

The Contribution of the Jurisprudence of the Supreme Court to the Protection of Social Rights

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Introduction

The contribution of the jurisprudence of the Supreme Court to the protection of social rights has many faces. Every day, a wide range of proceedings relating, in one degree or another, to social rights come before the Supreme Court. Unfortunately, social rights are not explicitly enumerated and anchored in the Basic Laws of Israel, and they lack a regulated and comprehensive legislative framework, as they should have.

The recognition of social rights currently exists within the framework of maintaining human dignity, this by virtue of Basic Law: Human Dignity and Liberty.¹ The Israeli Supreme Court, sitting as the High Court of Justice (HCJ), recognized the right to a minimum human existence with dignity, and dignified economic existence. The same goes for safeguarding the rights of those whose freedom has been denied, and more.²

There is a general agreement on the centrality of the role of the Supreme Court, both as an appeals court and in its capacity as a High Court of Justice, in the protection of social rights, their design and promotion.

The social rights deal with various aspects of human wellbeing. These rights are designed to ensure that the basic needs of life, which are intended to allow a person to take advantage of the opportunities that life presents to him, will be guaranteed to him by the society in which he lives. Some of these rights have a direct or indirect effect on a person's income level and economic welfare. They include the rights to health care and education, to work, to raise a family, to live with dignity, to social welfare, social security, nutritional security and adequate living conditions. The social rights are recognized under the International

* Supreme Court Justice, Supreme Court of Israel.

1 Yehudit Karp, "Some Questions on Human Dignity According to the Basic Law: Human Dignity and Liberty" 25 *Mishpatim*, 129 (1994). (Hebrew).

2 Hillel Somer, "The Unenumerated Rights - on the Scope of the Constitutional Revolution," 28 *Mishpatim*, 257, 1996)). (Hebrew).

Covenant on Economic, Social and Cultural Rights and under the Universal Declaration of Human Rights. International standards of human rights have also included the right to environmental quality as a constitutional right.

There is a school of thought that civil-political rights are 'superior' to the social and economic rights because of the necessity of the former for the very existence of a democratic framework. This approach sees social rights as lesser rights. The civil and political rights are individual rights in nature; they refer to a private individual, the single person, whose rights we wish to protect. In this way, these rights correspond with liberal thinking that refers to the individual person. The social rights are of a more general nature. The concern for the existence of a social right affects a broader system. Thus, the realization of the right to education requires an education system that is not directed to the individual but to the general public.

A Basic Law: Social Rights, was scheduled to be brought to a second and third reading at the Knesset, but the Labour Party refrained from voting due to the upcoming elections in view of the opposition of the religious parties.³

The Challenges of Judicial Implementation of Social Rights

Sometimes there is a tendency to assess the extent of the court's protection of social rights by examining the bottom line, whether the appeal to the court or petition to the HCJ was admitted or not. According to this approach, an appeal or a petition that is admitted means that the court is working to promote social rights, while if it is rejected, the Court is taking a step back or discouraging this activity.

It is possible that such an examination could create the impression that the attitude of the Supreme Court towards social and economic rights is 'reserved.' The reality is even more complicated. Social rights can be protected by various means: sometimes through an active judicial remedy, but sometimes precisely through a demonstration of judicial restraint, or within the framework of decisions of a purely procedural nature.

I will first refer to two judgments dealing with the right to equal education. In the two cases I will present, there is no dispute about the importance of this right, its promotion, and its implementation. However, the judicial relief given in the circumstances in each case is very different.

3 Shimon Shetreet, On Adjudication: Israeli Justice System, 504–505 (2004 Hemed Yediot Aharonot) (Hebrew).

In the case of the *Municipality of Bnei Brak*,⁴ a petition dealt with the eligibility of children with special needs who were integrated in 'regular' educational institutions, to be transported to those institutions. After the submission of the petition, there were substantial changes in the position of the Ministry of Education, so that a considerable part of the petition became redundant.

However, a decision was required in relation to the policy of the Ministry of Education, which created a certain distinction between the 'automatic' entitlement to transportation of special-education students studying in special institutions, and the special-education students integrated into the regular school system, who were required to act proactively to realize their entitlement to transportation.⁵

A concern arose that this policy attaches a 'price tag' to the choice of parents of children with special needs to include their children in the regular school system. This contravenes the purposes of the Special Education Law and the emphasis given in legislation and case law to the effort to integrate children with special needs in the regular education system.

In this regard, it should be noted that the day-to-day behaviour of parents of special-needs children deserves great appreciation, as do the physical and mental strength they require every day. Hence one should strive to provide them with all possible support and relief, and even encourage and welcome their choice to integrate their children into the regular education system where this is possible and appropriate for them. Through this choice, the integrated students contribute not only to themselves, but no less so to their classmates.

Since the nature of the educational framework in which the student studies is not a relevant consideration, it was determined that the decision of the Ministry of Education is inconsistent with the principle of equality, and is invalid. Therefore, it was decided that students with special needs who are integrated into regular education will be transported according to the same criteria as those that apply to special education students, despite the economic cost and the logistical implications of this decision. In those circumstances, the correct remedy is a sharp and clear operative remedy, an order instructing the authorities to act in a certain way.

On the other hand, in another case, an appeal was submitted against a petition which sought to compel *the Municipality of Nof HaGalil* to establish an Arabic elementary school.⁶

4 High Court of Justice 191/15 Plonit v. The Municipality of Bnei Brak (Nevo, April 18, 2019).

5 Yoram Rabin, "The Right of Education" 21 421, 472-495 (2002). (Hebrew).

6 Administrative Appeal 7058/19 Hani Salom and others v. Municipality of Nof HaGalil (Nazareth Illit) (Nevo, April 20, 2021). (Hebrew).

The background of the petition was that, despite the fact that about a quarter of the population of Nof HaGalil is from the Arab sector, there was no state school in which the language of instruction was Arabic. Most of the children of this population studied in educational institutions in neighbouring Nazareth.

Nine families living in Nof HaGalil petitioned the Court of Administrative Affairs in Nazareth, asking for an order to open a state school in the Arabic language within its jurisdiction. Their petition was rejected, and an appeal was lodged with the Supreme Court against the rejection. Among the members of the panel of judges there was no dispute that the Arab residents of Nof HaGalil have the right to study in their city in a school that speaks their language. The disagreement between the opinion of the majority and the opinion of the minority referred mainly to the matter of the nature of the desired relief.

According to the minority position, the Nof HaGalil municipality should be ordered to work to establish an Arabic language school within its jurisdiction, to start operating from the next school year after the ruling to be given. On the other hand, my position was that a demonstration of judicial restraint, so that the court would not immediately oblige the authority to establish a school - could promote the right to equal education in the best possible way.

The chain of events in Nof HaGalil, before the decision, illustrates the advantage of judicial restraint, and the power of natural social processes, led by the public, to change policy. This, in contrast to judicial determinations imposed on the local authorities.

A few years ago, there were only three state kindergartens for the Arab sector operating in Nof HaGalil, and there was strong opposition from the local authority to any change in the municipal education system. However, the natural processes in Nof HaGalil led to the opening of another state kindergarten in the city, intended for the Arab sector, and in addition, it was decided to implement a new and pioneering multicultural and multilingual curriculum in one of the state schools, without requiring judicial intervention in the matter.

Taking an approach of judicial restraint in the circumstances of that case had the effect of strengthening the power of the local authority council, which is made up of members of all denominations. It increased the responsibility of its members towards their constituents, and encouraged the residents of the local authority to demonstrate civic involvement in what was happening in their locality, to influence their elected officials, and to lead a growing change from within the community.⁷ In this way, a more delicate and precise balance

⁷ Dan Ben David, "A Socio-Economic Perspective of Israel's Educational System in an Era of Globalization" 50 *Israel Quarterly Journal of Economics* 47, 47-72 (2003). (Hebrew).

will be achieved than can be shaped by judicial decisions, which sometimes do not have the power to fully express the social complexities accompanying the issues before the courts.

Finally, the majority's position did not oblige the authority to establish a school, but to examine every year in an orderly manner the demand for its establishment, and to act in order to formulate solutions as soon as possible, which would enable the realization of the right of the residents of Nof HaGalil from the Arab sector to education in their language and in their city.

While at the end of the judgment it was written that the appeal was rejected, it cannot be concluded that the court did not deal with the protection of social rights - on the contrary.

It must be remembered that the toolbox available to the court is limited by its nature. It is not the function of the court and it is not able to outline comprehensive solutions out of nowhere, which take into account all the aspects concerning the matter. Solutions of this type are naturally in the hands of the relevant authorities, and require expertise, staff work and allocation of resources.

It is a well-known rule that the Supreme Court exercises restraint when a decision is required on issues involving policy considerations or the allocation of specialized resources, and this despite the criticism that is often heard of the Supreme Court that it excessively interferes in the decisions of the executive authority.⁸

And regarding Nof HaGalil, if the court instructed the municipality to establish a school in one form or another - what would be the consequences of such a determination on the possibility of registering the children of Nof HaGalil in educational settings in Nazareth? What would parents do whose older children are already enrolled in an educational framework in Nazareth? Where was the school located? How long did it take to find a suitable faculty? And many more questions the answers to which are not in the court's possession. Under the circumstances of the case, the judicial restraint that was taken even made it possible to increase the variety of options available to the parents of Nof HaGalil students, and prevented the possibility that Nof HaGalil children's access to educational institutions in Nazareth would be blocked. This does not mean that the court, as a starting point, should refrain from providing active remedies to protect social rights.⁹

8 HCJ 4298/93 *Mona Jabarin v. Minister of Education* P. D. 48(5) 199 (25.1.1994) which ruled that a private Christian religious school may regulate the policy on headcovers for women.

9 Daphne Barak Erez and Aeyal Gross, Introduction: Do We Need Social Rights? In *EXPLORING SOCIAL RIGHTS* 1, 2–3 (Daphne Barak Erez and Aeyal Gross eds., 2007).

Procedural Aspects of Social Rights

The Supreme Court has first and foremost a public duty to act as prescribed by the law, and, with the means available to it, to act for the promotion of social rights where it identifies an injustice that justifies intervention.

Sometimes it is possible to act to promote these rights in a very significant way even through purely procedural decisions. For example, in the Ozeri case,¹⁰ a lawsuit was filed by Yemenite immigrants and their descendants against the State of Israel and the Jewish Agency, in which they claimed compensation for the mental damages they suffered due to the disappearance of their children and siblings, in what is known as the Case of the Children of Yemen, the East and the Balkans. Their claim was dismissed outright by the district court, which believed that it was not possible to combine all those cases into a single claim. The Supreme Court decided to admit the appeal due to the concern that leaving the District Court's decision intact would lead, among other things, to the division of the lawsuits, with a real fear of closing the court doors to them in view of the costs of managing individual lawsuits of each and every family separately.

Due to the fact that among the appellants there were seven parents in their ninth decade of life, there was a significant fear that if the judgment of the district court were to be upheld, and the appellants would be required to reopen separate proceedings they would not have enough time to do so in their lifetime.

We also added that it is appropriate to speed up the preliminary proceedings in the case, so that the parents of the disappearing children will take the witness stand first and give their version of the events with a clear mind, since these testimonies have first-rate evidentiary value and are of great importance, both from the public aspect and from the documentary and historical aspect.

In this case, I stated that, *“Each of the families of the appellants carries with them a heavy burden of sorrow and pain for the loss of their child, and even the passage of time is not a cure. This sorrow has a name and a face, and it is experienced in a unique and personal way in each of the families. Along with this, it seems that there is also a common aspect that unites the personal stories of all the families. With the passage of seven decades since the occurrence of the events, this aspect justifies, from a factual and legal point of view, a unified discussion of this complicated and painful historical affair.”* (Paragraph 31 of the decision).

¹⁰ Civil Appeal 2392/19 Salma Ozeri and others. v. the State of Israel (Nevo 24. 12.22).

This decision reflects my view that a judge is required to show great sensitivity to the real and honest distress of a party. This sensitivity, along with the desire to reach a just decision in accordance with the provisions of the law, must be used as a compass for the needs of the judicial decision.

Legal and thorough knowledge are important and necessary qualities for judicial decision making. But no less than that, it requires empathy, sensitivity and common sense.

This concept is expressed every day in the decisions of the Supreme Court in the individual cases brought before it, even in which it has the potential to contribute to the protection of social rights.

Given all of this, while the Supreme Court's role in protecting social rights is extremely significant, it sometimes seems that the public focus on certain aspects of the court's work, such as constitutional issues, detracts from media coverage of decisions concerning social rights.

Conclusion

As someone who holds social rights close to his heart, I believe there is still a long way to go for the legislature and the courts as to how they shape and anchor those rights. I see a close connection between this issue and another area that is also close to my heart, public trust in the courts.

It is appropriate that the court, in accordance with the provisions of the law, act as much as it can for the promotion of social rights.¹¹ In doing so, we will be rewarded twice - both in the promotion of these rights, and in strengthening the public's trust, when it expects that the court will not distance itself from these areas, which concern the public in Israel in all its sectors.¹²

11 Guy Mondelek "Socio-economic Rights in the New Constitutional Discourse: From Social Rights to the Social Dimension of Human rights" 7 *Israeli Yearbook on Labour law* 67 (2000). (Hebrew).

12 Ruth Gavison, "On the Relationship Between Civil-Political Rights and Social-Economic Rights" *Social-Economic Rights and Culturalism in Israel* 25, 39 (Yoram Rabin and Yuval Shani editors, 2004). (Hebrew); Yoav Dotan, "The Supreme Court as the Defender of Social Rights," *Economic, Social and Cultural Rights in Israel* 69, 76 (Yoram Rabin and Yuval Shani editors, 2004).