contract* (Jerusalem, Din, 2nd ed, 1995) 25 [in Hebrew].

67 See H.C.J. 453/94, *supra* n. 62 (Opinion of Zamir, J.); Gavison, *supra* n. 47, at 519; Hillel Sommer, "The Enumerated Rights: On the Scope of the Constitutional Revolution" (1997) 28 *Mishpatim* 257 [in Hebrew].

68 See H.C.J. 1715/97, *supra* n. 49; H.C.J. 6055/95, *supra* n. 50, H.C.J. 1030/99, *supra* n. 51.

69 See *infra*, at Part III B.

70 Supreme Court judgments constitute binding precedents under the Israeli legal system. See Basic Law: The Judicature, article 20 ("Precedent issued by the Supreme Court is binding upon all instances except upon the Supreme Court").

71 See Cohen, *supra* n. 24, at 636–642; Stephen Goldstein, "Protection of Human Rights by Judges: The Israeli Experience" (1994) 38 St. Louis U. L.J. 605, at 605. ("In Israeli law, human rights have been protected almost exclusively by judge-made law. Indeed, almost uniquely in the world, Israeli courts have fashioned the law of human rights out of whole cloth").

In its pre-1992 case law, the Supreme Court recognized and enforced several important human rights such as the right to personal liberty;[72] freedom of occupation;[73] freedom of speech;[74] freedom of religion and conscience;[75] the right to equality;[76] and certain procedural due process rights (normally referred to in Israeli jurisprudence as 'rules of natural justice').[77] These judge-made rights have sometimes been referred to as 'the Israeli judicial bill of rights'[78] or 'fundamental principles of the Israeli legal system'.[79] Having no constitutional text to unequivocally rely upon, the Court supported its findings that such rights exist under the Israeli legal system through reference to principles derived from the democratic nature of the State, from its 'national spirit' and from the 'social consensus', all reflected in the State's Declaration of Independence[80] and in the history of Israel and the Jewish people.[81] In reality, it may be asserted that these judge-made human rights had been largely derived from natural law.

72 H.C.J. 7/48 *Al-Karbutli v. Minister of Defense* 2 P.D. 5.

73 H.C.J. 1/49 *Bejerano v. Minister of Police* 2 P.D. 80.

74 H.C.J. 73/53 *Kol Ha'am v. Minister of Interior* 7 P.D. 871. For an English version, see 1 *Selected Judgments of the State of Israel* (1953) 90

75 H.C.J. 262/62 *Peretz v. Local Council of Kfar Shmaryahu* 16 P.D. 2101. For an English version, see 4 *Selected Judgments of the State of Israel* (1962) 191.

76 *Ibid*., and see also H.C.J. 509/80 *Younes v. Director General of the Office of the Prime Minister* 35(3) P.D. 589.

77 H.C.J. 3/58 *Berman v. Minister of the Interior* 12 P.D. 1493. For an English version, see 3 *Selected Judgments of the State of Israel* (1958) 29.

78 Neta Ziv, "Combining Professionalism, Nation Building and Public Service: The Professional Project of the Israeli Bar 1928–2002" (2003) 71 *Fordham L. Rev*. 1621, at 1639.

79 See e.g. 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 Censure* 42(4) P.D. 617, 627.

80 The Israeli Declaration of independence states: "The State of Israel … will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holly Places of all religions; and it will be faithful to the principles of the Charter of the United Nations".

81 Barak-Erez, *supra* n. 22, at 315–316. A landmark precedent in this context is *Kol Ha'am*. H.C.J. 73/53, *supra* n. 74, at 884 ("The system of laws under which the political institutions … have been established and function are witness to the fact that this is indeed a State founded on democracy. Moreover, the matters set forth in the declaration of Independence

The implications of recognizing human rights as part of the Israeli judicial bill of rights were twofold: (a) statutory interpretation – an interpretive presumption was developed that legislation should be construed, as far as possible, as consistent with recognized human rights;[82] (b) limitation of administrative power – administrative law presumed that State officials were not authorized to violate recognized human rights, unless explicit and contrary authorizing language in Knesset legislation could be shown.[83] This last proposition also implied that secondary legislation conflicting with recognized human rights was invalid (unless there was explicit authorization in primary legislation to override human rights).

Powerful as the Israeli judicial bill of rights doctrine might be,[84] two caveats are obvious. First, the doctrine never purported to authorize the courts to invalidate Knesset legislation.[85] Hence, at best, it gave limited legal protection to human rights. Second, the catalogue of recognized rights

– especially as regards basing the State `on the foundation of freedom` and securing freedom of conscience – mean that Israel is a freedom-loving country. It is true that the Declaration `does not include any constitutional laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws` … but in so far as it `expresses the vision of the people and its faith, we are bound to pay attention to the matters set forth therein when we come to interpret and give meaning to the laws of the State").

82 See e.g. C.A. 6871/99 *Rinat v. Rom* 56(4) P.D. 72, 92; 482; V.CP. 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; Goldstein, *supra* n.71, at 610; Yoram Rabin, *The Right to Education* (Jerusalem, Nevo, 2003) 339 [in Hebrew].

83 See eg, H.C.J. 5128/94, *Federman v. Minister of Police* 48(5) P.D. 647, 652; Goldstein, *supra* n. 71, at 610; Rabin, *ibid.*, at 339.

84 In fact, an analogy could be drawn between the powers of the Israeli judiciary under the judicial bill of rights doctrine and the powers of the English judiciary under the Human Rights Act, 1998 to construe legislation and to review administrative acts. The main difference between the two systems of human rights protection is that Israeli judges are not competent to issue a declaration of incompatibility like their English counterparts. For a comparative analysis of Israeli and English systems of human rights protection, see Ariel L. Bendor and Zeev Segal, "Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model" (2002) 17 *Am. U. Int'l L. Rev.* 683.

85 However Justice Barak (as he was then) has opined in *obiter dicta* that in extreme circumstances the Court could conceivably invalidate legislation which is inconsistent with fundamental principles of the legal system. H.C.J. 142/89 *LAOR Movement v. Chairman of the Knesset* 44(3) P.D. 529, 554.

in the case law was quite limited as well. Notably it did not include any ESR (although nothing in the Israeli judicial bill of rights doctrine precluded their development). As a result, an effective possibility to compensate for the poor level of protection for ESR under the basic laws had been neglected.

III. *The Exclusion of Social Rights from the Israeli Constitutional Discourse*

The exclusion of ESR from all three avenue of constitutional evolution – enactment of basic laws, flexible interpretation of basic laws and the judicial bill of right – amount to exclusion of ESR from the official Israeli constitutional law rights discourse. Before reviewing the reasons for this state of things, it is perhaps worthwhile to note the irony of the matter: Israel was established by predominantly socialist elites. The Zionistic ideology embraced by the 'founding fathers' emphasized the centrality of the 'Jewish labourer' and supported co-operative and mutual solidarity projects such as the Kibbutzim, cooperative villages and the General Federation of Labourers. This vision led in the first decades following Israel's independence to the enactment of numerous social laws[86] introducing, *inter alia,* an impressive social security apparatus,[87] free primary and secondary education[88] and worker protection laws.[89] However, the socialist character of the State in Israel's formative years did not lead to constitutionalisation of ESR.

86 Daphna Barak-Erez, "The Israeli Welfare State: Growing Expectations and Diminishing Returns" in Eyal Benvenisti and Georg Nolte, eds. *The Welfare State, Globalization, and International Law* (Heidelberg, Springer, 2004) 103. See also Guy Mundlak, "Human Rights and the Employment Relationship: A Look Through the Prism of Juridification" in Daniel Friedmann and Daphna Barak-Erez, eds. *Human Rights in Private Law* Oxford, Hart, 2001) (discussing *inter alia* labor laws which introduce obligations to respect ESR in relations between individuals).

87 National Insurance Law, 1953, 714 S.H. 6. The current version of the law is National Insurance Law (Consolidated Version), 1995, 755 S.H. 210.

88 Compulsory Education Law, 1949, 709 S.H. 287.

89 See e.g. Work and Leisure Hours Law, 1951, 711 S.H. 204 ; Annual Leave Law, 1951, 711 S.H. 234; Women Labour Law 1954, 714 S.H. 154.

A. *The Failure to Enact Basic Law: Social Rights*

As was already mentioned the first Knesset explored the possibility of drafting a national constitution, and eventually adopted the 'Harari Resolution', which deferred the task to the future. It is notable that the Knesset Committee for Constitution, Legislation and Law (CLL Committee), in which constitutional discussions took place, was presented with a draft constitution, which was prepared by Dr. Yehuda Pinhas Cohen, at the request of the Jewish Agency.[90] The Cohen draft constitution contained reference to a number of ESR – the right to social justice and social security,[91] the right to work,[92] the right to adequate remuneration,[93] the right to adequate standards of living,[94] workers' right to associate and strike,[95] the right to health,[96] the right to education[97] and the right to equality.[98] Interestingly enough, Cohen believed that the economic, social and cultural rights enumerated in the draft were minimalist in their approach, compared to more aggressive socialist agendas prevalent at that time, so to enable the formation of the greatest possible consensus around the constitution.[99] While the draft constitution was never adopted, its language demonstrates the initial commitment of the Israeli establishment to the promotion of ESR[100] and highlights the dramatic decline in their importance in later years. Subsequent attempts to propose a comprehensive constitution in 1964 (initiated by MK Hans

90 Yehuda P. Cohen, *A Constitution for Israel: Proposal and Explanatory Remarks* (Tel Aviv, State Council, 1949) [in Hebrew].

91 *Ibid*., article 21.

92 *Ibid*., article 22.

93 *Ibid*., article 22.

94 *Ibid*., article 22.

95 *Ibid*., article 23.

96 *Ibid*., article 24.

97 *Ibid*., article 25.

98 *Ibid*., article 4.

99 *Ibid*., at 27.

100 See also Guy Mundlak, "Economic-Social Rights in the New Constitutional Discourse: From Social Rights to the Social Dimension of Human Rights" (1991) 7 *Labour Law Yearbook* 65, at 73 [in Hebrew].

Klinghoffer)[101] and in 1983 (initiated by MK Amnon Rubinstein)[102] – both containing a chapter on ESR – similarly failed.

In 1991, the Ministry of Justice promulgated a new draft Basic Law: Fundamental Human Rights which was sent to the Knesset CLL Committee. This draft did not initially include reference to ESR (nor to the right to equality). However, the Ministry, bowing to considerable pressure from labour unions and the academia, has decided to revise the proposed legislation and to include a provision on social rights in it.[103] Eventually, after sensing opposition to some key provisions, the Ministry decided to break down the proposed legislation to five separate basic laws, which were designed to gradually pass the legislative process. Two basic laws were adopted in 1992. The other three basic laws, including draft Basic Law: Social Rights are still pending, and must overcome resistance by influential religious parties and other politicians who are hostile to the entire basic laws project.

Since 1992 a number of attempts have been made by the government, as well as by private MKs, to reinvigorate the legislative process and to press for the adoption of Basic Law: Social Rights. Such drafts have varied in their language and in the level of protection they afforded to ESR. For example, a 1994 government draft bill provided that '[e]very resident has the right to satisfaction of his basic needs for subsistence in human dignity, including in the fields of labour, wage and labour conditions, in the fields of education, schooling and learning, and in the fields of health and social welfare; this rights will be implemented or regulated by governmental authorities in accordance to law, and in the light of the State's economic capabilities as determined by the government.'[104] However, a subsequent

101 Draft Basic Law: Bill of Fundamental Human Rights, 1963, 38 D.K. 801 [in Hebrew]. See also H Klinghoffer, "The Bill of Human Rights: The Legislative Immobilization" in Yitzchak Zamir, ed. *Public Law – In Honorarium of Klinghoffer* (Jerusalem, Sacher Institute, 1993) 137 [in Hebrew].

102 Draft Basic Law: Bill of Fundamental Human Rights, 1983, H.H. 1612, p. 111.

103 Mundlak, *supra* n. 100, at 73; Ruth Ben-Israel, "Work-Related Socio-Economic Rights in Israel: Myth or Reality? – From Aspirations to Rights" (paper presented in a Tel-Aviv University Conference, May 1998)(copy with authors). Interestingly enough, Knesset members were rather indifferent to the initial omission of ESR from the draft.

104 Draft Basic Law: Social Rights, 1994, article 2, H.H. No. 2253, p. 326. See also Draft Basic Law: Social Rights, 1994, article 2, H.H. No. 2256, p. 337.

1998 draft provided in far more flexible and less right-friendly language that: '[t]he State of Israel shall diligently promote and develop the conditions necessary to ensure its residences' 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.'[105] Private draft bills have been, as a rule, more generous approach towards ESR, embracing more specific and right-oriented language.[106] However, their prospects of passage are slim given the government's opposition to their budgetary implications. In sum, one can identify both parliamentary opposition to the basic laws project and erosion in the government's commitment to ESR (which perhaps correlates to the declining economic fortunes of the country). This combination of factors does not bode well for the prompt passage of a strongly-worded basic law enshrining ESR.

B. *The Failure to Incorporate Economic and Social Rights in the Existing Basic Laws Through Judicial Interpretation*

One of the solutions to the problem of the limited list of human rights protected by the 1992 basic laws has been judicial creativity in interpreting the two instruments. Such judicial activism had been based on the proposition, forcefully advanced by President Barak, that the basic laws can be read in a way that will encompass a number of unspecified human rights. The open-ended language used by the legislator – especially in resorting to terms such as 'human dignity' and 'human liberty' – were in fact viewed as an invitation to the courts to actively protect a variety human rights which contribute to the attainment of the broad constitutional objectives. Barak even argued that there is no legal impediment to incorporate into the new basic laws human rights that were specified in non-adopted draft basic laws.[107]

105 Draft Basic Law: Social Rights, article 3, in Ministry of Justice, Basic Laws Memorandum, 25 Jan. 1998 (copy with authors).

106 See e.g. Draft Basic Law: Social Rights (P1634) (submitted 1 Dec. 2003); Draft Basic Law: Social Rights (P2581) (submitted 5 March 2001).

107 Aharon Barak, "Human Dignity as a Constitutional Right" (1994) 41 *Hapraklit* 271, at 282–283 [in Hebrew]; ("It is true that the proposed bills pending adoption in the Knesset

Acting upon this proposition Barak developed a three-model theory for interpreting the 1992 basic laws – drawing three different 'circles of protection'. A restrictive model would only enable the protection of human rights explicitly specified in the basic laws; an intermediate model would also include *negative* human rights, directly linked to specified human rights and a bare minimum of indispensable *positive* human rights; a third, and final, expansive model would encompass all human rights – negative and positive – that have bearings upon the specified rights. Barak has taken the position that the intermediate model is the appropriate one, as it best comports with prevalent social conventions regarding the scope of constitutional protection.[108] This model encompasses the right to equality,[109] as well as other basic civil and political rights – freedom of expression,[110] the prohibition against torture,[111] freedom of movement,[112] humane conditions of detainment,[113] freedom of religion,[114] freedom of

> contain a long list of rights, including equality, freedom of speech and movement and other freedoms. This does not indicate that human dignity does not encompass these rights. Once these rights are legislated, they will stand on their own feet as particular rights. Until they have been legislated, they are protected under the principle of human dignity. The process of fragmentation by virtue of legislative convenience cannot dictate constitutional theory. The process of 'atomization' of human rights legislation – namely, the breaking up of the civil rights constitution into a number of basic laws – does not show a subjective belief on the part of the drafter of the constitution to limit the principle of human dignity. Even if they so believed, we, the law's interpreters, should not attribute to it decisive weight. The contents of legal concepts ought to be determined in accordance with society's conceptions at the time of the interpretation, and not in the light of the various mindsets of the members of the constitutive body at the time the text was drafted")(unofficial translation Y.R. and Y.S.). See also Aharon Barak, "Protected Human Rights: Scope and Limitations" 1 *Mishpat U-Mimshal* (1993) 253, 259–260 [in Hebrew]. One can but wonder whether Barak's rhetoric regarding the temporal dynamics of statutory interpretation is convincing given the fact that the text was written only two years after the adoption of the 1992 basic laws. It is questionable whether dramatic changes in social conditions can be identified during such a short period of time.

108 Barak, *supra* n. 61, at 417. *Cf.* Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977)129.

109 See *supra* n. 62.

110 See *supra* n. 63.

111 H.C.J. 5100/94 *The Public Committee Against Torture in Israel v. The Government of Israel* 53(4) P.D. 817.

112 H.C.J. 5016/96 *Horev v. Minister of Transportation* 51(4) P.D. 1.

113 P.P.A. 4463/94 *Golan v. Prison Service* 50(4) P.D. 136.

114 See *supra* n. 64–65.

assembly,[115] right of access to court,[116] freedom of contracts,[117] and other rights and freedoms.[118] It encompasses however only two positive rights – the right to equality and the entailing obligations it imposes on the government to take action designed to remove inequalities,[119] and the right to minimal subsistence conditions.

The proposition that the right to human dignity encompasses a minimal standard of living component had been affirmed in recent Supreme Court judgments.[120] In the most famous of these decisions – the *Gamzu* case,[121] President Barak held that laws governing the execution of judgments must be applied in a manner which does not deprive the debtor of assets required for his basic subsistence.[122] More generally Barak held that: "Human dignity encompasses, as we have seen, protection of minimal human subsistence… A man living on the streets and is without housing, is a man whose human dignity had been impaired; a man starving for food is a man whose human dignity had been impaired; A man deprived of access to elementary medical treatment is a man whose human dignity had been impaired; a man compelled to live in humiliating material conditions is a man whose human dignity had been impaired" (unofficial translation Y.R. and Y.S.).[123]

115 P.Cr.A. 5086/97 *Ben Hur v. City of Tel Aviv-Jaffa* 51(4) P.D. 625, 645; H.C.J. 2481/93*, supra* n. 63, at 468.

116 CA 733/95 *Arpal Aluminium Ltd. v. Klil Industry Ltd.* 51(3) P,D, 577.

117 H.C.J. 726/94 *Klal Insurance Co. Ltd. v. Minister of Finance* 48(5) P.D. 441, 467.

118 See e.g. Cr.A. 1362/99, *Refaeli v. State of Israel,* 59(2) P.D. 711 (right to human dignity includes right to attorney in criminal affairs); A.H.H.J. 1913/97, *Muassi v. Minister of the Interior,* 52(2) P.D. 49, 78–79 (human dignity incorporates democratic principles); Cr.A .111/99, *Schwartz v. State of Israel,* 54(2) P.D. 241 (right to human dignity may include the right to appeal final judgments).

119 The position that the right of equality is protected by Basic Law is however controversial. See *supra* n. 67.

120 See H.C.J. 161/94, *Atari v. State of Israel* (not published); H.C.J. 5368/01, *Yehuda v. Tshuva* (not yet published). See also the decision of the National Labour Court in – D.B.A. 04–265/96 *Hasid v. National Insurance Institute* (not published).

121 H.C.J. 4905/98, *Gamzu v. Yeshayau* 55(3) P.D. 360 (2001).

122 It is notable however that the final outcome in *Gamzu* – the grant of exemption to an alimony payment defaulter from repaying his financial obligations to his divorcee and daughter – is problematic from an ESR perspective.

123 *Ibid.*, at 375–376.

Barak explained his reluctance to incorporate the full gamut of ESR into Basic Law: Human Dignity and Liberty by reference to legitimacy-associated problems:

> 'It seems that minimal positive rights can be inferred from the right to human dignity… Beyond that the constitution should specify particular rights in order to confer a constitutional supra-legislative status upon positive claims for state action presented by the individual. Inferring broader particular positive rights from the general principle of human dignity is problematic'[124] (unofficial translation).

As will be discussed below, this position, which is in itself quite problematic, was essentially embraced by the Supreme Court in the 1996 *Friends of GILAT* case.

C. *The Failure to Include Economic and Social Rights in the Israeli Judicial Bill of Rights*

The third and last constitutional avenue which could have been utilized to promote the constitutional status of ESR in Israel is to include them in the judge-made list of human rights – the Israeli judicial bill of human rights. The inclusion of new rights in the list invests them with only partial constitutional status, as Knesset legislation cannot be invalidated on the basis of the bill of rights. Nevertheless, in reality, this would have gone a considerable way towards constitutionalising ESR given the centrality of statutory interpretation and administrative oversight in the Israeli constitutional discourse.[125] In any event, this has not happened during the 1990s. Although the legal doctrine continued to recognize the validity of the judicial bill of rights, no new rights were created. It seems that the

124 Barak, *supra* n. 61, at 364.

125 It should also be noted that article 10 of Basic Law: Human Dignity and Liberty limits the Courts' competence to invalidate pre-existing Knesset legislation. Thus, the status of rights protected under the Basic Law is significantly different from the status of rights exclusively protected by the Israeli judicial bill of rights only with respect to their effect vis-à-vis new legislation.

enactment of the 1992 basic laws, the interpretive possibilities generated by their open-ended language and the prospect of enacting additional basic laws were perceived as more attractive avenues of developing the constitutional discourse. In contrast the judicial bill of rights was viewed as an outdated legal tool befitting a pre-constitutional era.

D *The Friends of GILAT Case*

The Supreme Court's scepticism towards ESR in the 1990s is epitomized by the 1996 *Friends of GILAT* case, the first major case, in which a constitutional entitlement to a social right was discussed.[126] The *GILAT*[127] program was an educational-psychological program designed to address the cognitive needs of young normal children (aged 1–6 years) raised in grossly dysfunctional or extreme poverty-ridden families. It aimed at strengthening and developing the covered children's cognitive skills, so to enable their eventual incorporation in the regular school system (as opposed to the special education system). Although the program was ran by a private non-profit organization (The Friends of *GILAT* Association), the Ministry of Education provided financial support and allocated personnel for the program. In 1994 the Ministry decided to discontinue its support of *GILAT* and to seek more comprehensive alternative programs instead.[128] This last decision was challenged before the Supreme Court by the Friends of *GILAT* Association, which argued, *inter alia,* that the decision fails to respect the constitutional right to education of children covered by the program.

Justice Or, writing for the Court, dismissed the petition, holding that the Ministry's decision was reasonable, and thus lawful under Israeli

126 H.C.J. 1554/95 *Friends of GILAT Association v. Minister of Education, Culture and Sport* 50(3) P.D. 2.

127 *GILAT* is the Hebrew acronym for 'Unique Approach To Normal Development'.

128 At its height the *GILAT* program encompassed some 50 children in a limited number of municipalities around Israel. The Ministry undertook to directly sponsor a State-wide program which would replace the support of *GILAT*. It seems, however, that a personal fall-out between the Chair of Friends of *GILAT* and several Ministry of Education officials spurred the later to reassess its involvement in *GILAT*. *GILAT, ibid*., at 31.

administrative law.[129] According to Or, the Ministry was fully competent to substitute a private program, with partial scope of coverage, with a comprehensive State-run program. As the petition did not challenge the validity of primary legislation, Or could have ended his discussion there (and we believe his decision on the merits would have legally sound had he done so). Instead, he chose to specifically address the constitutional argument raised by the applicants. While acknowledging the social importance of education,[130] Or held that the constitutional claim must be supported by the language of a valid constitutional text. However, Basic Law: Human Dignity and Liberty contains no explicit reference to the right of education, and there was, in his view, a body of authority that it should not be construed as containing one.[131] Two other potential legal sources supportive of the right to education identified by the applicants – the 1948 Israeli Declaration of Independence and the 1989 Convention on the Rights of the Child (CRC) – have also been rejected by Or has having no conclusive legal status (the Declaration) or no status whatsoever under domestic law (CRC).[132] Or also opined that the language of both instruments does not entail an obligation upon the State to undertake specific funding obligations, especially not with regard to pre-primary education.[133]

It is not clear to what degree Justice Or's position is representative of the views of the full Court. The two other Judges who set on the bench in *GILAT* supported Or's position on the outcome of the case but explicitly

129 *Ibid.,* at 23.

130 *Ibid*., at 24–25. Justice Or cites in this respect President Barak's three model theory, and a number of comparative authorities, including the U.S. Supreme Court (*Rodriguez v. San Antonio Independent School District,* 411 U.S. 1 (1973) and American Scholars (R.M. Horowitz and H.A. Davidson , eds. *Legal Rights of Children* (Colorado Springs, Shepard's/McGraw-Hill, 1984)). The use made by Or of the *Rodriguez* case has been criticized by one of the present authors elsewhere; Rabin, *supra* n. 82, at 380–384. In any event, the use of US law, one of the staunchest opponents of ESR (see e.g. Philip Alston, "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" 84 *AJIL* (1990) 365), as a model for evaluating ESR constitutionalisation claims is vexing.

131 *GILAT, supra* n. 126, at 25–26.

132 *Ibid*., at 26–28

133 *Ibid*., at 27–28.

reserved judgment on the constitutional status of the right to education.[134] Still, we submit that Or's opinion in *GILAT* symbolizes the failure of the Supreme Court throughout the 1990s to effectively promote the constitutional status of ESR. It demonstrates the Court's reluctance to incorporate ESR into Basic Law: Human Dignity and Liberty, while it engaged, at the same time, in a parallel project of incorporating a number of non-enumerated civil and political rights into the same text. Further, the highly formalistic stance towards the incorporation of ESR into Israeli constitutional law underscores the Court's conservatism when it comes to addressing the status of ESR. This is illustrated by Or's resistance to use of the Declaration of Independence and international law (including treaties to which Israel is party) as legitimate constitutional law sources – even not as interpretive aids.[135] The unwillingness of the Court to utilize even the Israel judicial bill of rights doctrine, which facilitated in the past the development of numerous civil and political human rights, and to discuss the development of the right of education within its context is also disappointing and indicative of lack of creativity, and perhaps lack of will to be creative, when the promotion of ESR rights is at stake.

IV. *Implications of the Failure to Recognize Economic and Social Rights as Constitutional Rights*

In this part we will assess and criticize the main implications of the conclusion that post-*GILAT* Israeli constitutional law does not recognize ESR as constitutional rights. Our position is driven not only by moral and political considerations, but also by our understanding of the role human rights should play under existing Israeli law, if it were to be properly and consistently construed. In short, we criticize not only the

134 *Ibid*, at 34 (Opinions of Dorner, J. and Tal, J.). It is notable that President Barak rejected a petition to rehear the *GILAT* case on the basis that Justice Or's discussion of the right to education was *obiter dicta*. A.H. 5456/98 *Yitzhak v. Minister of Education* (not published).

135 It is interesting to note that in other cases, the Supreme Court embraced a more hospitable attitude towards utilization of the Declaration of Independence and international law as legal sources. See e.g. H.C.J. 726/94, *supra* n. 117; Cr.FH. 7048/97 *Anonymous v. Minister of Defense* 54(1) P.D. 721.

political choice of the legislator and courts to relegate ESR to the status of non-rights or, at best, second-rate rights. We also criticize the failure of the Supreme Court to abide by its own human rights rhetoric and doctrines when ESR are concerned.

The first and immediate problem arising out of the failure to constitutionalise ESR is the freedom it gives the legislature, and probably also administrative agencies, to cut down social service (e.g., unemployment benefits, pensions, health services) and to impinge upon economic and social interests without having to face meaningful standards of judicial review. Indeed, in recent years a string of government-sponsored laws cutting back social expenditures has passed in the Knesset,[136] without the restraining effect of a possible constitutional challenge.[137]

The shortcomings of the present constitutional situation are demonstrated in the 2004 *Adam, Teva Va-Din* case.[138] In that case the Supreme Court reviewed a challenge to the lawfulness of a 2002 amendment to the Planning and Building Law, which released the government from the need to commission environmental impact assessment surveys in respect to certain national infrastructure projects. The new legislation also introduced strict deadlines for the submission of public objections to such projects on environmental grounds. In rejecting the petition, President Barak held that the constitutional threshold has not been met with regard to any of the constitutional rights which the petitioner argued would be adversely affected by the harm to the environment that might ensue from the new planning and zoning procedures – the right to life, the right to body integrity,[139] the right to

136 See e.g. Programme to Heal Israel's Economy Law (Legislative Amendments Needed to Attain Budgetary Goals and Economic Policy for Fiscal Years 2003–2004) 2003; National Economy Arrangements (Legislative Amendments Needed to Attain Budgetary Goals and Economic Policy for Fiscal Years 2003) 2002. Both laws reduce child allowance, unemployment and old age benefits, income assurance and cut down government health expenses.

137 For a comparable result, see *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973) (the non-constitutional status of the right to education bars the application of a strict scrutiny test in an unequal treatment case pertaining to the funding of school districts by the Texas State legislator).

138 H.C.J. 4128/02 *Adam, Teva Va-Din v. Prime Minister of Israel* (not yet published).

139 It is perhaps instructive that President Barak addresses the right to life and the right

human dignity and the right to property. The end result is that a piece of legislation that President Barak himself characterized as inadequate,[140] and which has the potential to render meaningless protections afforded by many ESR (the right to health, the right to adequate standard of living and the right to a satisfactory environment itself)[141] has survived a constitutional challenge, by virtue of the exclusion of ESR from constitutional law. It is doubtful whether the same result could have been reached by the Court with respect to legislation compromising civil and political rights (e.g, legislation authorizing lower level of evidence for disqualification of political parties or severe time restriction for submission of appeals in certain criminal cases).

The other side of the coin is that claims directed at the government to improve social conditions (e.g., addition of new drugs and treatments into the state-sponsored 'health basket' or more affordable public housing) lack constitutional support. This seriously weakens the positions of individuals and NGOs committed to the promotion of economic and social causes. For example, numerous petitions seeking to introduce new drugs and treatments into the 'national health basket' (which is subsidised by the State) have failed by reason of inadequate constitutional grounds.[142] The exclusion of social rights from the dominant Constitutional discourse also influences societal perceptions of entitlements and perpetuates the image of ESR as charity-type privileges, which the government can accord or deprive at its discretion.

A second problem, which was already alluded to, is the imbalance created in the Israeli constitutional system. The choice to promote one group of rights and not to promote another has specific legal and social implications: Civil and political rights, often having dominant *negative*

to body integrity under article 2 of Basic Law: Human Dignity and Liberty, which introduces negative obligations upon the State, and not under article 4 of the Basic Law, which introduces positive obligations.

140 *Ibid.,* at paragraph 23 (per Barak P.)

141 *Cf.* Yuval Shany, "The Right to a Satisfactory Environment as a Human Right under International Law" 6 *Hamishpat* (2001) 291 [in Hebrew].

142 See Aeyal Gross, "Health in Israel: Between a Right and a Commodity" in Rabin and Shany *supra* n. 59. But see P.C.A. 6810/97 *Ben Shushan v. Ben Shushan* 41(5) P.D. 375 (the right to legal aid can be inferred from the constitutional right to human dignity).

features (e.g., the right to property) encourage governmental non-interference, whereas ESR often have dominant *positive* features, encouraging government intervention in social affairs. The preferred status of the first group of rights implies that courts assign the burden of showing the constitutionality of contested social instrument or policy interfering with constitutionally protected negative rights upon the party supporting the instrument or policy and not upon the party objecting thereto. In practice, this often means that the 'haves' – the property owners, whose right to property is constitutionally protected – are better protected than the 'have nots' – the workers and the welfare dependents, whose social rights are not constitutionally protected. The outcome of the constitutional deliberations of the 1990s – the constitutionalisation of civil and political rights and the failure to constitutionalise ESR – thus entrenches the existing balance of power and allocation of resources within Israeli society and stands in the way of social reform.

This development has been derided by one Israeli scholar as the *Lochnerisation* of Israeli constitutional law.[143] Specifically, it is argued that governmental plans to tax or regulate capital or businesses in order to promote social welfare would have to meet formidable legal obstacles – the constitutional rights to property[144] and the constitutional freedom of occupation (encompassing, according to the Supreme Court freedom from governmental interference in the conduct of businesses). In such cases, the government must demonstrate that the restrictions upon the right to property and freedom of occupation meet the conditions specified in the constitutional limitation clause[145] (except the 'lack of excessive restriction' test which, according to some justices, ought to be refuted by the party challenging constitutionality).[146] This contrasts with the ordinary rules

143 Gross, *supra* n. 59.

144 H.C.J. 10608/02 *Hazima v. Customs and VAT Dept.,* judgment of 9 March 2004, at paragraph 8. Some writers have expressed the view that general tax legislation does not represent a violation of the constitutional right to property. Yehusah Weismann, "Constitutional Protection of Property" (1995) 42 *Hapraklit* 258, at 273 [in Hebrew].

145 Basic Law: Human Dignity and Liberty, article 8; Basic Law: Freedom of Occupation, article 4. See also H.C.J. 726/94*, supra* n. 117, at 469 (once a protected right had been infringed, the burden to persuade the Court that the infringement is justifiable rests with the infringing party).

146 C.A. 6821/93*, supra* n. 28, at 348, 578–579.

of evidence, which place the burden of proof upon the party arguing the illegality of the challenged measure. Although the burden to justify pro-ESR measures can be realistically met, and indeed has been met in a few cases,[147] the current legal situation produces a chilling effect, which complicates taxation reform, business regulation and other redistribution or reallocation projects.

These developments have to be appreciated in the context of the ideological tensions characterizing Israeli politics from the mid-1990s and until the present day. The declining economic conditions in the country (attributed *inter alia* to the almost concurrent collapse of the peace process and NASDAQ), combined with the ascendancy of rightist economic agendas in the Israeli political system (dominating both the Likud and the Labour parties) have put the Israeli welfare State under increased pressure. In the last decade, the *bon ton* among influential government officials responsible for steering the national economy has been to support dramatic cuts in government spending on social programs and welfare, and to reverse the trend of a steady increase in such spending (from 1948 to the mid 1990s).[148] The unravelling of the traditionally robust Israeli welfare State has resulted in a dramatic increase in income gaps between Israeli citizens and in the proliferation of private welfare agencies, which are typically underfunded and often unqualified. The Supreme Court's lack of interest in promoting the constitutional status of ESR serves, perhaps unintentionally, the purposes of those who attack the Israeli welfare State. Thus, while the Court might be driven by a old school agenda of legal prudence, the implications of its policies are highly divisive.

Some critics of the Supreme Court did in fact try to link the Court's position on ESR to sociological factors. For example, it has been argued

147 See e.g. H.C.J. 450/97 *Tnuffa Manpower and Maintenance Services Ltd. v. Minister of Labour and Social Affairs* 52(2) P.D. 433, 442–446 (the requirement that manpower companies deposit securities to guarantee compliance with labour laws as a licensing prerequisite is constitutional despite its interference with freedom of occupation); C.A. (Haifa) 4726/97 *Minister of Health v. SNS – Drug Victims Rehabilitation Ltd.* (not published) (closing of a drug rehabilitation centre is justified despite the constitutional freedom of occupation of the association responsible for the operation of centre, because of the overriding need to protect the rights of patients in the centre).

148 For example the national health expenditure per capita rose in by 19% between 1991 to 1996 (in real money value) [http://www.cbs.gov.il/data/H1031229075013.csv] [in Hebrew].

that the Court's anti-ESR bias can be explained through reference to the elitist composition of the Supreme Court, which affects the discourse among its judges.[149] This discourse had allegedly embraced neo-liberalist (or neo-libertarian) positions, which are out of synch with the views of large parts of the population and are oblivious to the urgent needs of Israeli society.[150] Other domestic and international critics have portrayed the Court's attitude as part of a more general human rights problem. They have noted that Arab Palestinians – both Israeli citizens and residents of the Occupied Territories – being in the most vulnerable economic and social situation, are the most conspicuous group adversely affected by the legislator and Court's refusal to constitutionalise ESR. The approach towards ESR is, according to these critics, part of the systematic discrimination of Arab Palestinians by the Israeli political and legal system.[151]

We do not fully subscribe to these modes of criticism, since they fail to explain the Court's willingness to uphold non-constitutional social legislation[152] and to protect the civil and political rights of the disenfranchised, including, at least in some cases, the civil and political

149 See Ben-Israel, *supra* n. 59, at 439–441; Andy Marmour,"Judicial Review in Israel" 4 *Mishpat U-Mimshal* (1997–1998) 133 [in Hebrew]; Elay Zaltzberger and Alexander Kedar , "The Silent Revolution – More on Judicial Review under the New Basic Laws" (1997–1998) 4 *Mishpat U-Mimshal* 489, 504 [in Hebrew].

150 See Gross, *supra* n 59; Hirschl, *supra* n. 53.

151 See e.g. Michael Mandell, "Democracy and the New Constitutionalism in Israel" (1999) 33 *Is. L.R.* 259, 306, 315–320 (the Supreme Court's constitutional jurisprudences is designed to legitimate social inequalities). Indeed, the focus of the CESCR Committee concluding observations on the implementation of the ICESCR in Israel have addressed to a large extent the plight of Palestinians inside Israel and the Occupied Territories. Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant, Israel, UN Doc E/C.12/1/Add.27 (1998) para. 9; Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant, Israel, UN Doc E/C.12/1/Add.90 (2003) para. 13.

152 See e.g. H.C.J. 890/99 *Halamish v. National Insurance Institute* 54(4) P.D. 423 (Court construes broadly the scope of coverage of the National Insurance Law); H.C.J. 1911/03 *Association for Civil Rights in Israel v. Minister of Finance* (not yet publish) (Court noting with satisfaction the position of the government that the coverage of social security legislation should be broadly construed).

rights of Arab Palestinians.[153] We do believe, however, that the Court's conservatism can be explained through reference to the classic liberal background of the judges and to their hesitance to clash with the other branches of government on matters of social policy, entailing considerable financial consequences.[154] In this respect, the Israeli case does not differ from the experience of other jurisdictions which viewed for many years ESR as illusory or non-justiciable rights, entailing difficult political choices.[155]

The political context of the Court's decisions on ESR needs to be somewhat elaborated upon. The awkward manner in which the Israeli constitutional order was created in the 1990s – the pronunciation of the constitutional revolution by the judiciary without such clear intent on the part of the drafters of the Basic Laws – has led the political branches to view with suspicion and disapproval judicial attempts to develop the Israeli constitution, in a way which significantly limits the legislative power of the Knesset. Attempts to develop constitutional law so as to encompass ESR involving significant expenditures have been particularly criticized since they were perceived as indicative of unrestrained judicial activism, which fails to respect the policy-making prerogatives and expertise of both the executive and the legislator. Indeed, recent Supreme Court decisions requiring the government to allocate significant funds for the education of children with specific needs and to explain its refusal to establish standards for what constitutes minimal conditions for subsistence were harshly criticized in political circles and were met with an unequivocal Knesset denunciation.[156] The political resistance to the

153 See eg, H.C.J. 5100/94, *supra* n. 111; H.C.J. 6698/95 *Ka'adan v. Israel Land Administration,* 54(1) P.D. 258; A.Cr.H. 8613/96 *Jabbarin v. State of Israel* 54(5) P.D. 193; E.A. 11280/02 *Central Election Committee – 16th Knesset v. Tibi* (not yet published).

154 Mandel, *supra* n. 151, at 302–308. See e.g. H.C.J. 240/98 *Adala v. Minister for Religious Affairs* 52(5) P.D. 167 (Courts are ill-equipped to review a claim of discrimination against Arabs in the allocation of State religious services funds, as the courts cannot assess the implications of altering the existing State budget).

155 See e.g. Scheinin, *supra* n. 11, at 29–30.

156 On 13 January 2004 the Knesset adopted by a majority vote a non-binding statement voicing concern with respect to "recourse by the Supreme Court to issues which are obviously within the scope of authorities of the executive and legislative branches; the Knesset warns, on the basis of respect to the judiciary, in general, and to the Supreme

constitutionalization of ESR, no doubt complicates the task of the judiciary. It does not however release the courts from their responsibility to protect the human rights of all individuals in Israel, as far as the existing legal order so permits.

We see no use in revisiting here *in extendo* the policy arguments supporting the importance and the justiciability of ESR, the indivisibility of first and second generation rights and the narrowing of the differences between the two. These arguments have been developed by many authors, including the present writers, elsewhere.[157] It suffices to note that in the Israeli context, the legal case against the constitutionalisation of ESR is particularly weak. This is because the Israeli Supreme Court has taken an activist position on a wide variety of topics and has been willing to recognize through interpretive means numerous human rights, which are no less vague in nature than ESR, which are as politically divisive as ESR, and which impose upon the government *positive* obligations of conduct, including assumption of expenditures. For example, one has to assess the Court's failure to recognize a right to work or housing in the light of its willingness to recognize a right of access to court;[158] and its failure to recognize a constitutional right to health or education, in the light of its willingness to recognize a positive right to equality.[159]

Barak himself admits that the delineation of 'circles of rights' under the three model theory he created is somewhat arbitrary.[160] He does, however, suggest that a distinction could be drawn on the basis of 'enlightened public perceptions'[161]. Barak argues that such perceptions associate human dignity with matters of 'private will autonomy, freedom of choice and personal growth of the individual, while viewing human beings as equal

Court, in particular, against the continuation of this trend, which might develop into an Israeli constitutional crisis" (unofficial translation). 16th Knesset, 93rd mtg, 13 Jan. 2004 [http://www.knesset.gov.il/Tql//mark01/h0001687.html#TQL] [in Hebrew].

157 See e.g. Gavison, *supra* n. 44; Yoram Rabin and Yuval Shany, "Social Rights – An Idea Whose Time Has Come" in Yoram Rabin and Yuval Shany, eds. *Economic, Social and Cultural Rights in Israel* (Tel Aviv, Ramot, 2004) [in Hebrew]; Scheinin, *supra* n. 11, at 32–42; Eide, *supra* n. 18, at 10–12.

158 See P.C.A. 6810/97, *supra* n. 142.

159 See H.C.J. 453/94, *supra* n. 62.

160 Barak , *supra* n. 61, at 417.

161 *Ibid.*

in rights and duties and as an end by itself, and not as means to obtain other ends' (unofficial translation).[162] Even if one was to accept this highly individualistic and negative-rights oriented premise, one cannot but wonder whether ESR such as the right to education or the right to work are not related to 'personal growth'. In addition, other ESR, such as the right to adequate standard of living or the right to health, seem to be as much a condition to a life of dignity and liberty as the freedom of assembly or the right to a defence attorney. Thus, viewed from a policy perspective, the Supreme Court's refusal to recognize ESR, while actively promoting an expansive list of civil and political rights, is indefensible.

Another key deficiency of the Court's approach towards ESR is the dissonance it perpetuates between Israeli law and international law. In 1991, Israel ratified the ICESCR, which protects some of the most important ESR (including the right to work, the right to adequate work condition, the right to organize, the right to social security, right to family, right to adequate standard of living, right to health, right to education, right to culture and to enjoy the benefits of scientific progress).[163] The Covenant specifically provides in article 2(1) that: 'Each State Party to the present Covenant undertakes to take steps… 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*' (emphasis added). While this is not an absolute obligation to incorporate the Covenant into domestic law by way of legislation (among other reasons, because of the progressive nature of most of the obligations laid out in the Covenant), States are obliged to devise incorporation strategies, which will ensure the full realization of the covered ESR over time. Legislation is clearly the best method, which the Covenant and the International Committee on Economic, Social and Cultural Rights (ESCR Committee) recommend.[164]

162 *Ibid*.

163 ICESCR, *supra* note 1. Other rights not mentioned in the ESR include *inter alia* the right to a healthy environment, the right to legal aid and the rights of the disabled.

164 Committee on Economic, Social and Cultural Rights, General Comment 3: the nature of States parties obligations (Article 2, para.1 of the Covenant) (1990), UN Doc E/1991/23 (1991) para. 3; Committee on Economic, Social and Cultural Rights, General Comment 9: the domestic application of the Covenant, UN Doc E/C.12/1998/24 (1998)

To date, Israel has failed to incorporate the Covenant (or any other major human rights treaty) into its domestic law. While Israeli law does recognize many components of the ESR covered by the Covenant (e.g., the right to primary and secondary education, the right to specified health services, etc.) it does not promote other components (e.g., right to housing). Moreover, the denial of constitutional status from nearly all ESR puts the future of the existing social benefits system in question, and underlines their nature as revocable privileges, as opposed to entrenched rights. This state of things has led the ESCR Committee to note its concern regarding Israel's failure to incorporate ESR into its domestic law and to specifically criticize the 1997 draft Basic Law: Social Rights as providing an insufficient level of protection to the rights covered by the Covenant.[165]

The problem of inadequate incorporation has been aggravated by the Court's reluctance in *GILAT* to attribute any interpretive value to the CRC (to which Israel is a party). This approach contrasts with a long established interpretive 'presumption of conformity', according to which Israeli law should be construed as far as possible in a consistent manner with the State's international obligations.[166] While it is still unsettled whether the doctrine also applies to interpretation of the basic laws,[167] the presumption could certainly inform the interpretation of ordinary legislation and the judicial assessment of the legality and reasonableness of administrative measures (including the decision challenged in *GILAT*). Once again, the unwillingness of the Supreme Court to utilize readily available legal doctrines in order to promote the status of ESR arguably reveals a bias against them. Such bias seems to sit well with the scepticism demonstrated by the Court in the 1980s and most of the 1990s towards international law in general.[168]

para 8.

165 ESCR Committee (1998), *supra* note 164, at para. 9; ESCR Committee (2003), *supra* note 153, at para. 13.

166 CA 336/61 *Eichmann v. The Legal Adviser of the Government* 15(3) P.D. 2033; H.C.J. 279/51 *Amsterdam v. The Minister of Treasure* 6 P.D. 945.

167 See Yuval Shany, "My Home is not My Castle: Domestic Violence as a Form of Torture Prohibited by International Law" 7 *Hamishpat* (2002) 151, 188–190 [in Hebrew]. *Cf. Reference Re Public Service Employee Relations Act,* [1987] 1 SCR 313, 348 (Opinion of Dickson, J).

As indicated above, the only ESR which President Barak had been willing to incorporate into the 1992 basic laws have been the right to equality (including *positive* aspects of the right)[169] and the right to minimum subsistence. In fact, Barak's approach with regard to the latter right closely resembles the 'core obligations' approach developed by the ESCR Committee.[170] According to the Committee, the general provisions regarding the progressive manner of implementation of the ICESCR do not release States from their obligations to do everything within their power to immediately protect the core of ESR – freedom from hunger, right to shelter, emergency medical services etc.

While the willingness of the Barak Court to incorporate some core ESR obligations into the constitutional right to human dignity somewhat alleviates the problem of Israel's non-compliance with the ICESCR, the general problem of failure to incorporate many ESR rights (especially those entailing positive obligations) still remains. However, some developments in the last few years in the constitutional jurisprudence of the Supreme Court raise hope for a better future, as far as ESR are concerned. These developments are the topic of the fourth and last part of this article.

IV. *A Renewed Interest in Economic and Social Rights: A (Partial) Judicial Change of Heart?*

The *GILAT* case and the general reluctance on the part of the Supreme Court to embrace ESR and to promote their constitutional status have generated a barrage of academic criticism directed against the Court.[171] These criticisms seem to have encouraged some of the judges on the Court to re-evaluate their position on the legal status ESR and to embrace a

168 See e.g. Michael Sfard, "International Litigation in the Local Court: Between Legal Dilution to Legal Isolantionalism – Assessment of the Situation" 15 *Hamishpat* (2003) 73 [in Hebrew].

169 There is still considerable legal controversy whether the right to equality is covered by Basic Law: Human Dignity and Liberty. See e.g. H.C.J. 7111/95 *Municipal Government Centre v. Knesset* 50(3), P.D. 485, 494.

170 General Comment 3, *supra* n. 164, at para. 10.

more activist attitude towards their promotion. Concurrently, by the late 1990s it became clear to many Israeli jurists that the likelihood that new basic laws would soon pass the parliamentary process is rather low and that judges were the most suitable players to constitutionalise ESR. Finally, the change in the political climate in the 1990s – the increased integration of Israel in globalization processes and progress in peace negotiation throughout much of that period – have created increased openness on the part of the Israeli judiciary to international law, in general, and to international human rights law, in particular.

The combined thrust of these developments, as well as other factors such as: (a) the continued erosion of the Israeli welfare state; (b) the solidification of legal and political acceptance of the validity of the constitutional revolution theory (as far as it pertains to the protection of first generation rights), which served as the basis for attempts to apply these rulings with respect to ESR; and (c) the increase in the effectiveness of NGOs committed to social causes and interested in pursuing their agenda via court litigation – have led to renewed interest on the part of the Supreme Court (as well as other courts, especially – labour courts)[172] in the status of ESR. A first sign of the unease felt by some Supreme Court judges because of the exclusion of ESR from the constitutional discourse can be identified in Justice Zamir's opinion in the 1998 *Contram* case, which criticized in *obiter dicta* the Barakian rights model:[173]

> "According to President Barak, 'democratic system of government is based upon the recognition of the human rights of the individual… the role of government is to sustain a society which will respect human rights'… Indeed, this is a common understanding of the democratic system of government in this day and age and in our society. But, in

171 See *supra* Part III.

172 See e.g. D.B.A. 04–265/96, *supra* n. 120; L.A. 1091/00 *Sheetrit v. United Sick Fund* (not yet published).

173 H.C.J. 164/97 *Contram Ltd. v. Ministry of Finance – Custom and VAT Department* 52(1) P.D. 289, 340. The case dealt with revocation of license to operate a warehouse in response to non-disclosure on the part of the applicant of relevant legal and factual data. It raised the nature of the obligations that the State and the individual owe each other.

> my view, this is a partial conception. A democratic system of government is more than recognizing and enforcing human rights… Man is more than a cluster of rights. He is also a cluster of needs, tendencies and ambitions. Thus, one should not declare that the role of government is to protect human rights. Period. Indeed, this is a supreme role. However, it is merely one of the roles. One must also declare, in the same breath, that an additional role is to promote the human welfare of all human beings. Another role is to create social justice. Justice for all. Human rights should not overshadow human welfare and social justice. Human Rights cannot only serve the satiated man. Every man ought to be satiated so that he can enjoy, in practice, not only nominally, human rights.'

Although Zamir discusses ESR in non-rights terms (underscoring the exclusionary effect of the dominant constitutional discourse), the point is clear. The focus on civil and political human rights is unsatisfactory both in meeting actual needs and in promoting justice.

The next sign of change can be found in the Supreme Court's increased willingness to protect the *positive* component of the right to dignity, encompassing minimal standards of living and positive equality. In 2001, the Court held in *Gamzu*[174] that debt collection procedures must ensure a hard core of the right of the debtor to human dignity, including his right to minimum human conditions of subsistence. This holding has been recently applied in Court *dicta* with regard to environmental conditions, which are incompatible with the right of individuals to minimal standards of living.[175] In another line of cases, the Court has found past allocations of governmental funds for social programs and services and for municipal infrastructure projects to be discriminatory against the Arab minority in Israel. As a result, it instructed the government to modify its funding policies (in most cases, through the informal encouragement of out-of-

174 H.C.J. 4905/98, *supra* n. 121.
175 H.C.J. 4128/02, *supra* n. 138.

court settlement).[176] In yet another related development the Supreme Court invalidated in 2002, at the request of *New Discourse* – a social action NGO – a government land development program, which would have enabled a small group of farmers on *Kibbutzim* and *Moshavim* to collect considerable compensation fees for lost agricultural land, arguably at the expense of residents of poor towns and neighbourhoods which would be excluded from the planned financial 'windfall'.[177] This arguably confirms an increased awareness on the part of the Court to the need to promote social justice and to scrutinize distributional implications of social policy.

Another avenue of reform has been the growing inclination of the Supreme Court to construe social legislation broadly, in a manner indicative of the greater importance attributed to ESR in the Israeli legal system.[178] For example, in *Halamish*,[179] the Court recommended that the Minister of Labour and Social Affairs exercise his powers to facilitate, through the promulgation of regulations, the eligibility of non-resident Israeli citizens to collect old-age insurance payments. Justice Dorner, writing for the Court, noted that expansion of insurance coverage is consistent *inter alia* with the growing acceptance of the right to social security as a human right under international law.[180]

The most impressive decisions of the 'born-again' Supreme Court relating to the status of ESR in Israel were rendered in the two cases

176 H.C.J. 1113/99 *Adalah – The Legal Centre for Arab Minority Rights in Israel v. Minister for Religious Affairs* 54(2) P.D. 164; H.C.J. 2814/97 *Supreme Follow-up Committee for Arab Educational Interests in Israel v. Ministry of Education, Culture and Sport* 54(3) P.D. 233; H.C.J. 4671/98 *Abu-Freih v. Negev Bedouins Education Authority* (not published); H.C.J. 727/00 *Committee of the Heads of Arab Municipal Authorities in Israel v. Minister of Housing and Construction* 56(2) P.D. 79.

177 H.C.J. 3939/99 *New Discourse Association for Democratic Discourse v. Israel Land Administration* 56(6) P.D. 25.

178 See e.g., H.C.J. 4363/00 *Upper Poriyah Council v. Minister of Education* 56(4) P.D. 203; A.H.H.J. 4191/97 *Recanat v. National Labor Court* 54(5) P.D. 330. For review of labor court decisions, which have adopted a pro-ESR reading of health legislation, see Gross, *supra* n. 142.

179 H.C.J. 890/99, *supra* n. 152.

180 *Ibid,* at 429–430. However, on 19 January 2005, the Supreme Court held that the government's position that the expansion of old-age benefits to Israelis living abroad will have to await better economic tines is not unreasonable. A.H. 7873/04 *Eizen v. National Insurance Institute* (not yet published).

decided in 2002–2003,[181] which dealt with the right to special education of children with special needs. According to the Compulsory Education Law, 1949, as amended throughout the years, primary and secondary education in Israel is free. This has been supplemented by the Special Education Law 1988, which provided free education in special schools for children with special needs. However, both laws did not specifically address the following question: if parents of children with special needs wish to integrate them in the ordinary school system (in the hope that it will facilitate their better integration in society), who shall incur the integration costs (mainly, personal teaching assistance hours) – the parents or the State? Until 2002, the Ministry of Education required parents of children with special needs to incur some or all of these expenses, a policy resulting in the *de facto* exclusion of children with special needs, coming from non-affluent families from ordinary schools. This policy was the subject of proceedings before the Supreme Court brought by a group of parents of children suffering from the Down syndrome, who sought to impose the costs of integrating their children in ordinary schools upon the government.

Justice Dorner, writing for the Supreme Court in the 2002 *YATED* case, accepted the petition and ordered the Ministry of Education to accept the integration costs. The decision is particularly important due to its reasoning. Deviating from *GILAT*, Dorner explicitly held that Israeli law recognizes a right to education. The existence of this right is independent from any basic law and ought to be viewed part of the Israeli judicial bill of rights.[182] This conclusion was based upon a variety of legal sources – international law, comparative law (citing Belgian, South African, Spanish, Irish, German and US member States constitutional provisions), Jewish law, education legislation and judicial *dicta* regarding the importance of education.[183] She also noted in this regard that the right to education is linked to the principle of equality, given the potential of education to close social gaps. After establishing a fundamental right to education, Dorner

181 H.C.J. 2599/00 *YATED – Association for Parents of Down Syndrome Children v. Minister of Education* 56(5) P.D. (2002) 843.

182 *Ibid.*, at 843.

183 Ironically enough, Justice Dorner cites Justice Or's rhetoric in *GILAT* case. *Ibid,* at 843–844.

proceeded to hold that the right to special education derives from it, as well as from the right to equality.[184]

In the second part of her decision, Justice Dorner held that the Special Education Law 1988 must be construed in the light of the fundamental values of the Israeli legal system – specifically, the right to education, the principle of equality and the right to special education deriving from both of them.[185] In addition, she held that the law ought to be construed in accordance with the international obligations of the State of Israel – specifically, with the right to education and the obligations to address the special needs of disabled children enumerated in article 13 of the ICESCR and articles 23, 28–29 of the CRC. The Ministry of Education's interpretation of the law was thus found to be unlawful and the Court ordered it to assume upon itself, within a prescribed period of time, the integration costs.

The second petition, *Marciano v. Minister of Finance*[186] brought in late 2003 by a group of parents of children with special educational needs and by two Members of Knesset, criticized the unsatisfactory pace of implementation by the government of the special legislation that was adopted by the Knesset following the *YATED* judgment. The new amendment to the Special Education Law required the government to fund the integration of children with special educational needs in ordinary schools, but authorized the government to implement the law gradually, according to budgetary considerations. Relying upon this exception the government allocated no integration funds for 2003 and a nominal allocation of funds (35 million NIS) for 2004.

Justice Dorner writing again for the Court accepted the petition and instructed the government to immediately allocate sufficient funds for the implementation of the law in the current school year (2003–2004) and to prepare for regular and reasonable allocations in future years. The Court specifically indicated that the professional position of the Minister of Education that an immediate allocation 120 million NIS would be

184 *Ibid*., at 845.

185 *Ibid*., at 846.

186 C.J. 6973/03 *Marciano v. Minister of Finance,* judgment of 16 Dec. 2003 (not yet published).

required to implement the law represents a rough minimal standard of sufficiency, which the State cannot derogate from without nullifying the right of education and the right of equality of children with special education needs. A subsequent petition by the State for re-examination of the *Marciano* decision before an expanded chamber of the Supreme Court was rejected in May, 2004.[187]

The decision of the Court in the *YATED* and *Marciano* cases may signify a radical transformation in the approach of the Supreme Court towards ESR. First, the Court had been willing to accord, for the first time, a constitutional status (albeit a weak one – as no review of the validity of legislation can be undertaken on their basis) to a central ESR – the right to education, through legal deduction from binding and non-binding legal sources. This marks the revival of the Israeli judicial bill of rights doctrine, as an instrument for constitutional development. In fact, there is no reason that other ESR, such as the right to health or the right to adequate working conditions, also supported by international law, comparative law, Jewish law, specific legislation, judicial *dicta* and other common law rights, would not be similarly recognized as constitutional rights in the future. Second, the Court's willingness to apply a 'presumption of conformity' with relation to international human rights treaties to which Israel is a party goes a long way towards incorporating them in Israeli domestic law. It could even be argued that the presumption results in partial constitutionalisation of the rights covered by the said treaties.[188] In this respect, the *YATED* case continues a line of Supreme Court cases rendered in the late 1990s and the early 2000s, which reveal greater willingness on the part of the Court to apply the presumption of compatibility.[189] Finally, the willingness of the Court to issues specific remedies, notwithstanding their considerable financial implications, indicates a 'taking rights seriously' approach which underscores the potential of rights-talk to change reality in the field of ESR protection.

187 F.H.H.C.J. 247/04 *Minister of Finance v. Marciano,* judgment of 10 May 2004 (not yet published).

188 H.C.J. 890/99, *supra* n. 152.

189 C.A. 7048/97 X v. Minister of Defense 54(1) P.D. 721 (2000); H.C.J. 5100/94, *supra* n. 111, 53(4) P.D. 817.

However, several caveats need to be mentioned. The *YATED* case does not accord ESR a full constitutional status, as Justice Dorner explicitly reserved judgment on the question whether the right of education can be incorporated in the language of Basic Law: Human Dignity and Liberty.[190] Furthermore, she did not address the question whether the two interpretative presumptions (compatibility with the judicial bill of rights and international obligations) apply with respect to the text of the basic laws. In short, *YATED* does not fully remedy the failure to constitutionalise ESR in Israel. In this context, it is notable that the decision of the Court in *Marciano* is based upon the administrative law duties of the government to exercise its discretional powers reasonably, and not upon constitutional law. In addition, both cases dealt with the interpretation and implementation of social legislation adopted by the Knesset with a view of promoting a specific social right – the right to education. It is unclear whether the Court would be similarly inclined to develop a pro-ESR constitutional construction without such clear indicia of legislative will. Finally, it can be doubted whether Justice Dorner's pro-ESR views would be acceptable to all other judges on the Court. Given the fact that Justice Dorner, one of the most liberal judges among recent Supreme Court judges, had been in a minority position on a variety of issues,[191] it remains to be seen whether other judges would embrace the *dicta* of the *YATED* and *Marciano* decisions.

V. *Conclusions*

The status of ESR under Israeli law is not yet settled. Although the *YATED* and *Marciano* cases clearly create some room for optimism among supporters of ESR, it remains to be seen whether the Court is willing to change the negative approach vis-à-vis the promotion of ESR, which has characterized its decisions and intellectual climate in the 1990s. It is interesting to follow some of the current cases pending before the Court,

190 H.C.J. 2599/00*, supra* n. 181, at 843.

191 See e.g., A.D.A. 10/94 *Anonymous v. Minister of Defense* 53(1) P.D. 97; A.H.H.J. 4466/94 *Nusseibba v. Minister of Finance* 49(4) P.D. 68.

which raise complicated ESR-related issues, in the hope that greater legal clarity would emerge from the decisions in these cases.

Perhaps the most important of these cases is a petition challenging the lawfulness of cuts in social security subsistence payments adopted by the Knesset in the 2003 budget law.[192] This case might require the Supreme Court to consider the possibility of invalidating, for the first time in its history, legislation conflicting with *positive* ESR obligations. At the heart of the case, stands not the recognition of the right to minimum condition of subsistence but rather the methodology of ascertaining that minimum.

At the same time, strong normative considerations, including Israel's obligations under the ICESCR should encourage the Knesset to reinvigorate the constitutional enactment process and to finally pass Basic Law: Social Rights. Such a development is particularly timely in the light of the deteriorating economic and social conditions in Israel and the ensuing unravelling of the welfare state. A more rounded-up and well-balanced constitutional order could slow down the process and promote serious discussions, *inter alia,* in judicial fora regarding the human rights implication of the economic policies of the last decade.

We believe the Israeli experience is valuable despite some of its idiosyncratic features. It reaffirms trends in international law and in the constitutional law of numerous other countries towards more vigorous protection of ESR. It also underlines the indivisibility of human rights and the increasing willingness of the judicial system to recognize linkages between human rights (dignity and standard of living; equality and education). Finally, it demonstrates the benefits of inter-systemic cross-fertilization. The Israeli debate is evidently influenced by developments in international law and by comparative law. We believe it could also influence parallel debate conducted in other jurisdictions. This is yet another affirmation of the universality of human rights and their potential applicability to every form of social organization, everywhere.

192 H.C.J. 366/03 *Association for Commitment to Peace and Social Justice v. Minister of Finance* (case pending).