

**Courting Economic and Social Rights in Palestine: Justiciability, Enforceability and the Role of the Supreme Constitutional Court\***

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**Abstract:**

In this paper, I will discuss whether Economic and Social Rights (ESRs) constitute *fundamental* rights in Palestine, as a result of their entrenchment in the constitutional text, the Basic Law of the Palestinian Authority; and if yes, which ones. In fact, while in International Human Rights Law (IHRL), ESRs are presented as a monolithic category of rights, they are not treated as such in national constitutions. Some rights are simply missing from the text; others are present but enjoy different status within the constitution – often depending on the way they are written in the constitutional text, and on the way they are applied by state institutions, in particular the courts. I will also discuss whether those fundamental ESRs, in particular those that appear to be legally binding as a result of their entrenchment in the constitutional text, are – and ought to be – *justiciable*. I will finally discuss the theoretical and practical objections to the role of a specialized Court in *enforcing* entrenched ESRs, through constitutional adjudication.

**1. Introduction**

On February 23, tens of thousands of Palestinian teachers took to the streets to protest their poor pay and working conditions. The Palestinian Authority regarded this development with suspicion, fearing that the protests, in the context of the Fatah/Hamas split, could easily become ‘politicized’. The Palestinian security forces established checkpoints in major West Bank cities, with a view to preventing public school teachers from traveling to Ramallah to participate in the main protests.<sup>(1)</sup> Debates among the general public in the

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(1) ‘Palestinian security set up checkpoints to stop teachers protest,’ *Ma’an Agency News* (23 February 2016) <http://www.maannews.com/Content.aspx?id=770405>. All websites are

aftermath of the teachers' strike generally focused upon whether those teachers have rights that the government are not fulfilling, and whether public expenditure upon education is fair in comparison to other sectors (such as security, for example). Additional questions arose in relation to the status of human rights and levels of freedom within Palestinian society, in no small part due to the government's crack-down,<sup>(2)</sup> its refusal to recognize representatives, and the restrictions that it imposed upon freedom of movement.<sup>(3)</sup>

This example serves to reiterate that Economic and Social Rights (ESRs) – such as the right to work, education, adequate standard of living – are inseparable from civil and political rights (CPRs), such as the prohibition on arbitrary arrest and detention, freedom of movement, and freedom of thought, belief and expression. This conclusion, which is frequently advanced within studies of human rights, informs us that, in a just society,<sup>(4)</sup> we should not have to choose between not being killed arbitrarily and subsistence; or between privacy and the protection of our own family.

In opposing itself to the conventional wisdom that distinguishes between different generations of rights upon the basis some are 'negative' while others are 'positive', this paper attempts to expand the argument that ESRs are also human rights.<sup>(5)</sup> This line of argument has strong roots within key legal developments that have taken place over the twentieth century, including both International Human Rights Law (IHRL) and modern waves of constitutionalism.<sup>(6)</sup>

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accessed on March 07, 2017, unless otherwise indicated.

(2) 'West Bank teachers' strike goes on despite PA crackdown,' *Al Jazeera* (9 March 2016). <http://www.aljazeera.com/news/2016/03/west-bank-teachers-strike-pa-crackdown-160309061718386.html>

(3) It should be noted that Palestinian political representatives have recently ratified most International Human Rights treaties. For a detailed presentation of the treaties that President Abbas ratified in 2014, see: Dalia Hatuqa, "Paradigm shift': Palestinians join treaties', *Aljazeera* (22 April 2014). Available at: <http://www.aljazeera.com/news/middleeast/2014/04/shift-palestinians-join-treaties-2014418111950813313.html>.

(4) Jeff King, 'Introduction,' in *Judging Social Rights* (Cambridge: Cambridge University Press, 2012), 1.

(5) *Ibid.*, 1-2.

(6) *Ibid.*, 1; Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001), 221; David Landau, 'The Reality of Social Rights Enforcement,' *Harvard International Law Journal* 53 (2012): 406-7.

While in international law ESRs are often presented as a monolithic category of rights, this is not the form in which they are rendered within national constitutions.<sup>(7)</sup> In this paper, I will seek to address the question of whether ESRs, as a result of their entrenchment within the key Palestinian constitutional text (the Basic Law of the Palestinian Authority), can be said to constitute *fundamental* rights in Palestine; in the event of accepting this premise, it will seek to establish which ones. The situation is further complicated by the fact that some rights are simply missing from the text; others are present but enjoy different status within the constitution – their precise meaning often being contingent upon their written form within constitutional texts or upon their precise application by state institutions (particularly the courts). In the course of my discussion I will also engage the question of whether these fundamental ESRs, in particular those that appear to be legally binding as a result of their entrenchment in the constitutional text, are – and ought to be – *justiciable*.<sup>(8)</sup> In concluding, I will discuss the theoretical and practical objections to the proposition that a specialized Court should, through constitutional adjudication, enforce entrenched ESRs.

## 2. International Protection of Rights in Palestine

The Palestinian Authority was created by the Oslo Accords in 1993, being established as a non-sovereign entity with limited territorial, personal and functional jurisdictions over parts of the West Bank and Gaza Strip or the so-called ‘autonomous territories.’ By virtue of the fact that the ‘State of Palestine’ (which the United Nations (UN) General Assembly recognized as a non-member state in 2012<sup>(9)</sup>) is not (yet) a sovereign state, Israel is the only

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(7) Courtney Jung, Ran Hirschl, and Evan Rosevear, ‘Economic and Social Rights in National Constitutions,’ *Am. J. Comp. L.* 62 (2014), 1054.

(8) King, ‘Introduction,’ 3.

(9) During September 2011, the PA president, who also serves as the Chairperson of the PLO Executive Committee, presented a request for full UN membership to the UN Security Council. In order to be successful, this request required the positive recommendation of a majority of the Security Council (9 of its 15 members, including all five permanent members) and a two-third majority vote in the UNGA. The request was denied after it failed to secure the necessary votes in the Security Council. For more about the context, see Michele K. Esposito, “Update on Conflict and Diplomacy: 16 August 2011–15 November 2011,” *Journal of Palestine Studies*, 41, no. 2 (2012), 153-89. In 2012, the United Nations General Assembly adopted Resolution (A/RES/67/19) on 29 November 2012 recognizing Palestine as a non-member state. There were 138 states in favor, out of 193 member states of the UN, nine against, and 41

sovereign state within historical Palestine. As the occupying power, the Israeli government has repeatedly refused to uphold its treaty obligations with regard to the Occupied Palestinian Territories (OPT), persistently refusing to even reference its treaty obligations (to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights) within its national human rights reports. This position has been diametrically opposed to the one adopted by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights (CESCR), both of whom have frequently reiterated these obligations. It is also inconsistent with the position adopted by the International Court of Justice in its famous advisory opinion of 2004.<sup>(10)</sup>

IHRL clearly establishes that the Palestinian Authority has obligations towards the population under its direct control. However, until recently, it was not accountable to CESCR for treaty-based ESRs, a situation which prevailed while it was not a state authority with the commensurate ability to ratify international human rights treaties.

When UN General Assembly Resolution (67/19 (November 29, 2012) UN Doc A/RES/67/19.) recognised Palestine as a 'Non-Member State', it provided the basis upon which the PA could ratify International treaties.<sup>(11)</sup> In the event of ratification, the PA would be internationally accountable for the protection of ESRs, despite the fact that it did not exert sovereign control over its claimed

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abstentions.[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/67/19](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/19)

(9) While there are clear differences between the South African apartheid regime and the Palestinian occupation regime, I would be predisposed to suggest that the word 'apartheid' appropriately describes the prevailing status quo within the latter. In the absence of a more appropriate analogue, 'apartheid' provides a sufficient substitute. For a discussion of the apartheid paradigm and the rights discourse, see: Raef Zreik, 'Palestine, Apartheid, and the Rights Discourse,' *Journal of Palestine Studies* 34, no. 1 (2004): 68-80.

(10) See, Maarten Den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction,' in Malcolm Langford, Wouter Vandenhoe, Martin Scheinin and Willem Van Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 167-169. In footnote 67 the author presents examples of concluding observations by the two international committees.

(11) On April 1, 2014, the PA's President ratified a number of treaties. These included: The International Covenant on Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights. See: Dalia Hatuqa, "Paradigm shift": Palestinians join treaties,' *Al-Jazeera Network*, 22 April 2014:

<http://www.aljazeera.com/news/middleeast/2014/04/shift-palestinians-join-treaties-2014418111950813313.html>

territory and population. In 2014 this situation came to pass when the State of Palestine ratified the ICCPR and ICESCR.

While there is (almost) a worldwide consensus that ESRs are human rights,<sup>(12)</sup> it is important to acknowledge that both sets of rights (CPRs and ESRs) were entrenched in two separate international covenants – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both covenants, together with the Universal Declaration of Human rights (UDHR), constitute what has been referred to as the ‘International Bill of Rights’.<sup>(13)</sup>

Despite the fact that they are part of the same international regime, a distinction is often drawn between ‘first generation’ rights (referring to CPRs) and their ‘second generation’ (mainly ESRs) counterparts. While this distinction may have served a function at the time of the drafting, it is now misleading; after all, chronologically speaking, the two treaties were codified, ratified and diffused almost in parallel. Given this, we are driven to enquire as to the basis upon which the two set of rights continue to be distinguished. One plausible explanation originates within the implementation of both sets of rights. After all, ESRs require “affirmative government intervention in the economy”, in a way that is not true of classical rights.<sup>(14)</sup> This distinction implicitly underpins the categorisation, frequently reproduced within the scholarship on this subject, of CPRs as negative rights and ESRs as positive rights.<sup>(15)</sup>

Upon the basis of this distinction we might justifiably infer that the fulfilment of ESRs require resources and budgetary allocations from the state while CPRs do not. However there are solid grounds for questioning this inference. Firstly, CPRs often impact upon state budgets, most notably in the costs associated with the provision of justice. It should also be recognised that not all state obligations vis-à-vis ESRs are positive obligations. Quite the contrary, the full realization of ESRs sometimes requires that states refrain

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(12) King, ‘Introduction,’ 1.

(13) Although cultural rights and ESRs share a common regime, I will not engage the former in any depth over the course of this paper.

(14) Mark Tushnet, ‘Comparative Constitutional Law,’ in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* 1225-1258 (Oxford: Oxford University Press, 2006), 1231.

(15) *ibid*; David S. Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism,’ *California Law Review* 99, no. 5 (2011): 1195.

from undertaking specific courses of action: one example would be to refrain from creating monopolies that render the right of adequate housing difficult to fulfill, even for those who can afford it. This obligation exerts no direct impact upon the state's budget, but it is still necessary for the enjoyment of ESRs.

An alternative justification for the distinction of CPRs and ESRs can be found within the level of urgency that we can ascribe to each referent object. Whereas CPRs appear to impose immediate obligations on states, ESRs are instead, by virtue of the fact that they are indirectly realized through specific courses of action, programmatic. This interpretation finds further justification within the precise wording of international treaties. Article Two of the ICCPR establishes that: "Each state party... *undertakes to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 11.1 of the ICESCR, on the other hand, maintains that: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will *take appropriate steps to ensure the realization* of this right, recognizing to this effect the essential importance of international co-operation based on free consent." The United Nations Committee on Economic, Social, and Cultural Rights interpreted this to mean that states face a "minimum core obligation," which consists of a duty to "ensure the satisfaction of, at very least, minimum essential levels of each of the rights."<sup>(16)</sup>

The United States of America<sup>(17)</sup> has historically been one of the leading proponents of the division between human rights, being one of the few countries to ratify ICCPR but not the ICESCR. This international position is consistent with America's domestic political arrangements, specifically the lack of constitutional entrenchment of ESRs in the American constitution, and the associated reluctance of the American legal system to view ESRs as justiciable.

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(16) Sunstein, *Designing Democracy*, 229-30.

(17) Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution,' *U. Pa. L. Rev.* 141 (1992), note 45, citing D.J. Galligan. *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Oxford University Press, 1990), 19.

In addition, the ICESCR also enables States to accept an individual complaints mechanism by ratifying an optional protocol – an innovation which is absent from the ICCPR. This is another example which leads us to suspect that different considerations pertain to the justiciability of ESRs and CPRs.<sup>(18)</sup> At the current point in time, only 21 states are party to the optional protocol. The ‘State of Palestine’ did not ratify this protocol and nor did any of the Arab countries, either before or after the Arab Spring. This leads us to infer that the ratification of ICESCR by Palestinian representatives does not logically imply an alteration within attitudes towards the justiciability of ESRs at the level of international law.

### 3. Constitutionally Entrenched Rights

In order to offset the risk of being sidetracked, it should be reiterated that this paper is not concerned with Palestinian obligations that derive from treaty-based ESRs. Even when we discussed above the impact of Palestine’s ratification of international human rights treaties, we did not do so with the intention of tracing the treaty-based obligations of Palestine with respect to ESRs; rather, we were instead predisposed to identify if there was coherence within Palestine’s international and domestic stance upon the justiciability of ESRs.<sup>(19)</sup>

The PA had previously endorsed a Basic Law, which has the status of a written and unified constitution that entrenched certain rights as fundamental rights – in the words of the Basic Law, ‘public rights.’ This meant that the PA – even before the UNGA’s reference to Palestine as a ‘non-member state’ – acted as a state, acting in accordance with a binding written constitution and a prior acceptance that fundamental rights need to be upheld and protected by a constitutional text. To put it more concisely, the absence of sovereignty wasn’t an obstacle to the PA’s entrenchment of ESRs.<sup>(20)</sup>

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(18) Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008), 99, 20.

(19) This paper is not concerned with the sources (both domestic and international) of the obligations that adhere to Israel as an occupation authority. A more sustained engagement with this question would demand a very different kind of methodology. This framework would provide a sounder basis for considering the obligations that international humanitarian law and Israeli Basic Laws impose on the state of Israel with regard to Palestinian ESRs.

(20) This paper will set aside possible critiques of the viability of this approach. It will therefore

However, it was not merely that the PA entrenched ESRs in the constitutional text; the government even adopted the institution of constitutional review of law and governmental actions by a Supreme Constitutional Court (SCC). In April 2016, President Mahmoud Abbas nominated the SCC judges – thus reviving various controversies pertaining to the legitimacy of the court, its independence and its legal, constitutional and political significance within the PA system. Up until the formation of the SCC, the High Court had been mandated to review cases of constitutionality. In this capacity they even adjudicated upon a few cases, a number of which pertained to entrenched rights in the Basic Law.

It is true that, up until the writing of this paper, there were no cases involving entrenched ESRs. However, this doesn't render the national case study of Palestine on justiciability of ESRs less interesting: the lack of cases doesn't exclude the possibility that the SCC will be approached soon to decide cases related to ESRs – a prospect which makes this paper more – not less – pertinent. More importantly, the lack of case law by the SCC, the High Court, or the High Court of Justice doesn't mean that there are no legal disputes that are related to ESRs. After all, a number of these disputes will not necessarily culminate in court example – the example of the public school teachers being a case-in-point.

On April 19, 2016, thousands of private sector workers took to the streets to protest against the Decree Law pertaining to Social Security which had been adopted by President Abbas on March 2, 2016.<sup>(21)</sup> The protesters had a of objections concerning the preparation of the law (which had not been preceded by public consultations or meetings with appointed representatives, its endorsement (by Presidential decree-law, an innovation necessitated by the fact that the Palestinian Legislative Council had not convened since 2007). However, this was by no means an isolated occurrence - hundreds of decree laws have been adopted since 2007 in similar contexts; they invariably aroused

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assume that the lack of sovereignty isn't an obstacle for the constitutional entrenchment of ESRs; its analysis of whether or not those entrenched ESRs are justiciable will similarly overlook the implications which this pronounced defect has for the enforceability of those rights.

(21) The Decree Law was not yet published in the Palestinian Gazette (official Journal) at the time of writing. However a copy of the signed decree was made available by many sources, including:

<http://www.alhadath.ps/files/image/2016/3/19-3-2016/Social%20security.pdf>

criticism, however rarely did they mobilize the population or arouse accusations that the proposed decree laws were unnecessary, illegitimate or even unconstitutional. This raises the question of what was different in this instance. As a starting point I would suggest that it was the content of the decree law itself, which was widely denigrated as unsatisfactory, unacceptable and unjust for workers.

In addressing ourselves to the initial question, the social unrest that accompanied the public teachers' strike and the adoption of the Social Security Decree Law are just two of numerous possible examples that we could potentially cite. In the absence of a case law, it will be necessary to legal and constitutional disputes surrounding the justiciability of ESRs; this will ground my argument that the Basic Law contains the basis for an understanding of some ESRs as justiciable rights; this raises the prospect that the SCC may use these entrenched ESRs to play an active role in easing the tension surrounding those legal disputes by offering an interpretation of the constitutional obligations that adhere to the Palestinian Authority. This will be a significant development even if enforcement is advanced incrementally. This is of course not a prediction; rather, it is instead my own interpretation of the ways that ESRs can be entrenched in a manner that advances their justiciability in Palestine.

A clear challenge can be perceived when we depart from those legal and constitutional disputes which are obviously related to ESRs; at the point when this paper was written, no one had approached the SCC with a view to establishing whether public school teachers have protected economic rights. Similarly, the counsel of the SCC has not been sought upon the Social Security Decree Law. I will subsequently argue that the lack of submissions that have been made to the SCC do not undermine the proposition that entrenched ESRs are justiciable. For the sake of argument, let us begin by advancing a hypothetical suggestion that will help us to formulate the central research questions more clearly... Let us suppose that public school teachers, or the workers in the private sector, or their representatives,<sup>(22)</sup> had actually decided

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(22) One of the commissioners of the Palestinian Ombudsman, The Independent Commission for Human Rights (ICHR), recently said in an interview that the ICHR may represent the teachers, taking their case forward with a view to suing the government. See: <http://www.arn.ps/archives/177599>. However, it appears that the ICHR's central concern is the not the violation of ESRs but rather the teachers' right to strike.

to approach the SCC, advancing the complaint that the government's actions in the two relevant instances are unconstitutional because they undermine constitutional and employment rights.

In addressing ourselves to this hypothetical scenario, we should begin by enquiring as to the arguments that can be made with regard to the justiciability of ESRs in Palestine; once this question is addressed, we should then consider their application to the working context. This leads us to ask the following questions: Do public school teachers have a fundamental right to fair wages and a right to adequate standard of living? Do workers in private sector have a right to social security? How can a fair regulation of those matters be decided, and what is the balance between the workers' and the employers' needs on the one side, and the government's available resources on the other? I do not intend to provide answers to these questions using the relevant examples – this would be a redundant enterprise given their limited theoretical and analytical utility<sup>(23)</sup>. Instead, this paper turns its attention to a more fundamental, and essentially prior, question: Are ESRs (in general terms) and work-related rights (in more specific terms) justiciable in Palestine?

#### 4. Aspirational and Justiciable ESRs

Most constitutions now include a list of fundamental rights. In this respect the Basic Law of the Palestinian Authority is no different.<sup>(24)</sup> CPRs and ESRs are

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(23) It is not the author's concern to go into details of the specific articles that the protestors were objecting to in the decree law, the specific requests made by public school teachers or the question of how Palestinian law deals with those matters generally. Equally, I do not intend to engage with the question of how the SCC will specifically respond to complaints that it receives. While these questions are of general interest, they have little or no theoretical or comparative utility. Rather, this article instead begins from an assumption that these events have an illustrative value, thereby helping to provide the basis for a theoretical discussion that engages with the justiciability of ESRs in Palestine and the role of the SCC in enforcing ESRs.

(24) The Basic Law of the Palestinian Authority entered into force in 2002. In 2003, a new amended version of the Basic Law was adopted. In instances where this paper cites the Basic Law, it is referring to the 2003 version. There are potentially various arguments against the consideration of the Basic Law as the supreme Law in the territories under the PA jurisdiction and the non-state status of the Palestinian Authority itself. This paper aligns itself with the position of the High Court, which acts in the capacity of a Supreme Constitutional Court. It therefore assumes that the Basic Law is – or acts like – a constitution and the PA is – or has the structure of – a quasi-state. For more about the Basic Law of the Palestinian Authority, see: Asem Khalil, 'Beyond the Written Constitution: Constitutional Crisis of, and the Institutional Deadlock in, the Palestinian Political System as Entrenched in the Basic Law,' *International*

listed under the same title in the Basic Law of 2003 – it should, however, be acknowledged that both are referred to as ‘public rights and freedoms’ (articles 9-33) and not as ‘fundamental rights and freedoms.’<sup>(25)</sup>

Article 10 of the Basic Law establishes that “[f]undamental human rights and freedoms shall be protected and respected” before positing that “[t]he Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights.”<sup>(26)</sup> It is characteristic of the Basic Law in that it confers a general protection upon internationally recognized human rights. It should be noted, however, that this article does not establish the supremacy of International human rights treaties over national laws, let alone over the Basic Law. Article 9 outlines equally clear stipulations upon equality, another key component of liberal constitutionalism, when it establishes that: “Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, color, religion, political views or disability.”

Some CPRs and ESRs are then listed under ‘Public Rights and Freedoms’, although it should be noted that the Basic Law uses different formats to refer to different rights. The distinction between aspirational and justiciable rights cannot be deduced from the words used in the Basic Law alone;<sup>(27)</sup> however,

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*Journal of Constitutional Law* 11 (2013): 34-73.

(25) It is not our concern in this paper to discuss whether this was the result of a conscious choice by the drafters of this constitution-like text, or whether they, in the age of constitutional plagiarism, produced the text by chance. As Langford rightly observes: “In other instances, economic, social and cultural rights were made justiciable almost accidentally (constitutions were copied from other jurisdictions)] or international treaties were incorporated in the constitutional order with no public pressure.” Malcolm Langford, ‘The Justiciability of Social Rights: From Practice to Theory,’ in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, 3-45 (Cambridge: Cambridge University Press, 2009), 30. For a general discussion about the Basic Law and the unsuccessful constitutional borrowing, see: Khalil, ‘Beyond,’ 34-73.

(26) It is often the case that the word أساسية is translated as ‘basic’, with reference to rights and freedoms. In this article, I prefer to use ‘fundamental’ which is another translation for the same Arabic word. The same applies to حريات, which is often translated as ‘liberties’, and which I translate as ‘freedoms’. Unless otherwise specified, the non-official translation of the Basic Law of 2003 that I refer to in this paper is available (upon registration) at Birzeit University’s collection of Palestinian legislation and courts decisions, (Al-muqtafi).

<http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2003&MID=14138>

(27) This assumes, of course, that the other elements – which will be discussed in the following

the precise drafting of a specific right does provide us with considerable insight into the levels of status that the Basic Law ascribes to different ESRs.

Article 22 of the Basic Law states that Social, health, disability and retirement security<sup>(28)</sup> *shall be regulated by law* before establishing that “[m]aintaining the welfare of families of martyrs, prisoners of war, the injured and the disabled is a duty that shall be regulated by law. The [Palestinian] National Authority shall guarantee these persons’ education, health and social insurance.” Article 25 sets out equally vague stipulations upon employment rights. Upon the subject of housing, however, the Basic Law is considerably more explicit, with Article 23 clearly establishing that “[e]very citizen shall have the right to proper housing”, adding that the “Palestinian National Authority *shall secure housing* for those who are without shelter.”<sup>(29)</sup> Article 24 is equally forthcoming in outlining specific educational obligations<sup>(30)</sup> while Article 29 is equally precise upon the subject of children’s rights.<sup>(31)</sup>

Largely drawing upon the methodology used in a recent comparative study of different constitutions,<sup>(32)</sup> I will now discuss the status of ESRs in the Palestinian Authority’s Basic Law of 2003, being careful to draw a clear distinction between absent, aspirational and justiciable rights. With a view to this end, I tentatively distinguish 16 ESRs, seven of which are economic rights (rights connected to work condition or status). The remaining nine are social rights and therefore apply to all citizens. The following table sets out, in my own assessment, the different ESRs within the 2003 Basic Law.

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sections – for justiciability exist (in particular the institution of judicial review and possibility of recourse to the court in case of violation of recognized and protected ESRs).

(28) I use social security instead of social insurance (which is used in the unofficial translation of the Basic law that I refer to).

(29) Emphasis added.

(30) Article 24: “1. Every citizen shall have the right to education...”

(31) Article 29: “Maternal and childhood welfare are national duties. Children shall have the right to...”.

(32) Jung, Hirschl, and Rosevear, ‘Economic and Social Rights,’ 1049.

## [Courting Economic and Social Rights in Palestine]

ECONOMIC RIGHTS	For Workers only	The Basic Law of the Palestinian Authority	A	B	C
1	Fair wage		X		
2	Trade Union/ Workers' Union	Art 25		X	
3	Strike	Art 25		X	
4	Rest and Leisure	Art 25		X	
5	Standard of Living	Art 25		X	
6	Safe and healthy work environment	Art 25		X	
7	Social security related to employment	Art 25		X	
<b>SOCIAL RIGHTS</b>	<b>For all citizens, regardless of work status</b>				
8	Social security not related to employment (old-age pension, disability, welfare)	Art 22		X	
9	Financial support to vulnerable groups		X		
10	Rights of children	Art 29			X
11	Health		X		
12	Citizen's access to land (right to property)	Art 21		X	
13	Housing	Art 23		X	
14	Food and Water		X		
15	Education	Art 24			X
16	Detainee Rights		X		
A	Non existent				
B	Standard: Recognized vaguely, or as a standard, or left for the law to regulate				
C	Justiciable: Recognized explicitly as a justiciable right				

A quick scan of the preceding table shows that the Palestinian Basic Law follows the general pattern evidenced within the comparative study of 195 national constitutions.<sup>(33)</sup> While it should first be acknowledged that it is normal to entrench ESRs in national constitutions, it is also important to recognise that ESRs are not equally widespread. The Palestinian Basic Law establishes a right to education<sup>(34)</sup>, a right which is so widespread as to be practically universal. The Basic Law's oversight of food and water<sup>(35)</sup> is reproduced within constitutions across the world. Upon this basis we can infer

(33) Ibid., 1046-7.

(34) For a discussion of the right of education as a human right in Palestine, see: 'The Right to Education in Palestine,' *OECD Journal on Development* 9, no. 2 (2008): 119-131.

(35) For a presentation of the issue of water as a human right in Palestine, see: Simone Klawitter, 'Water as a Human Right: The Understanding of Water Rights in Palestine,' *Water Resources Development* 23, no. 2 (2007): 303-327.

that it is wrong to continue talking about ESRs as a block of second generation rights; by logical extension, it is equally inappropriate to view them as positive rights requiring the same amount of obligatory actions by the state.<sup>(36)</sup>

Second, it is important to recognise that constitutions accord ESRs different statuses or strengths.<sup>(37)</sup> Upon closer reflection, it appears that Palestine adopted a mixed system, which brought together aspirational and justiciable rights. Five rights are absent (including the right to fair wage, the right to health, and food and water); two rights (children's rights and education) are potentially, under certain circumstances, justiciable; meanwhile, nine rights can, upon the basis that they provide standards or guidelines for government actions, be considered aspirational.

Third, it should be recognized that the Basic Law includes a reasonable amount of aspirational and justiciable ESRs. Taking into account the fact the foundations of this law (a mixture of civil law and Islamic tradition), it is instructive to reflect that most economic rights, in particular those related to working conditions<sup>(38)</sup> are, at best, aspirational. Finally, the Basic Law's broad entrenchment of aspirational rights with few justiciable rights corresponds to the more general pattern within the Middle East and North Africa (MENA).<sup>(39)</sup>

## 5. Constitutional Review in Palestine

The Palestinian Authority, having been strongly influenced by the Egyptian example,<sup>(40)</sup> opted for the judicial review model that is often adopted in civil law countries. It therefore put in place a specialized court that was entrusted with the mandate to review the constitutionality of laws and the government's actions.<sup>(41)</sup> This model of constitutional review is coherent with Palestine's legal system. It is essentially a civil law country – this means that the decentralized judicial review

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(36) Jung, Hirschl, and Rosevear, 'Economic and Social Rights,' 1046.

(37) *Ibid.*, 1046-7.

(38) For more about the Palestinian Labor law on the light of international standards, see: Mutaz Qafisheh, 'The Inte play between International Human Rights and Labour Rights in Palestine,' *J. Islamic St. Prac. Int'l L.* 9, no. 1 (2013): 121-164.

(39) Jung, Hirschl, and Rosevear, 'Economic and Social Rights,' 1069.

(40) For a general presentation of the Supreme Constitutional Court of Egypt, see Kevin Boyle, *Human rights and democracy: the role of the Supreme Constitutional Court of Egypt* (Kluwer Law International, 1996); Lama Abu Odeh, 'The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere' *AM. J. COMP. L.* 59 (2011), 985-1008.

(41) In this paper, I refer to this method of judicial review as "constitutional review."

system used in many common law countries is pre-emptively excluded as a suitable option. It is similarly closely aligned with its historical legacy. Palestine has not been subject – in clear opposition to the examples of Lebanon, Morocco and Tunisia by the French model, in which constitutional review is put into effect by Constitutional Council. Finally, this model is increasingly widespread across the region. After the Arab Spring, it was reinforced within countries that are familiar with this institution (such as Egypt)<sup>(42)</sup> and those which have historically been more immune to its attractions.

Articles 103 and 104 of the 2003 Basic Law set out the basic structure and mandate of the ‘Supreme Constitutional Court’ (SCC), while affirming that it will be established by an organic law. Up until the point at which the SCC was established, the High Court was temporarily entrusted with all the duties assigned to the Supreme Constitutional Court (see Article 104). In acknowledging the High Court in this temporary capacity, I will refer to it as the ‘Acting SCC’.

The ‘Law Establishing a Supreme Constitutional Court’ (*hereafter* the ‘2006 SCC Law’) was adopted four years after the Basic Law came into force. The Acting SCC didn’t need to wait until this law was adopted before acting as a constitutional court, and indeed this was not the case. Citing its mandate established within the Basic Law, the Acting SCC abrogated a 2005 decree law, adopted by President Abbas, which pertained to the judicial authority.<sup>(43)</sup>

A *prima facie* analysis of the Basic Law establishes that: 1) the SCC is the only court with the mandate to review legislation and government’s actions,

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(42) *Constitutional Courts after the Arab Spring: Appointment mechanisms and relative judicial independence* (Center for Constitutional Transitions at NYU Law & Center for Constitutional Transitions and International IDEA, 2014).

(43) The SCC was mandated with many other prerogatives; for the purposes of this paper, our interest will be limited to the mandate to review the constitutionality of “laws, bylaws or regulations, and others,” and to the “interpretation of the Basic Law.” Article 103 used the word غيرها, leaving the article open to interpretation, potentially extending the SCC’s mandate to acts that are not necessarily legislative in nature. This can be contrasted with a narrow interpretation, based on the “same kind” rule of interpretation. A narrow interpretation may be preferred if we take in consideration article 24 of the SCC Law which limited the SCC mandate to laws and regulations. However, again, article 27.2 takes us back to the wider interpretation. Article 27.1 refers, besides the law, to the control of constitutionality of any ‘action’. This confusion is attributable, in part, to the author’s understanding to the way the Basic law and laws generally are drafted – this often occurs by copying and pasting from other jurisdictions, invariably without due consideration for overall coherence.

thus ensuring that entrenched ESRs are upheld and respected; 2) The Acting SCC perceived entrenched rights to be justiciable rights; upon this basis, it seems reasonable to infer that the newly formed SCC will share this attitude towards entrenched rights;<sup>(44)</sup> 3) That in instances where there is disagreement over the legal significance of a specific right (e.g. whether the Basic Law establishes a justiciable right or a standard), it is the SCC that is mandated to establish the correct interpretation; 4) with regard to ESRs that are not formally entrenched within the Basic Law, it is the SCC that will determine the sources of 'constitutionality' means: there is nothing that limits the SCC's consideration of constitutionality to the Basic Law alone.

However, while the SCC is empowered to review the constitutionality of a specific measure, it is the courts who decide in instances where damages have been incurred as a result of an unconstitutional legislation or other actions upon the part of the government (Article 25.3 of the SCC Law). Article 41.1 of the SCC law clearly establishes that: "The judgments of the Court on constitutional actions and its decisions concerning interpretation shall be binding to all the authorities of the State and to the public." Article 25 establishes that a ruling of unconstitutionality does not directly abrogate the legislation or action, but instead renders them unenforceable. Upon this basis, the same authority that issued the legislation or action is invited to amend or abrogate it.

Article 106 of the 2003 Basic Law did not clarify who can approach the SCC with a view to asking it to remedy an unconstitutional act of government. In its 2005 ruling (5/2005), the Acting SCC agreed to look into the case filed by the Arab Lawyers' Association for Human Rights (an NGO registered in Gaza), citing the general rules governing a party's right to file a case by way of an original action.

With the adoption of the SCC Law, this is no longer a problem. Article 27.1 of the SCC Law explicitly recognizes a right for "any aggrieved person" to register a case. This establishes a very broad remit, making it possible to file a case of unconstitutionality even in cases that go beyond the violation of fundamental rights and freedoms that are protected by the Basic Law. This attribute is problematically reconciled with comparative constitutional experiences. In those instances where this right is recognised, it is frequently subject to certain conditions, such as the requirement that the perceived damage can be

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(44) Of course, the way a right is entrenched and the words used are relevant to the court's ultimate conclusion. See Langford, 'The Justiciability,' 30.

demonstrated to have negatively impacted a fundamental right or freedom.

Article 27 proceeds to set out other ways in which constitutional objections can be registered: (1) Referral to the SCC for unconstitutionality by any court, if the “law, bylaw, decree, bylaw, regulation or decision is necessary for the adjudication of the dispute.” (2) Indirect attack by any of the parties in a case that is being heard before a court, if the court finds the rebuttal of unconstitutionality is serious. (3) By the SCC itself in its review of a case and during the proceeding in the dispute. There is nothing in the Basic or SCC Law to suggest that the SCC has discretion to choose not to decide a case if it is submitted through one of the aforementioned procedures.

Taking in consideration the large mandate of the SCC and the fact that any aggrieved person has recourse to seek remedies from the SCC, it would be expected that the SCC would have addressed itself to numerous instances in which fundamental rights and freedoms, including ESRs, had been violated. However, closer inspection reveals that this has not proven to be the case. In actual fact, since its mandate was first established, the acting SCC adjudicated upon very few cases.

A revision of the decisions adopted so far by the Acting SCC indicates the following points:<sup>(45)</sup> (1) there was a relatively small number of cases (this feature is particularly striking given the expansive scope of the adopted system

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(45) These are the cases the author was able to collect (they have not yet been authoritatively published by the judiciary): (1) Constitutional Complaint (n 5) of 2005 that abrogated a new judiciary law; (2) Constitutional Complaint (n 1) of 2006 that cancelled PLC decisions; (3) Constitutional Complaint (n 1) of 2009 which was related to Military Courts that still apply (PLO) Revolutionary Penal Codes. (4) Constitutional Complaint (n 3) of 2009 objecting the constitutionality of Decree Law (n 17) of 2009, that regulates dealings in foreign stock exchange; (5) Constitutional Complaint (n 2) of 2010, objecting the constitutionality of PLO’s Revolutionary Penal Code and Penal Procedures of 1979; (6) Constitutional Complaint (n 3) of 2010, objecting the constitutionality of the prosecution for personal status issues, in particular their decision to annul a marriage because of apostasy; (7) Constitutional Complaint (n 2) of 2011, objecting the constitutionality of PLO’s Revolutionary Penal Code and Penal Procedures of 1979; (8) Constitutional Complaint (n 6) of 2012, objecting the President’s decision to lift the parliamentary immunity from Mohammad Dahlan; (9) Constitutional Complaint (n 1) of 2013, objecting the constitutionality of inclusion of religion in the ID; (10) Constitutional Complaint (n 1) of 2014, objecting the constitutionality of Jordanian Laws that are in force in the West Bank. Interestingly, with the exception of the two first complaints discussed in this paper (n 5 of 2005, and n 1 of 2006), the high court, in its capacity as Supreme Constitutional Court, simply rejected the case, mostly grounding its decision within formalities.

of judicial review); (2) In most cases, the preference of the Acting SCC was to avoid the substance of the matter, frequently using formal irregularities as an excuse for dropping the case. (3) The Acting SCC considers the Basic Law to be the 'Constitution' of the Palestinian Authority; by virtue of this ascribed trait, any legislation or action that contradicts the Basic Law is unconstitutional. (4) The Acting SCC confirms the right of any aggrieved person to file a case and seek remedy from the court. (5) Nothing in the Acting SCC's decisions suggests that there is any fundamental difference between its treatment of the rights included in the Basic Law and any other rule or principle contained within this same source. It will be noted that there were few cases that referred to the obligatory character of Human Rights (article 10) or to specific CPRs. However, as mentioned earlier, there appear to be no litigation cases relating to ESRs. Taking in account the generous provisions that the Basic Law makes for the justiciability of fundamental rights and freedoms in general, it is puzzling why no cases concerning ESR rights were directed towards the Acting SCC. Taking into account the two examples cited at the beginning of this paper, this puzzle becomes still more perplexing.<sup>(46)</sup> However it is not my concern to establish why individuals do not file claims or orientate towards the SCC to enforce their justiciable ESRs, placing particular emphasis upon rights entrenched within the Basic Law. While this question remains open, it is nonetheless possible to assert, with a considerably greater degree of certainty, that its existence does not demonstrate that that ESRs are not justiciable in Palestine. Justiciability does not depend on the effective exercise of aggrieved parties of their right to claim remedy for a violation of a constitutionally protected right – rather, it instead depends on the *existence of the possibility*.

This raises the question of whether, in the event that the newly formed SCC was approached in a case involving ESRs, whether it would be willing to exercise its role and become involved in their enforcement? In the account that I have outlined, it is not necessary for ESRs to be enforced by the SCC in order for them to be considered justiciable. After all, in cases involving the enforcement of CPRs, the court appears to implicitly accept their justiciability (this is unavoidable given their entrenchment in the Basic Law) but find ways not to enforce them.

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(46) I would be tempted to speculate that this can be partially explained by the lack of confidence in Palestinian Authority's institutions generally, and constitutional review in particular. The practice of the Acting SCC adds further weight to this speculation.

Let us consider the hypothetical proposition of workers approaching the SCC for remedy with reference to the two examples cited in the introduction of this article, both of which are essentially concerned with economic rights. In the two examples, the SCC will address itself to three questions: 1) what is, taking into account its constitutional entrenchment within the Basic Law, the content of the right to work? 2) What limits are imposed on political institutions (the legislature and the government) in the regulation of the work-related rights? 3) Taking into consideration the overall political, social and economic context of Palestine, to what extent is it appropriate for the SCC to enforce these justiciable rights?

For the SCC, the first obvious approach – taking into account the earlier discussion of the constitutional entrenchment of ESRs – is to establish the position of the Basic Law upon the right to work and the related rights of workers. This is relatively straightforward, as Article 25 of the Basic Law clearly establishes that: “1. Every citizen shall have the right to work, which is a duty and honor. The Palestinian National Authority shall strive to provide work for any individual capable of performing it. 2. Work relations shall be organized in a manner that guarantees justice to all and provides workers with welfare, security, and health and social benefits. 3. Organization of unions is a right that shall be regulated by the law. 4. The right to conduct a strike shall be exercised within the limits of the law.”

The right to work is explicitly and clearly outlined. It is impossible for the SCC not to take such a right into account when it is so explicitly indicated within the Basic Law. However, the redaction of the remainder of the article reinforces the view that, rather than being justiciable, employment rights are, at best, aspirational. One way to engage with this puzzle would be to suggest that the legislator and the government have obligations towards citizens who enjoy a ‘right to work.’ It would indeed be difficult to see how the SCC could argue against this, as it is explicitly stated within the Basic Law. However, it is quite another thing to argue that the entrenchment of a ‘right to work’ is itself sufficient to claim that there are specific *legal* obligations that derive from constitutionally protected employment rights. There are accordingly strong grounds for suspecting that the entrenched employment rights are instead aspirational. Furthermore, there is an equally strong basis for suspecting that the SCC will share this conclusion, thus leaving it to the government and the legislature to uphold their obligations towards citizens, thereby ensuring that

they are in a position to exercise their right to work. In the case of education the SCC may reach a different conclusion, in large part due to the way that this right is entrenched, a consideration which has strong implications for the constitutional obligations placed upon the Palestinian government.

#### **6. Arguments against the Justiciability of ESRs in Palestine**

In order to militate against the risk of over-simplifying, it needs to be recognized that the situation is considerably more complicated than we have hitherto acknowledged. In addition to the practical obstacles that impede the justiciability of ESRs in Palestine, there are also strong arguments against this course of action – importantly, these apply even in instances where the constitution wording provides a narrative that is *prima facie* supportive of justiciable ESRs. These arguments are of course stronger in cases where specific rights have been redacted in a way that suggests they are aspirational or are absented from the constitutional text. I will now proceed to set out some of the possible arguments that may be used against the justiciability of constitutionally entrenched rights and against their enforcement by the SCC through the institution of constitutional review.

##### *Argument One: The Constitution Does not have to protect all Rights and Interests*

This proposition is easy to summarise: A democratic constitution does not – and is not expected to – protect every right and interest that should be protected in a decent or just society.<sup>(47)</sup>

The obvious response to this argument is that even if constitutions don't *have to*, they simply *do* protect some ESRs. The 2003 Basic Law's explicit reference to some ESRs appears to suggest that it is receptive to some kind of protection of work-related rights. In this respect we can distinguish other rights that remained outside the text of the Basic Law. The basis of their justiciability rests upon a fundamentally different line of argument which falls far beyond the parameters of the current paper.

The argument against justiciability does not collapse at this point but finds renewed impetus with the suggestion that the constitutional entrenchment of ESRs doesn't mean that the SCC should substitute for constituted authorities (the government and the legislator) in the organization of the working context.

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(47) Source of arguments 1-3 below are: Sunstein, *Designing Democracy*, 222 -235.

However, this is transparently not the argument that is being made upon behalf of justiciability. Even its strongest advocates would not attempt to uphold the proposition that the SCC should replace the government or regulators in the regulation of the workplace. Clearly, entrusting constituted authorities with the task of government is one thing while ‘keeping an eye’ (of which constitutional review is but one example) is another.

A further point of objection may be found within the argument that the proposed measure betrays a lack of trust within politicians and in politics more generally. They, the argument holds, are best-placed to manage these social and economic rights and interests. Constitutions should be focused upon more elevated matters, such as the constitution and dispersal of political and legal authority. Upon attending to our immediate preoccupation, we can set aside this line of argument upon the basis that it does not argue against the general or specific (work-related rights in Palestine) justiciability of ESRs. Taking the basic law as our point of reference, it is sufficient to assert that the inclusion of certain ESRs in the canonical text requires, from a constitutional law perspective, the SCC to give these entrenched ESRs due consideration.

Setting aside these setbacks, the argument may then proceed to suggest that the legacies of the past make it incumbent upon the court to refuse the justiciability claim of ESRs. However, a legacy of past injustice is often precisely the *basis* upon which the court can claim an active role. In South Africa, for example, we would expect the constitutional court to assess the right to housing (along with its accompanying disputes) with reference to the legacy of apartheid South Africa, whose influence is still perceptible within the acute housing shortage that afflicts many parts of the nation. It is unrealistic to suggest that these legacies of the past can be overcome by day-to-day politics, a point which is further reiterated by the fact that the new South African constitution takes the destruction of apartheid’s poisonous legacy as its overarching goal.

I would therefore suggest that it is appropriate to invert the initial argument. Rather than considering the legacies of the past, and the economic inequalities of the present as reasons to object justiciability of work-related rights in Palestine, it is instead the case that both should be considered to provide an additional justification for the SCC to make a contextualized judgment upon those rights. In doing so, it should take into account the ongoing Israeli occupation, the limited authority of the Palestinian Authority

and the pervasive fragmentation of Palestinian land and population. This of course imposes an added layer of complexity onto an already complex matter; however, complexity in itself is not an argument against the justiciability of ESRs in Palestine.

*Argument Two: The Constitution Should Protect Real Rights or Otherwise All Constitutional Rights Will Be Jeopardized*

In advancing this line of argument, its adherents contend that the central function of the constitution is to prevent the abusive or oppressive exercise of government power. Proceeding by logical extension we can infer that only CPRs should be included in the constitution, as the constitution needs to protect individuals *against* the aggressive state. The premise that the constitution should provide for private entitlements *to* protection by the state is thereby comprehensively refuted. At its furthest point of extension this argument suggests that the inclusion of ESRs could potentially jeopardize constitutional rights altogether. In the unhappy event that certain ESRs are already in place, then the courts should not enforce them or even recognize them as justiciable rights, with a view to protecting and promoting ‘real’ rights. This line of argument is of course preceded by a prior assumption, namely that CPRs are *negative* rights and ESRs are *positive* rights – both terms being understood as the respective poles of a spectrum structured around state involvement in the satisfaction of those rights. The posited binary opposition is of course deeply problematic – after all, many CPRs, such as the right to property and freedom of speech and movement, require certain amount of government actions. At the same time, many ‘positive’ rights, such as the right to adequate standard of living, require the government to respect individual freedoms, thereby resisting the temptation to impose monopolies on certain products, goods, or services.

Article 25 of the Basic Law further reiterates this essential point. While paragraphs one and two prescribe positive actions by the government, the rights that are set out within paragraphs three and four (which relate to rights of collective organisation and the withdrawal of labor) are deemed to be ‘negative rights’ (i.e. in the sense that they do not involve direct intervention by the government. However, this distinction is difficult to sustain. Upon precisely what basis can we distinguish work-related ESRs rights from CPRs that are necessary for the satisfaction of the same (constitutionally protected) ‘right to work’?

It may be argued that the satisfaction of the *positive* rights requires resources which are often lacking; by logical extension, ESRs shouldn't, by virtue of the pressures that they place on limited resources, be included in the Constitution. Even if they are present, they should not be enforced by the court, upon the basis that it is technically incapable and lacking in democratic legitimacy – the balancing of public resources and national priorities instead being the purview of the politician.

However, this line of argument fails to militate against the inclusion of ESRs. After all, the satisfaction of many negative rights, such as the access to justice for example, requires substantial resources, often accounting for a considerable part of any state's budget. If we were to follow this line of argument to its logical conclusion, then the whole human rights protection regime will collapse. In conclusion, the argument is also refuted by the fact that: a) The Basic Law is drafted in a way that includes a protection regime for some fundamental rights and freedoms; b) because Palestinians adopted the institution of constitutional review, setting the many theoretical arguments (some of which are sound) that suggested the opposite course of action.

*Argument Three: The Government Can Meet People's Needs in Various Other Ways*

It is clearly the case that we cannot simultaneously criticize a government's abuse of negative rights while at the same time accepting a situation in which its people's minimal needs are not met. The argument against responds by suggesting that there are other ways, aside from justiciability and enforceability, in which people's needs can be met. One way would be to provide incentives which ensure that people are able to empower themselves. Democratic – as opposed to constitutional – innovations would be optimal in this regard. Again, it is the attempt to construct a false binary that is inherently problematic. The inclusion of certain ESRs in the constitution is not intended to substitute for democratic tools. These rights do not preempt democratic deliberation but help to provide political impetus, directing attention to important issues that might otherwise be neglected or overlooked. These rights also feed into democratic deliberation, ensuring that the overall democratic process is strengthened and consolidated. This sustained interlinkage of political and economic rights provides a strong rebuttal to those who continue to counsel in favor of a delimited 'safety net' model. The essential argument that could be made is that democracy requires a certain

independence and security for everyone; especially – but crucially not only – those in desperate conditions.

It is also important to recognise that the Palestinian democratic process (free elections were held in 1996 2006) is irrevocably stalled. The PLC is currently incapable even of meeting, let alone legislating or exercising oversight over the incumbent government. Since 2007 the actions of successive Palestinian governments have not been subject to the approval of the PLC. Annual budgets have similarly escaped scrutiny with President Abbas effectively ruling through executive decrees. Given this complete absence of oversight and accountability, it is fundamentally flawed to attempt to advance an argument against the SCC upon the grounds of democratic deficiency or to argue that the SCC is democratically deficient.

*Argument Four: ESRs that are included will not be enforced by the courts*

It is possible to oppose the justiciability of ESRs on the basis that ESRs have a political dimension and accordingly should be left to political institutions to decide. While it is a legitimate concern to distinguish the political aspects of a right, it is now widely accepted that many political matters – including matters related to the separation of powers, electoral inequalities, etc. – can be legitimately subject to constitutional adjudication.<sup>(48)</sup>

Even so – the argument goes on – it is possible that the courts would prefer to refrain from enforcing ESRs even if they may be entrenched in the constitutional text. In the first instance this may be due to the indeterminacy of the referent object; in the second instance, it may be due to the court's own lack of democratic legitimacy and institutional capacity.<sup>(49)</sup> In the Palestinian context, both factors may go some way towards explaining why the Acting SCC has evidenced such restraint with regard to the enforcement of entrenched rights. This concern about institutional capacity is often linked into the fear that any attempt by the courts to assume a managerial role will bring the whole constitutional process into question and possibly even contribute to contestation and even challenge.<sup>(50)</sup> The argument proceeds to suggest that it not for the courts to assume this managerial function, to determine the

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(48) Antonio Carlos Pereira-Menaut, 'Against Positive Rights,' *Val. U. L. Rev.* 22 (1987-1988): 378.

(49) Landau, 'The Reality of Social Rights,' 408.

(50) Sunstein, *Designing Democracy*, 223.

allocation of scarce resources or to rank priorities.<sup>(51)</sup>

It should be acknowledged that the entrenchment of ESRs does not necessarily imply that the courts will enforce them. This point is reiterated by the example of India, where it was the legislature, not the judiciary that was explicitly entrusted with enforcement.<sup>(52)</sup> In those instances where the constitution is unclear or indecisive, it is true that the courts sometimes choose not to actively enforce ESRs (as was the case of the Acting SCC). In some instances, this may be attributable to a prior understanding that their role is limited to strictly legal matters; in others, it may instead derive from a desire to avoid sanctions or repercussions from other branches of government or the general public.<sup>(53)</sup>

However, closer examination of the empirical record throughout the world shows that this reluctance and reticence is not widely evidenced. Quite the contrary, courts have frequently adopted a variety of approaches in order to enforce and reinforce ESRs. The individual or negative enforcement models, in addition to the weak enforcement model, provide examples of ESRs enforcement that do not necessitate large-scale intervention in public policy.<sup>(54)</sup> Conceivably, the SCC could draw upon any number of these models as well, doing so in the knowledge that it would be unlikely to incur the wrath or consternation of the executive authority.

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(51) Landau, 'The Reality of Social Rights,' 406-7.

(52) Sunstein, *Designing Democracy*, 224.

(53) Landau, 'The Reality of Social Rights,' 406-7.

(54) *Ibid.*, 407-408.

## 7. Conclusion

In drawing upon the conclusions of comparative theoretical and empirical constitutional studies on ESRs, we can conclude by offering a number of prescriptive conclusions that argue in favor of the constitutionalization of ESRs, thereby reiterating the need for these rights to be justiciable and upheld by a specialized constitutional court (i.e. SCC). In advancing these conclusions, I further underline the SCC's ability to enforce and uphold the referent ESRs.

In the case of Palestine, it can be strongly argued that some ESRs (such as the right to education, the right to adequate housing and children rights) are justiciable. This assertion is sustained by the observation that these rights are entrenched in the constitutional text and theoretically (in lieu of empirical confirmation) protected by the SCC's mandate of constitutional review and the individual's right to claim and uphold these rights. There are, however, a number of complicating factors in this regard – these include the language of the Basic Law (which reinforces the impression of standards or guidelines for government action) and the pronounced absence of some ESRs.

Arguments against the enforceability of rights by courts that find grounding within democratic deficiencies and institutions inadequacies are, as we have already seen, deeply problematic. Various apex courts enforce ESRs in various ways and at different levels; besides, the same courts may enforce ESRs differently over time.

A realist analysis of the current status of rights within the territories under the Palestinian Authority's jurisdiction may suggest a pessimistic view about the possible involvement of the SCC in the enforcement of ESRs in Palestine. This pessimistic appraisal would be further reinforced by the limited role of constitutional adjudication (refer to the Acting SCC) and doubts with regard to the legitimacy of the SCC's nominated judges in the SCC. On a more optimistic note, there is no reason why the disillusioning state of current affairs should necessarily prevail into the future. If the SCC decides to perform its duties, as suggested by this paper, the Basic Law provides the basis for such a transformation. In the event of a more active engagement upon the part of the SCC, various entry points for the enforceability of justiciable ESRs in Palestine present themselves.

(1) This can be achieved by directly enforcing ESRs that are entrenched in the Basic Law, indirectly connecting them to CPRs or even by making reference

to the equality clause in general.

(2) This can also be achieved by using the general reference to Human Rights in Article 10 of the Basic Law, making use of the obligation to respect and uphold these internationally recognized rights. This approach has particular potential in relation to ESRs that are absent from the text of the Basic Law or ESRs that are formulated in ways that leads them to be interpreted as policy standards rather than fundamental rights.

(3) It is possible for the SCC to use international law – the recent (2014) ratification of ICESCR by Palestine has particular potential in this respect. This will provide further weight to arguments that insist upon the obligatory character of ESRs within national jurisdiction, placing particular emphasis upon those that do not contradict the text of the Basic Law.

(4) It is also possible for the SCC to negatively enforce ESRs. This can be achieved by reviewing actions undertaken by the Palestinian Authority and by ordering the government to refrain from hindering the satisfaction of ESRs. Neither course of action requires the extensive or sustained use of public resources.

(5) The SCC can decide to enforce ESRs upon an individual basis, thereby providing justice in the specific instance. This would help it to avoid large-scale policy interventions that could potentially impact the public budget.

The Palestinian SCC's change of attitude doesn't have to be immediate. This certainly wasn't the case in most countries that have achieved statehood in the aftermath of sustained conflict. Upon the basis of these wider examples, it seems more likely that this change will occur incrementally, with Palestinian judges taking small steps at a time, hesitantly and tentatively stepping beyond the familiar environs of the legal status quo.<sup>(55)</sup> This slow progression may conceivably take the form of individualized enforcement, the indirect linking of ESRs and CPRs or the negative enforcement of ESRs. Alternatively, the SCC may interpret Article 10 in a way that incorporates new ESRs into the text. In concluding, we should acknowledge the possibility that the actions of the SCC judges may be driven by what they perceive as the basic values of the Palestinian constitutional system – under this happy circumstance, equality, justice and basic rights would come to function as the driving forces of

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(55) King, 'Introduction,' 1,2, 9.

constitutional reform.

قابلية الحقوق الاقتصادية والاجتماعية للتقاضي في  
فلسطين: التطبيق، الإنفاذ، ودور المحكمة الدستورية العليا

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ملخص البحث باللغة العربية:

في هذا البحث سأعرض للمكانة الدستورية للحقوق الاقتصادية والاجتماعية في فلسطين، على ضوء ما يحتويه القانون الأساسي الفلسطيني من إشارة صريحة لبعض منها. فبعكس ما يظهر في القانون الدولي لحقوق الإنسان فإن الحقوق الاقتصادية والاجتماعية لا تظهر في القانون الأساسي وفي الخبرات الدستورية المقارنة على أنها كلّ متكامل فقد يحتوي النص على بعض الحقوق ويتغافل عن غيرها. كما أن القانون الأساسي لا يمنح المكانة نفسها لكافة الحقوق الاقتصادية والاجتماعية التي وردت في النص الدستوري، حيث أن ذلك يعتمد إلى حد كبير على طريقة صياغة تلك الحقوق من جهة وعلى ممارسة الفاعلين الرسميين في الدولة، وأهمها المحاكم. وفي حال أن صياغة بعض الحقوق الاقتصادية والاجتماعية في القانون الأساسي تشير بما لا يقبل الشك على أنها حقوق دستورية يترتب عليها التزامات قانونية ملزمة على الدولة، سيتم نقاش مدى إمكانية اعتبار تلك الحقوق في الوقت ذاته قابلة للتقاضي أمام المحكمة الدستورية العليا. وهذا الشأن سأعرض للمواقف الداعمة والرافضة لدور المحكمة الدستورية العليا في إنفاذ الحقوق الاقتصادية والاجتماعية في فلسطين ومبررات كل منهما.