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The Welfare State, Globalization, and International Law

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Springer

http://www.springer.de

4 The Israeli Welfare State: Growing Expectations and Diminishing Returns

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Contents

4.1 Introduction: Incentives to Curtail the Welfare State

The welfare state model, which was developed in Western democracies during the twentieth century,[1] is in trouble. Discussions of the so-called

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[1] Despite the obvious differences between various models of the welfare state, all share the aspiration to guarantee decent universal standards in various aspects of economic and social life. For a review of the development of the British model of the welfare state before and after the Beveridge Report, see: Neville Harris *Social Security Law in Context* (Oxford, 2000), pp. 69–117 (Chapters 3–4). For a review of the development of the German model of the welfare state, see: Eve Rosenhaft "The Historical Development of German Social Policy" *So-*

"crisis" of the welfare state are widespread.[2] Ideological opposition to the welfare state always enjoyed considerable support in right wing political circles. Over the years, however, this criticism has intensified, as the welfare state is proving rather expensive and thus an alleged burden on national economies,[3] particularly in an era of globalization when these economies must compete to attract investors and retain high profile workers.[4] Criticism has also been forthcoming from other directions, emphasizing, for instance, the bureaucratic nature of the welfare state, which, at times, undermines its ability to achieve its own professed goals. Ross Cranston has described this problem as the "paradox of social welfare bureaucracies", stating "that although they might be ostensibly devoted to the wider public interest and the interest of intended beneficiaries, frequently they appear to neglect these interests in what they do."[5]

These critiques resonate in the Israeli scene as well. Soon after the State of Israel was established, it enacted a succession of social laws,[6] including

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cial Policy in Germany (Jochen Clasen and Richard Freeman ed., Hertfordshire, 1994), p. 21. For the development of welfare and welfare reforms in the United States, see: Joel F. Handler "'Constructing the Political Spectacle': Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History" 56 *Brooklyn L.Rev.* p. 899 (1990). See also: *The Development of Welfare States in Europe and America* (Peter Flora and Arnold J. Heidenheimer ed., New Brunswick-London, 1981); Abraham Doron *The Welfare State in a Changing Society* (Jerusalem, 1985), pp. 1–41 (Hebrew).

2 For discussions of the welfare crisis, see: Peter Koslowski "Restructuring the Welfare State: Introduction", *Restructuring the Welfare State: Theory and Reform of Social Policy* (Peter Koslowski and Andreas Follesdal ed., Berlin, 1997), p. 1; Yosef Katan "The Welfare State – Continuity, Change or Dissolution" 42 *Social Security*, p. 17 (1994) (Hebrew); Joel F. Handler "American Regulatory Policy: Have We Found the "Third Way"?" 48 *Kan. L. Rev.* p. 765 (2000).

3 The economic and demographic reality that was the background for building the welfare state has changed dramatically, with the aging of the population, immigration, rising cost of health care, and so forth. The power of the public so-called "moral" criticism of welfare without duties unquestionably owes much to the objective rise of welfare costs.

4 See: Reuven Avi-Yonah "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State" 113 *Harv.L.Rev.* p. 1573 (2000); Ramesh Mishra *Globalization and the Welfare State* (1999).

5 Ross Cranston *Legal Foundations of the Welfare State* (London, 1985), p. 232. See also: D. J. Galligan "Rights, Discretion and Procedures" *Law, Rights and the Welfare State* (1986), p. 128.

6 For the history of the groundwork preceding the social security system in Israel, based on the Knev Report that served as the equivalent of the famous Beve-

the establishment of a national insurance (social security) system,[7] the introduction of free and mandatory education,[8] the recognition of core labor law standards, limiting working hours,[9] and granting statutory entitlements to vacations,[10] paid sick leave,[11] paid maternity leave,[12] and more.[13] Yet, even this legacy failed to immunize the Israeli welfare state against the present crisis, and critical views of the welfare state model formulated in other countries have influenced local views.[14] The highly centralized economy that prevailed in the past also evoked among economic players a strong desire "to be left alone", on the assumption that economic success goes hand in hand with decreased regulation and reduced taxation, which inherently imply less welfare.[15] The aim of this paper is to conduct an in-depth study of the complex changes presently affecting the Israeli welfare state.

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ridge Report in England, see: Abraham Doron "50 Years Since the Publication of the Program for Social Insurance in Israel – The Report of the Knev Committee" 8 *Labor, Society and Law* p. 43 (2001) (Hebrew).

[7] The original law – National Insurance Law, 1953 (Hok ha-Bituah ha-Leumi, 1953) – was updated several times. The present version is the National Insurance (Integrated Version) Law, 1995 (Hok ha-Bituah ha-Leumi [Nosah Meshulav], 1995).

[8] Compulsory Education Law, 1949 (Hok Limud Hovah, 1949).

[9] Work and Leisure Law, 1951 (Hok Sha'ot Avodah u-Menuhah, 1951).

[10] Annual Leave Law, 1951 (Hok Hufshah Shnatit, 1951).

[11] Sick Leave Law, 1976 (Hok Dmei Mahalah, 1976).

[12] Women at Work Law, 1954 (Hok Avodat Nashim, 1954), as augmented by the entitlement to "motherhood insurance", according to the National Security Law (currently, Chapter C in National Insurance Law [Integrated Version], 1995).

[13] This legislation is perceived as reflecting the ideology of the then hegemonic Labor party regime, which dominated all Israeli governments as well as the Israeli parliament (the Knesset) until 1977. At the same time, it was part of an ideology of nation-building. See: Zeev Sternhal *Nation-Building or a New Society? The Zionist Labor Movement (1904–1940) and the Origins of Israel* (1995); Zeev Rosenhek "Social Policy and State Building: the Dynamics of the Israeli Welfare State" (unpublished manuscript).

[14] See: Abraham Doron *In Defense of Universality – A Challenge to Israel's Social Policies* (Jerusalem, 1995), p. 33–46 (Chapter 2) (Hebrew).

[15] See also: Rosenhek, *supra* note 13 (stressing the efforts of the Ministry of Finance to reduce the increased costs of social security and social services); Shlomo Swirski "Fiscal Policy and the Ideological Drive to Downsize the State in Israel" 59 Social Security p. 19 (2001).

4.2 The Inner Tension: Increased Expectations from the Welfare State

In light of the current pessimistic views of the welfare state, and the pressures to adapt the economy to international competition, one could expect legislation designed to ensure welfare and social rights to shrink. In Israel, however, this rule does not seem to apply, and there are a relatively large number of new laws granting citizens or residents additional social and welfare rights.[16] This new legislation denotes the significant support that the welfare state still enjoys within the Israeli polity.[17] In other words, support for the welfare state ideology is increasing rather than decreasing among the public, in contrast to the views of high profile economists, industrialists, and government officials, who strive to present favorable economic results.[18] People seem to feel entitled to social services. This sense of entitlement has also begun to apply to new, previously non-existent, standards of medical care and educational services, such as the prevalent expectation that public health services should include new life-saving drugs, regardless of the cost. The "revolution in expectations" resulting from the reality of the welfare state described by Lawrence Friedman describes[19] was indeed extremely successful in Israel. These expectations still flourish despite the changing economic reality: "first, a general expectation that the state will guarantee total justice, and second [...] a general expectation that the state will protect us from catastrophe."[20] An inner tension is visible in Israel between a sense of entitlement to a decent standard of living, the main aspiration of the welfare state, and an ambition to take part in the global economy, which urges the curtailment of expensive welfare arrangements.[21]

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[16] See Chapter C (1) below.

[17] Some of these laws reflected the lobbying efforts of particular groups. Many, however, cannot be characterized in these terms and reflect public support for the welfare state, as evident in the description of these laws in the next chapter.

[18] Indeed, in other countries as well, researchers point to gaps between "ordinary" public opinion towards the welfare state, and the more critical views of professionals and politicians. See: Doron, *supra* note 1, at pp. 32–34; Katan, *supra* note 2, at pp. 21–25.

[19] Lawrence M. Friedman "Legal Culture and the Welfare State" *Dilemmas of Law in the Welfare State* (Gunther Teubner ed., Berlin, 1985), pp. 13, 23.

[20] Friedmann, *ibid.*

[21] Abraham Doron, the leading authority on the Israeli welfare state, also points to this contradiction in the 1980s and 1990s. See: Abraham Doron "Welfare Policy in Israel – The Developments during the Eighties and Nineties" *Public Policy in Israel* (David Nachmias and Gila Menachem ed., 1999), pp. 437, 442–

4.3 The Result: Promising Primary Legislation and Strategies to Avoid Related Costs

4.3.1 The New Wave of Social Rights Legislation in Israel

A series of new statutes that have significantly raised levels of social and welfare rights beyond the "first generation" of social legislation in Israel during the fifties attests to the growing expectations from the welfare state. The blooming of welfare-oriented and social rights-oriented statutes in Israel, which combined to form a "second generation" of welfare legislation, can be traced back to the late 1980s. In this context, the following laws deserve note:

i. *The Nursing Amendment to the National Insurance Law* enacted in 1986[22] – a law establishing eligibility for home nursing, providing primary care at home for incapacitated elderly people.

ii. *Special Education Law*, 1988[23] – a law providing equal educational opportunities for children with disabilities that affect their normal development and impair their learning aptitude (ranging from severe levels of mental retardation up to learning disabilities). The law ensures that, between the ages of three and twenty-one, these children will have a right to free education, including special needs such as speech therapy, physiotherapy, psychological evaluation, etc.

iii. *Senior Citizens Law*, 1989[24] – a law granting privileges and discounts to citizens reaching retirement age. According to this law, senior citizens are entitled to discounts in television fees, public transportation, and more.

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444 (Hebrew). Doron views this as the result of conflicting pressures between, on the one hand, the dominant trend seeking to narrow government involvement and, on the other hand, the activity of social-oriented lobbying, together with the support the welfare state still enjoys among some political segments.

[22] This entitlement originates in the National Insurance Law (Amendment No. 61), 1986. The relevant provisions now form Chapter 10 of the National Insurance Law [Integrated Version], 1995. For more details, see: Dan Schnitt "The Long-Term Care Insurance Law" 30 *Social Security*, p. 65 (1987) (Hebrew); Mimi Ajzenstadt and Zeev Rosenhek "Privatization and New Modes of State Intervention: The Long-Term Care Programme in Israel" 29 *Jnl.Soc.Pol.*, p. 247 (2000).

[23] Special Education Law, 1988 (Hok Hinukh Meyuhad, 1988).

[24] Senior Citizens Law, 1989 (Hok ha-Ezrahim ha-Vatikkim, 1989).

iv. *Extended School Day and Educational Enrichment Law*, 1997[25] – a law expanding the time children spend at school beyond the standard practice, usually confined to five or six hours a day. The purpose of this law was to enable parents to take full-time jobs and to broaden children's opportunities for educational enrichment, even if their parents cannot afford to pay for them. This law was preceded by an earlier Extended School-Day, 1990,[26] which was abolished when the new law was enacted.

v. *State Health Insurance Law*, 1994[27] – this law, "the jewel in the crown" of present day Israeli welfare legislation, ensures universal health coverage. The entitlement created by the new law applies to all aspects of health care and is not limited to primary care. The law created a new health tax to finance this expensive entitlement, reaching up to five percent of individual salaries, but allows exemptions for the unemployed.[28] Consequently, the mechanism created by the law is also subsidized by tax payments from other sources.

vi. *Equal Rights for People With Disabilities Law*, 1998[29] – a law recognizing the right of the disabled population to equal opportunities. The implementation of the equal opportunity principle requires actual investments, such as, for instance, investment in building in order to secure easy access to buildings.

vii. *Public Housing (Purchase Rights) Law*, 1998[30] – a law granting public housing tenants the right to buy their apartments at subsidized prices, which takes into consideration the length of their prior period of residence.

viii. *Rights of Tenants in Public Housing Law*, 1998[31] – a law recognizing the right of tenants leasing public housing to reasonable maintenance of their apartments, and the right of their immediate family to continue the lease in the event of death or hospitalization.

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[25] Extended School-Day and Educational Enrichment Law, 1997 (Hok Yom Hinukh Arokh ve-Limudei Ha'asharah, 1997).

[26] Extended School-Day Law, 1990 (Hok Yom Hinukh Aroch, 1990).

[27] State Health Insurance Law, 1994 (Hok Bituah Bri'ut Mamlakhti, 1994).

[28] Section 2(c)(3) of the Law.

[29] Equal Rights for People with Disabilities Law, 1998 (Hok Shiviyon Zekhuyot le-Anashim im Mugbalut, 1998).

[30] Public Housing (Purchase Rights), Law 1998 (Hok ha-Diyur ha-Tsibburi [Zekhuyot Rekhishah] 1998).

[31] Rights of Tenants in Public Housing Law, 1998 (Hok Zekhuyot ha-Dayar ha-Tsibburi, 1998).

Other new laws have been enacted recently,[32] providing for the right of children "at risk" to free daycare,[33] the significant increase of allowances paid to large families,[34] the right of sick children to education at times of hospitalization and prolonged illnesses,[35] the amended right of the mentally retarded to housing within the community whenever possible,[36] and more.[37]

Not all these laws share the same characteristics or a similar ideology. Some represent an attempt to expand universal social services, such as the laws on special education and health insurance, which until then had not been guaranteed by law. Others are specifically intended for needy sectors of the population, such as public housing tenants. Some might even be characterized as sectorial legislation, such as the privileges granted to senior citizens. Despite these and other differences, the emerging picture, when considered in a broader perspective, is one of a cluster of laws designed to raise living standards and, therefore, promote the welfare state project in Israel.

This massive body of social legislation is in glaring conflict with the aspirations of the powers in charge of economic development (the government in general and the higher echelons of the Ministry of Finance in particular). Consequently, the latter have persistently resisted the newly enacted welfare legislation by attempting to circumvent it. The implementation of this legislation is thus often compromised through the application of bureaucratic measures intended to lower accompanying costs. These measures curtail the effectiveness of social laws without altering their grandiose declarations. Jerry Mashaw claims that broad declarative provisions have the advantage of enabling adjustments of legislation to changing views in government.[38] In the context of Israeli social legislation, how-

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[32] The political dynamics leading to this legislation, originating in private bills, is discussed in Section D below.

[33] Children at Risk Law (The Right to Daycare), 2000 (Hok Pe`otot be-Sikkun [ha-Zekhut le-Ma`on Yom], 2000).

[34] National Insurance Law (Amendment No. 41) (Large Families Subsidy), 2000 (Hok ha-Bituah ha-Leumi [Tikkun Mispar 41] [Siyu`a le-Mishpahot Berukhot Yeladim], 2000).

[35] Free Education for Sick Children Law, 2001 (Hok Hinukh Hinam le-Yeladim Holim, 2001).

[36] Welfare Law (Caring for the Retarded) (Amendment No. 4), 2001 (Hok ha-Sa`ad [Tipul bi-M'fagrim] [Tikkun Mispar 41], 2001).

[37] For example: Daycare Rehabilitation Law, 2000 (Hok Me`onot Yom Shikumiyim, 2000); Assisting Victims of the Chernobyl Disaster Law, 2001 (Hok ha-Mesa`iym le-Nitrul Ason Chernobyl, 2001).

[38] See: Jerry L. Mashaw *Greed, Chaos, & Governance – Using Public Choice to Improve Public Law* (1997), pp. 131–157.

ever, the provisions of welfare laws are in fact systematically adapted in the direction of curtailment, in conspicuous contradiction to the legislator's message.

4.3.2 Techniques for Lowering the Costs of Welfare and Social Services

General: The Dynamics of Welfare Bureaucracies

As noted in the introduction, welfare bureaucracies do not necessarily encourage the fulfillment of welfare entitlements.[39] This phenomenon will be explored in detail below, pointing out the methods used for taking the wind out of the sails of the seemingly progressive Israeli legislation on welfare and social services.

The relative disadvantages of the two extreme models of welfare legislation – the one that awards broad discretion to public welfare officers and the one based on stringent and explicit rules – must be stressed in this context.[40] The discretionary model grants the bureaucracy a large measure of discretion in determining the actual level of welfare, weakening certainty as well as the sense of entitlement.[41] On the other hand, legislation setting highly definitive conditions may burden, and even deter, needy welfare ap-

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[39] See the text to *supra* note 5.

[40] The alternative adoption of these two models is discussed by Matthew Diller "The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government" 75 *N.Y.U.L.Rev.* p. 1121 (2000). A classic article in this field is Richard M. Titmuss "Welfare 'Rights', Law and Discretion" 42 *The Political Quarterly* p. 113 (1971).

[41] Discretionary legislation may also result in differential treatment in similar circumstances. In a discretionary system, the attitudes of welfare personnel play a crucial role and could result in substantial variations when handling comparable cases. Consequently, a problem of uniformity emerges, not just in the same welfare office but also within the overall welfare system of the country. As early as 1971, Jerry Mashaw studied five welfare departments in Virginia and discovered that "welfare in the rural departments [...] is essentially a different program from that in the urban department, [...] although all these jurisdictions are contiguous and none is beyond a thirty minute drive from another." See: Jerry L. Mashaw "Welfare Reform to Local Administration of Aid to Families with Dependent Children in Virginia" 57 *Va.L.Rev.* pp. 818, 821 (1971). See also: Joel F. Handler "Discretion in Social Welfare: The Uneasy Position in the Rule of Law" 92 *Yale L. J.* p. 1270 (1983). Overall, dependence on government discretion is understood to be a threat to human liberty. See: Charles Reich, "The New Property" 73 *Yale L. J.* p. 733 (1964).

plicants. Modern welfare legislation includes myriad funds, benefits, and pensions. With so many mandatory rules and stipulations, applicants can hardly find their way through the legal labyrinth.[42]

Besides the complex rules and conditions that applicants must meet, the attitude of welfare officials is often described as discouraging and alienating. Welfare authorities may enforce informal practices that deter potential applicants from requesting public benefits. Michael Lipsky coined the term "bureaucratic disentitlement"[43] for these practices. These may include, *inter alia*, unnecessary demands for hard-to-obtain proofs of eligibility as prerequisites for filing applications, a demand for the applicant's presence during the entire process, lack of information, and more.[44] The result is that benefits are withheld from eligible recipients, and their actual receipt is delayed until the applicant's eligibility is officially confirmed.

Another problem relates to the passivity of the bureaucratic procedure. The welfare system operates in a way that helps only those aware of their rights, as opposed to those entitled to them. Social welfare bureaucracies are generally not obligated to locate eligible claimants or assist them in pursuing their application. The premise is that citizens are aware of their rights but, as noted, this is usually not the case. In fact, many claimants need legal advice and even representation. This help, however, is often not available.[45]

The bureaucratic problem is exacerbated due to the social stigma attached to welfare claimants, at least concerning some entitlements. "Benefit programs can stigmatize, sending a message that recipients are failures who are a drain on society. Conversely, programs can confer benefits in a dignified manner suggesting that recipients are worthy of respect."[46] This social stigma affects not only the tendency to refrain from applying but

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[42] In the words of Ross Cranston: "People have difficulty learning about, and then negotiating, the labyrinth of rules governing the many social welfare benefits and services." Cranston, *supra* note 5, p. 165.

[43] Michael Lipsky "Bureaucratic Disentitlement in Social Welfare Programs" 58 *Soc.Serv.Rev.* p. 3 (1984).

[44] See also: Gary L. Blasi "Litigation Strategies for Addressing Bureaucratic Disentitlement" 16 *N.Y.U. Rev.L.& Soc.Change* p. 591 (1987–88); Susan D. Bennett, "'No Relief But Upon the Terms of Coming Into the House' – Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System" 104 *Yale L. J.* p. 2157 (1995); David J. Kennedy "Due Process in a Privatized Welfare System" 64 *Brooklyn L. Rev.* pp. 231, 241–250 (1998).

[45] Sheri M. Danz "A Nonpublic Forum or a Brutal Bureaucracy? Advocates' Claims of Access to Welfare Center Waiting Rooms" 75 *N.Y.U.L.Rev.* pp. 1004, 1007–1008 (2000).

[46] Diller, *supra* note 40, p. 1134.

also generates ungenerous attitudes towards social welfare applicants within the government and its officials.[47]

The Israeli Bureaucracy in Action

I have so far pointed out the power of welfare bureaucracies and their impact on welfare rights *de facto*. The recognition of this impact is the starting point for my discussion. I build upon it in order to claim that, in Israel, the power of the bureaucracy is used to limit the effect of the generous welfare legislation. Government agencies use several techniques to curtail the achievements of welfare legislation. These techniques are mainly bureaucratic measures employed by state officials under official guidance, or at least with silent government approval. Occasionally, the courts abet this process by applying minimalist interpretations of the relevant legislation. These measures are also accompanied by legislative amendments enacted in the Knesset resulting from political compromise, on the pretext of revising details of the entitlements (such as contribution fees or dates of application) rather than issues of principle. Officially, these amendments are parliamentary rather than bureaucratic actions, but in fact they usually originate in the government, prompted by officials of the Ministry of Finance. It is important to view these techniques in a broader context:

i. *Lowering standards through bureaucratic measures.* Entitlements secured by welfare and social legislation are often defined so that the standard of service can be lowered without changing the law. For instance, whereas the Special Education Law secures the right of every child to study in a normal class whenever possible (with additional professional help),[48] in practice, many children with disabilities are denied this right and required to study in special separate classes. This way, ordinary schools do not have to accommodate children with special needs, or supply them with individual help. The right to integration within the regular school system is thus contingent on the parents' ability to fight bureaucracy,[49] often requiring them to prove the justice of their case by adding expert (and costly) evaluations of the children.[50] A well-known

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[47] Cranston, *supra* note 5, pp. 220–221.

[48] Section 7(b) to the Special Education Law, 1988.

[49] For example, see HCJ 2599/00 *Yated v. Ministry of Education* (to be published, 14 August 02) concerning the right of children suffering from Down Syndrome to study in a normal class.

[50] In general, petitions questioning decisions of the boards referring children to institutions of special education are difficult to prove. See, for instance, HCJ 85/716 *Ben-Baruch v. Municipality of Ashkelon* 40(1) P.D. 344 (petition dis-

Supreme Court precedent deals with a disabled child with normal learning abilities, who could not attend his neighborhood school because the school building lacked reasonable access to the toilets.[51] This case is probably only the tip of the iceberg in this context.[52]

In the regular educational system, a gradual decrease in school hours and school services can be noted. In principle, nothing has changed regarding the state obligation to provide free education. In fact, however, changes occurred in school curricula, mainly manifest in the minimization of enrichment classes, such as art lessons. The more affluent parents pay the school for these additional classes.[53] In other cases, well-to-do parents seek to establish "special" schools with specific educational foci (arts schools, nature and environment schools, democratic schools etc.), which are expected to offer more enrichment classes and are also subsidized by the parents.[54] Another prominent change is the growing number of pupils in every class, making classes of 35–40 pupils the standard.[55]

The health system assures people of the right to expensive treatments, but they are often forced to wait, mainly for surgery, a fact that partially offsets the effectiveness of their rights. In addition, patients are often denied choice of the hospital in which they undergo treatment, although public hospitals should all be equally available. This reality prompts the more affluent patients to avoid, at least partially, regular public health services, enabling the national health system to save some money.[56]

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missed). The authorities generally tend to compromise in disputes with petitioners who have gone that far, without establishing a precedent. See: HCJ 93/4746 *Hilah Association for Education v. Minister of Education* (unpublished); HCJ 95/6259 *Almi v. Board of Special Education Law* (unpublished); HCJ 94/1090 *Kashizda v. Board of Special Education Law* (unpublished).

51 HCJ 93/7081 Botser v. Maccabim-Re`ut Municipality 50(1) P.D. 19.

52 Bizchut, The Israel Human Rights Center for the Disabled, *Comments on the Combined Initial and Second Reports of the State of Israel Concerning the Implementation of the UN Convention on Economic, Social, and Cultural Rights* (November 1998), p. 10.

53 See: Orna Kazin "Buying Knowledge" *Ha'aretz*, 29 August 2000.

54 See: Rali Saar "10% Have Already Transferred From State to Private Education" *Ha'aretz*, 25 February 2001.

55 Rali Saar "The Overcrowding of Classes will Increase Due to The Curtailment in Education" *Ha'aretz*, 15 June 2001.

56 See: Chaim Shadmi "Increase in the Number of Applicants to Private Medical Services" *Ha'aretz*, 1 April 2001. People with "good connections" within the bureaucracy may still obtain exactly what they want through the mechanisms of the national health insurance law, but many others will be made to understand that they are requesting special privileges rather than the fulfillment of their entitlements.

ii. *Under-budgeting of social services.* The annual budget laws often provide less funds than are realistically needed to support social services guaranteed by legislation. To a great extent, this is why there are not enough positions for social workers and psychologists in welfare services. Sometimes, budgets earmarked for a particular purpose (such as placing children from dysfunctional families in foster homes) are completely depleted before the end of the fiscal year. Underbudgeting is designed to lower the standard of welfare (as fewer services can be expanded because of the decreasing number of social workers).

When welfare laws are passed, the entitlements guaranteed by the new legislation are sometimes financed at the expense of previous ones. For example, when children at risk are entitled to daycare,[57] this may be financed by reducing the number of social workers employed by the welfare authorities. In other cases, the state budget cannot accommodate laws expected to increase the demand for social services, although these laws are not strictly defined as welfare statutes. For instance, the Law for Prevention of Violence in the Family, 1991,[58] meant to protect victims of family violence by judicial preventative order, contributed to the growing demand for state assistance to these victims. New budgets, however, failed to follow.

Often, insufficient budgets cause direct damage to the quality of welfare services,[59] which may be prevented if personnel at social services are willing to work for low salaries and without due compensation for extra hours.[60]

A relatively recent instance of recourse to the under-budgeting technique was the original proposal for the 2000 budget law, which did not provide a budget for the new position of the Commissioner for Complaints against Discrimination of People with Disabilities, as set out in the new 1998 Law.[61] It was also reported that the Ministry of Justice withholds the payments to lawyers hired to provide services to defendants via the Public Defender's office, since the budget for this purpose

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[57] *Supra* note 33.

[58] Hok Limni`at Alimut Ba-Mishpaha, 1991.

[59] For instance, the number of social workers in charge of children at risk is far below what is necessary. According to recent publications, 500 social workers are in charge of 32,000 children at risk. See: Ruthi Sinai "500 Social Workers for 32,000 Children" *Ha'aretz* 21 August 2001.

[60] See also Section C (3) below.

[61] This lacuna was amended due to a petition submitted to the Supreme Court by a human rights organization – Bizchut, The Israel Human Rights Center for the Disabled.

was exhausted before the end of the fiscal year.[62] In addition, the managing director of the Ministry of Justice ordered the office of the Public Defender to refrain from hiring private lawyers to represent defendants, disregarding their statutory entitlement to legal representation.[63]

iii. *Postponing the application of new entitlements.* Another prevalent technique in implementing social legislation in Israel is postponing implementation "for budgetary reasons." This is achieved by legislating an amendment to the law postponing its application, or even by including a provision to this effect in the original statute. This technique allows supporters of the new welfare statute to claim victory, albeit hollow. Let me point out some examples of the use of this strategy. The law ensuring more school hours includes a provision stating it will be applied gradually.[64] To date, over ten years after the enactment of the first law to implement this entitlement, it has hardly been applied.[65] Although priority was given to areas with deprived population, implementation is far from satisfactory, and Arab education can serve as a prime example.[66] Other laws which were postponed as part of the political agreement enabling parliamentary approval of the budget for 2001 are: Public Housing Law (Purchase Rights), 1998,[67] Children at Risk (The Right to Daycare), 2000,[68] and the Free Education for Sick Children

[62] Assaf Bergerfruend "The Ministry of Justice Withholds Payments of Fees to Public Defenders" *Ha'aretz*, 14 January 2001.

[63] Letter of Dan Yakir, legal adviser of the Association for Civil Rights in Israel, to the Minister of Justice, 6 June 2001.

[64] Section 4(a) to the Extended School-Day and Educational Enrichment Law, 1997.

[65] According to data included in a relatively recent decision of the Supreme Court, only 2% of state kindergartens in Israel have an extended day program. See: HCJ 99/8437 *Chain of Habad Kindergartens in the Holy Land v. Minister of Education* 54(3) P.D. 69, 93.

[66] Two petitions centering on the alleged discrimination of the Arab population in the gradual implementation of the original Extended School-Day Law, 1990, were argued before the Supreme Court, but dismissed. See: HCJ 90/3491 *Agabria v. Minister of Education and Culture*, 45(1) P.D. 221; HCJ 91/3954 *Agabria v. Minister of Education and Culture*, 45(5) P.D. 472.

[67] Section 23 of the Regulation of the State Economy Law 2001 (Legislative Amendments for Achieving the Goals of the Budget and the Economic Policy for the Fiscal Year 2001) (Hok ha-Hesderim be-Meshek ha-Medinah (Tikkunei Hakikah le-Hasagat Ye`adei ha-Taktziv ve-ha-Mediniyut ha-Kalkalit li-Shnat ha-Ksafim 2001), 2001). This law had already been postponed previously, through Section 37 of the Regulation of the State Economy Law (Achieving Goals for the Year 1999), 1998 (Hok ha-Hesderim be-Meshek ha-Medinah (Tikkunei Hakikah le-Hasagat Ye`adim 1999), 1998. A petition to the Supreme

2000,[68] and the Free Education for Sick Children Law, 2001.[69] Recently, the Constitution, Law, and Justice Committee of the Knesset proposed a bill including a standard rule, whereby a new law with budgetary implications will only be enforceable in the year after its enactment.[70]

An informal way of postponing new entitlements is delaying their implementation bureaucratically, without a formal postponing amendment. This was done, for example, concerning the provision mandating accessibility of public transport to people with disabilities.[71] The regulations for implementing this provision were not enacted, while steps were taken to purchase new buses inadequately adapted for the wheelchair-bound. The new regulations were only enacted following a petition to the Supreme Court.[72]

iv. *Nominal standards.* Some of the welfare legislation standards are so low that their social significance becomes almost negligible. For instance, welfare payments for people with a 100% disability are equivalent to US$ 400 per month,[73] a sum that cannot provide for minimal living standards in Israel. Moreover, even this relatively modest entitlement is granted according to very stringent criteria; severely handi-

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Court to apply the law was rejected, based on section 37. See: HCJ 99/403 *Ran Cohen v. Minister of Construction and Housing* (unpublished). This petition was submitted by Knesset Member Ran Cohen, who led the legislation process of the initial law.

68 Section 31 to the Regulation of State Economy Law 2001 (Legislative Amendments for Achieving the Goals of the Budget and the Economic Policy for the Fiscal Year 2001).

69 Section 18 to the Regulation of State Economy Law 2001 (Legislative Amendments for Achieving the Goals of the Budget for the Fiscal Year 2001) (Amendment, Revocation and Suspension of Legislation Originating in Private Bills) 2001 (Hok ha-Hesderim be-Meshek ha-Medinah [Tikkunei Hakikah le-Hasagat Ye'adei ha-Taktziv li-Shnat] 2001) (Tikkun, Bitul ve-Hatlaya shel Hakikah she-Mekorah be-Hatsa'ot Hok Pratiyot), 2001).

70 Basic Law: The State Economy (Amendment No. 6) (Approval by the Budget Control Committee) Bill (Hatsa'at Hok Yesod: Meshek ha-M'dina (Tikkun Mispar Shesh) (Ishur ha-Va'adah le-Bikoret Taktsivit).

71 Section 19 in Equal Rights for People with Disabilities Law, 1998.

72 HCJ 00/3989 *Bizchut, The Legal Center for Human Rights of People with Disabilities v. the Minister of Transport* (unpublished).

73 According to Section 202(b) of National Insurance Law [Integrated Version], 1995, the maximum allowance under this provision is defined as 25% of the average salary in Israel.

capped applicants may be awarded only part of it (for instance 50%).[74] Another example relates to the standard established in the schedule of the State Health Insurance Law, 1994. In a recent case, the labor court (which is authorized to resolve disputes in many welfare entitlement cases) rejected a petition submitted by individuals with multiple sclerosis, who requested additional physiotherapy beyond their allotted twelve treatments per year.[75] Child benefits for the first three children are also nominal and unrelated to economic and social reality. Payment for each of the first two children is about US$ 40 a month, and payment for the third child, which is double, is also far from generous.[76] Threats of cancellation or taxation on the payments for the first two children are often voiced when budget cuts are discussed.

v. *Avoiding the updating of standards.* Statutory standards for welfare services that were reasonable at the time they were set, gradually lost their effectiveness due to the reluctance to amend and update them. A prime example of this technique of resisting the spirit of the original statute can be found in the implementation of the State Health Insurance Law, 1994. This law was enacted with a schedule describing all the services included in its coverage, which reflected the medical standards of the time. Proposals to add new drugs and surgical techniques since developed were encountered by objections based on budgetary considerations. People often turn to the courts demanding a specific drug or treatment not included in the schedule. The labor court recently rejected another petition submitted by individuals with multiple sclerosis, who demanded the supply of a drug not sanctioned by the schedule as standard treatment for their illness.[77] This specific litigation ended in a compromise, when the decision of the labor court became a matter for further litigation in the Supreme Court.[78] The case represents a more ex-

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[74] For example, deaf children are entitled to a full allowance only until the age of eight, according to the National Insurance Regulations (Living, Assistance in Studies and Arrangements for the Handicapped Child), 1998 (Takkanot ha-Bituah ha-Leumi [Dmei Mechiyah, Ezra be-Limudim ve-Sidurim le-Yeled Nekhe), 1998]. This rule was recently the subject of a new petition to the High Court of Justice. See: HCJ 01/137 *Harpaz v. the Minister of Labor and Welfare* (petition pending).

[75] L.A. 97/7-5 *Medzini v. Kelalit Health Fund and the State of Israel*, 33 P.D.A. 193.

[76] Section 68 of the National Insurance Law [Integrated Version], 1995.

[77] L.A. 97/7-4 *Kelalit Health Fund v. Carmel* 33 P.D.A. 415.

[78] HCJ 99/501 *Carmel v. The State Labour Court* (unpublished). In this case, Kelalit Health Fund was willing to declare in court that it would not stop supply of

tensive problem, bearing on the general concern of updating the schedule.[79]

vi. *Additional payments for so-called free services.* Supplementary payments are increasingly demanded for presumably free education and health services. Parents are asked to pay all expenses not strictly connected to teaching (textbooks, school trips, etc.). These payments are deemed legal according to the Mandatory Education Law, which provided for the possibility of education-related payments.[80] Patients are ordered to pay "contributory fees" for almost every service (doctor's appointments, medication, etc.).[81] Findings indicate that the public directly finances 36% of the medication costs covered by the State Health Insurance Law, 1994.[82] Recently, the principle of contributory fees was also introduced into the relatively new Rights of Tenants in Public Housing

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the requested medication to the petitioners without a minimum six-month notice, to enable them to apply for judicial remedy.

[79] A widely publicized issue was the battle over the supply of Herceptin to women with breast cancer, since this drug was not included in the original plan of the State Health Insurance Law, 1994. See: R.A. 99/186 *Kelalit Health Fund v. Grundstein* (unpublished). In this case, the labor court was willing to grant the plaintiff an interim injunction ordering that the drug, although not included in the plan, be supplied because of the immediate danger to the plaintiff's life.

In another case pending in the labor court, which deals with the entitlement to genetic tests vital in cancer treatment, the main claim of the applicant is that the general provision of the State Health Insurance Law, 1994, providing for treatment "of reasonable quality and in accordance to medical discretion" (section 3(d)) involves a dynamic principle, necessarily implying the steady updating of standards, even without expressly amending the plan. See: I.A.98/70065 *Lazar-Haramati v. Kelalit Health Services* (petition pending).

[80] Section 6(d) of the Mandatory Education Law allows for the collection of payments. In addition, Section 6(e) allows requests for payments for additional classes, with the parents' consent.

[81] Section 8 of the State Health Insurance law, 1994.

[82] Chaim Shadmi "The Public Finances 36% of the Drugs in the Health Basket" *Ha'aretz*, 12 January 2001; *idem* "Research: The Burden of Financing Health Shifts to the Insured" *Ha'aretz*, 1 November 2001.

Law, 1998,[83] and into the Public Defender Law, 1995,[84] which was curtailed through regulations requiring contributory fees from defendants.[85]

Although basic services are still free, the gradual decline in the quality of services through the application of these techniques makes satisfactory service contingent on extra payments. Residents of more affluent areas pay for additional classes and extended school days ("gray education").[86] "Supplementary health insurance" is also advised to be purchased. This voluntary insurance is not a private, elitist insurance policy solely available to the affluent, but a standard option offered by the public health funds that supply services according to the Health Insurance Law. Barring proper updating of the treatment standards provided by law, this supplementary insurance has become a way of securing a reasonable level of treatment for the middle and upper classes.[87] Furthermore, a so-called "private" health service offers the option of paying for medical care (mainly surgery) in public hospitals, bypassing the waiting list, and allowing a choice of physicians.[88]

vii. *Excluding politically weak groups.* Entitlements secured by Israeli welfare legislation are not equally available to all segments of society, thus placing a disproportional burden on populations wielding less political power. A major example is the continued disadvantage of the Arab

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[83] Section 23 of Regulation of State Economy Law 2001 (Legislation Amendments for Achieving the Goals of the Budget and the Economic Policy for the Fiscal Year 2001). According to this amendment, necessary repairs in public housing will be contingent on contributory payments.

[84] Hok ha-Sanegoria ha-Tsibburit, 1995.

[85] Public Defender Regulations, 2000 (Mandatory Payments Required from People Entitled to Representation) (Takkanot ha-Sanegoria ha-Tsibburit (Hovat Tashlum shel Zakayim le-Yitsug), 2000). A decision issued by a Magistrate Court recently ruled that these regulations are unconstitutional. See: C.C. (Ramla) 00/2698 *The State of Israel v. Katabi* (unpublished).

[86] See *supra* note 53. See also: Swirski, *supra* note 15, pp. 39–43.

[87] For example, see: L.A. 00/1091 *Shitrit v. Meuhedet Health Fund* 35 P.D.A. 5. The appellant required a medical treatment that was not covered by the National Health Insurance Law but only by the "supplementary insurance" provided by his health fund and requiring additional payment. In this case, the court based its decision on a promise made to the appellant that the "special cases committee", which has discretion to approve treatments not covered by the law, would consider his case.

[88] For more details on the various forms of privatization of the health system in Israel, see: Dani Filk "The Neo-Liberal Project and Privatization Processes in the Health System" *Distributive Justice in Israel* (Menachem Mautner ed., 2000) pp. 375, 380–382 (Hebrew).

population vis-a-vis the various welfare and social services, which are usually implemented through bureaucratic means rather than through explicit legislation.[89] At present, the distinctions between budgets allocated to Jews and Arabs are not rooted in any legal provision; rather, they reflect the sympathies and priorities of the officials working in a reality of limited budgets. One instance at the heart of several legal proceedings is the educational system in the Arab sector. There is patent discrimination of this system that becomes even more conspicuous in the context of relatively expensive services such as special education. The options for special education in the Arab sector of the state education system are very limited.[90] As already indicated, the implementation of the long school-day regime was slower in the Arab sector than in other comparable socioeconomic groups, which headed priority lists.[91] Moreover, the Arab educational system was not originally included in several programs for the advancement of school children from disadvantaged populations.[92] Similar concerns have been voiced regarding the availability of mother-and-baby state clinics in the Arab sector.[93] Evidence is also available concerning differences between Jewish and Arab

[89] On the origins of the exclusion, or at least partial exclusion, of the Arab population in the context of welfare, see: Zeev Rosenhek "The Exclusionary Logic of the Welfare State" 14(2) *International Sociology* p. 195 (1999) (centering on the example of the child allowance scheme); Zeev Rosenhek and Michael Shalev "The Contradictions of Palestinian Citizenship in Israel – Inclusion and Exclusion in the Israeli Welfare State" *Citizenship and the State in the Middle East* (N. Butenschan and Others ed., Syracuse, 2000), p. 288 (discussing both the child allowance issue and housing policy).

[90] See: H.C.J. 01/1079 *Houri v. Ministry of Education* (petition pending). This petition points to the inadequate implementation of the Special Education Law, 1988, in Arab cities and villages. It appears that many Arab children suffering from mental or emotional disabilities, who are officially eligible for special education, attend the regular education system because the Ministry of Education has not yet found appropriate educational settings for them.

[91] See *supra* note 66.

[92] HCJ 97/2814 *The Supreme Committee for the Surveillance of Arab Education in Israel v. The Ministry of Education, Culture and Sport* 54(3) P.D. 233.

[93] For example, see: HCJ 01/1472 *Farah v. the Municipality of Jerusalem* (unpublished). The petition focused on the lack of proper services of this kind in East Jerusalem. At this stage, the authorities were willing to declare in court that three new clinics would be built during the year, voiding the need for continuing the current petition.

localities in expenditures for families and individuals receiving social services.[94]

Another example of the inclination to grant fewer entitlements to groups unable to mobilize political clout is the annual quota set for entitlements to paramedical treatments, such as speech therapy and physiotherapy. The State Health Insurance Law, 1994, does not provide a guiding rule in this regard,[95] and patients are assigned to treatments up to the "ceiling" that was prevalent (as a result of a bureaucratic decision-making within the health funds) when the law was first enacted, and not necessarily according to medical needs.[96] In this context, it is important to remember that entitlement to these treatments is usually relevant to permanently disabled patients who are therefore unable to work. These patients are often excluded from the community of working and functioning citizens. In contrast, costly treatments for cancer patients are provided relatively generously,[97] not to mention the highly expensive fertility treatments covered by the law.[98] In addition, when the health funds failed to provide new cancer drugs to patients, it was relatively easy to organize a political coalition to fight this decision, in contrast to the "brick wall" encountered when pleading for the well-being of children unable to express their needs.

viii. *Strict interpretation of entitlements.* The authorities tend to interpret entitlements minimalistically. Below are some representative examples. In a case dealing with regulations providing for entitlements to a secured income allowance for claimants obligated to stay home to provide "constant care" to an ailing relative,[99] the authorities and the court dismissed the claim of a woman who could not hold a job because both her mother and son were ill and needed this care.[100] She claimed to be entitled to the

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[94] Yosef Katan and Dan Shnit "Provision of Personal Social Services in Israel – Issues of Distributive Justice and Territorial Inequality" (presented at the "Social Rights" Conference, Minerva Center for Human Rights, Tel-Aviv University, May 2001).

[95] See: sections 20 (regarding developmental problems in children) and 22 (in general) of the Second Schedule of the State Health Insurance Law, 1994.

[96] See also *supra* note 77.

[97] See section 26 of the Second Schedule of the State Health Insurance Law, 1994.

[98] See section 6(d) of the Second Schedule of the State Health Insurance Law, 1994.

[99] Section 3(a)(3) to the Securing Income Regulations, 1982 (Takkanot Havtahat Hakhnasah), 1982).

[100] L.A. 1990/04–39 *National Insurance Institute v. Menachem* 21 P.D.A. 490.

allowance, even though separately, neither her son nor her mother needed "constant care." The Court adhered to the administrative position and interpreted the provisions to mean that the allowance could only be granted for a single sick relative requiring constant care. The claimant, a divorcee, had no choice but to stay home and tend both her ailing mother and son, deprived of the right to an income allowance because neither relative was "sick enough" in his or her own right. In another case, a mother's request for a maternity grant was denied because she gave birth at home and not in a hospital, as stipulated by law.[101] Another applicant was denied a maternity grant due to a former debt she owed the National Insurance Institute at the time of giving birth. Her claim was denied even after the debt was paid.[102] An unemployed woman who took an accounting course was refused the unemployment allowance routinely allocated to unemployed participants undergoing "professional training" because she had not been referred to this course by the employment bureau, even though the course was initiated by the Ministry of Labor and Welfare.[103] In another case, the plaintiff was originally declared a "work objector" and refused unemployment allowance because he informed a potential employer that he had back problems.[104]

Many examples concern the narrow interpretation and application of the senior citizens' entitlement to home nursing aid,[105] which proved a much larger burden on the welfare budget than originally estimated. According to one precedent, this entitlement can only be applied in the form of payment to a professional caretaker, a stranger rather than a family member.[106] More significantly, the entitlement was also very narrowly interpreted regarding an assessment of the applicants' need for aid. In order to "prove eligibility" for the entitlement, one must be "en-

[101] L.A. 1988/0–191 *Ladvin v. National Insurance Institute* 21 P.D.A. 5.

[102] L.A. 1994/0–267 *Deutch v. National Insurance Institute* 28 P.D.A. 503.

[103] L.A. 1990/04–237 *Biton v. National Insurance Institute* 22 P.D.A. 530.

[104] This decision was revoked by the regional labor court. See: I.A. (Jerusalem) 00/1913 *Goliger v. Employment Service* (unpublished).

[105] In addition to constricting conditions expressly set in the law. According to section 227 to the National Insurance Law [Integrated Version], 1995, the entitlement does not apply to applicants who reside in nursing homes. In the case of L.A. 1994/05–275 *National Insurance Institute v. Vioneta* 27 P.D.A. 409, the court sanctioned the decision not to implement this entitlement for residents in private nursing homes, which are not state-subsidized. When ruling against this petition, the court argued that the nursing allowance had been intended to help the sick/elderly to continue functioning within the community.

[106] L.A. 1990/0–138 *National Insurance Institute v. Shayvis* 22 P.D.A. 152.

tirely dependent on assistance" while performing "everyday activities."[107] The currently applied evaluation method is based on criteria that grant "points" according to the patient's performance of several key activities such as walking, dressing, washing, and eating. In practice, these criteria are so rigidly applied that even an extremely limited independent behavior overrules entitlement. Abiding by these criteria, the court ruled against a petitioner who was not completely dependent on others in performing these activities.[108] This rigid application occurred in another reported case: a 78 year-old woman was denied this entitlement because of her ability to walk in her home "independently" – with a walker or by leaning on furniture and eat "independently" – after being served the dishes (she could not cook herself). In addition, the court lacked evidence that she could endanger herself.[109] Similar inflexibility prevails concerning entitlements to allowances for disabled children.[110]

ix. *Waiting Periods*. Many entitlements are contingent on waiting periods, which limit and sometimes eliminate the significance of the entitlement. A prime example is the disabled child allowance,[111] which was contingent upon a minimum six-month dependence period.[112] Controversy arose in the case of a child who had undergone surgery and was confined to a wheelchair for a six-month period. The parents claimed to have met the condition set by the regulations for the allowance. Yet, both the authorities and the court denied their claim, on the grounds that the allowance is paid from the seventh month of disability onwards, and not retroactively.[113] Many other entitlements have similar stipulations.[114] Moreover, payments for many entitlements are only disbursed from the application date and not from the occurrence of the handicapping event, even if the latter dates further back.[115]

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[107] Section 224(a) National Insurance Law [Integrated Version], 1995.

[108] L.A. 1989/05–120 *National Insurance Institute v. Tishler* 21 P.D.A. 22.

[109] N.I.A. 99/2 *Vingord v. National Insurance Institute* 34 P.D.A. 551.

[110] L.A. 1989/0–179 *National Insurance Institute v. Peretz* 22 P.D.A. 61.

[111] Current regulations in this regard are National Insurance Regulations (Living, Assistance in Studies and Arrangements for the Handicapped Child), 1998 discussed in *supra* note 74. The example discussed in the text concerns the 1980 regulations (under the same name).

[112] The new regulations reduced the waiting-period to 90 days.

[113] L.A. 1989/0–213 *National Insurance Institute v. Ben Or* 21 P.D.A. 227.

[114] For example, the nursing entitlement of elderly people is contingent on a twelve month (!) eligibility period, according to Section 226 National Insurance Law [Integrated version], 1995.

[115] See: L.A. 95/0–198 *Na'im v. National Insurance Institute* 30 P.D.A. 9; N.I.A. 97/246 *Muskal v. National Insurance Institute* 35 P.D.A. 348.

4.3.3 Techniques for Externalizing the Costs of Welfare and Social Services

An alternative way to circumvent welfare expense is to save costs not by curtailing entitlements but by refraining from paying full value for services provided by welfare personnel (who earn very low salaries), or by private institutions legally mandated to supply some services (which are not always fully reimbursed for invested funds). This "survival technique" has become characteristic of social services in Israel.

i. *Externalizing costs by lowering standards of remuneration and work.* Salaries for social service personnel in Israel are low. This description applies to the education system (teachers), the welfare system (social workers and psychologists), and the health system (doctors and nurses). These services, therefore, suffer from the damaging repercussions of recurring strikes seeking to raise salaries. Strikes, however, have been ineffective, proving only marginally successful in raising salaries and having little impact on the strikers' quality of life or social status. Although some professionals add to their income (doctors in private practice and teachers with private tutoring), this does not hold true for the majority. Moreover, these additional endeavors sometimes lower the standard of service provided by the public system (e.g. doctors and teachers who hurry to leave work to go to their private jobs). Significantly, most members of the work force in these public service areas are women, who are more willing to compromise due to their discrimination by private employers and their preference for relatively convenient work schedules.

ii. *Externalization to care workers.* Another class of workers crucial to the survival of the Israeli welfare system consists of care providers employed by private individuals disabled by sickness and old age. Welfare legislation (mainly the National Insurance Law mentioned earlier) helps to finance these nursing services. Standards of state subsidy enabling this necessary help, however, assume very low salaries and therefore exploitation of these workers, at the lowest echelons of the work force. In addition, the policy on work permits for foreign workers is especially lenient regarding nursing aid, perhaps as a response to widespread frustration with the State Health Insurance Law, 1994, which failed to address the nursing needs of the elderly. If inexpensive care providers are available, the problem appears less acute (at least for the more affluent). Although most of the rights secured by the labor legislation concerning minimal wage and extra-hours also apply to foreign workers, these arrangements are hardly ever enforced in this context. A recent example

illustrating the reliance on inexpensive imported labor is a new precedent in tort damages awarded to plaintiffs who, due to severe disabilities, became dependent on help. The Supreme Court held that these damages should be quantified with the assumption that a foreign worker (whose salary is significantly lower than that of a local counterpart) would supply nursing aid.[116] Another aspect of the low employment costs of foreign workers is that their health insurance only grants partial coverage.[117]

iii. *Externalization to other institutions or suppliers*. Externalization of costs also occurs in official refusals to refund institutions supplying services according to statutory duties, and which are therefore entitled to be fully reimbursed. This occurred in the case of *Jerusalem Theater v. the Minister of Labor and Welfare*.[118] The Ministry refused to reimburse the petitioner for discounts granted to elderly patrons according to the provisions of the Senior Citizens Law, 1989, which mandates a list of institutions to ensure discounts to senior citizens. The Jerusalem Theater was not on the list, but used to buy and sell tickets for productions by other theaters included in it. In these cases, the petitioner granted elderly patrons the discount on tickets stipulated by law. A request for a refund from the authorities was refused on the grounds that the original theaters producing the shows should provide compensation. The High Court of Justice ruled against the petitioner, although aware of the complicated and burdensome process of obtaining refunds from the original theaters. In practical terms, the discounts provided by law to senior citizens were thrust in this case upon the Jerusalem Theater.

More significant from the perspective of Israel's economy is the case of *Maccabi Health Services v. the Minister of Finance*.[119] This petition

[116] C.A. 99/450 *Axelrad v. Zur-Shamir, Insurance Company Ltd.* 54(4) P.D. 450. For the status of foreign workers in Israel, see: Zeev Rosenhek "Migration Regimes, Intra-State Conflicts, and the Politics of Exclusion and Inclusion: Migrants Workers in the Israeli Welfare State" 47 *Social Problems* p. 49 (2000).

[117] The provisions of the State Health Insurance Law do not apply to them, and they only enjoy the more limited entitlements accorded by the Foreign Workers Law (Prohibition on Unlawful Employment and Securing Fair Conditions), 1991 (Hok Ovdim Zarim [Issur Ha`asakah she-lo ka-Din ve-Havtahat Tna'im Hognim], 1991). See also: H.C.J. 01/6433 *Filora v. Minister of Health* (petition pending).

[118] HCJ 98/8150 *The Jerusalem Theater v. The Minister of Work and Welfare* 54(4) P.D. 433.

[119] HCJ 98/2344 *Maccabi Health Services v. The Minister of Finance* 54(5) P.D. 729.

concerned the refusal of the Ministry of Finance to update its payments to the health funds, which supply services according to the State Health Insurance Law 1994. The health funds' argument rested on the increased costs of their standard services due to medical developments since the original enactment of the law, the aging of the Israeli population, and other factors. The court ruled in favor of the health funds, ordering the authorities to reconsider, but without mandating any specific decision.

Another way to externalize the costs of social laws is to make the employers, rather than the state, responsible for the expense of entitlements given to salaried workers. This is the model adopted by the new laws granting workers the entitlement to paid sick leaves even in the case of a sick relative – a child,[120] a parent,[121] or a spouse,[122] including a pregnant spouse.[123]

4.3.4 The Limited Effectiveness of Judicial Review

At this stage of the discussion, it is important to assess the impact of judicial review on the bureaucratic implementation of welfare legislation. Do the courts accept this cumbersome application? Can judicial remedies improve the implementation of welfare and social laws? Overall, my answer is not encouraging. When disentitlement originates in the welfare statute itself, namely, when the law expressly provides for low standards or constricts the entitlement by setting stringent conditions, prospects for judicial review are dim. Such a review could rely, if at all, on the concept of a constitutionally protected level of social rights that the statute fails to meet, and would require a uniquely activist judicial approach. When the argument addresses issues concerning the implementation of the legislation, judicial review is possible, but in practice, the judiciary can hardly be expected to have too much influence. The judge is indeed better placed than the bureaucrat to value the law-protected rights and is not expected to use efficiency as the sole criterion when ruling on the application of welfare

[120] Sickness Payment Law (Leave Due to a Child's Illness), 1993 (Hok Dmei Mahalah [He`adrut be-shel Mahalat Yeled], 1993).

[121] Sickness Payment Law (Leave Due to a Parent's Illness), 1993 (Hok Dmei Mahalah [He`adrut be-shel Mahalat Horeh], 1993).

[122] Sickness Payment Law (Leave Due to a Spouse's Illness), 1998 (Hok Dmei Mahalahl [He`adrut be-shel Mahalat Ben Zug], 1999).

[123] Sickness Payment Law (Leave Due to a Spouse's Pregnancy or Childbirth), 2000 (Hok Dmei Mahalah [He`adrut Ekev Herayon ve-Leidah shel Bat Zug], 2000).

legislation. Yet, barriers still exist at a deeper level. In standard welfare cases, applicants lack relevant information that might facilitate litigation. They also lack the financial resources for successful litigation to reach the Supreme Court. More often than not, applicants are also dependent on the goodwill of welfare officials and might therefore think twice before entering into legal confrontation with them.[124] Above all, applicants are not "repeat players" and are thus less prepared for legal battle than the welfare authorities.[125] Throughout this paper, I have pointed to the many judicial decisions reflecting a tendency of the Israeli labor courts to endorse minimalist interpretations of entitlements.[126]

And yet, despite the difficulties of welfare cases on the way to court, there are documented legal victories. What characterizes Israeli precedents in the realm of welfare and other social services? First, successful petitioners tend to be affluent. A prominent example is the renowned case of *Botser v. The Macabim-Reut Local Municipality*,[127] involving a municipality that failed to build a school accommodating the needs of children using wheelchairs. The municipality did not assume responsibility for providing the necessary conditions for disabled pupils until forced to do so by a Supreme Court decision. Macabim-Reut, however, is a suburb with one of the most affluent populations, on average, in the country. Can we expect a poor family to engage in this path-breaking battle? Another legal victory for a national insurance applicant, won in *Halamish v. National Insurance Institute*,[128] addressed the entitlement to old-age allowances (social security payments) of former residents who no longer reside in Israel but have paid their dues for many years.[129] This case, originating in a petition brought by a well-to-do former Israeli who migrated to the United States, is once again not a representative welfare dispute.

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[124] Joel F. Handler "Continuing Relationships and the Administrative Process: Social Welfare" *Wis.L.Rev.* pp. 687, 690 (1985).

[125] Using the terminology suggested by Marc Galanter "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" 9 *L. & Soc.Rev.* p. 95 (1974).

[126] See *supra* notes 75, 77, 99–110 and accompanying texts.

[127] *Supra* note 51.

[128] HCJ 99/890 *Halamish v. National Insurance Institute* 54(4) P.D. 423.

[129] According to the rule set by the law, the entitlement at the time of payment is limited to residents. The law, however, acknowledges the possibility of recognizing exceptions that may mitigate this harsh rule. Before the matter was brought to court, administrative officials had refrained from setting regulations covering these exceptions. The result of the proceedings was a court order to consider the enactment of new regulations on this matter.

From the perspective of the welfare bureaucracies, it still pays to wait for court rulings. In many cases, applicants get tired of waiting and do not exhaust all the legal options.[130] If they do go to court, they may still lose. If they win, the authorities are usually not penalized for refusing to accept the applicants' demand before their recourse to legal means. In the case of the discriminatory exclusion of the Arab sector from programs assisting children from disadvantaged populations,[131] the Ministry of Education accepted the petitioners' argument and there was no need for a ruling. If so, why were legal proceedings necessary in this case? More crucially, what incentive do the authorities have to refrain from illegal policies at an earlier stage?

Even when courts rule for the petitioners, decisions might still be construed as limited to the circumstances for the case at hand. The court itself tends to limit the scope of its decisions, and thus even hard-fought precedents may not help future claimants who may need to start everything afresh. In *Sofer v. The Ministry of Labor and Welfare*,[132] the petitioner argued that a provision postponing payment of a disability allowance, due to an appeal pending on the original decision to award the allowance,[133] was unreasonable and void. The court accepted this argument but refrained from overruling similar arrangements which postpone allowances upon appeal of the original decisions to grant them, leaving the issue for future litigation.[134] In many cases, the petitioner is also unable to argue his case in the context of a systemic problem in the realm of welfare. A legal victory then will typically not be applied in other contexts, despite the similarities.

4.4 The Welfare Scene in a Political Context

The present situation has many disadvantages. First, the most sensitive to the curtailment of rights are the most vulnerable and neediest – low-in-

[130] In the context of unemployment allowances, findings show that only few of the thousands of unemployed individuals classified as "work objectors" appeal to the labor court each month. See: Ruthi Sinai "The Labor Court Accepted the Appeal of an Unemployed Individual Contesting his Definition as 'Work Objector'" *Ha'aretz*, 12 January 2001.

[131] See *supra* note 92.

[132] HCJ 98/5580 *Sofer v. The Minister of Labor and Welfare* 54(4) P.D. 319.

[133] Section 27(a) National Insurance Regulations (Determining the Level of Handicap for People Injured at Work) (Takkanot ha-Bituah ha-Leumi [Kevi`at Dargat Nekhut le-Nifga`ei Avodah], 1956).

[134] Sofer, *supra* note 132, p. 326.

come citizens lacking skills to cope with cumbersome bureaucratic mechanisms. If employed, they are the ones most likely to suffer from the practice of long waiting hours in the corridors of the National Insurance offices or in the hallways of public hospitals, in order to meet the relevant official. Their appointment will usually be scheduled for an indefinite morning hour. Because of their difficulties in earning a living, they will not consider a private afternoon appointment for a doctor. Second, the present reality sows further distrust as to the accomplishments of the welfare state. Distrust originates from the recognition that the level of some entitlements is below a reasonable minimum. For instance, children from needy homes cannot participate in extracurricular activities, such as the annual field trip, if their parents cannot afford to pay. Distrust also stems from the growing gap between the exaggerated promises of legislation and its actual implementation.

Distrust in the state welfare system leads to the gradual development of parallel, seemingly private welfare alternatives, mainly in religious communities, both Jewish and Muslim. The independent educational system of the *Shas* religious party offers its pupils inexpensive transportation to school, lunch, and an extended school day, which is usually not available in the state public education system. The Islamic movement is also gradually developing an alternative system of education and welfare support. Admittedly, voluntary activities are considered positive signs in a civic society. They should not, however, serve as substitutes for reasonable state provided activities. Moreover, the so-called private services provided by *Shas* rely heavily on state subsidies. The result seems to be that the state, rather than providing for the general public through ordinary welfare channels, allocates taxpayers' money on a sectorial basis to selected groups. Sectorial parties have good reason to support and strengthen this pattern, which both benefits their constituencies and enhances their popularity.

Another problematic development is the increasing number of citizens opting out of state supplied services due to their unsatisfactory nature – especially by buying private medical services, "gray education" and enrolling in "special" schools. This trend illustrates that affluent groups tend to despair of public services. To some extent, these groups have stopped struggling to improve the quality of these services, exposing the whole system to deterioration (without the political support of influential constituencies).[135] This sets in motion a vicious cycle, in line with the well-known truism that "services for the poor become poor services".

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[135] Compare: Clayton P. Gillette "Opting Out of Public Provision" 73 *Denver L.Rev.* p. 1185 (1996).

What the Israeli welfare state truly needs is a sense of direction. Israel must decide what it can offer its population as a whole and what it can offer its needy population. As a result, some entitlements may be defined more rigidly than they are today, but the final definition should be fully respected. In other words, the focus of this article is not the level of welfare and social services currently offered by the Israeli welfare state but rather the systemic gap between the statutory promises and their application.

Unfortunately, prospects for this change in the near future are exceedingly slim. Social issues are marginal to the political debate in Israel, which is dominated by the life-and-death questions of the Israeli-Arab conflict. When forced to choose, most voters prefer to focus on these questions, even at the cost of their social worldview and possibly their immediate welfare interests. Due to the political split in matters of security and the peace process,[136] all governments rely on fragile parliamentary support and are deterred from promoting new initiatives, thus making any significant reform in the social or political realms practically impossible. For leaders in the two major parties, reforms threatening the political gains of powerful interest groups represent a daunting endeavor,[137] since any reform seeking to establish a more coherent welfare policy would necessarily curtail some rights in order to secure others. Leading political figures do not consider the Ministry of Labor and Welfare an attractive office, and incumbents are usually not expected to take political initiatives. In fact, the Ministers of Labor and Welfare in the period relevant to our discussion considered this appointment a political compromise. Having accepted the nomination, however, and as leaders of sectorial parties (usually *Shas*), they were more interested in pursuing the particularistic goals of their constituencies by, for instance, supporting religious hostels for children at risk.

Due to changes in the electoral system, the effects of the political split on the inability to initiate and lead reforms intensified in the last few years.

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[136] In Israeli political jargon, this split is known as one between "left" and "right". This terminology, however, does not attest to differences on social issues. So-called left-leaning politicians do not necessarily support social views, nor do right-leaning politicians necessarily hold economic views associated with the political right in Western parlance.

[137] Note in this context the inability of the Barak government to carry a legislative initiative intended to bring about a major tax reform. See: Amendment to the Tax Law Bill, 2000 (Hatsa`at Hok le-Tikkun Dinei ha-Missim, 2000), based on a report submitted by a committee appointed by the Minister of Finance and chaired by Prof. Ben-Basat.

Since the adoption of direct and separate elections for prime minister,[138] Israeli voters began to split their vote, voting for a sectorial party in parliament and for a candidate for prime minister affiliated with a different party. This led to a parliament splintered into even more small parties, which cannot guarantee effective support to the prime minister, and compete with each other in the area of popular legislation intended to gain new welfare rights or improve existing ones.[139] Some of the laws enacted during these years are justified, while others are not as sound. They include the important new law concerning day-care arrangements for children at high risk,[140] as well as the controversial new amendment increasing children allowances to large families (starting from the fifth child),[141] which the ultra-orthodox parties strongly supported.[142] These new laws, initiated by individual Knesset members (and not by the government), are not isolated ex-

[138] According to the Basic Law: The Government, enacted in 1992, which abolished the original parliamentary regime as set in the Basic Law: The Government, from 1968.

[139] Shachar Ilan "Israel is Probably the Only Democracy Without Limits on Private Budgetary Legislation" *Ha'aretz*, 17 December 2000.

[140] See *supra* note 33.The lack of appropriate aid for children at risk in early stages of development was acknowledged by the court in HCJ 95/1554 *Gilat Supporters Association v. The Minister of Education, Culture and Sports* 50(3) P.D. 2. This petition was dismissed, however, because it argued for continued state support for a private project in this area, while the Ministry of Education stated it was planning new initiatives to accomplish the same goal. The court ruled that the Ministry of Education's decision was reasonable.

[141] See *supra* note 34.

[142] In practice, this amendment was supported by a strange coalition that also included the Arab parties, which recognized the (unintended) advantages of this law to their voters. For a critique of the privileged position of large families in the Israeli system of children's allowances (even before the new amendment), see: Yoram Margalioth "Child Support Allowances" *Berenson Book,* Vol. 2 (2000), p. 733 (Hebrew); Yoram Margalioth "Child Support Allowances Distort the Tax System: Analysis and Proposal" 47 *The Economic Quarterly* p. 252 (2000) (Hebrew).

According to available statistics, almost 60% of the children considered "poor" by the Institute for National Insurance do not benefit from the new amendment, as, according to the terms of the law, their families are not large enough. See: Shachar Ilan "The Large Families Law Does Not Help the Majority of the Poor" *Ha'aretz,* 20 June 2001.

amples. Social bills privately initiated by Knesset members,[143] as well as new bills that they submitted to the Knesset, continue to accumulate.[144]

4.5 Concluding Thoughts

The Israeli welfare and social service systems send an ambivalent message to their recipients. Officially, all social rights are secured by statutes, if not more.[145] In practice, however, implementation may require the entitled to follow a long, arduous, and not always promising path. The parallel development in two opposing directions, preserving and broadening welfare statutes while narrowing their significance and impact, cannot coexist for long.

Globalization is liable to make adherence to welfare ideals increasingly difficult. Therefore, it is essential that the money invested in welfare be

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[143] See *supra* notes 33–37.

[144] For example: State Health Insurance Law (Amendment No. 12) (Rights of Non-Resident Children) Bill, 2000 (Hatsa`at Hok Bituah Beriut Mamlachti [Tikkun Mispar 12] [Zekhuyot Yeladim she-Enam Toshavim] 2000); Equal Rights for People with Disabilities Law (Amendment) (Accessibility, Housing in the Community and Personal Assistance, Sport, Leisure, Culture, Education and Studies, the Legal System, Special Needs and Information) Bill, 2000 (Hatsa`at Hok Shivyon Zekhuyot le-Anashim im Mugbalut [Tikkun] [Negishut, Diyur ba-Kehilah ve-Siyu`a Ishi, Tarbut, Pnai ve-Sport, Hinukh ve-Haskalah, ha-Ma`arekhet ha-Mishpatit, Tsrakhim Meyuhadim ve-Meyda] 2000); State Health Insurance (Amendment No. 14) (Health Services for Pupils) Bill, 2001 (Hatsa`at Hok Bituah Beriut Mamlakhti [Tikkun Mispar 14] [Sherutei Beriut la-Talmid] 2001); National Insurance Law (Amendment No. 44) (Study Scholarship for Bar-Mitzvah Youth) Bill, 2001 (Hatsa`at Hok ha-Bituah Haleumi [Tikkun Mispar 44[ (Ma`anak Limudim le-Yeled she-Higi`a le-Mitzvot] 2001). A new initiative to limit the enactment of social laws with considerable budgetary consequences is the amendment to Basic Law: The State Economy mandating every law with budgetary consequences to be passed with the support of at least 50 Knesset members (out of 120). See: Basic Law: The State Economy (Legislative Bills with Budgetary Consequences) (Temporary Provision) 2002 (Hatsa'at Hok Yesod: Meshek ha-M'dina [Hatsa'ot Hok ve-Histayguyot Shebevitsu'an Krucha Alut Taktsivit]]Hora'at Sha'a) 2002).

[145] The constitutional status of social rights (as opposed to their ordinary protection by legislation) is still imprecise, since proposals to enact a Basic Law in this regard have so far failed to mobilize sufficient political support. For a discussion of the effect of the Basic Laws in the realm of human rights, see: Aeyal Gross "The Politics of Rights in Israeli Constitutional Law" 2 *Israel Studies* p. 80 (1998).

used to convey clear preferences. Due to the political deadlock in Israel, the prospects for change in this area are, at best, unclear. Strong criticism of the electoral system introduced only a few years ago[146] resulted in significant constitutional change. A new version of the Basic Law: the Government[147] was enacted, renewing the traditional parliamentary regime based on a single vote. It remains to be seen whether this change will diminish the power of sectorial parties and enable new social initiatives based on a broader view of the developments currently affecting the welfare state. This constitutional reform will not guarantee change, however, as long as Israeli political life is dominated by security problems perceived by the public as more vital.

[146] See *supra* note 138.

[147] Basic Law: The Government, enacted in March 2001.