ISRAELI ADMINISTRATIVE LAW AT THE CROSSROADS: BETWEEN THE ENGLISH MODEL AND THE AMERICAN MODEL

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Administrative law in Israel is at the crossroads. Historically, Israeli administrative law was born from English administrative law and like its English counterpart was developed against the background of two significant factors: the relative dearth of constitutional law concerning the protection of human rights on the one hand, and the power of the central government on the other. These two factors had traditionally contributed to the centrality of administrative law that underwent a radical change. First, constitutional law is now an independent source for the recognition and enforcement of human rights following the enactment of new basic laws on human rights—Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty. Second, privatization has changed completely the scope and pattern of activities conducted by administrative agencies in both countries.

This Article discusses the developments in Israeli administrative law as a result of these changes. In this context, it also evaluates the potential recourse to American administrative law, which has grown in the context of a well developed constitutional law and a relatively low level of government activity in the economic sphere.

The Article argues that the main focus of administrative law—in contrast to constitutional law—should be on the protection of interests (that are not considered human rights), on distributive justice, on procedural justice (in the context of bureaucratic decision-making) and on a broader scope of review (not limited to the protection of human rights), with a special emphasis on the executive branch. In the context of adapting to privatization, it also argues that administrative law should strengthen its focus on the challenge of regulation, on the protection of social rights and on the duties of "mixed" bodies, which are, in many cases, the product of privatization.

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I. *Introduction: The Emergence of Constitutional Law and Privatization*

Administrative law in Israel is at the crossroads. Historically, Israeli administrative law was born from English administrative law, and like its English counterpart acquired the status of an important branch of law against the background of two significant factors: the relative dearth of constitutional law concerning the protection of human rights on the one hand, and the power of the central government on the other.

These two factors that had traditionally contributed to the centrality of administrative law underwent a radical change in both Israel and England. First, constitutional law is now an independent source for the recognition and enforcement of human rights—in England following the legislation of the Human Rights Act, 1998[1] and in Israel following the enactment of new basic laws on human rights—Basic Law: Freedom of Occupation[2] and Basic Law: Human Dignity and Liberty.[3] Second, privatization has changed completely the scope and pattern of activities conducted by administrative authorities in both countries.

In order to remain relevant, administrative law is supposed to adapt to this new reality. What is the role of administrative law in a legal environment that ensures constitutional protection to human rights, and in a political reality wherein the administration, at least partly, is gradually being privatized? The Article is aimed at exploring this question. In general, the discussion is not descriptive, but rather tries to map the potential for the future development of Israeli administrative law.

In this context, the Article also evaluates the potential recourse to American administrative law, which has grown in the context of a well-developed constitutional law and a relatively low level of government activity in the economic sphere. More specifically, it explores the potential for developing Israeli administrative law from a legal branch based on the traditional English model of administrative law (which met the needs of a system with a significant level of government involvement in the economic sphere and without a developed constitutional protection of human rights) toward a legal branch that has the potential to be inspired and enriched by the American model of administrative law (traditionally developed to meet the

[1] Human Rights Act, C. 42 1998 (Eng.).
[2] Basic Law: Freedom of Occupation, 1992, S.H. 90.
[3] Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

needs of a system with a low level of government activity but with a developed scheme of constitutional rights). Two warnings are due regarding the recourse to the two models: First, the characterization of the English model refers to the tradition which inspired Israeli law in its formative years. Since then, English administrative law has also gone through a transformation—due to the privatization trends in the 1980s, which brought to less government involvement in economic life and more administrative regulation of private activities, and the constitutional changes brought about by the legislation of the Human Rights Act, 1998. Second, the reference to American administrative law is relevant only as far as it concerns the rules applicable to the operation of the agencies. Other aspects of American administrative law—those which deal with the complicated relationship between the President and the agencies—are irrelevant to the Israeli context, as they are derived from the American structure of government.[4]

Following the introduction, the second part of the Article discusses the role of administrative law vis-à-vis the issues ruled by constitutional law in the era of basic laws on human rights. The third part discusses the changes that should be introduced in order to meet the challenges posed by the privatization policy. The main conclusions of this analysis form the last part of the Article.

II. *Administrative Law in an Age of Constitutional Protection of Human Rights*

In its formative years, Israeli constitutional law was a rather unimportant branch of law for the protection of human rights as Israel followed the English tradition of legislative sovereignty. Against this background, the protection of human rights has rested on doctrines of administrative law (the principle of legality, the rules of the administrative process, and the principles of judicial review of administrative discretion). These doctrines were not originally defined as oriented to the protection of human rights, but in practice formed limitations on the power of the executive and therefore afforded protections to human rights. The principle of legality prevented

[4] For discussions related to the relationship between the President and the agencies, *see* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L. J. 541 (1994); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws,* 106 Colum. L. Rev. 263 (2006).

the government from infringing on human rights without statutory authorization.[5] The rules of the administrative process, especially the rules of natural justice[6] made it impossible to infringe on rights through an arbitrary and biased decision-making. Limitations on the use of administrative discretion also helped to protect human rights. For example, the prohibition to exercise irrelevant considerations prevented agencies from executing their powers for the promotion of religious or political goals (and thus protected freedom of religion and thought).[7]

As already indicated, this constitutional background to the expansion and growth of administrative law has changed. The basic laws on human rights were interpreted as eroding the sovereignty of the legislature. Legislation infringing on human rights is now subject to judicial review according to the constitutional standards set by the basic laws.[8] In a similar manner, administrative actions are now also evaluated according to their compatibility with these standards.[9] This constitutional change has overshadowed the role of administrative law as the primary protector of human rights. Accordingly, the focus of administrative law should be on issues that are beyond the domain of the human rights discourse in the strict sense.

A. *Protection of Interests and Distributive Justice*

An analysis of the unique role of administrative law must begin with the distinction between the protection of human rights and the protection of personal and group interests that are not in the category of constitutionally protected rights or even of legal rights. Administrative decisions often have an effect not only on human

[5] *See* HCJ 1/49 Bejerano v. the Minister of Police [1949] IsrSC 2 80; HCJ 144/50 Shaib v. the Minister of Defense [1951] IsrSC 5 399; HCJ 5100/94 Public Committee against Torture v. the Government of Israel [1999] IsrSC 53(4) 817.

[6] *See* HCJ 3/58 Berman v. the Minister of Interior [1958] IsrSC 12 1493.

[7] HCJ 98/54 Lazarovitz v. the Food Supervisor of Jerusalem [1956] IsrSC 10 40.

[8] The leading precedent in the area of judicial review of legislation is CA 6821/93 United Hamizrahi Bank Ltd. v. Migdal Kfar Shitufi [1995] IsrSC 49(4) 221. For more background, *see* Daphne Barak-Erez, *From an Unwritten to a Written Constitution: the Israeli Challenge in American Perspective*, 26 Colum. Hum. Rts. L. Rev. 309 (1995).

[9] *See, e.g.,* FH HCJ 4466/94 Nuseiba v. the Minister of Finance [1995] IsrSC 49(4) 68, 87-91; HCJ 5016/96 Horev v. the Minister of Transportation [1997] IsrSC 51(4) 1, 40-42. For the impact of the Human Rights Act on English administrative law, *cf*. Paul Craig, *The Courts, the Human Rights Act and Judicial Review*, 117 L.Q.R. 589, 594-96 (2001); R. C. Austin, *The Impact of the Human Rights Act 1998 Upon Administrative Law*, 52 Current Legal Problems 200 (1999).

rights issues but also on matters influencing the quality of life of citizens, their living conditions, and the prices they have to pay for activities. The role of administrative law is to ensure that these decisions are made fairly, giving due weight to the interests of various groups and individuals.[10]

In other words, the special contribution of administrative law, vis-à-vis constitutional law, is its concern with protecting legitimate interests, not recognized as human rights.[11] A decision on accepted levels of pollution, for instance, is not expected to infringe upon human rights, according to the classic definition of this term. Nevertheless, it is an act that affects wealth distribution and enjoyment of public resources. Decisions on the allocation of educational resources (taking into account factors like the size of classes) are also crucially important. They influence the life opportunities of individuals and the chances for communal and cultural development of groups. Distributive decisions of this type are regulated by doctrines of administrative law. This argument does not suggest that distributive decisions are always concerned only with interests rather than with rights, especially given that the distinction between these two categories is not always clear-cut. Some of these examples have a distinctive human rights dimension, particularly from the perspective of the protection of social rights (such as the right to education). But distributive decisions do not necessarily include a human rights dimension, and the concern with the distributive consequences of administrative actions is important even when no potential violation of rights, as opposed to interests, can be detected.[12]

In sum, the study of administrative law should focus on the distributive aspects of agency decisions and their impact on various interests. This focus of administrative law emphasizes the common traits it shares with private law, which also deals with conflicts of needs, demands, and interests (of parties to a contract, of injuring and

[10] This emphasis on interests is exemplified too by the relatively new development of protecting substantive legitimate expectations also in English Law. *See* Robert Thomas, Legitimate Expectations and Proportionality in Administrative Law (2000); Soren Schonberg, Legitimate Expectations in Administrative Decision-Making (2000).

[11] This distinction between rights and interests is not contrary to the view that rights also represent interests. In other words, I accept the observation suggested by Raz that: "[t]o say that a person has a right is to say that an interest of his is sufficient ground for holding another to be subject to a duty…." Joseph Raz, Ethics in the Public Domain 243 (1994). Still, once some interests are recognized as rights, they are treated by the legal system differently and enjoy a presumptive advantage when they contradict with other interests.

[12] The leading Israeli precedent which regards distributive justice as a fundamental principle in the area of administrative decision-making is HCJ 244/00 Association of New Dialogue for Democratic Dialogue v. the Minister of National Infrastructures [2002] IsrSC 56(6) 25**.**

injured parties, of shareholders and company executives etc.)—in contrast to the traditional association of administrative law with constitutional law. Ecological problems, for instance, can be the concern of either tort law (when they form the basis for a suit filed by the injured parties) or administrative law (through regulation and enforcement). Government regulation is intended to answer some of the problems which tort law cannot optimally solve because of various market failures (such as externalizations to future generations). At the same time, the breach of administrative standards may also serve as a basis for a tort suit (e.g. in the framework of the tort of breach of statutory duty).

B. *Procedural Justice and the Bureaucracy*

A significant perspective on administrative law concerns the treatment of individuals in the administrative process. In many cases, the main problem of citizens who apply to an administrative agency is not the content of its decision from a human rights perspective, but rather a protracted procedure, insensitivity, lack of information, and a sense of inaccessibility.[13] From this perspective, the focus of administrative law not only on the essential contents of the decision but also on its procedural aspects is extremely important, and highlights its unique role vis-à-vis the issues governed by constitutional law. Obviously, the protection of human rights may at times include procedural aspects, such as due process standards. Administrative law, however, includes many more requirements with regard to the procedural aspects of the administrative decision-making process, beyond the threshold requirements compelled by human rights concerns.

Traditionally, English administrative law recognized the importance of procedure mainly through rules that sought to guarantee fairness for individuals who were affected by administrative decisions, such as the rules of natural justice. The challenge of present day administrative law is to broaden its procedural requirements in order to open the administrative process also for representation of collective interests of different groups and thus achieve not only individual fairness but also fulfill democratic values of participation. In other words, administrative law must explore

[13] For the concern with the bureaucratization of administrative authorities, *see also* James O. Freedman, *Crisis and Legitimacy in the Administrative Process,* 27 Stan. L. Rev. 1041, 1064-68 (1975).

new channels to enable a dialogue between the citizens and the government, by expanding participation rights in the administrative process (including in rulemaking procedures).[14] In this context, there is much to learn from American law which is concerned not only with individual fairness in the administrative process but has also developed schemes for public participation in it.[15]

A related topic worth noting is the role of legislation in the field of administrative law. The administrative process can greatly benefit from a detailed law that will ensure citizens' procedural rights vis-à-vis the government. Israeli administrative law has developed based on judicial precedents, following the English case law tradition. In this context as well it is worth looking at the American context, in which the basic requirements of the administrative process were established in legislation in the form of the Administrative Procedure Act 1946. Legislation of the basic principles of administrative law will also have public significance, because it will carry the message of the importance of fair administrative procedures.

The potential ingrained in legislation for the public sphere can be exemplified by the developments in Israeli constitutional law. The enactment of the new basic laws on human rights had great symbolic value, beyond their formal legal aspects. In other words, the recent development in constitutional law indicates that efforts to formulate legislation in the area of administrative law could represent a worthy investment. An administrative procedure law could make a great contribution to strengthening the awareness to human rights in the bureaucratic sphere. An example of such contribution is the legislation of the Israeli Freedom of Information Law, 1998,[16] which not only granted the right to examine documentation in the possession of agencies but has also created an awareness to this right.[17] The absence of legislation on the basic principles

[14] *Cf*. Gerald E. Frug, *The Ideology of Bureaucracy in American Law,* 97 Harv. L. Rev.1276 (1984); Jerry Frug, *Administrative Democracy*, 40 U. Toronto L. J. 559, 583 (1990).

[15] These procedures include the notice and comment procedure set by the original provisions of the American Administrative Procedure Act, 5 U.S.C. § 553(b) (1946), as well as more advanced procedures such as negotiated rule making (reg-neg), recognized by the Negotiated Rulemaking Act, 5 U.S.C. §§ 561-70 (1990). The classical article on the opening of the American administrative process to participation and interest representation is Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975).

[16] Freedom of Information Law, 1998, S.H. 226.

[17] Although, unfortunately, this awareness is, still, at its first steps. *See* Yoram Rabin & Roy Peled, *Between FOI Law and FOI Culture: The Israeli Experience,* 1(2) Open Gov't: J. Freedom Info. 41 (2005). In this context as well there is much to learn from the experience of the American Freedom of Information Act, 5 U.S.C. § 552 (1966).

of administrative law ties in contrast to the fact that the activity of administrative agencies is entirely based on legislation. Administrative agencies are established by legislation that determines the scope of their powers. In this sense, the realm of administrative law is packed with legislation. This legislation, however, is specific and does not convey a uniform and integrated worldview concerning administrative decision-making and the rights of citizens who are affected by administrative powers.

C. *The Scope of Review*

Because administrative law focuses not only on rights but rather also on interests and good governance, judicial review of administrative decisions occurs also in situations that do not constitute infringements of constitutional rights. As far as equality is concerned, whereas the constitutional right to equality protects mainly against group-based prohibited discriminations or other forms of discrimination that affect personal autonomy,[18] in the administrative context, the court may invalidate a decision when it is tainted merely by unjustified differential treatment of individuals or corporations (importers or licensees, for example).[19]

Another example in this regard is the use of reasonableness as a ground for judicial review. In Israeli administrative law, a decision is considered unreasonable when it reflects an improper balance between the various considerations addressed by an agency (in contrast to a different issue—taking irrelevant considerations into account).[20] In contrast, in constitutional law, unreasonableness is not a separate ground for judicial review (when there is no infringement of human rights).

The new basic laws on human rights have introduced a new form of judicial review regarding both legislation and administrative decisions—the proportionality test.[21] To

[18] In Israel, the constitutional right to equality is part of the constitutional protection of the right to human dignity. *See* HCJ 6427/02 The Movement for Quality Government in Israel v. the Knesset [November 5, 2006] (not yet published), and HCJ 7052/03 Adalah—The Legal Center for Arab Minority Rights v. the Minister of Interior [May 14, 2006] (not yet published).

[19] *See, e.g.,* HCJ 509/80 Yunas v. the General Director of the Prime Minister's Office [1981] IsrSC 35(3) 589.

[20] HCJ 389/80 Dapey Zahav Ltd. v. the Broadcasting Authority [1980] IsrSC 35(1) 421.

[21] For example, the Israeli Supreme Court used the proportionality principle for the review of the decisions regarding Israel's security barrier. *See* HCJ 2056/04 Beit Sourik Village Council v. the Government of Israel [2004] IsrSC 58(5) 807; HCJ 7957/04 Mara'abe v. the Prime Minister of Israel [September 15, 2005] (not yet published).

some extent, the proportionality standard is similar to the reasonableness standard, because it also focuses on balancing, more specifically on the balance between the purpose of the administrative decision and the measure used to promote it. For this reason, there is even a sense of vagueness in the case law regarding the differences between these two grounds for judicial review.[22] Against this background, I would like to propose a distinction between reasonableness and proportionality (as grounds for judicial review) that can reflect the special focus of administrative law on the protection of interests. Reasonableness should be used by the courts also for the review of administrative decisions that do not affect human rights (but rather only balance between interests). In this context, the court has only to review the reasonableness of the relative weight the agency had ascribed to each of the relevant interests. In contrast, when an administrative decision limits human rights for the promotion of public interests, judicial review should be more precise, and follow the proportionality formula. Indeed, according to the basic laws, the proportionality test is part of the standards that an infringement of a human right has to meet in order to be considered constitutional. In other words, according to the basic laws, the proportionality standard is not called into action when an infringement of a right is not established.

D. *The Focus on the Executive Branch*

Another difference between the focus of constitutional law and that of administrative law relates to the branches of government they concentrate on. Constitutional law focuses on the relationship between the various branches of government (the legislature, the government and the courts). In contrast, administrative law focuses mainly on the executive branch (and on the judicial review of its actions).

Accordingly, in order to broaden its understanding of the executive branch, the study of administrative law should concentrate not only on "big" decisions reviewed by the Supreme Court. More specifically, it is important to look at decisions made by agencies, tribunals, and courts of first instance, although they are not as widely published as decisions of the higher courts.[23]

[22] In some cases, they are even used alternatively. *See Horev v. the Minister of Transportation*, *supra* note 9.

[23] This critique is largely valid concerning the understanding of other areas of law as well. In a similar manner, the study of private law is usually based on cases considered to be precedents rather than on decisions of lower courts. An interesting comparison worth mentioning here is the

In addition, for the sake of a better understanding of everyday administrative reality, it is important to study also administrative rulings and policies and not only formal legal sources such as case law and legislation. In fact, court decisions have only limited influence on the operation of administrative agencies. The scholars of legal realism have long been teaching that the legal principles of the book are not necessarily those of reality.[24] Public administration is an area in which this gap is particularly prominent.[25] Greater exposure to the decisions and rulings of lower courts in administrative matters is only part of this understanding.[26] Even more significant should be the growing awareness of the influence of institutional and political culture on administrative reality and of the significance of non-formal procedures applied by administrative agencies.[27]

III. *Administrative Law in an Age of Privatization*

Traditionally, the power of the government, which used to control the economy and provide many services, also contributed to the centrality of administrative law in Israel.

critique raised in the United States against the focus on federal administrative law (which is mainly concerned with powerful federal bodies), while ignoring the important area of state administrative law, which is highly relevant to most lawyers (in contrast to Washington lawyers). *See* Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 Tex. L. Rev. 95 (1982).

[24] *See* Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910); Richard L. Abel, *Law Books and Books About Law*, 26 Stan. L. Rev. 175, 187 (1973).

[25] On the gap between administrative law doctrines and the administrative reality, *see* H. F. Rawlings, *Judicial Review and the "Control of Government,"* 64 Pub. Adm. 135 (1986); Michael Kerry, *Administrative Law and Judicial Review—The Practical Effects of Developments Over the Last 25 Years on Administration in Central Government*, 64 Pub. Admin. 163 (1986); Ross Cranston, *Reviewing Judicial Review*, in Administrative Law & Government Action—The Courts and Alternative Mechanisms of Review 45, 69-75 (Genevra Richardson & Hazel Genn eds., 1994); Genevra Richardson & Maurice Sunkin, *Judicial Review: Questions of Impact,* 22 Public Law 79 (1996); Carol Harlow & Richard Rawlings, Law and Administration 565-73 (2nd ed. 1997); Andrew Le Sueur & Maurice Sunkin, Public Law 470-4 (1997); Maurice Sunkin & Kathryn Pick, *The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund,* Pub. L. 736 (2001).

[26] For the significance of tribunals, *see also* Harlow & Rawlings, *supra* note 25, at 456-94.

[27] Peter Strauss, a prominent scholar of administrative law in the United States, quoted a Washington lawyer specializing in this area, who claimed that most of his professional activity is in the informal area of negotiating with the government. *See* Peter L. Strauss, *Teaching Administrative Law: The Wonder of the Unknown,* 33 J. Legal Educ. 1, 8 (1983). Another argument raised in this context is that the cases reaching judicial review represent "pathological" situations and, therefore, are not representative of public administration in general. *See* Mario Bouchard, *Administrative Law Scholarship*, 23 Osgoode Hall L. J. 411, 414 (1985).

Principles of administrative law were vital because, in every context, citizens faced agencies which set quotas, provide services, or operate industries. Areas of government activities included, to name a few: education, welfare, transportation, agriculture, and industry. The state intervened in all these areas by granting legal powers, generally very broad ones, to administrative agencies.

Currently, the other factor which influences the scope of administrative law is the official privatization policy powerfully endorsed in Israel since the eighties (of the twentieth century), following similar trends in other countries, including England. The declared intent of privatization is to scale down the public sector and to transfer a variety of activities (including the sale of government assets and the contracting out of government functions) to the private sector. In light of this policy, administrative law may appear, on the face of it, as less important, being associated with the public sector now expecting reductions both in its strength and in the scope of its activities. In fact, however, this perception is wrong. As explained below, the implementation of privatization policies does not eliminate the role played by administrative agencies but rather changes it.

In the short run, privatization is itself a complex process entailing decision-making, policy formulation, managing bids, and closing deals—all through public administration. The high profits involved in such a process and its distributive implications compel careful attention to standards of fairness, prohibitions on conflicts of interests, and so forth. Hence, even assuming that privatization is irreversible, it is a long and intricate process to which administrative law will apply for many years to come.[28] As for the future, privatization is not the end of public administration, but rather the beginning of a change in its functions and methods of operation. When the government contracts out functions it has to supervise its contractors. In a similar manner, when the government sells companies which operate important economic and social activities or when it gives licenses to other private parties, it still bears the responsibility of regulating these activities.

A. *The Challenge of Regulation*

A major change in administrative law that should accompany the implementation of privatization policies is the focus on government regulation. Many privatized

[28] Daphne Barak-Erez, *Applying Administrative Law to Privatization in Israel,* in Israeli Reports to the XVI International Congress of Comparative Law 47 (Alfredo Mordechai Rabello ed., 2006).

activities are vital to the economy and also important for the quality of life of citizens. Accordingly, the role of public agencies concerning privatized activities is to create a regulative system that will guarantee quality of service, decentralize the control of socially or politically sensitive economic activities, and ensure reasonable prices in areas where competition is impossible.[29] In the past, such regulation was less crucial, partly because the government had controlled many economic domains by making use of its legal rights as the owner. Indeed, regulation has always been part of administrative law, but due to the privatization of more functions and services, it has become more central and crucial. In addition, it has to cope with new areas of activity (telecommunication services, for example) and with the power of big corporations, including international ones.

In other words, one of the results of privatization should be the emergence of regulation as a major area of concern for administrative law scholars,[30] in contrast to the traditional focus on the issue of judicial review.[31] In this sense, the model of American administrative law which has dealt with the regulation of private actors for many years becomes more relevant to the study of administrative law in Israel, as well as in other countries, including England.

Despite privatization, administrative law will not disappear and, most likely, will gradually focus on the operation of agencies regulating private activities.[32] The United

[29] For the purposes of regulation, *see* Stephen Breyer, Regulation and Its Reform 15-35 (1982); Anthony I. Ogus, Regulation—Legal Form and Economic Theory 27-54 (1994). For the practice of regulation in England, *see* Tony Prosser, *Regulation, Markets, and Legitimacy*, in The Changing Constitution 229 (Jeffrey Jowell & Dawn Oliver eds., 4th ed. 2000).

[30] For arguments in favor of a focus on regulation, *see* Robert L. Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U. L. Rev. 120 (1977); Joseph P. Tomain & Sidney A. Shapiro, *Analyzing Government Regulation*, 49 Admin. L. Rev. 377 (1997). This new focus must include also reference to the possibility of exploitation of administrative powers of regulation for purposes other than the attainment of its original goals, by organized interest groups, a process described and analyzed public choice theorists. *See* Ogus, *supra* note 29, at 55-75; Daniel A. Farber & Philip P. Frickey, Law and Public Choice—A Critical Introduction (1991); *Symposium on Public Choice*, 74 Va. L. Rev. 167, 167-518 (1988). For the need to highlight this perspective in the study of administrative law in England, *see also* Patrick McAuslan, *Public Law and Public Choice*, 51 Mod. L. R. 681 (1988); Carol Harlow, *Changing the Mindset: The Place of Theory in English Administrative Law*, 14 Oxford J. Legal Stud. 419, 433 (1994).

[31] *See* D. J. Galligan, *Judicial Review and the Textbook Writers*, 2 Oxford J. Legal Stud. 257 (1982).

[32] For discussions of the regulatory new reality, *see* Commercial Regulation & Judicial Review (Julia Black et. al eds., 1998).

States, which in many ways epitomizes an economy based on private initiative, has many powerful administrative agencies specializing in the regulation and control of different domains (the FDA in the area of food and drugs or the FCC in the area of communication, to name a few). Accordingly, it is reasonable to expect new precedents that will focus on the economic aspects of regulation.[33]

B. *The Challenge of Social Rights*

The shift toward market-oriented economy brought by the privatization policy has far-reaching implications for society, including the widening of income gaps, higher poverty indices, and the vanishing of certainty concerning minimal standards of living conditions to be provided by the state. Against this background, the protection of social rights becomes more crucial.

The first front in the war for the recognition of basic social rights is indeed that of constitutional law,[34] and in this area, unfortunately, American constitutional law cannot serve a good example.[35] At any rate, the daily, practical arena for the implementation of social rights is that of administrative law. First, social rights are contingent on the administrative arrangements that enable their implementation;[36] an abstract legal recognition of social rights does not suffice. Second, legislation does ensure, in many cases, important social rights, regardless of their constitutional status.

In the field of education, for example, the legislation that recognizes the right to free public education[37] is only a starting point. In practice, the quality and accessibility

[33] *See* HCJ 7721/96 Union of Insurance Assessors v. the Inspector of Insurance [2001] IsrSC 55(3) 625.

[34] *See* Yoram Rabin & Yuval Shany, *The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights*?, 37 Isr. L. Rev. 299 (2004); Daphne Barak-Erez & Aeyal M. Gross, *Social Citizenship: The Neglected Aspect of Israeli Constitutional Law*, in Exploring Social Rights: Theory and Practice (Daphne Barak-Erez & Aeyal M. Gross eds., forthcoming 2007).

[35] *See* William E. Forbath, *The Constitution and the Obligations of Government to Secure the Material Preconditions for a Good Society—Constitutional Welfare Rights: A History, Critique and Reconstruction,* 69 Fordham L. Rev. 1821 (2001).

[36] *See* Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N. Y. U. L. Rev. 1121 (2000); Daphne Barak-Erez, *The Israeli Welfare State: Growing Expectations and Diminishing Returns*, in The Welfare State, Globalization and International Law 103 (Eyal Benvenisti & Georg Nolte eds., 2004).

[37] Compulsory Education Law, 1949, S.H. 287.

of education depends on the administrative policy in such matters as teachers' salaries, the number of pupils per class, and school dropouts. The right to receive a state education, then, exists at the legislative level, but its implementation is administrative–bound.[38] The same is true regarding the right to receive health services,[39] which is actually contingent on the administrative updating of the standard of the services and medications offered to the public. In sum, the growing importance of basic social rights must find expression in an emphasis on the crucial role of the administration in the actual implementation of these rights.

C. *The Challenge of "Mixed" Bodies*

Another change of emphasis brought about by privatization is the growing reference to "mixed" bodies found in the middle, between the private and the public spheres, usually private bodies exercising public functions. The privatization process often results in an endeavor that is not completely private, by shifting functions to bodies that are privately owned but exercise public tasks, and even enjoy statutory powers.

"Mixed" bodies of this type are not administrative agencies according to the classic definition of this term. Gradually, however, and at least partly, their activities replace those of administrative bodies.[40] Given these circumstances, the domain of administrative law cannot be confined to "agencies" in the narrow meaning of this term, but must also extend to bodies of mixed public-private character. The case law has already subjected those bodies to some public law norms.[41] Against this background, it is important to stress that not only is this a significant process but, in the future, private bodies of "dual substance" (due to their involvement in exercising public functions) will no longer be a limited sector subsisting on the margins of administrative law. Instead, they will become crucial to our understanding of the current performance of the public administration and, accordingly, to any significant discussion of administrative law. The existence of mixed bodies featuring public

[38] *See* HCJ 2599/00 Yated v. the Ministry of Education [2002] IsrSC 56(5) 834; HCJ 6973/03 Marzianno v. the Minister of Finance [2003] IsrSC 58(2) 270.

[39] Provided by the National Health Insurance Law, 1994, S.H. 156.

[40] For this new reality of public administration, *see also* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, in Recrafting the Rule of Law: The Limits of Legal Order 331 (David Dyzenhaus ed., 1999).

[41] *See* HCJ 731/86 Micro Daf v. the Israeli Electricity Company Ltd. [1987] IsrSC 41(2) 449; HCJ 294/91 Hevra Kadisha "Jerusalem Community" v. Kastenbaum [1992] IsrSC 46(2) 464.

and private characteristics preceded the present privatization trends. Privatization is, however, expected to lead to these bodies becoming, in many ways, the more typical and frequently selected structure adopted by the government. American law is currently dealing with the same issues, although often with a significant emphasis on the constitutional aspects of the cooperation between public parties and the government.[42]

IV. *Conclusion: The New Challenges of Israeli Administrative Law*

The analysis thus far was aimed at outlining the parameters that should guide the updated perception and development of Israeli administrative law. Administrative law should be understood as concerned with balancing between the demands and interests of individuals and groups, in contrast to the focus of constitutional law on the protection of human rights. In this light, it is important to emphasize the procedural aspects of the administrative decision-making process, in order to ensure fairness to individuals as well as to strengthen its democratic virtues. Administrative law must expand its scope and study all levels of public administration, instead of focusing solely on the activity of the highest political echelons. Privatization processes add further layers to the concerns of administrative law, with regard to the regulation of privatized bodies and the application of judicial review to bodies that the process of privatization left somewhere between the private and the public frameworks.

Administrative law applies to the state and its institutions, and as such, it must be sensitive to the changes affecting them.[43] The constitutional change in the status of human rights and the privatization policy that has changed the scope of government activity cannot leave the perception of administrative law untouched. While engaging in this process of updating Israeli administrative law, it may be useful to look also

[42] *See, e.g.,* Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization,* 45 Syracuse L. Rev. 1169 (1995); Martha Minow, Partners, Not Rivals—Privatization and the Public Good (2002); Gillian E. Metzger, *Privatization as Delegation,* 103 Colum. L. Rev. 1367 (2003). For an administrative law focused analysis *see* Jody Freeman, *Collaborative Government in the Administrative State,* 45 UCLA L. Rev. 1 (1997).

[43] "Administrative law theory has struggled to keep pace with changes in public administration, unsure whether to treat them merely as the context for a relatively self-contained system of administrative law… or categorize them as innovations to the structure and values of administrative law." Harlow & Rawlings, *supra* note 25, at 150.

at the example of American administrative law, which is now more relevant to the domestic context than it was in the past. At the same time, absorption from American law should be conducted in a critical manner in order to accommodate the differences between the two systems, as well as to avoid doctrinal choices that are criticized even in the United States.