

LAW AND AGEING IN ISRAEL: THE DEVELOPMENT OF A NEW FIELD OF LAW

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I. INTRODUCTION

In Israel, as in the rest of the world, society is undergoing a process of ageing. In 1948, when the State of Israel was established, its population was relatively young. Some 85,000 of its citizens, less than 5 percent of the population, were over the age of 65. At the beginning of the twenty-first century, however, over 640,000 Israeli citizens, almost 10 percent of the population, were over 65.¹ Moreover, while the overall population of the state grew by about 3.5 percent during this period, the aged population grew by approximately 7 percent. Another indication of the ageing of the Israeli population is the rate of growth of the number of 'old old' – those aged 75 and above. Whereas the number aged 65 and over doubled between 1970 and 1990, the number of over-75s tripled, and the sector which grew most quickly during this period was the over-80s.²

These trends are connected, among other things, with a significant rise in life expectancy in Israel. Whereas in 1965 the life expectancy was 70.5 years for males and 73.2 years for females, by the year 2002, life expectancy had risen by almost 10 percent, reaching 77.9 and 81.9, respectively.³ The difference between the life expectancy of men and women is indicative of another important dimension of the ageing of the population: that of gender. In the population aged 65 and above, women constitute a majority, and between 1970 and 2003 the proportion of this sector grew from 51 percent to 57.5 percent. Among the 'old old' it is even greater, with 60.5 percent of those above 80 being women.⁴

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¹ See Jenny Brodsky, Yitschak Shoor & Shmuel Be'er, *The Elderly in Israel: Statistical Abstract*

2004 4 (Eshell 2005) (hereinafter "The Eldelry in Isreal").

² *Id.* at 16.

³ *Id.* at 76.

⁴ *Id.* at 19.

The ageing of the Israel society may also be viewed from another angle – the Elder Support Ratio: the number of people above the age of 65 to every hundred people of working age. In the 1960s, the Elder Support Ratio in was about 10. By 2003 it had almost doubled. There were 19 old people to every hundred of working age.⁵ Looking to the future, the population is expected to continue to age, and it is forecast that by 2025 the proportion of old people will reach 14 percent. In addition, there will be a further increase in the life expectancy and the birth-rate will continue to fall.⁶ Thus, the State of is clearly undergoing a dramatic change in the number and proportion of old people in the population, and this change has deeply significant social implications.

Israeli law was not blind to this significant social and demographic change. Throughout the years, legislation and court-rulings, have addressed the new legal needs that have arisen with the ageing of the Israeli society. This article will describe the diverse ways in which the field of law and aging has developed in Israel, and the challenges it still faces.

II. ELDER LAW IN ISRAEL

A. *General Outline of the Development of the Field*

Until the end of the 1990s, the field of elder law was not recognized as such in law. It is true that, as will be shown below, there existed a variety of legal arrangements dealing with the rights of the old, but there was no awareness of the existence of a special branch of law concerning the rights of the old. This was expressed in several contexts. There were virtually no academic articles or books on the subject. There were no non-governmental organizations dealing with the promotion of the rights of the old. There were no courses in the faculties of law in which the subject was taught as such. There were no private-bar or law-firms that openly declared themselves as "elder law attorneys." And, there were virtually no scholars who focused their research on the subject.

This was also true at the level of national and local politics. Until the early 1990s, activities of organizations or other bodies concentrating on the rights of the old, as such, were extremely

⁵ See Jenny Brodsky & Brenda Morginsein, *Balance of Familial and State Responsibility for the Elderly and their Caregivers in Israel*, in *Work and Caring for the Elderly: International Perspectives* 68-69 (V.M. Lechner & M.B. Neal eds., Brunner/Mazel 1999).

⁶ *The Elderly in Israel*, *supra* n. 1, at 257.

restricted.⁷ Legislative activity concerning the rights of the old at the parliamentary level (the *Knesset*) was also very limited.⁸ And, finally, the Israeli Bar Association, the professional union of all lawyers, had not set up a committee, or taken any special action, to deal with elder rights, and there was very little awareness of the economic and commercial potential of old people as a category of clients.⁹

From the beginning of the 1990s, there began a significant change in this state of affairs – a change which is still in progress. First, at the academic level, articles and research projects on the subject of elder law, some of which will be discussed below, began to be published. Second, several non-governmental organizations were founded for the promotion of the rights of the old.¹⁰ Third, a number of law faculties created academic courses for LL.B. students on the subject of old age and the law.¹¹ And, fourth, several books were published, which, for the first time, included a broad overview of the field of elder law in the legal library.¹²

Moreover, in the sphere of the academic development of elder law, a theoretical model was developed that attempts to present a multi-dimensional model of the whole field of elder law in the context. This model has been described in detail elsewhere.¹³ In brief, it comprises a number of dimensions, each of which attempts to satisfy the different requirements and aspects of the complex of social issues concerning old age that need to be dealt with by the law. The core of the model is based on the fundamental constitutional and legal principles of the existing legal system by means of which the rights of the old can be defended and grounded in law, even though they contain no specifically age-related provisions. The protective dimension aims at protecting the elderly population against abuse and injury. The family support dimension strengthens informal social reinforcement networks. The planning and

⁷ Ester Iecovich, *Pensioners' Political Parties in Israel*, in 12(3) J. of Aging and Soc. Policy 87-107 (The Haworth Press, 2001).

⁸ See Israel Doron, *The Rise and Fall of Israel's Senior Citizens Act* (submitted for publication) (copy on file with author).

⁹ See Israel Doron, *How Would the Aging of Israeli Society Influence the Legal Profession*, 26 Law. 52, 53 (2001).

¹⁰ The Association of Law in the Service of the Elderly, <http://www.elderlaw.org.il/english.asp> (accessed March 28, 2007).

¹¹ For example, within the Faculty of Law in the University of Haifa, and the Faculty of Law in the Ramat-Gan Academic College of Law, courses in Law and Ageing were added during the early 2000s.

¹² See Israel Doron, *The Right to Die at Home* (Eshel 2002); Israel Doron, *The Fifth Commandment – Elder Law in Israel* (Dorat 2002); Ben-Israel Ruth & Ben-Israel Gideon, *Who is Afraid from the Third Age* (Eshel 2005).

¹³ Israel Doron, *A Multi-Dimensional Model of Elder Law: An Israeli Example*, 28(3) Ageing Intl. 242, 244 (2003).

preventive dimension attempts to put into practice the principle of the individual freedom of the aged individual, and to enable them to realize their desires and aspirations even when they are no longer competent or in control of their faculties. And, finally, the empowerment dimension includes techniques of education, explanation and representation without which old people are incapable of exercising their legal rights.

The most dramatic change in the field of elder law, however, took place in the political sphere. It began at the local level, where, from the mid-1990s, in a number of local authorities, including Tel Aviv-Jaffa (the biggest city in), pensioners' political lists began to compete successfully in the local elections, and to bring about changes in public policy with regard to the old in the local authorities. This trend came to its peak, and created a world-wide precedent, in the national elections of March 2006, when seven members of a pensioners' party (*GIL*) were elected among the 120-member Knesset. They have joined the coalition led by Ehud Olmert, and one of the members of this list has been appointed Health Minister while the other was appointed as the Minister for Pensioners' Affairs. This is an unprecedented political achievement, which has aroused great expectations in for the development and expansion of elder legislation. However, this development is still too young to assess.

B. Elder Law & the Right to Social Security in Israel

1. Poverty and Social Security in Old Age in General

Old people constitute one of the most substantial sectors of the poor society.¹⁴ Many older people are forced to contend day by day with problems of economic survival and social security. Historically, the system of social security for the old was one of the earliest achievements of the modern Israeli welfare state. In general, the aims of the social security system were threefold.¹⁵ First, on the universal level, the system is aimed at preventing poverty and distress among the old by ensuring a minimum income which will afford every old person a minimum standard of living, regardless of his/her living standard before reaching old age. Second, on the particular level, the system aims at ensuring that the old person will continue to enjoy his/her former status, and prevent a sharp decline in standards of living with the coming of age by

¹⁴ In 2003, 22.3% of families headed by an older person in Israel were under the poverty line (after taxes and governmental payments/transfers). Prior to taxes and governmental payments the figure was 59.3%. See *The Elderly in Israel*, supra n. 1, at 183.

¹⁵ Abraham Doron & Ralph M. Kramer, *The Welfare State in Israel* 85 (1st ed., Boulder Westview 1991).

guaranteeing a reasonable relationship between income before and after the retirement from the work-force. Third, on the individual level, which will not be discussed in this section, the system is aimed at making it possible for everybody to continue to earn a living, provide for him/herself individually, and enjoy the fruits of his/her labor in old age.

2. *The Social Security Pension Level*

One of the earliest social insurance programs, adopted by virtue of the National Insurance Law, was the right to an old age pension.¹⁶ Old age pensions, as defined in law as early as the beginning of the 1950s, are based on the principle of universal coverage. They are also based on legally established objective criteria, and are not conditional on proof of financial need. The conditions of eligibility were defined by law. The first legal requirement was the age of entitlement: men are entitled to a pension at the age of 70, and women at the age of 67; but men aged 67 and women aged 64 are entitled to a pension if their income is not greater than a 'maximum income' as defined by the National Insurance Law and the relevant regulations (and, in fact, the vast majority of older Israelis receive their old age pensions at the ages 67 and 64, respectively).¹⁷ The second requirement concerns residence: as in other rights connected with social security, residence (as distinct from citizenship) is sufficient for the allocation of pensions based on a universal criterion. The definition of the concept 'resident' occasionally raises issues of legal interpretation, particularly concerning the time when a person begins to be a resident as the result of migration, and when the older person ceases to be a resident as the result of long-term residence outside the country (e.g., joining their son's family in the US).¹⁸ The third requirement concerns a 'benefit build-up period': the right to a pension is conditional on payments made over the years by the insured person and/or his/her employer to the National Insurance Institute. The National Insurance Law lays down that the payment of an old age pension is conditional on the insured person's having contributed during a 'benefit build-up period,' which, as a rule, consists of a minimum 60-month period (not necessarily continuous) during which the person was insured in the course of the ten years before reaching pensionable age. Alternatively, a person is entitled to a pension on condition that [s]he was insured for 144 months (not necessarily

¹⁶ For an historical overview, see Doron and Kramer, *id.* at 73.

¹⁷ Social Security Regulations (Income Decisions in Old Age), 1976, 3608, art. 1.

¹⁸ See Menachem Goldberg, *The Social Security Reference Book* 161 (20th ed., Tel Aviv 2000). See also Israel Doron & Tal Golan, *Ageing, Globalization, and the Legal Construction of "Residence": The Case of Old Age Pensions in Israel*, *The Elder Law J.* (in press).

continuous), or for not less than 60 months in special circumstances.¹⁹ The fact that the legal requirements - residence, age, and build-up period - are so minimal has created a state of affairs in which virtually all old people in Israel are entitled to social pensions.

However, the preliminary requirements for entitlement to an old age pension constitute only one dimension of the legal arrangement. One of the most important aspects of old age pensions is their financial value. This has two components: its absolute level – the amount which the individual receives every month; and its relative level – its level relative to the standard of living of the general population. The level of the old age pension was originally fixed during the 1950s at 15 *lirot* for an unmarried pensioner. At that time, this amount was equivalent to about 25 percent of the average wage in the market, and it was intended to make it possible to live in dignity without any additional income. As time went on, the relative value of the pension eroded since it was linked to the index of retail prices rather than the average wage. Therefore, during the 1960s and 1970s, the real value of the pension decreased by more than 50 percent, falling to 10 percent of the average wage. As a result, the law was amended, and during the 1970s the pension was linked to the average wage, but at a considerably lower proportion than in the original rate: only 16 percent of the average wage in the market for an unmarried person, and 24 percent for a couple with only one wage-earner. It should be pointed out that the law permits these basic allocations to be increased on the grounds of long-term insurance payments so that in practice the pension can be 50 percent higher than the basic rate, *i.e.*, 25 percent of the average wage for an unmarried person, and about 36 percent for a couple.²⁰

Finally, during the early 2000s, in the wake of the bursting of the Internet bubble and the outbreak of the second *Intifada* (the Palestinian uprising), Israel was hit by a serious economic depression. As a result, social pensions were temporarily cut by 4 percent, and their real level frozen for four years.²¹ These measures came to an end in 2006; but the most serious amendment to the law was the change in the linkage of the pensions, from the average wage to the Consumer Price Index.²² The effect of this change was to erode the real value of the pension, and make

¹⁹ Israel's National Insurance Law, 1995, art. 246.

²⁰ *Id.* at art. 248.

²¹ See The Emergency Economic Plan Act (Legislative Amendments for the Achievement of the 2002 and 2003 Economic Policy), 2002, Law of Statutes 1850.

²² See The Economic Recovery Plan Act (Legislative Amendments for the Achievement of the 2003 and 2004 Economic Policy), 2003, Law of Statutes 1892.

many old people dependent on the selective support system provided by the Supplementary Support Income Law,²³ which is discussed below.

In practice, many old people in Israel cannot lead a dignified existence relying only on their social security pension, and often are not entitled to the increased rate because they have not contributed for a long enough period. These old people, whose income from their social pension is insufficient and who have no other financial resources, are liable to find themselves below the poverty line. Law has recognized the existence of such dire situations, and has established a system of supplementary social protection for those in such a state. This system of complementary social protection was based on the payment of social benefits, and later on the Supplementary Support Income Law of 1980 (hereinafter, the Supplementary Income Law).²⁴

Unlike the social security old age pensions, the system of supplementary income is based not on the principle of universality, but on that of individual need. Only those old people to whom the financial criteria detailed in the law apply are entitled to receive the additional monetary benefit.²⁵ In general, the purpose of the Supplementary Income Law in the present connection is to supplement the minimal income of old people, who exist only on their social old age pension, by paying them a pension at a maximum of 25 percent of the average wage for an unmarried person and 37.5 percent of the average wage for a couple. Thus, the combination of social security old age pensions with supplemental payments made under the Supplementary Income Law is intended to improve the economic situation of these old people, to ensure that they have minimum means of existence, and to bring them up above the poverty line.

The social pensions schemes described above have succeeded in guaranteeing uniform and egalitarian pensions to the elderly population of .²⁶ This system is reinforced by supplementary payments in the Supplement Income Law. Together with the old age pension, this ensures that all the elderly population in Israel has a minimum standard of living, and is delivered from life below the poverty line. As a result, the proportion of families headed by an old person whose financial resources leave them below the poverty line has been reduced from 59.3 percent to

²³ See The National Insurance Institute, *The Consequences of the Israeli Economic Recovery Plan on the National Insurance Institute* (Jerusalem 2003).

²⁴ Book of Statutes, 1417.

²⁵ The law is based on "needs testing," thus the regulations impose various financial tests to be examined prior to being eligible to the supplementary financial support. Income Maintenance Regulations, 1982, 4309.

²⁶ Old age pension are actually progressive: the exchange rate (income prior to retirement divided to old age pension after retirement) is higher for lower income elders. See Israel Doron, *Law Morality and Old Age*, 103, at 127, in *Poverty and Aging* (Yitzhak Brick ed., Eshel 2005).

22.3 percent.²⁷ On the other hand, the protection afforded by this system is so basic, and its level so low, that in practice many old people are forced to live close to the poverty line, in conditions unworthy of a democratic welfare state.²⁸ Thus, the universal system of social security, as it stands at present in Israel, fails the elder population in that it ensures them an existence which cannot be called an existence with dignity. Finally, when, in 2002, an attempt was made to challenge the constitutionality of the cuts in the old age pension, it was rejected by the Supreme Court on the grounds that it did not detract from the constitutional standard of 'human dignity;' and, further, that if it infringed the constitutional right of property, the infringement was not serious enough to violate the 'principle of proportionality.'²⁹

3. *The Occupational Pensions Level*

The second sphere of financial security for old people is that of occupational pensions. This level is very closely bound up in law with the *Histadrut* – the Israeli Labour Union Association. The legal conception, which was the historical consequence of the alignment of political forces at the time of the establishment of the state, held that the state was responsible only for the social security level. The second level, that of occupational pensions, was the concern of the labor union, *i.e.*, the *Histadrut*.³⁰ It is to the credit of the *Histadrut* that over the years it established a comprehensive system of collective labor agreements which guaranteed a generous occupational pension scheme for the majority of the organized hired working force. For this purpose, central pension funds for different branches of employment were established, and for many years they guaranteed adequate pensions to their members on retirement.

Since the arrangements for this type of pension were left in the hands of the *Histadrut* rather than the state, legal arrangements at this level were not made by primary legislation. Therefore, there is still no legislative arrangement regarding occupational pensions in the State of

²⁷ See *The Elderly in Israel*, *supra* n. 1, at 183.

²⁸ A specific weak group within the older population in Israel are lonely older women, of whom 30% are under the poverty line. Another weak group in the Israeli older population are the new immigrants, who were not able to accumulate rights within the social security system, thus receive only the minimal pension. See *The Elderly in Israel*, *supra* n. 1, at 154-5.

²⁹ See C.A. 5578/20002, *Manor v. The Minister of Finance*, Supreme Court of Justice Rulings (Piskei-Din) 59, 729. For a general overview of Israel's constitutional law, see David Kretzmer, *Constitutional Law*, in Amos Shapira, Keren C. Dewitt-Arar, *Introduction to The Law of Israel* 39-58 (Kluwer 1995).

³⁰ See Doron & Kramer, *supra* n. 15, at 85. The only exception was that of government employees, whose right to an occupational pension was ensured by specific legislation.

and there is no mandatory occupational pension law. Thus, at the time of writing, law has not recognized the socio-economic right to an occupational pension.³¹ In this sense, there is a basic defect in law, in that the entitlement of every worker – indeed, every citizen – to an occupational pension is dependent on the individual or his/her employer (by virtue of an individual or collective labor agreement), and his/her awareness and foresight.

As a result of this legal situation, it is estimated that, since there is no comprehensive legal arrangement, in the year 2000, about half of the labor force had no occupational pension insurance,³² and that at the beginning of the twenty-first century only about a third of 's elderly population received an occupational pension.³³ This partial coverage seriously impairs the social security of the old, and exposes a significant number to poverty and a drastic reduction in their standard of life on retirement. But the economic security even of those who do receive a pension is not guaranteed, as a result of legal uncertainty and ambiguity of a wide range of concepts included in the pension system. For example, the way in which the 'exchange ratio' or the 'determining wage' is calculated has a direct and dramatic influence on the level of payment to which the pensioner is entitled in practice.³⁴

policy-makers were aware of these complex problems. As early as the 1960s, a number of suggestions for the reform of the pension market, as well as proposals for a National Insurance Law, began to be mooted.³⁵ In addition, from the 1980s onwards, the fact that the *Histadrut* pension funds had amassed considerable actuarial deficits, and that the state was committed to the payment of huge sums for occupational pensions, was well known and was on the public agenda.³⁶

³¹ While there is no one, specific piece of legislation to regulate the occupational pensions schemes, there is a wide variety of references to legal aspects of this field in various laws of other fields (income tax; labor compensation; social security; and more). For a broad overview of the various legal references in Israeli law to the field of occupational pensions, see Menachem Golberg, *Insuring Employees in Pension Funds – Legal Aspects*, L. Lab. Annual Publication 95, 96 (1992).

³² See Allen Zifkin & Brenda Morginstin, *Income Rates and Pension Coverage Rates in Older Persons in Israel*, 35 Soc. Sec. 45 (1990).

³³ Miriam Shmeltzer, Brenda Morginstin & Ramsis Gara, *The Income of Older Persons in Israel* 3 (The National Insurance Institute 2002).

³⁴ Exchange rate is the ratio between the income prior to retirement and the income after retirement. Traditionally, under Israel's occupational pension scheme, every year in the working force, the employee accumulated 2% of pension rights, so that after 34 years, the employee reached the maximum exchange rate of 70% of his or her income.

³⁵ John Gal & Reuven Pesach, *The Development of Old Age Social Security in Israel*, 62 Soc. Sec. 114, 125 (2002).

³⁶ According to one estimate, as of 1997, the actuary debt of the state to its workers for pension rights was about 185 milliard NIS (New Israel Shekes, which is approximately, \$37 milliard). See C. Bi'or, M. Basok & S. Peretz, *From Retirement Stage to Security Satey Net* (Haaretz 1999). See also Gil Luria, *Pension Crisis in an International Perspective*, 24 Tax. Q. 39, 42 (1997).

These increasing cumulative deficits were the result of a series of developments which included the rise in life expectancy, changes in the composition of the labor force in various branches, administrative problems, and the granting of special privileges to certain sectors. These deficits raised doubts as to whether the pension funds would be able to fulfil their obligations, and created deep uncertainty about the future of the occupational social security of many old people in.

As a result of this instability, several public committees were set up, and their recommendations led to the reforms of the 1990s, which brought about considerable changes in the occupational pension market.³⁷ These legal changes included: the 'closing' of the *Histadrut's* old pension funds and prohibiting recruitment of new members; the opening of the pension market to competition; authorization of the creation of new pension funds which would be based on full actuarial balance and giving less favorable conditions to their members than the previously existing funds; a gradual change of public sector insurance from a "pay as you go" system to personally cumulative pensions; a change in the calculation of cumulative pensions from the system of defined benefits to that of defined contributions; a reduction of the proportional yield guaranteed to investments in pensions; and greater flexibility of choice and the right to move from one scheme to another.³⁸ These massive legal changes reached their peak in , again in the course of the years 2003 and 2004, when, following the laws prompted by the economic emergency, all the *Histadrut* pension funds were 'nationalized,' and all their internal regulations were replaced by a uniform regulatory scheme, which, in effect, reduced the financial benefits of the insured, but gave legal guarantees of financial support by the government in order to prevent their financial collapse and ensure that they would be able to fulfil their obligations to the insured.

The significant legal reforms of the mid 1990s and early 2000s in the field of occupational pensions totally changed the legal landscape. However, although the occupational pension constitutes an important means of protecting the social security of the greater part of the elder population of , there is still no primary legislation which fully encompasses and regulates this subject. Moreover, the claim to an occupational pension has not yet been recognized as a universal

³⁷ In 1993, a governmental commission was appointed to examine the pension reality in Israel (a commission known in Israel as the Fogel Commission). Later on, in 1996, another commission was established to examine the capital market in Israel. This commission, known in Israel as the Brodet commission, also made recommendations regarding the pension field. For these reports and more, see Yoram Margalot, *Discrimination in the Pension Schemes and a Proposed Solution*, 31(3) *Mishpatim* 529, 540 (2001).

³⁸ Margalot, *id.* at 552.

economic or social right under Israeli law. An economic analysis of the reasons for the failure of the i social security system to deal with the economic plight of old people shows clearly that the weakest link in the system is the fact that most old people do not receive an occupational pension.³⁹ It seems, therefore, that the real challenge in this field is to base the social and economic right to an occupational pension on primary legislation, in such a way as to safeguard the social security of the majority of the old people of .

C. *The Law, Old Age, and the Right to Health Care in*

I. *Health and Old Age in General*

Old people are the most important clients of the i health services.⁴⁰ In many respects, this sector of the population is affected in the most fundamental way by anything connected with the definition and demarcation of the right to health. The influence of the right to health on the phenomenon of old age is complex and multi-dimensional, and paradoxical in many respects. On the one hand, the marked improvement in the health services and in medical science, and the achievement of the right to health, have led to an increase in life expectancy, so that today old people live longer and better than in previous times. On the other hand, as a result of the lengthening of the expectation of life the “new’ elderly are today exposed far more to long-term chronic diseases and to illnesses such as Alzheimer’s, and require medication to an extent quite unknown in the past. This paradox also has an economic aspect: the higher the standard of health, and the more successfully disease and death at an early age are prevented, the higher the expenditure on health care at later stages of life.⁴¹ As a result of this paradox, national expenditure, private and public, on health and nursing care in in 1999, was, according to one estimate, no less than NS 9.5 billion.⁴²

Two important legal developments during the 1990s had a dramatic influence on the right of the old in to health care services: the

³⁹ Gal and Pesach, *supra* n. 35, at 138.

⁴⁰ In 1996, 22% of all visits to family doctors and 19% of visits to expert doctors were made by elderly persons (compared to 10% of their weight in the general population). See Amir Shmueli & Yoram Levi, *The Use of Health Services in Israel According to Age*, 47 Soc. Sec. 146, 147 (1997).

⁴¹ This paradox was called “The Modern Catch”, see Hava Golander & Nili Tabak, *Under Watching Eye: The Health Market in Old Age in Israel – Economy and Failure*, in *The Politics of Old Age* 142, 144 (Yitzhak Brick ed., Eshel 2002).

⁴² Jochanan Stessman, Yoram Maaravi & Aharon Cohen, *Reform of Health Services for the Aged*, 27(1) *Gerontology* 69, 76 (2000).

enactment of the National Health Insurance Act, 1994;⁴³ and the passing of the Patients' Rights Act, in 1996.⁴⁴ The Patients' Rights Act is a comprehensive law which defines the fundamental human rights of all sick people in , including basic rights such as the right to receive information, the prohibition of treatment not knowingly agreed to, the duty of medical staff to preserve confidentiality, and much more. This law deals primarily with 'negative' rights, such as 'freedom,' which are not specific to the elderly, and will not be discussed in detail here. As against this, the Health Insurance Act has had a decisive influence on the socio-economic right to health in general, and for old people in particular, and will be discussed below.

2. *The Elder Population and the National Health Care Insurance Act*

At the beginning of 1995 the right to health in underwent a dramatic change, when the Health Insurance Act was enacted.⁴⁵ For the first time in Israeli history, an overall universal system granted all the residents of the state the right to enjoy a universal basket of health care services, as a matter of legal right. The law is financed mainly by the insured persons who pay regular fees for health care insurance and participate in various services.⁴⁶ The law establishes the mandatory provision of health services included in the 'basket' at a reasonable standard, at a reasonable time, and at a reasonable distance from the insured person's place of residence as a legal right. The law defines the way in which health insurance fees are to be levied through the National Insurance Institute, and lays down that membership of a health management organization (HMO) through which health services are provided is obligatory. By virtue of this law, all older people, like the rest of the population, are entitled to receive health services and choose the HMO through which they will receive these services.

The National Health Insurance Act legalized the right to health services in general, and also related specifically to the elderly population in a number of connections. One of these concerns the price which old people have to pay for medications, which is less than that charged to the

⁴³ Book of Statutes, 1469.

⁴⁴ Book of Statutes, 1591.

⁴⁵ See *The Report of the National Commission to the Examination of the Health Care System in Israel* 35 (Governmental Press 1990).

⁴⁶ See Revital Gross, Baruch Rosen & Aryeh Shirom, *The Israeli Health Care System after the National Health Insurance Law*, 54 Soc. Sec. 11, 14 (1999).

general population.⁴⁷ Another is the prohibition of the practice whereby HMOs refuse to accept old people as members, the cost of whose health care is greater than that of the young and healthy. The law forbids discrimination on grounds of age, and also incorporates the principle of progressive taxation, since the formula for calculating the funding given to the HMOs for treatment of old people takes into account the age of the insured.⁴⁸

It appears, therefore, that the Health Insurance Law was intended to improve the status and importance of old people's right to health. The law afforded universal health care insurance coverage to all the old people of Israel on a universal coverage scheme, and eliminated the possibility of an old person's being completely without health insurance or unable to obtain treatment for ill health. Moreover, the matters covered by the law include long-term hospitalization of patients with complicated maladies, rehabilitation of long-term patients (though in this case there is not full coverage, and the patient has to pay some of the cost). The law confirmed the freedom of choice and the freedom to transfer from one HMO to another for the elderly, as for the rest of the population.⁴⁹ Moreover, it was the intention of the law to consolidate health services for the old, and transfer the responsibility for institutional geriatric services from the state to the HMOs (although this intention has not yet been put into practice).⁵⁰ The overall improvement in old people's right to health as a result of the enactment of the Health Insurance Law was confirmed in a 1997 research project which examined the degree of accessibility, quality of treatment and satisfaction of old people following the enactment of the law. This study showed an improvement in old people's satisfaction both with the service provided by the HMOs and with the degree of accessibility. In general, more than a quarter of those interviewed considered that health services had improved as a result of the operation of the law.⁵¹

⁴⁷ In general, health taxes paid by the poor elderly are a minimum set by law (approximately \$20 a month). National Health Insurance Act, art. 14.

⁴⁸ This is determined by a capitation formula, which takes into account the number of older members in each HMO. The financial weight of older members is 4 times higher than non-elder adult member. Golander and Tabak, *supra* n. 41, at 156.

⁴⁹ This is compared to the situation that existed prior to the law, in which some HMOs prevented older persons to join in in old age. *Id.* at 156.

⁵⁰ Articles 6 and 7 to the law state that geriatric medicine and geriatric nursing are included in the basic health care services which should be provided by the HMOs. However, article 67 to the law allowed to temporarily keep the existing reality, in which institutional long term care was the state's responsibility and not the HMO's responsibility. This "temporary" situation has not changed yet. National Health Insurance Act, 1994, arts. 6 & 7.

⁵¹ See Netta Bentur, Revital Gross & David Chinitz, *National Health Insurance Law and the Elderly: Accessibility to Services, Quality and Satisfaction*, 54 Soc. Sec. 76, 85 (1999).

Nonetheless, even after the enactment of the National Health Insurance Law old people's right to health is still flawed. The main defect is in the content of the 'basket of health care services.' This basket is not complete, and does not entirely cover the treatments and medical requirements of the older population. Complete areas of health care which are particularly important to the old are excluded from the 'basket.' For instance, the financing of long-term care of old people in institutions such as geriatric hospitals is not included in the 'basket', and the support given to these people by the Ministry of Health is conditional on a means test which in practice imposes a heavy financial burden on the old people and their families.⁵² Since there is no legal obligation to fully subsidize the cost of long-term hospitalization of the old, with its many ramifications, old people are in danger of finding that they have no access to treatment which is essential for the preservation of their health and their lives.⁵³ A further example is the whole field of palliative treatment, including home hospices and systematic action to deal with environmental aspects of incurable diseases. This, too, is not included in the 'health basket,' and is currently dealt with in Israel on a voluntary basis, or sporadically, according to the judgment of the various HMOs.⁵⁴ Nor is dental care, which is an important factor in the quality of life of the old, included in the 'health basket'.⁵⁵

Moreover, the effects of the financial pressure to save money and increase efficiency exerted on the HMOs by the Finance Ministry is now beginning to have an effect on the level and quality of the services provided for the old. Up to date research executed in the past few years indicates a setback in the degree of old people's satisfaction with the national health insurance system; they have recently begun to feel that their situation has deteriorated.⁵⁶ Recent interviews with old people show that they feel that economic efficiency has been attained at the expense of their health. Research focusing on health care workers (doctors, nurses, and health-care teams) has shown that economic pressure to increase what is called 'efficiency,' as well as reductions in manpower norms, have adversely affected the treatment of old people.⁵⁷ The 1999 research project also showed that, despite the institution of a system of budgetary calculations that took the age of the insured into

⁵² See Golander and Tabak, *supra* n. 41, at 164.

⁵³ *Id.*

⁵⁴ See Israel Doron, *From Negative to Positive Right to Die at Home*, 6(1) Care Mgt. J. 22, 27 (2005).

⁵⁵ See Anzalem Langer, *Pathological and Epidemiological Aspects of the Ageing of the Mouth*, in Beno Chabut & Albert Hart *Selected Issues in Geriatric Medicine* (Eshel 1994).

⁵⁶ Golander & Tabak, *supra* n. 41, at 157.

⁵⁷ *Id.*

account and was intended to provide a financial incentive for improving services for the old, the change did not prompt the HMOs to try to attract chronic and aged clients, or to improve their services to such people. It became apparent that, in practice, the HMOs still prefer young and healthy clients, and emphasize the marketing of services suitable to them.⁵⁸

Thus, the situation in regard to old people's right to health is complex, dynamic, and only partly open to scrutiny. Despite the important contribution of the National Health Insurance Act to old people's right to health, there are today reasons for concern about the future. In a situation in which there is heavy economic pressure to increase efficiency and reduce costs, in a political atmosphere which encourages a decrease in the commitment of the government to underwrite the cost of the health services and where there exists no political force capable of satisfactorily defending the rights of the old, there is cause for concern that, instead of the Health Insurance Act's being the beginning of a leap forward in the improvement of the right of the old in to health, it may prove to be the beginning of the erosion and deterioration of that right.⁵⁹

D. Old Age, the Law, and the Right to Long-term Care

1. Long-Term Care of the Old in General

The term 'long-term care' refers to a wide range of means of aid and support to disabled old people who find it difficult to function independently in their daily lives.⁶⁰ The measure of disability is generally considered to be the degree to which a person can function independently and perform the activities of daily living which include eating, getting dressed, washing, moving, etc., as well as the instrumental activities of daily living, which include preparing meals, shopping, using the telephone, taking medication, etc.⁶¹ In Israel the proportion of old people who suffer from disabilities is quite considerable. At the end of 2003, the number of disabled old people was estimated at about 16 percent of all the elder population; of these, about 76 percent were living

⁵⁸ Gross, Rosen and Shirom, *supra* n. 46, at 30.

⁵⁹ See generally Danieal Filk, *The Neo-Liberal Project and Privatization in the Health Care System*, in M. Mauntner *Distributive Justice in Israel* (Tel Aviv: Ramot – Tel Aviv University Press 2001).

⁶⁰ Long Term Care (LTC) involved persons in all ages and not only older persons. In this article, the reference is for LTC for older persons in the context of an ageing society.

⁶¹ See L.F. Feinberg, American Society of Aging, *Options for Supporting Informal and Family Caregiving: A Policy Paper*, <http://www.asaging.org/pew/feinberg/feinberg.html> (1997).

in the community, and 24 percent in various kinds of institutions.⁶² The combination of the ageing of the general population and the growth in the number of disabled old people has increased the awareness of the need for long-term care as an important social right of the old in Israel and in the world.

In practice, old people obtain long-term care through a wide range of health, community and other services. Any attempt to divide this subject into sub-groups or 'categories' is essentially artificial, since all its elements are inter-connected. In our discussion, in order to present the issues on the fundamental level, and because of the unique Israeli statutory framework, we shall distinguish between community-based long-term care and institutional long-term care.

2. *Community-based Long-term Care*

One of the areas in which Israeli law can congratulate itself on legal innovation in the field of elder law is the development of a legal framework which establishes the right to community-based long-term care as a social right. This was done by the addition of a section on community-based long-term care to the National Insurance Act in 1986.⁶³ This addition, among the first of its kind in the world, sprang from recognition of the fact that it is preferable to care for the elder population at home and in the community rather than in the institutionalized framework. Within the framework of overall legislation for social insurance in Israel, the law establishes the right to long-term care at home and in the community, in such a manner as will enable the old person to continue to live an independent life despite his/her physical disability.⁶⁴

This right is implemented by providing long-term care for old people in their homes or in day centers provided by the community. The extent and content of the treatment is decided on an individual basis after testing the extent of the old person's disability in his/her home. The law has a selective dimension, in that treatment is conditional on a means test, and those with an income above a certain level are not entitled to care. Care is given at home, and is terminated when the old person enters an institution. The individual receives treatment, not money, and this treatment includes the daily services of a home helper up to a maximum of 15.5 hours per week and/or care in a day center and/or

⁶² *The Elderly in Israel*, *supra* n. 1, at 109.

⁶³ See Israel's National Insurance Law, ch. 10, arts. 223-237.

⁶⁴ See Allan Borowski and Hillel Schmid, *Israel's long term care insurance law after a decade of implementation*, 12(1) *J. Aging and Soc. Policy* 49, 51 (2000).

laundry services and /or the provision of disposable bandages and/or a distress button. The care is provided by private companies or voluntary societies, and payment is made directly to the suppliers of the services. Thus, the insured person receives the services, but does not pay for them directly.

The law is intended to provide treatment through service providers who are not members of the client's family, with the express intent of freeing the family of the burden of care or lightening it, and transferring it to professional carers by the employment of companies and voluntary associations. Thus, the law does not only free (at least partially) the old person's family of the burden of care; it also reduces the tensions within the family caused by the burden of care, and prevents the deterioration of family relationships based on economic considerations alone. Apart from establishing general principles, the law makes detailed provisions for an administrative system to investigate eligibility for long-term care by means of an objective assessment of the ability to perform everyday tasks, with the right to appeal against decisions regarding the right to care and its extent.⁶⁵

Since the law was first implemented in 1988, the extent of the care granted under its provisions has expanded greatly, and gone well beyond the amount that was expected before its enactment.⁶⁶ This has led to a considerable financial deficit. True, the sharp rise in the amount of long-term care required was proof of the law's success, and of the real need for its existence. But, on the other hand, this situation created a series of economic pressures, and those responsible for its implementation are caught in a financial trap which does not enable them to fulfil all the aged population's requirements for long-term care; and from its inception the law only provided for the partial satisfaction of these needs. Moreover, the application of the test for eligibility for long-term care – a test which examines the older person's ability to carry out daily activities such as dressing – is said to be humiliating or that it fails older people who do their best to show that they are still independent.⁶⁷ Nor does the quality of the assistance given by the service providers, particularly private companies, always reach the required professional and humane standards.⁶⁸ The very fact that care is provided by private profit-making companies means that they will attempt to reduce their costs and economize on the provision of services; and, further, this

⁶⁵ See Hillel Schmid & Allan Borowski, *Selected Issues in the Delivery of Homecare Services to the Elderly a Decade after Implementing Israel's Long-Term Care Insurance Law*, 57 Soc. 59, 61 (2000).

⁶⁶ *Id.* at 64.

⁶⁷ *Id.* at 73

⁶⁸ *Id.*

arrangement may well lead to the exploitation of the company's employees, and to insufficient investment or professional training of the carers, and to lack of adequate supervision of the quality and content of the care provided.

Nonetheless, the overall assessment is that, despite the weak points which have been revealed since the enactment of the law, Israel's community-based long-term care law constitutes a significant milestone in the legal endorsement of the social rights of the old in . It is an important legal development, and efforts should be made to improve it, to broaden its field of application, and to strengthen its economic basis.

3. *Institutional Long-Term Care*

For many years institutionalization was considered to be the appropriate solution to the problem of prolonged care of the old. Old people who suffered from chronic health problems or a decline in their functional capacity were put into specialized institutions that were supposed to supply all their needs. In , too, the consequences of this approach are still felt, and today more than 4 percent of the aged population – about 30,000 old people – are living in some 400 institutions.⁶⁹ At the legislative level, i law has regularized control over institutions providing prolonged care for the old by means of two main legal frameworks: hostels for independent but feeble old people, under the supervision of the Ministry of Labor and Welfare, were given legal status by the Law of Supervision of Hostels, 1965,⁷⁰ and the ordinances issued under it; and Geriatric hospitals and nursing homes, which were put under the supervision of the Ministry of Health, were given legal status by the Public Health Ordinance 1940,⁷¹ and various other laws concerning health.⁷²

Institutionalization of old people raises a number of moral, economic and social issues.⁷³ The main problem of the institutional solution, in relation to economic and social rights, is that in institutionalization has never been considered part of the legal right to health; nor has it ever been provided for old people as part of the general system of health or welfare services. The state has provided prolonged institutional care for old people only on the basis of assessment of

⁶⁹ See *The Elderly in Israel*, *supra* n. 1, at 278.

⁷⁰ Book of Statutes, 444.

⁷¹ Book of Statutes, 1065.

⁷² See Jenny Brodsky & Nira Shamai, *The Long Term Care for the Elderly: Organizational and Economic Perspectives* 1 (Eshel 1999).

⁷³ See Ariela Lowenstein & Ester Iecovits, *The Older Persons, The Family and the Institutional Setting* 5 (Jerusalem: Magnes 1996).

individual needs, and only then within the stringent budgetary limits of the ministries concerned.⁷⁴ Moreover, by applying the principle of family responsibility, as defined in the Family Law Statute (*Alimony*), 1959,⁷⁵ when the old people themselves are unable to afford the cost of institutional living the state has shifted the burden onto the shoulders of their family whenever it is able to pay the price.

The result is that the burden of institutional long term care falls mainly on the old people themselves or on their families, (unless they are exempted as the result of a very strict means test). The economic burden is not equal as between different families, since those with higher incomes pay a relatively smaller proportion of their income for the same service. That part of the cost which is nonetheless financed out of the state budget does not cover all the clients' needs, in view of budgetary limitations, and so even those who are deemed eligible for a place in an institution often have to wait for a long time until a budgetary allocation is available, or, having no alternative, are forced to choose an unauthorized old age home, which is less expensive. Finally, the statutory division between the different authorities dealing with prolonged institutional care, and the division between them and the general national health service leads to bureaucratic complications and administrative failures which reduce the ability of old people to achieve their rights. The results of these failures are severe. The waiting period for long-term care can be as long as a year or more, and this involves difficult conditions, a great deal of suffering, and an intolerable quality of life.⁷⁶ The defects of the arrangements for finding places for old people in institutions are well known, and have been noted by the State Comptroller on several occasions.⁷⁷ But nobody has yet found the social or political power to bring about a real reform in this area, and old people's right to prolonged institutional care has not been recognized as an economic and social right.

⁷⁴ Israel Doron, *Old age and social and economic rights*, in *Economic, Social and Cultural Rights in Israel* 893, 920 (Yoram Rabin & Yuval Shany, eds., Tel Aviv: Ramot 2004).

⁷⁵ Book of Statutes, 256.

⁷⁶ Israel Doron, *supra* n. 74, at 922.

⁷⁷ State of Israel Comptroller's Reprt, 1998, No. 48, pages 449, 472 (Jerusalem; The Office of the State Comptroller).

E. *Old Age, Law, and the Right to Housing in Israel*

I. *Housing in Old Age in General*

The connection between the human environment in which old people live and their quality of life has long been recognized.⁷⁸ The degree of suitability of the apartment, the dwelling-place, the district and the town to the limitations which accompany old age directly influence old people's ease of access to essential locations and their ability to continue to control their lives independently and with dignity. It must be added, however, that a discussion of the right to housing which is not connected with a discussion of the economic and medical condition of the old people concerned is bound to be artificial, since at the time of old age all these factors are interconnected.⁷⁹ In this sense, the specific 'right to housing' of the elder population means far more than the right to 'a roof over one's head' under which one may live a dignified life. Here we shall describe two legal issues concerning the right to housing which have arisen in Israel.

2. *Ageing in Place: The Right to Grow Old in the Community*

One aspect of the approach to the question of housing in old age is the right of the old to continue to spend the final period of their lives in their own homes, within the community, despite disabilities or sickness. This approach is known as "ageing in place." Its proponents have evidenced fierce opposition to the institutional approach, considering that enabling people to grow old without detaching them from their natural home environment, depriving them of their personal freedom, or making them suffer the trauma of moving to a total institutional framework, is of prime importance. This goal has been achieved by encouraging networks of informal support and developing formal support systems in the community, and, simultaneously, creating alternative housing complexes within the community which preserve independence and autonomy in old age, and provide support services in accordance with the wishes of the old people themselves. These varied methods make it possible to ensure the quality of life and fulfilment of the rights of old people in the best

⁷⁸ See Mark Rosenberg & John Everitt, *Planning for Aging Populations: Inside or Outside the Walls*, 56(3) *Progress Plan*. 119, 119.

⁷⁹ See e.g. Gary V. Engelhardt, Jonathan Gruber & Cynthia D. Perry, *Social Security and Elderly Living Arrangements*, <http://www.papers.nber.org/papers/w8911> (2002).

possible manner, prevent their exclusion from social activities, and enable them to remain integrated in a multi-generational community.⁸⁰

Israeli law relates in part to this issue, in the Planning and Building Law, 1965⁸¹ (hereinafter, Planning and Building Law), and in the Law for the Equality of Rights of the Disabled, 1998.⁸² These two laws establish a legal foundation for the basic right to continue to live in one's own home within the community, even if physically or mentally disabled. Thus, for instance, as a result of the existence of legal obstacles to the establishment of old age homes in residential areas, in the 1990s the Planning and Building Law was amended to state that it is permitted to establish an old age home in a residential area, and that this is not a 'deviant use' which requires a special permit. This amendment deprived neighbours of the right to oppose the establishment of old age homes in their district, and paved the way to the building of old people's housing in residential districts. Another amendment to the Planning and Building Law, passed in the early 2000s, requires local and public authorities to adapt public buildings and make them accessible to the disabled, the old, and those who need assistance in order to attain mobility.

A full account of the other provisions of these laws is beyond the limits of this article, but their underlying rationale, in the context of elder concerns, is important: it is their application and enforcement that enables many disabled old people to continue to live active lives in regular accommodation despite their disability. It is these laws which enable them to continue to live 'normal' lives, and not to move into an institution. But, as is the case with other issues discussed here, the problem is that the legal arrangements are limited. For instance, the state does not subsidize the financial outlay or the equipment involved in adapting a house to various physical disabilities. Thus, the burden involved in adapting the personal environment in a private house or apartment is still borne by the old person him/herself, and not by the state.⁸³

Moreover, providing housing in the community necessitates positive initiatives on the part of official bodies in order to build apartments and buildings suitable for old people from the point of view

⁸⁰ See Leon A. Pastalan, *Preface in Aging in Place: The Role of Housing and Social Support* (Leon A. Pastalan ed., The Haworth Press 1990).

⁸¹ See Israel Doron & Assaf Davidi, *Homes for the Aged and Residential Zoning: Can legislation make a difference?*, 20 *J. Hous. Elderly* 97, 100 (2006).

⁸² Ariela Offir & Dan Horenstein, *Equal Rights for People With Disabilities Act 1998: Emancipation at the End of the 20th Century* (A. Barak et. al eds., Tel Aviv 2002).

⁸³ Along the years, various experimental projects have been conducted in Israel regarding housing solutions for elderly. One such example was the attempt to create a multi-generational neighborhood or supportive neighborhoods. These projects, despite their local success, were never adopted at the national level.

of their location (accessibility and proximity to centers of activity and services), of their physical structure (elevators, accessibility, etc.) and their cost (prices suited to old people's incomes). The Israeli government is scarcely involved in such initiatives at all, and there is only a very limited degree of activity in the field of government-supported building aimed at creating housing adapted to old people's needs.

3. *The Right to Assisted Living*

The ageing of Israeli society, changes in the structure of the family, the high cost of accommodation in old age homes and hospitalization in geriatric hospitals, and the search for alternatives to traditional arrangements for institutional care – all of these have led over the past two decades in to a considerable increase in the number of independent forms of accommodation which also provide services for the care of the old.⁸⁴ The innovative notion of supportive housing for old people, often designated 'assisted living,' has been added to the vocabulary of building entrepreneurs, public bodies and policy-makers to mean a combination of a type of accommodation, a cluster of services and a philosophy of treatment of the old. It presents a model of a type of long-term accommodation which serves as an alternative to the classical institutional model, while preserving the autonomy and independence of old people in the framework of the community.⁸⁵

Since the early 1980s, assisted living in Israel has expanded considerably, and changed its character significantly. Originally dominated by the volunteer sector, with no participation by private elements, it has turned into an area primarily controlled by private entrepreneurs and public or governmental organizations.⁸⁶ In 2003, Israel had 167 schemes for assisted living, housing 19,976 old people.⁸⁷ The standards and quality of these schemes is extremely varied; they range from clusters of minimal accommodation with a limited range of services

⁸⁴ See Thomas D. Begley, Jr. et. al., NAELA Public Policy Committee, *White Paper on Assisted Living*, <http://www.naela.com/pdf/whitepaper2001.pdf> (2001). See also Miriam Shtarkshall, *Ageing in Place and the Public Sheltered Housing in Israel: A Special Focus on Age Integration* 114, 116 (Leonard F. Heumann & Duncan P. Boldy eds., Praeger 1993).

⁸⁵ See Rosemary Chapin & Debra Dobbs-Kepper, *Ageing in Place in Assisted Living: Philosophy Versus Policy*, 41(1) *Gerontologist* 43, 48 (2001); Victor Regnier, Jennifer Hamilton & Suzie Yates, *Assisted Living for the Aged and Frail: Innovations in Design, Management, and Financing* (Colum. U. Press 1995).

⁸⁶ See Israel Doron & Ernie Lightman, *Assisted-Living in Israel: Market Control or Government Regulation?*, 23 *Ageing Socy.* 779, 782 (2003).

⁸⁷ *The Elderly in Israel*, *supra* n. 1, at 274.

to elegant and exclusive complexes with a wide variety of services, social and cultural activities, sports, etc.

From the economic and legal point of view, assisted living in Israel has never been subsidized by the welfare services. In general, apart from exceptional cases, those who choose to live in such frameworks have had to bear the financial burden themselves, and have sometimes had to enter into contracts containing inequitable financial terms.⁸⁸ This results in an absurd situation, whereby old people from the lower classes are forced to live in institutional frameworks (which are financed on the basis of means tests set by the authorities), since there are no schemes of financial assistance to enable them to have the benefit of assisted living, which would enable them to continue to live active lives in the community with assistance to help them cope with illness or disability. The situation in this area in Israel cries out for the formulation of a clear legal policy, which at the moment does not exist on the national level.⁸⁹

F. The Right to Work

1. The Right of the Old to Work in General

Work is an essential element in the life of every human being, whether economically, as a source of income, psychologically, as a source of status, purpose, and self-respect, or socially, as a source of interaction between people, self-expression, and a manifestation of success and standing. Clearly, therefore, the right to work is linked directly to the status and social rights of the old. The legal and social situation whereby old people are, in practice, denied the right to find employment and forced to cease working and accept the status of 'pensioners' is a natural reflection of stereotypic views of the old, and forces them to pay a high economic and social price. Moreover, in Israel, those old people who nonetheless attempt to keep on working suffer from discrimination both in finding employment and in wages and working conditions.⁹⁰ Here, we shall discuss the way in which a number of basic issues are expressed in Israel law.

⁸⁸ See e.g. C.A. 5017/1998, *Gloden Tower v. The Attorney General*, Online, http://www.nevo.co.il/Psika_word/mechozi/m98005017-5.doc (accessed 18/4/2007).

⁸⁹ See I. King & M. Shtarkshal, *The Governmental Assisted Living Programs: Characteristics and Needs of Tenants, and Organizational Characteristics* (1997).

⁹⁰ See generally Dan Shnit, *Age Discrimination in Employment*, 4 Tel Aviv U. Stud. L. 168 (1979); Sharon Rabin Margalio, *Distinction, Discrimination and Age: A Game of Power Relationships in the Labor Force*, 32(1) *Mishpatim* 131, 132 (2002).

2. *Mandatory retirement*

Historically, the establishment of a 'mandatory retirement age' and the statutory requirement to retire, were viewed as social achievements, and served as protection against exploitation and the infringement of basic human rights.⁹¹ In Israel, too, compulsory retirement was considered to be a means of social protection, and was adopted from the early days of the state. However, until 2004, the age of compulsory retirement was fixed in collective and individual labor contracts, and not by statutory legislation (except for state employees and certain special groups of workers). This situation remained unchanged until the early years of the twenty-first century, when, in the framework of the emergency economic regulations, the Retirement Law, 2004,⁹² was enacted. This law raised and standardized the age of compulsory retirement for both women and men to 67; the age of entitlement to a pension (*i.e.*, the age at which one had the right to retire voluntarily and receive an employment pension) was fixed at 64 for women (as against 60 until then) and 67 for men (as against 65). It is important to note in this connection that the main reason for the raising of the retirement age was economic: the desire to improve the actuarial state of the pension funds, and to reduce the economic burden of pension payments.⁹³

The most palpable element in the matter of retirement in Israeli law was the difference in the retirement ages of men and women; men retired at 65, and women at 60. Historically, just as in the matter of compulsory retirement, the difference was the result of the aspiration to protect women and recognize the fact that, in view of the extra burden of housework and child care, they should be 'liberated' from labor at an earlier age.⁹⁴ In the reality of the modern age, discrimination in the matter of retirement age has become yet another stumbling block in the way of the advancement of women: it has seriously impaired their economic status, and has been another means of perpetuating their inferior social status.⁹⁵ One of the mileposts in the revolution in this sphere in Israeli law was an appeal to the Supreme Court by Dr. Naomi Nevo, a sociologist employed by the Jewish Agency. According to the labor agreement of the Jewish Agency, which fixed the retirement age of

⁹¹ For the distinction between "Mandatory Retirement Age" (when an employer can mandate an employee to retire) compared to "Minimum Pension Age" (which is the minimum age for an employee to start receiving occupational pension), see The Retirement Age Law, 2004.

⁹² Book of Statutes, 1919.

⁹³ Ministry of Finance, *Retirement Age: Report of the Netanyahu Committee* 9 (Jerusalem 2000).

⁹⁴ See C.A. 104/1987, *Dr. Naomi Nevo v. The National Labor Court*, Supreme Court Rulings (Piskei Din) 44(4), 749

⁹⁵ *Id.* at 755

men as 65 and of women as 60, she was obliged to retire at the age of 60.⁹⁶ The Israeli Supreme Court decided that, under these circumstances, discrimination between the retirement age of men and women was illegitimate and illegal.⁹⁷ At the same time as this judgment was handed down, a statutory initiative led to the enactment of the Equal Retirement for Men and Women Law of 1987,⁹⁸ which laid down that wherever there was an ordinance fixing different retirement ages for men and women, the woman had the right to choose whether to retire at the age laid down by the law for women, or at the age fixed for men, or at any age between the two. This law abolished the possibility to force women to retire earlier than men, while maintaining the perception that women should be allowed, under their own discretion, to retire earlier than men.

As noted above, historically speaking, the starting-point of Israeli law was that the establishment of a compulsory retirement age was a just action. However, of recent years, doubts have arisen as to the social and legal justification of such an arrangement. Why should one compel workers to terminate their employment at the age of 65, when it is quite clear that no physiological or psychological 'miracle' takes place at that age? Automatic imposition of compulsory retirement at a standard age, and the adoption of a chronological criterion with no relationship to the nature of the work, the physical and mental demands of the job, or the physical and professional state of the worker, is seen to be an infringement of the basic principles of justice, and irrational from the professional point of view. It would seem that a flexible functional system, which takes into account the individual state of the worker, the degree to which he or she is essential and suitable, could be a more just alternative to that which exists in Israeli law.⁹⁹ On the other hand, it has been maintained that complete abolition of retirement age would lead to even more serious infringements of basic rights of the old, as a result of their having to undergo humiliating tests in order to keep their positions of employment.¹⁰⁰ The bottom line is that from the legal point of view, mandatory retirement is still valid and obligatory in Israel, and its constitutionality has not yet been tested in the Supreme Court.

⁹⁶ *Id.* at 753.

⁹⁷ *Id.* at 761

⁹⁸ Book of Statutes, 1208.

⁹⁹ See Yitzhak Brick, *Politics and Ageing in The Politics of Old Age* 19 (Y. Brick ed., Eshel and the Kubutz Hameuchad 2004).

¹⁰⁰ The main pressure in Israel to raise the retirement age is not a concern for the human rights of older persons, but rather to the financial stability of the pension system. See the Netanyahu Report, *supra* n. 93.

3. *Age Discrimination in Employment*

While the mandatory retirement age is considered legal in Israel, in all other work-related matters age discrimination is forbidden.¹⁰¹ The legal prohibition of discrimination against the old on account of their age is based on the principle of equality. Apart from the general legal justification of the principle of equality, of recent years there have been several legal and constitutional developments relating to the possibility of infringement of old peoples' right to employment and age-related discrimination. One central development is the enactment of two new basic laws: Basic Law: Human Dignity and Freedom;¹⁰² and Basic Law: Freedom of Occupation.¹⁰³ These two basic laws give constitutional backing to the right of every person in Israel to work in an occupation of his/her choosing, and in accordance with his/her abilities, and prohibit any discrimination or violation of a person's self-respect.

However, the most important development in this sphere took place in 1995, with the amendment of the Law for Equality of Employment Opportunities, 1988 (hereinafter: Equality of Employment Opportunities Law).¹⁰⁴ The amendment to this law, which originally contained no mention of age discrimination, added to its provisions the prohibition of age discrimination within the compass of labor relationships.¹⁰⁵ The prohibition of age discrimination was applied not only to the right to be accepted for employment, but to all matters relating to economic rights during the period of employment and at its conclusion: for instance, salary, labor conditions, career advancement, leave for professional training, cases of dismissal, compensation for dismissal, and even bonuses and payments related to the cessation of employment. All of these wide dimensions of occupation were included within the broad prohibition of age discrimination.

It should be emphasized that the Equality of Employment Opportunities Law is of particular importance for the elder population of Israel, since it contains a number of legal innovations which make it a particularly useful instrument in the struggle against age discrimination in the field of employment. For instance, it applies to all employers, both private and public. It gives the Labor Court authority to grant monetary compensation to a claimant even if [s]he has not suffered financial loss. In a situation where the old person has fulfilled all the demands of the job and has nonetheless not received the appointment, it permits the

¹⁰¹ See Israel Doron, *supra* n. 74, at 931.

¹⁰² Book of Statutes, 1391.

¹⁰³ Book of Statutes, 1451.

¹⁰⁴ Book of Statutes, 1240.

¹⁰⁵ Book of Statutes, 1528.

transfer of the burden of proof to the employer. And, it allows public and representative bodies to make a claim in place of the worker (subject to his/her agreement).

Unfortunately, the elder population has not yet afforded this law the recognition it deserves. So far, although eight years have passed since the amendment prohibiting age discrimination was passed, no body of judicial decisions in the matter has yet accumulated, and the law has not succeeded in bringing about a social transformation in this sphere.¹⁰⁶ Israeli reality still reflects the stereotypic image according to which employers, in defiance of the law, prefer to employ young people. In a sense, this law exemplifies the fact that a formal change in the law is not sufficient to alter the realities of life for the old in Israel. A number of other things are also needed: education, legal aid, and financial resources which will enable old people to appreciate their legal rights and acquire tools for activating them; for they should both know of their rights and be able to put them into practice.

G. *Some More Legal Points*

I. *The Right to Meaningful Citizenship in Old Age*

In the modern age, old age leads to exclusion in many senses: built-in exclusion from social activities, lack of accessibility to centers of power and influence, and systematic disregard of the older population in cultural and media events.¹⁰⁷ The reasons for this state of affairs, and the methods used to bring it about, are many and varied. One central factor should, however, be emphasized: the phenomenon of ageism. This is a complex and controversial concept, and has been given a great many definitions. Under almost all definitions, it is clear that ageism creates a reality in which the older population is excluded and alienated.

One way to combat ageism is to recognize that the inviolable rights of the old include the right to continue to enjoy culture and art, to play an active part in society, and to continue to acquire education and knowledge. These rights are a part of what it means to be a citizen in the Israeli democracy. This recognition leads to the understanding that the state has an obligation to assist and encourage old people to realize their citizenship.¹⁰⁸ The Israeli legislator was not blind to this aspect, as is shown by the Senior Citizens' Law, 1989 (hereinafter: Senior Citizens'

¹⁰⁶ For an analysis of the failure of this law in Israel, see Sharon Rabin Margalio, *The Slippery Case of Age Discrimination – How Does One Prove Its Existence?*, 44(3) *Advoc.* 529, 537 (2000).

¹⁰⁷ See Israel Doron, *supra* n. 74, at 933.

¹⁰⁸ See Jeffrey A. Burr, Francis G. Caro & Jennifer Moorhead, *Productive Aging and Civic Participation*, 16 *J. Aging Stud.* 87, 88 (2002).

Law).¹⁰⁹ This law enjoins the creation of a Senior Citizens' Council, whose function is to advise the Minister of Welfare on the formulation of policy with regard to senior citizens; it also states that senior citizens should receive certain financial benefits, primarily in the form of reductions of property tax, payment for public transport, admission to cultural events, etc.¹¹⁰

The accepted view is that the Senior Citizens' Law is an 'economic law,' whose purpose is to lighten the economic burdens of the old. However, it is a very important law which confers social rights on the old people of Israel, and enables them to continue to enjoy an active social and cultural life. This it does, among other things, by affording financial concessions to cultural events and reduced fares on public transport, through which they have easy access to social events. The high cost of public transport is not 'only' an economic burden; for senior citizens who are dependent on public transport for their mobility it can be a social barrier, seriously impairing their active citizenship. The problem that arises in this connection is, of course, the limited degree to which this matter is addressed by legislation; in its present form it does not make it possible to apply the legislative rationale fully in this connection. Moreover, the public is not yet fully aware of the character of this law. Therefore, in its short legislative history, it has always been easy to curtail and cancel its provisions whenever it has been necessary to cut public expenditure.¹¹¹

2. *The Right to Family Life and to Aid for Social Relationships*

The network of social support which old people enjoy is an important component of their ability to grow old with dignity. Relatives, friends, colleagues, neighbours and others can give them aid and support, and represent them when needed. Historically, such networks have been a part of the culture and customs of society. But in modern society, in which traditional social frameworks are falling apart, the existence of isolated old people without family or friends is becoming more frequent, and legal intervention is required to support and assist the continued existence of these social networks. Of recent years several legal tools have been developed to this end. One such case, in the Israeli context, is the Law of Sick Pay (Absence Because of a Parent's Illness) 1993,¹¹² which was enacted with the express objective of dealing directly with the

¹⁰⁹Book of Statutes, 1295.

¹¹⁰See Israel Doron, *The Rise and Fall of Israel's Senior Citizens Act*, *supra* n. 8, at 11.

¹¹¹*Id.*

¹¹²Book of Statutes, 1442.

issue of legal backing for the social support networks of old people in Israel.

The law allows workers to take six days' leave of absence per year as the result of the sickness of a parent or partner's parent over the age of 65, on account of his/her accumulated days of sick leave, on condition that his/her partner works and is not absent from work by reason of this entitlement.¹¹³ Despite the limitations of this law, its basic rationale reflects a fundamental approach which aims to strengthen the network of family support for the old.¹¹⁴

In this connection we may also mention other innovative trends, such as: payment to people who provide informal care for old relatives; tax reductions for expenses incurred in caring for aged relatives; and the recognition, in the framework of a number of laws, of the legal status of such people as friends, colleagues or those with other close relationships in proceedings such as guardianship or as surrogate decision-makers in matters of medical treatment or care when the patient is incompetent to decide.¹¹⁵ Finally, the development of the recognition that grandparents should be given special legal status with regard to their grandchildren is an expression of the same trend.¹¹⁶ All of these spheres are currently only at an early stage of development in Israeli law, and it is to be hoped that they will be developed with all due speed in the years to come.

3. *Elder Abuse and Neglect*

Until the end of the 1980s, there was in Israel no real consciousness of the existence of elder abuse and neglect. When it was referred to, it was discussed only in general and sketchy terms, with no reference to the social context or its special characteristics.¹¹⁷ Empirical research on the subject was carried out only towards the end of the 1980s and in the mid-1990s.¹¹⁸ In the last few years several more studies have

¹¹³ *Id.* at art. 1.

¹¹⁴ See Israel Doron & Galia Linchitz, *The Work Versus ElderCare Dilemma and the Law: An Israeli Example*, 10 *Ethics, L. Aging Rev.* 109, 113 (2004).

¹¹⁵ *Id.* at 118-120.

¹¹⁶ See generally Anne Marie Jackson, *The Coming of Age of Grandparent Visitation Rights*, 43 *Am. U.L. Rev.* 563, 566 (1994).

¹¹⁷ See Dan Shnit, *Protection of the Elderly in Israeli Law*, 7 *Gerontology* 6, 10 (1976).

¹¹⁸ Mati Ronen & Shimshon Neikrog, *The Perception of Elder Abuse in Israel*, 14(1) *Soc'y Welfare* 17, 20 (1993); S. Zuabi, *Elder Abuse in the Arab Sector: Myth or Reality?* (Masters Thesis, Hebrew U. 1994); Ariela Lowenstein & Pnina Ron, *Elder Abuse by Family Members Who Care for Them* (Ctr. Ageing Stud. Research Haifa U. 1995); Ariela Lowenstein & Pnina Ron, *Elder Abuse in a Domestic Context in Israel: Victims' Typology and Abuse Etiology*, 20(2) *Soc'y. Welfare* 175, 176 (2000).

been carried out.¹¹⁹ The most recent data came out in December 2004, when Eisikovits, Winterstein and Lowenstein published the findings of Israel's first national survey on elder abuse and neglect. A full description of these findings is beyond the scope of this article. However, in general, the survey exposed relatively high rates of abuse and neglect of the older population in Israel: 18.4 percent of the elderly were exposed to at least one kind of abuse (the rates were similar among Jews and Arabs); and 25 percent were subject to neglect.¹²⁰

Analyzing the legislative developments in relation to elder abuse and neglect shows that Israeli law has undergone historical and ideological developments. More specifically, four “legislative generations” can be clearly discerned:¹²¹

The First Generation - Paternalism and Social Intervention

The first generation of laws relating to elderly people at risk was enacted for the most part in the first two decades of the existence of the State of Israel (i.e. the 1950s and 1960s). Two central laws, which are still in force and used for dealing with elder abuse and neglect, were enacted at the time: the Law of Legal Competence and Guardianship, 1962,¹²² and the Law for the Defense of Protected Persons, 1966.¹²³ The social credo on which these laws are based is that professionals, including social workers, will be capable of recognizing cases in which older people are incapable of dealing with their own affairs, and take care of them through the nomination of legal guardians or through compulsory injunctions given by the courts.

The Second Generation - Criminal Law and Mandatory Reporting

Although it did not result directly from the existence of elder abuse and neglect, Amendment 26 to the Criminal Code, 1989¹²⁴ created a new legal initiative in this area. In effect, this legislative amendment

¹¹⁹ Samir Zuabi, *Structural and Interactional Characters of Older Israeli Arabs Suffering from Abuse* (doctoral thesis, Hebrew U. 2000); Beth Katsman & Howard Litwin, *Protecting the Elderly and Preventing Violence Against Them*, Jerusalem: Natl. Ins. Inst. Center of Research (2002); Sarah Alon, *Social Workers' Intentions to Employ Legal or Treatment Interventions in Cases of Elder Abuse* (doctoral thesis, Haifa U. 2004).

¹²⁰ Zvi Eisikovits, Tora Winterstein & Ariela Lowenstein, *The National Survey on Elder Abuse and Neglect in Israel* 32 (Haifa U. & Eshel 2004).

¹²¹ This analysis is based on Israel Doron, Sarah Alon & Offir Nissim, *Time for Policy: Legislative response to elder abuse and neglect in Israel*, 16(4) J. Elder Abuse & Neglect 63, 66 (2005).

¹²² Book of Statutes, 380.

¹²³ Book of Statutes, 480.

¹²⁴ Book of Statutes, 390.

included the addition of a new chapter to Israeli criminal code; the section entitled “injury to the helpless.” There were two principal aspects of this amendment to the Criminal Code. The first was the explicit assertion that physical, mental or sexual abuse, by omission or commission, of “helpless persons” was a criminal offence, and subject to severe punishment.¹²⁵ The second central aspect of the amendment was the obligation to report any act of abuse.¹²⁶

The Third Generation - Protection and Therapy Within Family Violence

Three years after the Amendment to the Criminal Code, a completely new law was enacted: the Law for the Prevention of Violence in the Family, 1991.¹²⁷ This legislation was enacted as a result of the report of a committee on violence in the family.¹²⁸ The legislative innovation of the third generation was the adoption of a legal instrument that rested on civil law and could be set in operation quickly and independently by the victim or a relative. Moreover, the types of relief given in the law are mainly of two kinds: the physical removal or distancing of the aggressive person(s) from the threatened victim; and compelling the aggressor to undergo treatment as a means of reaching a solution to the violent situation.¹²⁹

The Emergence of the Fourth Generation – Empowerment

This new legal development in Israeli law is still very young and in its preliminary stages. Its characteristic is that it adopts an empowering approach and tries to be more focused on the elderly. For instance, in 2002, the Law for the Prevention of Family Violence was amended.¹³⁰ For the first time, Israeli law added the duty of professionals and service providers to supply information to victims of abuse and neglect (as opposed to establishing a duty to report or to intervene) in order to enable them to apply for and receive assistance and treatment – if they choose to do so.

In sum, Israeli law in the field of elder abuse and neglect seems to be at a crossroads. On the one hand, after going through four stages of development, it has reached a relatively mature stage. On the other hand,

¹²⁵ *Id.* at art. 368(c) (the maximum punishment is 8 years in prison for elder abuse or neglect).

¹²⁶ *Id.* at art. 368(d).

¹²⁷ Book of Statutes, 1352.

¹²⁸ Judith Karp, *Report on Domestic Violence*, in *The Status of Women in Society and Law* 280 (Frances Raday, Carmel Shalev & Michal Liban-Kobi eds., Shoken 1995).

¹²⁹ *Id.* at 307.

¹³⁰ Book of Statutes, 1817.

Israeli law in this area has not yet achieved its final form. Moreover, for the most part, it does not yet relate at the legislative level to the phenomenon of elder abuse, as distinct from other acts of violence or other social groups of abused persons (such as children or women). Thus, it seems that the main legal issue today is not the existence of legal tools, but the lack of a holistic, coherent and rational legal policy towards elder abuse and neglect.

III. CONCLUSIONS

The overall picture of the state of elder law in Israel, as described above, displays an interesting dynamic; it is undergoing processes of formation and maturation. Because it is still developing, it is hard to make even approximate generalizations about the subject at this stage. The picture is complex and neither black nor white, and it is changing rapidly at this very time.

There is no doubt that in certain respects old people in Israel enjoy some of the most advanced legal arrangements in the world. Important developments in the spheres of national health insurance, insurance for community based long-term care, the Senior Citizens' Law, and the right to paid sick leave because of a parent's illness definitely indicate recognition of the importance of economic and social rights in general, and the rights of the old in particular. Moreover, the dramatic achievement of the Pensioners' Party in the recent elections ensures that in the near future there will be far-reaching changes in various legal arrangements affecting the rights of the old in Israel.

On the other hand, in various legal areas Israel still lags behind other Western and developed states. As shown above, many legal rights are flawed, and suffer from difficulties and limitations. Thus, if we take a broad view and attempt to make an overall assessment of the state of old people's social rights in Israel, we can point out a number of challenges which Israel law should confront in the future. First, there needs to be a heightened sense of awareness and consciousness to the developing field of elder law. As shown, one of the central problems in the sphere of elder law in general, and of the social and economic rights of the old in particular, is the lack of awareness of these rights' independent existence in the world of law and social policy. Leading bodies in the world of law, such as the *Knesset*, the Israeli Lawyers' Bureau, the law faculties of the universities, the Ministry of Justice and the State Advocacy are still at a preliminary stage in developing awareness to the field of elder law as an independent and important subject in the development of social policy for the senior citizens of Israel.

Second, we need to protect the existing legal achievements. It is important to preserve what has been achieved despite the neo-liberal atmosphere and the current economic ‘hysteria’ concerning the implications of the ageing of the Israeli population. One of the trends which can be seen in Israel in the sphere of old people’s economic and social rights is the constant attempt to erode them and reduce their scope. Prominent examples are the continuous effort to reduce old age pensions, the attempts to cut down the expenditure occasioned by the National Community-Based Long-Term Care Insurance Law, the opposition to the enactment of a national pension scheme, and the attempts to impair the National Health Insurance Law and to revoke the rights granted by the Senior Citizens’ Law.

There are many reasons for these ongoing attempts to erode elder rights. But in a broader perspective, it chimes well with two main trends. The first is ideological: the increasing support in Israeli society for neo-liberal tendencies, which favor the reduction of government involvement with and support for the underprivileged.¹³¹ The second, which is indirectly linked to the first, is the tendency to create ‘panic’ and ‘hysteria’ as a result of the socio-economic implications of the increase in the elder population. Prophets of doom proclaim that if immediate steps are not taken the ageing of the Israeli population will lead to the collapse of the social security system, as a result of the financial burden which this population will impose on the state budget.¹³² It is important to recall that these prophecies are generally unfounded, in that there are solutions at the policy level to most of the dangers they describe which do not impinge of the rights of the old. Nonetheless, one of the challenges of the coming years is clearly the need to keep watch and fight against attempts to diminish the already existing social rights of the elder population.

Third, we need to protect the connection between social rights and old age. It is vital to be aware of the importance of the socio-economic rights of the old as a means of preventing exclusion and preserving active citizenship. One of the unique social aspects of old age in modern times is the phenomenon of ‘ageism,’ discussed above. The exclusion of old people from active social life is part of a broader social context in which modernism and post-modernism vie to create the illusion that there are no old people, and no need for people to be old. According to modern approaches, there is no need for old people, since

¹³¹ See Dani Filc, *Model 2000 of the State of Israel: Post-Fordism and Neoliberalism*, in *The Power of Property: Israeli Society in the Global Age* 34 (Dani Filc and Uri Ram ed., Van-Leer Institute 2004).

¹³² See Richard Disney, *Can We Afford to Grow Older?* (Cambridge MIT Press 1996).

when they are old they make no contribution to the progress of mankind; and, according to post-modern approaches, a person's age is no longer relevant to the definition of his or her place in society.¹³³ Unfortunately, the result of these approaches is that in practice many old people are excluded from the sphere of social activity, and experience a difficult life of exclusion, discrimination and neglect in which they are denied the true liberty of choosing 'not to be old.' Social rights in the fields of health, housing, employment, etc. are able to give the old the ability and the strength to resist, and to wage an effective struggle for the position they deserve as an integrated, active and substantial sector of Israeli society.

Fourth, there needs to be a holistic approach, an overall socio-legal policy, as distinct from the adoption of the perspective of 'atomistic rights.' The legal world in general, and the world of rights in particular, is accustomed to weigh up complex issues in the context of specific 'rights.' It is methodologically convenient to consider legal issues under the category of 'the right to education,' 'the right to housing,' or any other specific label. But, when considering the social rights of the elderly population, the distinction between various social rights is completely artificial. Moreover, spreading the discussion over various concrete rights may, in practice, do damage to the rights of the old. Thus, it may well be that when the rights of the old are under discussion it is important not to lose sight of the broad picture, and to try to find a suitable all-embracing social policy for the older population in Israel

¹³³ See Haim Hazan, *Getting Older in a Global Village*, in *The Politics of Aging 30* (Yitzhak Brick ed., Eshel 2002).