CONSTITUTIONS, COURTS, SUBSIDIARITY, LEGITIMACY, AND THE RIGHT TO POTABLE WATER

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I. INTRODUCTION

When courts are asked to construe—and at times decipher—constitutional provisions, lawyers and the general public in the United States typically expect them to do so within the four corners of the Constitution. However, a number of foreign supreme courts rarely follow this principle. One example is the Supreme Court of Israel—the subject of this article. When that court sits as a constitutional court, i.e., the High Court of Justice ("HCJ"), and interprets the country's Basic Law,[1] i.e., its constitution, it routinely turns to extra-constitutional instruments.[2]

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[1] *See, e.g.*, Ariel Bendor & Michael Sachs, *The Constitutional Status of Human Dignity in Germany and Israel*, 44 ISR. L. REV. 25, 29 (2011).

> Until 1992, most basic human rights in Israel were considered part of common law and developed by means of judicial rulings. The courts determined that they could be violated only by statute, and that parliamentary statutes violating human rights would be interpreted, as far as possible, in light of the central position of human rights in democratic regimes.

Id.; Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm. The law was amended in 1994 as follows:

> (1) Section 1 shall be designated 1(a) and shall be preceded by the following section:
> Basic principles
>
> > 1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

5754-1994, SH No. 1454. For the history of the Basic Law, see RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 51-53 (2004). *See also* Leslie Friedman Goldstein, *From Democracy to Juristocracy*, 38 LAW & SOC'Y REV. 611, 624 (2004).

[2] *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., para. 6 [2006] (Isr.), *available at* http://elyon1.court.gov.il/Files_eng/02/690/007/a34/02007690.a34.pdf (A/k/a Israeli Targeted Killing Case) (citing Article 51(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International

The use of these sources is noteworthy in human rights cases, particularly when the judges seek remedies for breaches of these rights. Indeed, Israel's Supreme Court has relied on extra-constitutional sources in the context of the human right for water.[3] The present article focuses on these extra-constitutional influences, and the subsequent engrafting of human and environmental rights, specifically the right to/for water.

Clearly, constitutional rights are those most protected by courts.[4] Query then, why would a court that is asked to adjudicate a constitutional controversy seek a remedy outside of the confines of those offered by that charter? One reason may be that some constitutions are devoid of the kind of entitlement that the court seeks to provide in order for justice to prevail. For example, the U.S. Constitution does not provide for certain rights, e.g., a right to human dignity. Such rights, if they are addressed at all by U.S. courts, would be adopted via statute and may be imported from the laws of states/nations that have redressed similar issues,[5] from international conventions or from the judgments of international courts and tribunals.[6]

Armed Conflicts (Protocol I), 8 June 1977); *see also* HCJ 769/02, at para. 21 ("Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the area is the international law dealing with armed conflicts. So this Court has viewed the character of the conflict in the past, and so we continue to view it in the petition before us."); HCJ 785/87, Abd Al Nasser v. Commander of the Isr. Def. Forces in the West Bank, 42(2) PD, 4, 12 [1988], *available at* http://elyon1.court.gov.il/files_eng/87/ 850/ 007 /Z01/87007850.z01.htm.

[3] *See, e.g.*, CA 9535/06 Abu Masad v. Water Comm'r [2011] (Isr.).

[4] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); Ferguson v. Comm'r, 921 F.2d 588, 589 (5th Cir. 1991) ("The right to free exercise of religion, guaranteed by the First Amendment to the Constitution, is *one of our most protected constitutional rights*.") (emphasis added); Lindsy J. Rohlf, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 707 (2009) ("Parental rights are now some of the *most protected and valued constitutional rights* in this country.") (emphasis added). As regards Israel, see Justice Aharon Barak, A Constitutional Revolution: Israel's Basic Laws, Address Delivered Upon Receiving Degree of Doctor of Philosophy, Honoris Causa, from University of Haifa (May 18, 1992), in FACULTY SCHOLARSHIP SERIES PAPER 3697 (Jan. 1, 1993), at 1, *available at* http://digitalcommons.law.yale.edu/cgi/ viewcontent.cgi?article=4700&context=fss_papers, which provides in pertinent part:

> With the enactment of the Basic Laws, these fundamental rights have become "inscribed in the book." From now on, they bind not only the citizens and residents, and not only the administrative authorities, such as the government and local authorities. From now on, they bind the Knesset itself. Above the Knesset as the legislative branch stands the Knesset as constitutive branch, and above the ordinary law of the Knesset stand the two Basic Laws. The people are sovereign, and the Basic Laws are supreme.

[5] In the United States, see Muller v. Oregon, 208 U.S. 412, 419-20 (1907). This is the landmark case where the famous Brandeis Brief was filed in a dispute that challenged an Oregon law limiting the number of hours women worked in Muller's laundry. Brandeis collected law from numerous countries where the amount of hours a woman could work in a day or week was limited. Thus, in agreeing with Oregon that the State had a special interest in protecting women's health, the Court was persuaded by laws from other countries. *Id.* See also Kansas v.

Many jurisdictions have constitutions that provide greater substantive and social and economic rights than those offered by the constitution of the United States. The High Court of South Africa has, for example, emphasized the following, in a dispute "about the fundamental right to have access to sufficient water and the right to human dignity"[7]:

> section 27(1) of the Constitution guarantees everyone the right to have access to sufficient water. In terms of section 39(1) (b) of the Constitution, the *Courts in interpreting the Bill of Rights must consider international law*. In terms of section 233 of the Constitution a reasonable interpretation of any legislation which is inconsistent with international law, must be preferred.[8]

But, what of those foreign courts that are not so mandated by their constitutions? Is it possible that when they adopt extra-constitutional norms, including international law, they do so to buttress or legitimate their judgments? Alternatively, is such a court turning its State's constitution into an instrument that is subsidiary to international law, or vice versa? Then again, is it conjoining remedies that are non-existent under that State's constitutional scheme? There may very well be other reasons. Here, however, the focus will be on two notions: the principle of subsidiarity and that of the court's legitimacy.

The following sections explore these concepts and view them through the prism of a seminal constitutional and international law judgment issued by the Supreme Court of Israel, *Abu Masad v. Water Commissioner*.[9] There, the Court found that human dignity requires the State to provide a right for water to Bedouin citizens who have no access to potable water under the dignity prong of Israel's Basic Law.[10] Part II of this article reviews the principle of subsidiarity. In turn, Part III assesses the concept of court legitimacy, and why courts seek to legitimate their decisions, particularly when they may not be politically popular. Part IV discusses the judgment in the case *Abu Masad v. Water Commissioner*, which found a right for water.[11]

Colorado, 206 U.S. 46, 97 (1907) where Justice Brewer, writing for the Court, declared that "because Kansas and Colorado are States sovereign and independent in local matters, the *relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal.*" (emphasis added).

[6] *Mazibuko v. City of Johannesburg*, 2008 (471) SA 2 (CC) at 2 para. 2 (S. Afr.).

[7] *Id.*

[8] *Id.* at 12 para. 31 (emphasis added) (interpreting the 1996 post-apartheid constitution).

[9] CA 9535/06 Abu Masad v. Water Comm'r [2011] (Isr.).

[10] *Id.* ¶ 20, 21.

[11] *Id.*

II. THE PRINCIPLE OF SUBSIDIARITY

Subsidiarity is a concept grounded in European Union law. Within that context, the principle[12] is founded upon Article 5 of the Treaty of the European Union.[13] It is essential to both the operation of the European Union (EU), as well as to the European Court of Justice's ("ECJ") decision-making process.

As applied, the principle is intended to determine the level of intervention that is of utmost relevance, in the areas of mutual jurisdiction or competency that is shared between the EU and its member States. Actions involving European, national or local levels are subsumed by the principle of subsidiarity.[14] Nevertheless, in every case, intervention by the EU may only occur if the Union is most adept at performing a task, e.g., adjudicating a

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[12] *See, e.g.*, Florian Sander, *Subsidiarity Infringements before the European Court of Justice: Futile Interference with Politics or a Substantial Step towards EU Federalism?,* 12 COLUM. J. EUR. L. 517, 527 (2006):

> [T]he principle of *subsidiarity* is closely linked to the European institutional design that provides for proper allocation and execution of competences, and the changes recently imposed on it by the European Constitution aim to enhance this element. Subsidiarity is a recent phenomenon in the history of European integration, and from the very beginning has served as a corrective tool for deficiencies of the competence order. Initially introduced by the Single European Act of 1987 . . . .

(emphasis added).

[13] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, 2007 O.J. (C 306) 12; *see also*, Consolidated Version of the Treaty on European Union, 2010 O.J. (C 83) 18 Article 5 (ex-Article 5 TEC):

> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of *subsidiarity* and proportionality.
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> * * *
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> 3. Under the principle of *subsidiarity*, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
> The institutions of the Union shall apply the principle of *subsidiarity* as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of *subsidiarity* in accordance with the procedure set out in that Protocol.
> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of *subsidiarity* and proportionality.

(emphasis added).

[14] *The Principle of Subsidiarity*, EUR-LEX, http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1424439406002&uri= URISERV:ai0017 (last updated Apr. 3, 2010).

dispute via the ECJ, more effectively than a member State.[15] The protocol regarding the application of the Principle of Subsidiarity rests upon "three criteria aimed at establishing the desirability of intervention at [the] European level:

> [1] Does the action have transnational aspects that cannot be resolved by Member States?
> [2] Would national action or an absence of action be contrary to the requirements of the Treaty?
> [3] Does action at European level have clear advantages?"[16]

Although the Principle of Subsidiarity is utilized in both legislative and judicial decision-making, the emphasis here is on courts and their dispute resolution functions. Within that legal environment, the ECJ has for two decades exercised the jurisdiction of adjudicating issues of subsidiarity, although it was regarded for decades as a principle that was "merely political and non-justiciable in nature."[17] Thus, in the aggregate, subsidiarity can be regarded "as fundamentally concerned with the distribution of competences among different levels of governance . . . ."[18]

The first dispute in which the ECJ construed the principle was a 1994 challenge by the United Kingdom to the validity of the European Treaty's Article 118a:[19] a directive involving hours worked, that is, the *Working Time* directive.[20] The petitioner contended that the European Parliament and the Council of the European Union failed to establish that the directive's goals would be better served at the community level, as opposed to the national level.[21] The ECJ rejected the U.K.'s argument that the directive failed to comply with the principle of subsidiarity.[22]

Conversely, as utilized here, the concept is defined as the distribution of power between parallel laws, or legal systems. Just how that relationship plays out in the framework of the constitutional right to water will need to linger until Part V. We next turn to the subject of court legitimacy.

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[15] Koen Lenaerts & Tim Corthaut, *Judicial Review as a Contribution to the Development of European Constitutionalism*, 22 Y. B. EUR. L. 1, 16 (2003).

[16] *The Principle of Subsidiarity, supra* note 14.

[17] Sander, *supra* note 12, at 520. *See also* Lenaerts & Corthaut, *supra* note 15, at 22.

[18] Paolo G. Carozza, *Subsidiarity, as a Structural Principle of International Human Rights*, 97 AM. J. INT'L L. 38, 57 (2003).

[19] Case C-84/94, United Kingdom v. Council, Opinion Advocate General Léger, 1996 E.C.R. I-5755, I-5758.

[20] Case C-84/94, United Kingdom v. Council, 1996 E.C.R. I-5793, I-5795 (contesting Council Directive 93/104, 1993 O.J. (L 307) 18(EC)).

[21] *Id.* There have been a number of subsequent cases filed with the Court. *See also*, Case C-233/94, Germany v. Parliament & Council, 1997 E.C.R. I-2405, I-2411 (challenging the Directive on deposit-guarantee scheme); Case C-377/98, Netherlands v. Parliament & Council, 2001 E.C.R. I-7079, I-7085 (disputing over the Biotech Directive, European Parliament and Council Directive 98/44, 1998 O.J. (L 213) 13).

[22] Case C-84/94, United Kingdom v. Council, 1996 E.C.R. I-5793, I-5816-17.

III. COURTS AND LEGITIMACY

Judicial legitimacy is a notion or characteristic that has no clear-cut or objective meaning. Rather, it is a concept that is more predisposed to a subjective definition as opposed to an objective one. For example, Laurence Helfer and Anne-Marie Slaughter have observed that there are several articulations of the bases of judicial legitimacy.[23] These include the following constituents that are associated with the structural and procedural attributes of a court's or tribunal's authority: "impartiality; principled decisionmaking; reasoned decisionmaking . . . consistency of judicial decisions over time . . . and provision of a meaningful opportunity for litigants to be heard."[24] Although the foregoing list is not exhaustive, it does provide a general idea of the "judicial attributes that undergird the 'compliance pull' of judicial decisions."[25]

Similarly, Shai Dothan has observed that international courts strive to enhance their legitimacy, i.e., they seek to have their judgments perceived as just, correct and unbiased, by the community in which they serve.[26] They also seek to be viewed as legitimate institutions, which will improve compliance with their rulings.[27] A more nuanced view of court legitimacy was expressed by Thomas Franck, who contended that it is "that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process."[28] (Right process refers to valid or binding sources of law.) But, there are also other elements of legitimacy. For example, any government institution in a democracy, particularly a court, seeks to protect its institutional authority and authenticity, as well as abiding by its constitutional mandate.

Alternatively, Yuval Shany argues that legitimacy and effectiveness for the majority of courts are measured by evaluating whether these adjudicative bodies satisfy four goals established for them by their mandate providers, that is, the individual court's creators.[29] These objectives are: (1) promoting compliance with the prevailing norms; (2) resolving disputes; (3) supporting applicable legal regimes; and (4) legitimizing the legal regime and its norms.[30] Pursuant to this agenda, legitimacy may correspondingly serve to reinforce

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[23] *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 284 (1997).

[24] *Id.*

[25] *Id.*

[26] Shai Dothan, *How International Courts Enhance their Legitimacy,* 14 THEORETICAL INQUIRIES L. 455, 456 (2013).

[27] *Id.* ("[C]ourts try to enhance their legitimacy and behave strategically to pursue this goal. They seek legitimacy both for its own sake and as a way to fulfill other goals, such as improving compliance with their judgments.").

[28] Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988).

[29] Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L. L. 225, 244 (2012).

[30] *Id.* at 244-47. Although Shany's criteria is used for international courts, I believe that they can be applied to constitutional ones as well.

other goals and assist a court in fulfilling them.[31] This arrangement or design demonstrates that courts have to pursue or assume tradeoffs between diverse goals.[32]

A court's legitimacy is therefore both its foundation, and its stock in trade. One of the key attributes of a court is that it is a body that issues judgments and remedies, but relies on the goodwill of the parties and political pressures, to comply with those rulings. This is because courts lack the means of enforcing their judgments—other than the possibility of holding a disobeying party in contempt. Moreover, domestic or constitutional courts serve broad audiences, with a more varied group of stakeholders and constituencies than do non-constitutional courts. Consequently, the prior courts are more likely to issue judgments that are unpredictable, e.g., in the United States, *Brown v. Board of Education*[33] or *Bush v. Gore*,[34] which may produce serious repercussions.[35]

We now move onto an analysis of the Supreme Court of Israel's decision in *Abu Masad v. Water Commissioner*.[36]

IV. THE ABU MASAD V. WATER COMMISSIONER CASE

Abu Masad was a dispute brought by six Bedouin men, who represented hundreds of similarly situated Bedouin, in Israel's Negev Desert—which forms the southern extent of the country—(located south and east of Be'er Sheba).[37] They filed their claim against the Israel Water Commissioner and the Lands Authority.[38] The respondents were alleged to have denied the petitioners direct connections for drinking water and sanitation.[39] The government agencies were only ready to run connections to major roads nearest to the Bedouin settlements.[40] A number of these settlements, however, are as far as five kilometers (three miles) from these roads.[41] The

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[31] Yuval Shany, *supra* note 29, at 247.

[32] *Id.* at 246.

[33] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[34] Bush v. Gore, 531 U.S. 98 (2000).

[35] *See generally* Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, 14 THEORETICAL INQUIRIES L. 437 (2103).

[36] CA 9535/06 Abu Masad v. Water Comm'r [2011] (Isr.).

[37] *Id.* at ¶ 3.

[38] *Id.* at ¶ 4.

[39] For a full history of the *Abu Masad* case, see Itzchak E. Kornfeld, *Dignity and the Right to Water in Comparative Constitutional Law: Israel's Supreme Court Extends the Human Right to Water*, 28 J. ENVTL. L. & LITIG. 1, 10 (2013); Sharmila L Murthy et al., *The Human Right to Water in Israel: A Case Study of the Unrecognised Bedouin Villages in the Negev*, 46 ISR. L. REV. 25, 27-28 (2013).

[40] CA 9535/06 *Abu Masad*, at ¶ 1.

[41] It should be noted that with one caveat, similar Jewish settlements and outposts do have water pipelines run to their homes. The caveat is that the Government of Israel has classified the Bedouin settlements as illegal, since the Government maintains that the Bedouin are squatting on state-owned land. This interpretation has been held-up by the courts. *See, e.g.*, H.C. 1991/00 Abu Hamad v. Nat'l Council for Planning & Construction [2007] (Isr.), *available at* http://elyon1.court.gov.il/files/00/910/019/R31/00019910.r31.pdf (This judgment is cited in the *Abu Masad* case at para. 5.). *See also*, Ronen Shamir, *Suspended in Space: Bedouins Under the Law of Israel*, 30 Law & Soc'y Rev. 231, 251 (1996); HAIA NOACH, INTERNATIONAL HUMAN RIGHTS

Lands Authority was named a party, since the Government of Israel deems the Bedouin settlements, particularly those in the Negev Desert to be illegal on two principal grounds.[42] First, because the Bedouin residents do not possess proof of title dating back to the nineteenth century Ottoman period, or in the alternative, for asserted failure to register their properties with the British Mandatory Authorities in 1921.[43]

Although the Court acknowledged that the petitioners are *illegally* inhabiting the land, that fact notwithstanding, the justices observed that the right for water is a critical entitlement and declared that with regards to the status of an individual's right to water:

> There exist three levels in the normative recognition of a person's right to water: the right to water on the level of a regular law, both by virtue of a statutory arrangement and by virtue of customary law; the constitutional right to water, derived from another recognized constitutional right, by virtue of the *Basic Law: Human Dignity and*

DAY 2011 REPORT ON THE DEMOLITION OF ARAB-BEDOUIN HOMES IN THE NEGEV-NAQAB 15 (Avner Ben-Amos & Karen Douglas eds., Bracha Ben-Avraham trans., 2011), *available at* http://www.dukium.org/eng/wp-content/uploads/2011/06/demolitions_report_2011-for-print.pdf. Some of the small Israeli settlements that have government supplied/piped water, or wells drilled by government paid contractors, include Niran (Naaran in Hebrew), located northeast of Jericho, which has a population of 56, and Yafit, located southeast of Nablus, with a population of 106. *Settlements: Statistics on Settlements and Settler Population*, B'TSELEM - THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, http://www.btselem.org/settlements/statistics (last updated Aug. 8, 2013).

[42] CA 9535/06 *Abu Masad*, at ¶ 5 (explaining that the communities are referred to as "unrecognized villages" because several were built "without any of the legally required adaptations to the regulations of the Planning and Construction Law" and because there are "issues of trespassing on government or privately owned land").

[43] *See, e.g.*, RAWIA ABURABIA, THE ASS'N FOR CIV. RTS. IN ISR, PRINCIPLES FOR ARRANGING RECOGNITION OF BEDOUIN VILLAGES IN THE NEGEV 12 n.29 (2011), *available at* http://www.acri.org.il/en/wp-content/uploads/2011/09/Prawer-Policy-Paper-May2011.pdf.

> Contrary to popular belief, the Bedouin are not squatters. They are residents of the Negev who have lived there for generations, and for many years have employed an organized, traditional system of property acquisition. This mechanism is still in use to this day, and is utilized by the Bedouin to record transactions, regulate costs, and resolve conflicts. This traditional system of property acquisition evolved within the cultural and political autonomy that the Bedouin enjoyed until the beginning of the 20th century. It was affirmed and honored by Ottoman rule, British rule, and also in part by the Israeli government during the first few years of the state . . . [t]he Israeli government classified the lands held by the Bedouin until 1948 as *mawat* ("dead land" – uncultivated, unassigned, and uninhabited), and thus available for registration as "state lands." Among the arguments used to justify this decision was the fact that the lands were not registered in the official Land Registry in the name of their Bedouin owners. [The state claimed that since the Bedouin had not registered the land in 1921 in response to the British land accounting, and since (according to the state) there were no villages in the area during the same period, the lands were in fact mawat and thus were rightfully registered as state lands].

Id. at 11-12.

> *Liberty* – in our case, the right to live in dignity; and finally, at the top of the pyramid, the legislative right to water that is recognized by virtue of itself. *This constitutional right for water is recognized in different countries, particularly in those that suffer from a severe shortage of water* (*see*, *for example*, section 27(1)(b) in the final clause of the South African Constitution; section 216(4) of the Gambian Constitution 1996; section 14 of the Ugandan Constitution 1995; section 90(1) of the Ethiopian Constitution 1998; section 112 of the Zambian Constitution 1996; section 20 of the Nigerian Constitution 1999) and documents and conventions in international law.[44]

The Court's allusion to the *Basic Law: Human Dignity and Liberty*, above, is a reference to Israel's self-styled Constitution. The Basic Law is a product of Israel's constitutional revolution, which occurred in 1992, when the Knesset (Israel's Parliament), enacted the law.[45] One characterizes it as self-styled or a quasi-Constitution, since it is not a constitution *per se*, akin to the United States Constitution. Rather, it is a compilation of laws that although modeled upon the European Convention on Human Rights,[46] is still a work in progress.

In its *Abu Masad* judgment, the Israel Supreme Court, by Justice Ayala Procaccia, observed that:

> Israel recognizes the right to water first and foremost as a statutory right by virtue of the Water Law. *The right to water has not yet been granted independent constitutional status by virtue of a basic law*. Nevertheless, *as water is vital to the very existence of a person, and to his existence with dignity*, one must examine whether the right to water was granted the normative status of *a constitutional right, deriving from the constitutional right to life with dignity*; and whether, by extension, the

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[44] CA 9535/06 *Abu Masad*, at ¶ 19 (emphasis added).

[45] Basic Law: Human Dignity and Liberty, *supra*, note 1. The law was amended in 1994 as follows:

> Basic principles
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> 1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

Id. For the history of the Basic Law, see Kornfeld, *Dignity and the Right to Water*, *supra* note 39, at 6-8; ISRAELI CONSTITUTIONAL LAW IN THE MAKING (Gideon Sapir, *et al.* eds. 2013); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 21-24 (2004). *See also* Leslie Friedman Goldstein, *From Democracy to Juristocracy*, 38 LAW & SOC'Y REV. 611 (2004).

[46] *See* Consolidated Version of the Treaty Establishing the European Community, art. 4, 2002 O.J. C 325/33, 41, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429661444441&uri=CELEX:12002E/TXT. *Cf.* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (example of European Convention on Human Rights).

> State is obligated to provide any person living in Israel with water to the extent needed for minimal existence with dignity.[47]

Indeed, in her judgment Justice Procaccia found that a human being, resident in Israel, has a constitutional right to receive water,[48] where that person's abode does not have a connection to government supplied water, noting that:

> [T]he idea that the dignity of a person as a constitutional right also includes the right of a minimum of human existence, such as a roof over one's head, basic food, and basic medical care, and that the state is obligated to ensure that a person's level of existence does not go below a minimum required for living with dignity has put down deep roots in the Israeli legal system.[49]

Seeking to buttress its point, the Court also quoted President Justice *Emeritus* Aharon Barak who initiated Israel's constitutional judicial review for the following proposition:

> *The right of a person to dignity is also the right to conduct his everyday life as a human being, without* being subdued by distress and encountering *unbearable depravity*. This is an approach, by which the right to dignity is the right that a person be ensured the *minimum of material means to exist within the society in which he lives*. This approach has been repeatedly expressed in the rulings of this court, in a variety of contexts.[50]

Finally, the Court observed that "[a]ccessibility to water sources for basic human use falls within the realm of the right to minimal existence with dignity. *Water is a vital need for humans, and without basic accessibility to water of a reasonable quality, humans cannot exist*."[51] Consequently, Justice Procaccia noted that one must deem the entitlement to water "as a right to *human existence with dignity that is afforded constitutional protection* by virtue of the constitutional right to human dignity, anchored in the *Basic Law: Human Dignity and Liberty*." [52]

Immediately following the finding of a constitutional right to water, the Court peculiarly and intriguingly turned to the human right for water in international law, asserting that "[a]n individual's right to water also derives from the principles of international law, to which Israel is a party as a member

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[47] CA 9535/06 *Abu Masad*, at ¶ 20 (emphasis added).

[48] *Id.* at ¶ 23.

[49] *Id.* at ¶ 21 (citing Leg. App. 3829/04 Twito v. Municipality of Jerusalem, Verdict 59(4) 769, 779 (2004)).

[50] *Id.* at ¶ 21 (emphasis added) (internal citation omitted).

[51] *Id.* at ¶ 23 (emphasis added).

[52] *Id.* (emphasis added). *See also* Basic Law: Human Dignity and Liberty, *supra* note 1 (stating in § 4, "[a]ll persons are entitled to protection of their life, body and dignity," and in § 2, "[t]here shall be no violation of the life, body or dignity of any person as such").

of the family of nations."[53] Justice Procaccia noted that "Israel is a party to the International Covenant for Social, Economic and Cultural Rights 1996 . . . ."[54] While the convention has yet to be incorporated into the country's legal system, the Court found that it "comprises a guiding and directing value not only on an international level, but also in the interpretation of internal legal matters."[55] Nevertheless, the judgment cited language from Article 11 of the Covenant, which in pertinent part provides:

> 1. 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.
> 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed:
>   (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>   (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.
>
>   This instruction relates to a person's basic right for food for his existence, and this also includes the right to water.[56]

The Court's judgment also noted that while the "right to water" is not explicitly encompassed in the Covenant, the Committee for Economic, Social and Cultural Rights[57] concluded in its General Comment no. 15, the Right to

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[53] CA 9535/06 *Abu Masad*, at ¶ 25.

[54] *Id.* at ¶ 26

[55] *Id.* (citing Aharon Barak, *Interpretation in Law,* Vol. C: LEGISLATIVE INTERPRETATIONS 235-37 (5744)).

[56] *Id.* at¶ 27.

[57] Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx# (last visited Mar. 19, 2014).

Water, that water is included within the bounds pursuant to Article 11, the right for suitable living conditions, and Article 12, the right for suitable standards of health, of the Covenant[58] locating the right within a normative framework[59] of international law. Moreover, it also sets a standard for attainment of the right.[60] Justice Procaccia similarly relied on Article 1 of General Comment 15, stating that: "*Water is a limited natural resource and a public benefit, fundamental for* ***life and health****. The human right to water is indispensable for leading life in human dignity. It is a prerequisite for the realization of other human rights*."[61] Continuing to rely on that General Comment, she then declared that:

> Section B of General Comment No. 15 states the normative content of the right to water. Section 10 of the comment states that the right to water includes free access to existing water sources, the right for protection from disturbances in consuming a minimal amount of water, and the right to benefit from an equal supply of water. Section 11 of General Comment No. 15 anchors the concept that water is a social and cultural resource, and not only an economic resource, and the obligation to manage a water system in order to maintain intergenerational justice. Finally, Section 12 determines that the criteria for the realization of the right to water are availability, quality and accessibility. The element of accessibility has four aspects: physical access to water, economic access to water, equality in access to water and access to information about water. This instruction reflects on the scope of the right to water.

> The Committee on Economic, Social and Cultural Rights (CESCR) is the body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, *supra* note 57.

[58] U.N. ESCOR, Comm. on Econ., Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 11-12, U.N. Doc. E/C. 12/2002/11 (Jan. 20, 2003).

[59] On the normative framework, see *id.* at ¶ 10, which states in pertinent part:

> [t]he right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

[60] CA 9535/06 *Abu Masad*, at ¶ 29.

[61] *Id.* (emphasis added).

> Section 16 of the General Comment directly discusses the right of special populations to water.[62]

One question raised by the Court's reference to, and use of, international law, is why it would do so, given its initial reliance on the constitutional terms of the Basic Law when it determined that the Government of Israel was in breach of Articles 2 and 4. There may be a number of reasons. The first of these is the fact that the Court routinely adopts international law into the country's domestic or municipal law.[63] However, a more plausible reason may be that it relied on international law to legitimate its judgment. And what of the issues of subsidiarity?

V. ANALYSIS

As an initial matter, one needs to note that the Court decided to deal with two separate sets of law: domestic constitutional law, and international human rights law. But, are we to read into the judgment equal weight for these two disparate legal regimes? Yuval Shany suggests that when domestic courts adjudicate claims pursuant to international law, they "double" as international judicial agencies, and consequently, perform an international judicial role.[64]

Accordingly, given the principle of subsidiarity, the question raised, is whether the constitutional/basic law issue or determination is subordinate to the international law analysis or vice versa. Recall that for our purposes subsidiarity is defined as the distribution of power between constitutional law and international human rights law, i.e., the doctrine works like a seesaw. Since the Court addressed the constitutional issue first, one could logically conclude that domestic constitutional law likely is the predominant norm that is being evaluated in *Abu Masad*. Consequently, under this view, the social and economic rights are subsidiary to domestic ones. However, since Justice Procaccia did not explicitly state so, one is uncertain that this in fact is the case.

A second possibility may be that the Court sought to "buttress" or "wrap" its constitutional decision with international law, in order to legitimate its judgment. I posit that this indeed is the reason that Justice Procaccia went on to incorporate international law into the Court's judgment.[65] An apposite question then, would be, why? One possible answer is that the decision fits within the overall goal of the Court, and its view of itself as an effective legal institution.

Assuming, that this Court seeks to be viewed as an effective adjudicative

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[62]CA 9535/06 *Abu Masad*, at ¶ 29. The Court continues to quote from Comment 15, but that text is unnecessary for our purposes.

[63] *See* HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. para. 19 [2006] (Isr.), *available at* http://elyon1.court.gov.il/Files_eng/02/690/007/a34/02007690.a34.pdf.

[64] Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73, 74 (2009).

[65] Of course, only the justices know for sure why they engrafted international law onto a constitutional law dispute.

body, how can one measure that effectiveness? A subsidiary question, and a natural as well as relevant query that flows from the foregoing, is, effective to what end? A growing body of legal literature has, over the past decade, turned its attention to the question of the effectiveness of courts and tribunals.[66] These scholars posit that the first step in assessing a court's effectiveness is to determine whether it is an independent forum: "judicial independence--must be viewed as [being] consonant with the long-term expectations of [the court's legal regime and its] . . . contribut[ion] to the success and legitimacy of the regime."[67] If the adjudicative body is found to be independent then an additional question that is raised is: do the judges and other stakeholders view this institution solely as a tool for dispute resolution? I suggest that courts interpreting their country's constitutions do not view their task that narrowly. They have other goals in mind.

Furthermore, when a domestic court adopts international human rights law, in order to support or expand its constitutional rights—as was done in the case *sub judice*—its judges, I posit, are, in essence, declaring that they wish to operate in a dual legal environment and incorporate both norms into the constitution. Another issue that I believe is raised by the *Abu Masad* case's adoption of international law is whether these judges may have sought to continue the Court's trend of melding social and economic rights into Israeli case law.[68]

That is, the Court previously laid down a number of precedents, i.e., an existing body of constitutionally grounded international human rights norms. Thus, by the time the Court was asked to adjudicate this dispute, it had already adopted a number of human rights touchstones. Indeed, Justice Procaccia did not necessarily stretch the Court or its precedents too far from where the Court's case law was prior to the adjudication of this case. Accordingly, it appears that international human rights law, or social and economic rights *per se*, fell into a subsidiary role within the Court's constitutional jurisprudence.

Placing the above within the framework of the goal-based approach, we may note that it:

> highlights the constant tradeoffs that courts make as they seek to advance different and, at times, inconsistent goals. Hence, if a court sees a potential decision as conducive to attaining its other judicial goals, the court may issue the decision even if the losing party is likely to reject it.[69]

This indeed appears to be the case in the *Abu Masad* judgment. Since the Court did not specifically order the Water Commissioner to supply water to the petitioners—rather, it remanded to the Commissioner to evaluate, in accordance with the judgment, whether he should run a pipe to the Bedouin

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[66] Shany, *supra* note 29, at 226 n.5.
[67] *Id.* at 259.
[68] *Id.* at 259. *See also* CA 9535/06 Abu Masad v. Water Comm'r [2011] (Isr.), at ¶ 5.
[69] Shany, *supra* note 29, at 262.

residents. He did so for only one of the six petitioners, and rejected the claims of the other five.

Although in some situations this type of noncompliance may focus interest upon the losing party's failure to comply with both the constitutional and human rights norms, which this court's judgment seeks to promote, Shany posits that, at least in the international court circumstance, such an occurrence may "potentially lead[], in the long run, to better norm compliance. [He also suggests that s]imilarly, the setting of high normative standards may be conducive to the regime's goals and legitimacy."[70]

I posit that one of the generic goals of courts that address constitutional issues—and the Supreme Court of Israel, in particular—"is to confer legitimacy--understood as accepted authority . . . on the norms and institutions that constitute the regimes in which"[71] the court operates. An example of this type of authority is *Marbury v. Madison's* declaration that the Supreme Court of the United States has the power to say what the law is.[72]

Nevertheless, here it appears that the Court may have been wary of "going all the way," i.e., ordering the Government of Israel to supply water directly to the Bedouin, because such a move places the Court into the political arena, a position it did not wish to place itself in.

VI. CONCLUSION

Courts that are asked to adjudicate constitutional issues, and in the process adopt international human rights norms—as was true with the *Abu Masad*[73] case—play a dual role. Constitutional questions are, of course, a unique set of disputes because in such cases, the Court is asked to determine fundamental rights. But when judges do not stop at the constitutional issue and expand the remedy's scope to include human rights law, then the question is why, since the court is thrusting itself into the international arena. Another question raised by such judgments is whether the court is seeking to juxtapose the constitutional issue with the human rights norm? That is, do we have an issue of subsidiarity or is the court lending greater legitimacy to itself and its judgment. It appears that, at least in the *Abu Masad* dispute, the Court was attempting to do both, although the predominant element, given the wide-reaching scope of its decision, appears to have been bolstering its legitimacy, while saying what the law is.

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[70] Shany, *supra* note 29, at 262.
[71] *Id.* at 265.
[72] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[73] *See generally* CA 9535/06 *Abu Masad* [2011] (Isr.).