

**BETWEEN INSTITUTIONAL SURVIVAL AND HUMAN RIGHTS PROTECTION: ADJUDICATING LANDMARK CASES OF AFRICAN UNDOCUMENTED ENTRANTS IN ISRAEL IN A COMPARATIVE AND INTERNATIONAL CONTEXT**

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ABSTRACT

States compare asylum and immigration policies with one another. The Israeli immigration and asylum regime influenced American law, and was also directly influenced by it. This Article offers the most comprehensive analysis to date of the Israeli case law on the rights of undocumented entrants, at the core of which is a series of cases on immigration detention. Three times within a two year period, the Israeli Supreme Court invalidated immigration

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detention laws and the legislature complied with increasing frustration. Our argument is that although the Court courageously protected the undocumented entrants' rights, it also resorted to strategic ambiguity as a means of institutional survival in light of legislative threats to incorporate a general legislative override clause and executive attempts to "pack" the Court with conservative justices through appointments. This high-stakes dialogue is unprecedented in the Israeli context and uncommon in comparative law. We argue that courts must not only protect the constitutional and international human rights of undocumented entrants, but also bring the political branches to accountability. They should force states to conduct refugee status determinations in a timely manner rather than be satisfied with temporary protection regimes. They should further recognize that rights may accumulate as a result of a prolonged presence of an undocumented entrant in a country. The Article discusses the Israeli judicial techniques used to reduce the conflict with the representative branches, including the use of constitutional avoidance and comparative law, and juxtaposes them with the American approach evident in *Zadvydas v. Davis* and *Jennings v. Rodriguez*. The harsh implications of a policy that leaves people in an indeterminate state of mere protection from removal are manifest in the Israeli story and should serve as a warning to the U.S. courts as they formulate their reaction to the recent asylum ban.

## TABLE OF CONTENTS

1. Introduction .....	46
2. Avoidance of Constitutional and International Human Rights Issues .....	58
2.1. <i>Engaging in a Three-Stage Judicial Review of Immigration Detention</i> .....	58
2.2. <i>Failing to Determine Who These Migrants Are</i> .....	63
2.2.1. <i>The Failure to Require Accountability</i> .....	63
2.2.2. <i>The Accountability Role of Courts</i> .....	68
2.2.3. <i>The Constitutional and International Law Implications</i> .....	70
2.3. <i>Failing to Refer to the Legal Implications of the Duration of Presence</i> .....	74
2.3.1. <i>The Constitutional Law Dimension</i> .....	74
2.3.2. <i>The International Law Dimension</i> .....	80
3. A High Stakes Constitutional Dialogue .....	84
3.1. <i>Using Constitutional Avoidance Doctrine</i> .....	84
3.2. <i>Sectioning to Reduce the Appearances of Judicial Activism</i> .....	87
3.3. <i>Delaying Decisions and Babysitting Techniques</i> .....	88
4. Strategic Use of Comparative Law .....	90
4.1. <i>Employing Strategic Comparisons</i> .....	91
4.2. <i>Comparing the Incomparable: 1. Immigration Detention</i> .....	93
4.3. <i>Comparing the Incomparable: 2. Residency Centers</i> .....	97
4.4. <i>Comparing the Incomparable: 3. Third Country Agreements</i> .....	100
5. The Road Ahead .....	104

## 1. INTRODUCTION

The treatment of immigrants in general and asylum seekers in particular is hotly contested around the world and is the subject of parliamentary and presidential election campaigns.<sup>1</sup> The Western world is awakening to a new age of protectionism, exclusion and border control in light of the rising and massive waves of migration of immigrants and asylum seekers worldwide.<sup>2</sup> As states fight against immigration, they turn to each other for “inspiration” on the most effective means of exclusion. Similarly, domestic courts often adopt each other’s standards of interpretation when they delineate states’ obligations under international immigration law. Therefore, a comparative approach to immigration law is beneficial to the understanding of how both representative branches and courts operate.

Israel, too, is currently coping with a population of undocumented entrants. Within a few years (primarily 2006–2013), about 65,000 undocumented entrants arrived in Israel—a country roughly the size of the state of New Jersey<sup>3</sup>—with a population of 8,796,200 residents<sup>4</sup> and a territory of 8,630 sq. miles,<sup>5</sup> through the State’s southern border with Egypt. Israel is surrounded by a number of countries with which it maintains tense to conflictual relations, through which the migrants have crossed. While the nationality of undocumented entrants varied, approximately 70% are from Eritrea and about 20% from Sudan.<sup>6</sup> Hundreds of

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<sup>1</sup> See, e.g., Lewis Davis & Sumit S. Deole, *Immigration and the Rise of Far-Right Parties in Europe*, 15 IFO DICE REPORT–J. FOR INSTITUTIONAL COMPARISONS 10, 10 (2017); Martin Halla, Alexander F. Wagner, & Joseph Zweimüller, *Immigration and Voting for the Far Right*, 15 J. EUR. ECON. ASS’N 1341 (2017) (discussing the increase in support of right wing parties following an inflow of immigrants into a neighborhood).

<sup>2</sup> See STEPHEN CASTLES & MARK J. MILLER, *THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD* (4th ed. 2009).

<sup>3</sup> See *Quick Facts: New Jersey*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/NJ/PST045218#> [<https://perma.cc/9M92-CSYT>] (last visited Nov. 4, 2019).

<sup>4</sup> Demographic Characteristics, ISR. CENT. BUREAU STAT. (Apr. 27, 2017), [http://www.cbs.gov.il/reader/?MIval=cw\\_usr\\_view\\_SHTML&ID=403](http://www.cbs.gov.il/reader/?MIval=cw_usr_view_SHTML&ID=403) [<https://perma.cc/6EWB-KNDT>].

<sup>5</sup> See *Israel—Size and Dimension*, ISR. MINISTRY FOREIGN AFF. (2013), <http://www.mfa.gov.il/MFA/AboutIsrael/Maps/Pages/Israel-Size-and-Dimension.aspx> [<https://perma.cc/55QM-UYKQ>].

<sup>6</sup> See *Data on Foreigners in Israel*, POPULATION & IMMIGR. AUTHORITY 7 (Jan. 2018),

thousands of the nationals of these two African dictatorships have fled and sought refuge in different countries around the world.<sup>7</sup>

This Article examines Israel's policy towards people who entered the State in an undocumented manner, through a non-recognized border crossing point. It argues that Israel refrained for many years from deciding whether these individuals are entitled to refugee protection, and that the Court enabled the State to get away with it. Indeed, there is no agreement on the reason for the entry of these persons into Israel. The undocumented entrants argue that they are refugees, and the State cannot return them to their home countries for fear of persecution on political, ethnic or religious grounds.<sup>8</sup> On the other hand, the State argues that these people by and large are seeking to improve their economic conditions, and does not interpret the definition of "refugee" in international law to

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[https://www.gov.il/BlobFolder/generalpage/foreign\\_workers\\_stats/he/foreigners\\_in\\_Israel\\_data\\_2017.pdf](https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreigners_in_Israel_data_2017.pdf) [<https://perma.cc/2MMU-XRSY>] (in Hebrew) [hereinafter 2018 Data of PIA].

<sup>7</sup> See *File: First Instance Decisions by Outcome and Recognition Rates, 30 Main Citizeships of Asylum Applicants Granted Decisions in the EU-28, 4th Quarter 2016*, EUROSTAT: STAT. EXPLAINED (Mar. 16, 2017), [http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:First\\_instance\\_decisions\\_by\\_outcome\\_and\\_recogn\\_recog\\_rates\\_30\\_main\\_citizenships\\_of\\_asylum\\_applicants\\_granted\\_decisions\\_in\\_t ht\\_EU-28\\_4th\\_quarter\\_2016.png](http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:First_instance_decisions_by_outcome_and_recogn_recog_rates_30_main_citizenships_of_asylum_applicants_granted_decisions_in_t ht_EU-28_4th_quarter_2016.png) [<https://perma.cc/XMS6-BPPA>].

<sup>8</sup> Eritreans primarily argue that they fled army service, or the mandatory draft of 18 months that might lead to indefinite army service, in conditions amounting to slavery. If Israel returns them to Eritrea after fleeing army service, they argue that they might be subject to torture or even death. See, e.g., *File No. 1010-14 Appeals Tribunal (Jerusalem), John Doe v. Ministry of Interior* (Feb. 15, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter *Mesegene Case*]. They further argue that they could not have enjoyed refugee protection in Egypt, even though they passed through it on their way to Israel, since it was not a safe country for them. Egypt has executed a few asylum seekers, tortured and detained others and returned people to Eritrea where they suffered further persecution. Israel was the first safe country in which they arrived and could seek refuge. Sudanese primarily argue that they fled the genocide in Darfur or civil war. See, e.g., *Sinai Perils: Risks to Migrants, Refugees, and Asylum Seekers in Egypt and Israel*, HUM. RTS. WATCH (Nov. 2008), <https://www.hrw.org/sites/default/files/reports/egypt1108webwcover.pdf> [<https://perma.cc/5NKS-ZWAE>]. Both groups demand that the State, which is a party to the 1951 International Convention Relating to the Status of Refugees and the additional protocol (Refugee Convention), respect its international obligations to refugees. See *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*]; *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. They should thus receive protection and access to rights in Israel.

include them.<sup>9</sup> As a result, only a few are recognized as refugees, and the rest—those who never applied for asylum, those whose asylum applications were never determined, and those whose asylum applications were denied—had received a temporary group-based protection from refoulement to their states of origin.<sup>10</sup> We will therefore refer to these individuals as “undocumented entrants”, people who entered in an undocumented way but their presence in the country is documented, intentionally refraining from using the derogatory language of illegality or the legitimizing language of refugees. We do so despite our inclination to believe that many of these individuals are refugees. We use this term for

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<sup>9</sup> With regard to Eritreans, Israel argues that fleeing army service is not a cause for refugee status in and of itself, unless the person can further show that he will be individually persecuted on political grounds. See Uri Tal, *Infiltrators and Asylum Seekers from Sudan in Israel – Submitted to the Interior and Environmental Protection Committee of the Knesset*, THE KNESSET’S CENTER FOR RESEARCH & INFORMATION (June 19, 2007). With regard to Sudanese, the State claims that as Sudan is an enemy state, it is not obliged to grant its nationals asylum. It further claims that Israel was not the first safe country that the Sudanese passed by after fleeing their home country. Egypt, for example, which almost all Sudanese had crossed through, was willing to grant some refugee status. On the dispute between the parties, see File No. 8665/14 High Court of Justice (Jerusalem), *Destá v. The Knesset* para. 4 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>10</sup> See, e.g., File No. 8665/14 High Court of Justice (Jerusalem), *Destá v. The Knesset* (Aug. 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Currently, Eritreans enjoy an unofficial temporary group protection—recognized in judicial decisions, though not anchored in official government decisions or legislation, while Sudanese are not returned primarily because of lack of diplomatic relations between the two countries, in addition to the recognition of the hardship they would likely experience, if returned. See State Comptroller’s Annual Report 68c, Chapter 2: On Minister of Interior—The Population and Immigration Authority: The Treatment of Political Asylum Seekers in Israel, 1428, n. 19 (May 2018) (in Hebrew) [hereinafter *State Comptroller 2018 Report*], [http://www.mevaker.gov.il/he/Reports/Report\\_627/8eaa80a0-a426-4424-aefa-8fdc4e8b176a/221-zarim-2.pdf](http://www.mevaker.gov.il/he/Reports/Report_627/8eaa80a0-a426-4424-aefa-8fdc4e8b176a/221-zarim-2.pdf) [<https://perma.cc/4GZX-XZQD>]. PIA issued only short-term documents, which grant them a fragile status with very few rights, and force them to constantly renew their papers in lengthy bureaucratic processes. The State granted them temporary stay status lasting between two to four months. Lately, in October 2019, the Minister of Interior decided to lengthen the period to last between half a year to a year each time. See Orly Harrari, *Improvements to Infiltrators from Eritrea and Sudan*, ISR. NAT’L NEWS (Mar. 3, 2018), <https://www.inn.co.il/News/News.aspx/367608> [<https://perma.cc/NP4-9RRQ>]. The State denied them any option of naturalization; Yuval Livnat, *Refugees and Permanent Status in Asylum State, in WHERE LEVINSKI MEETS ASMARA: ASYLUM SEEKERS AND REFUGEES IN ISRAEL – SOCIAL AND LEGAL ASPECTS* 343 (Tally Kritzman-Amir ed., 2015) (in Hebrew); see also *infra* note 40.

the sake of caution, since most of them did not undergo Refugee Status Determination (RSD) on their individual cases.<sup>11</sup>

Israel's struggles with undocumented entry and its immigration and asylum policy regime are closely studied by the Trump administration. Thus, for example, the erection of a Southern border fence along Israel's border with Egypt, which effectively blocked almost all undocumented entry into the country, is offered as proof to the feasibility of this plan on the U.S.' Mexican border.<sup>12</sup> The American travel ban has an antecedent counter-part in Israel's policy, banning entry of nationals of certain enemy countries, including a ban on the entrance of young Palestinians from the West

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<sup>11</sup> United Nations High Commissioner for Refugees (UNHCR), UNHCR's Position on the Status of Eritrean and Sudanese Nationals Defined as 'Infiltrators' by Israel (Nov. 2017) [hereinafter 2017 UNHCR position], <http://www.refworld.org/docid/5a5889584.html> [<https://perma.cc/7D2R-GX39>]. According to Daniel Solomon, the Legal Adviser of the Population and Immigration Authority (PIA), in the discussions of the Interior and Protection of Environment Committee of the Israeli legislature (Knesset) in November 2017: "Eritreans submitted 9,189 applications for asylum since 2007. Israel decided 5,050 cases and 4,139 cases are still pending. Ten Eritreans received refugee status. Sudanese submitted 3,170 applications. Israel decided 1,494 cases and 1,676 cases are still pending. Only one Sudanese person received a refugee status." Protocol no. 508 of Interior and Environment Protection Committee, 28 (Nov. 27, 2017), <http://m.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=2023509>; see also Press Release of the Interior Committee on Infiltrators Law (Nov. 19, 2017), <http://main.knesset.gov.il/Activity/committees/InternalAffairs/News/Pages/291117.aspx#> [<https://perma.cc/FJ6Z-3RDD>]. Cf. 2018 Data of PIA, *supra* note 6, at 1 (noting that between 2013 and 2017, 9,539 Eritreans and 4,559 Sudanese applied for asylum in Israel). See 2017 UNHCR position, 1 (Nov. 2017), <http://www.refworld.org/docid/5a5889584.html> [<https://perma.cc/7D2R-GX39>] (noting that the asylum applications submitted, 3,567 Eritreans and 3,870 Sudanese, had pending applications in June 2017). It is not clear why there are discrepancies in the data. This data means that Israel recognized less than 0.1% of those applying for asylum from Sudan and Eritrea as refugees. Many did not submit official applications for asylum out of lack of confidence in the process. *Id.* at 1-2. Israel also granted 500 Sudanese from Darfur temporary residence status based on humanitarian grounds. This status grants fewer rights than a refugee status since these people are not entitled to bring their immediate family members to Israel. See State Comptroller 2018 Report, *supra* note 10, at 1448-49. According to the Comptroller, between 2009 and 2017, the Minister of Interior granted refugee status to 52 out of 55,433 seekers of asylum in Israel. Eight of these recognized refugees are from Eritrea and one from Darfur. *Id.* at 1436, 1447.

<sup>12</sup> Except for a few dozens of people who entered Israel in 2015 despite the barrier, there were no entries through the Egyptian border since 2013. A MAJORITY STAFF REPORT OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE, 115TH CONG., SECURING ISRAEL: LESSONS LEARNED FROM A NATION UNDER CONSTANT THREAT OF ATTACK (Feb. 1, 2017) [hereinafter SECURING ISRAEL].

Bank into Israel, even for family unification purposes, and an exclusion of enemy nations from the asylum system.<sup>13</sup>

Additionally, we show that not only has Israel influenced U.S. immigration policy, but the Israeli Supreme Court has explicitly relied upon U.S. law, and primarily the *Zadvydas v. Davis* decision, to develop Israeli immigration detention law, albeit in a problematic way.<sup>14</sup> While the confrontation between the courts and the representative branches over the treatment of undocumented entrants heated in the U.S. primarily since Trump's election,<sup>15</sup> the Israeli drama has been unfolding since 2007. The successes and failures of the Israeli judicial policy and strategies in protecting rights of undocumented entrants should thus be studied carefully by anyone interested in understanding the stakes involved.

The Israeli debate regarding the treatment of these undocumented entrants is conducted along deeply emotional lines as well. According to its Declaration of Independence, Israel was founded after the Second World War, as the nation state for the Jewish people, many of whom survived the Holocaust, leading many of its people to know a thing or two about persecution and seeking asylum. For a lot of them, their personal or family histories include seeking refuge. Many are well-familiar with the harsh consequences and the inevitable losses of a merciless world turning a blind eye to human misery.<sup>16</sup> In fact, this awareness of the importance of the surrogate protection to refugees, was precisely the reason for Israel's active involvement in the drafting process of the Refugee Convention.<sup>17</sup> Yet, many in the Israeli society raise (justified or unjustified) concerns about the impact of this undocumented migration, mostly along the lines of demography,

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<sup>13</sup> See, e.g., HCJ 7052/03 Adalah v. Minister of Interior, 61 P.D. 202 (2006) (Isr.); HCJ 466/07 MK Zahava Galon v. Attorney General, 65(2) PD 44 (2012) (Isr.); Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, U. ILL. L. REV. 563 (2019).

<sup>14</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>15</sup> Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/U3GQ-Y3PX>].

<sup>16</sup> The Declaration of the Establishment of the State of Israel, 1 OFFICIAL GAZETTE 1 (May 14, 1948), [https://www.knesset.gov.il/docs/eng/megilat\\_eng.htm](https://www.knesset.gov.il/docs/eng/megilat_eng.htm).

<sup>17</sup> File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 13 (Aug. 11, 2015) (Melcer, J., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).



economy, sovereignty, and security.<sup>18</sup> In particular, there is concern over the fact that these persons reside primarily in under-developed neighborhoods. While some welcome the migrants to those neighborhoods, others from the native residents vocally object to having to share their already-lacking infrastructure and social services with the migrants, as the responsibility to the integration of these undocumented entrants is unevenly shared by the Israeli population.<sup>19</sup>

Due to these concerns, and for potentially many other reasons, Israel adopted numerous exclusionary practices with regard to undocumented entrants. Israel has erected a fence along the Egyptian border,<sup>20</sup> which blocked virtually all undocumented entries since 2013.<sup>21</sup> It placed the undocumented entrants in immigration detention, enacting provisions to allow prolonged detention periods<sup>22</sup> and other forms of limitations on the freedom of movement such as a forced residence of some of the men in a designated center<sup>23</sup> and geographical restrictions on movement and employment.<sup>24</sup> Israel signed agreements with third-party countries to remove these undocumented entrants to their territories.<sup>25</sup> The State imposed economic restrictions on undocumented entrants,

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<sup>18</sup> See, e.g., Elizabeth Tsurkov, *Workers Hotline: "Cancer in Our Body" – On Racial Incitement against Asylum Seekers from Africa, Discrimination and Hate Crimes against them* (Jan.-June 2012), <https://hotline.org.il/wp-content/uploads/IncitementAndHateCrimesReport.pdf> [<https://perma.cc/5MQX-KH9Q>].

<sup>19</sup> File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 20 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>20</sup> SECURING ISRAEL, *supra* note 12.

<sup>21</sup> Not a single person was able to come in through the Egyptian border in 2017, and only a handful came in since 2013. 2018 Data of PIA, *supra* note 6, at 3.

<sup>22</sup> Prevention of Infiltration (Offenses and Jurisdiction) Law, 5714–1954, 8 133, (1953–54) (Isr.). The Israeli legislature amended the harsh provisions as a result of judicial review, as elaborated in this Article.

<sup>23</sup> *Id.* These provisions are no longer valid.

<sup>24</sup> In February 2008, the Minister of Interior decided to prohibit this population from working or staying in the geographical areas between Gadera and Hadera, covering the center of Israel. This policy was inserted as a condition of the temporary permits of stay issued to these people, under § 2 of the Entry into Israel Law. See Entry into Israel Law, 5712–1952, § 2, 6 159, (1951–52) (Isr.). A petition against this policy to the Supreme Court led the Minister of Interior to cancel this policy. See File No. 5616/09 High Court of Justice (Jerusalem), *African Refugee Development Center v. Minister of Interior* (Aug. 26, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>25</sup> File No. 8101/15 Administrative Appeals, *Zegete v. Minister of the Interior* (Aug. 28, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

which included heavy taxation on their employers,<sup>26</sup> salary reductions,<sup>27</sup> and limitations on their ability to transfer remittances until they departed from Israel.<sup>28</sup> It also limited their ability to access the Israeli welfare state by excluding them from the national health care scheme,<sup>29</sup> denying their access to most social and economic rights (including the right to gainful employment,<sup>30</sup> housing subsidies, most governmental and municipal welfare services, legal

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<sup>26</sup> File No. 4946/16 Court of Appeals, Saad v. Revenue Services, Ashkelon Branch (Sept. 12, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (stating that employers who employ foreign workers in Israel, including people from Sudan and Eritrea, have to pay a special tax of 20% of the salary of the employee to the State. This tax cannot be deducted from the employee's salary, but it makes employing foreign workers less attractive and their salaries more costly to employers. The Supreme Court denied a petition against the application of this tax to undocumented migrants.).

<sup>27</sup> Under the amendment to the Foreign Workers Law, 5751-1991, which became effective on May 1, 2017, the State requires employers of people who entered Israel through a non-authorized border crossing to make monthly deposits to a designated account held by the State in favor of the employee. The State will release these monies only when the person permanently leaves Israel and may forfeit the money if he does not leave Israel when required. The employer will deposit 16% of the employee's wages as severance and pension funds. In addition, the employer will deduct 20% of the employee's wages in favor of this deposit. See Yoel Lipovetzky, *Information Sheet – Infiltrator Foreign Worker Deposit*, POPULATION AND IMMIGRATION AUTHORITY (May 14, 2017), [https://www.gov.il/BlobFolder/guide/guide\\_for\\_infiltrators\\_regarding\\_monies\\_from\\_employers/he/Information%20Sheet%20%E2%80%93%20Infiltrator%20Foreign%20Worker%20Deposit.pdf](https://www.gov.il/BlobFolder/guide/guide_for_infiltrators_regarding_monies_from_employers/he/Information%20Sheet%20%E2%80%93%20Infiltrator%20Foreign%20Worker%20Deposit.pdf) [<https://perma.cc/8D5N-TL8Q>]. In practice, in most cases, employers pocketed the deductions instead of putting them in the deposit. This practice was met by little enforcement. See Lee Yaron, *Israeli Employers Pocketing Deposits Deducted From Asylum Seekers' Pay*, HAARETZ (June 28, 2019, 1:42 AM), <https://www.haaretz.com/israel-news/.premium-israeli-employers-pocketing-deposits-deducted-from-asylum-seekers-pay-1.7418455> [<https://perma.cc/8TN6-UBRA>]; see also U.S. Dep't of State, Office of the Under Secretary for Civilian Security, Democracy, and Human Rights, *Trafficking in Persons Report 254* (June 20, 2019) (calling on Israel to "[r]epeal the 'Deposit Law' (article 4 of the Prevention of Infiltration Law), which significantly increases vulnerabilities to trafficking for the irregular African migrant population.").

<sup>28</sup> Prevention of Infiltration (Offenses and Jurisdiction) Law, 5714-1954, §§ 7a, 7b, 7c, 8 133, (1953-54) (as amended in 2018) (Isr.).

<sup>29</sup> According to the Foreign Workers Order (Prohibition of Unlawful Employment and Assurance of Fair Conditions) (Health Services Package to Workers), 2001, the law requires employers to pay for private health insurance that covers specified services, regardless of the legal status of the foreign employee. See *Health Insurance for Foreign Workers*, KOL ZCHUT, [https://www.kolzchut.org.il/en/Health\\_Insurance\\_for\\_Foreign\\_Workers](https://www.kolzchut.org.il/en/Health_Insurance_for_Foreign_Workers) [<https://perma.cc/G5EG-Y78F>] (last updated Mar. 3, 2019).

<sup>30</sup> *But see* discussion *infra* note 42.

services, etc.).<sup>31</sup> The State further restricted their ability to operate independent businesses.<sup>32</sup> Some Israeli officials used derogatory and delegitimizing terms when referring to this population.<sup>33</sup> All of these measures have resulted in their social marginalization and extreme vulnerability. These different measures were effective in prompting many of these people to leave the country and seek refuge and safety elsewhere. Of the 65,000 undocumented entrants who entered Israel since 2007, only around 37,000 were still residing in Israel at the end of 2017.<sup>34</sup>

These different exclusionary policies have sparked litigation. Petitions of individuals and human rights organizations challenged the fundamental aspects of the exclusionary regime applied by Israel, including: immigration detention<sup>35</sup> and the conditions

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<sup>31</sup> Galia Sabar & Elizabeth Tsurkov, *Israel's Policies toward Asylum-Seekers: 2002–2014*, ISTITUTO AFFARI INTERNAZIONALI (May 20, 2015), <https://www.osce.org/networks/newmedtrackII/165436?download=true> [<https://perma.cc/7AAU-ZS94>].

<sup>32</sup> To get a permit to open a business, a person must be a resident of Israel. These new regulations emerged around 2010. Eritreans and Sudanese have tried to bypass these regulations by using third parties as the “faces” of their businesses. See Tally Kritzman-Amir & Anda Barak-Bianco, *Food as Means of Control: On Food and Asylum Law and Policy in Israel*, in *FOOD AND THE LAW* 597, 614–615 (Yofi Tirosh & Aeyal Gross eds., 2017) (in Hebrew).

<sup>33</sup> Tsurkov, *supra* note 18 at 10, 13 (noting that statements from Israeli politicians and decision-makers include claims that an “overwhelming majority of those claiming asylum in Israel are ‘illegal work infiltrators’ and not genuine refugees,” that “15% of the asylum-seekers ask for protection because spirits are haunting them,” that asylum-seekers are “a cancer in our body” and that asylum seekers are “‘infiltrators,’ ‘criminals,’ a ‘demographic threat’ and worse”).

<sup>34</sup> 2018 Data of PIA, *supra* note 6, at 4–5.

<sup>35</sup> The Court invalidated parts of the law three times. See HCJ 7146/12 Adam v. The Knesset 64(2) PD 717, 745 (2013) (Isr.); File No. 7385/13, 8425/13 High Court of Justice (Jerusalem), Eitan—Israeli Immigration Policy Center v. The Israeli Government (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter Eitan decision]; File No. 8665/14 High Court of Justice (Jerusalem), Desta v. The Knesset (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

thereof,<sup>36</sup> expulsion,<sup>37</sup> geographical restrictions,<sup>38</sup> salary reductions,<sup>39</sup> refusal to naturalize,<sup>40</sup> the documents' renewal services,<sup>41</sup> and the poor access to social and economic rights.<sup>42</sup>

In many of these cases, the Supreme Court struck down significant policy measures or parts thereof, thus introducing

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<sup>36</sup> The Court accepted the petition in part and ordered to prevent overcrowding in the mandatory residence center as well as enable residents to possess cleaning materials in File No. 4386/16 High Court of Justice (Jerusalem) Madio v. Commission of Prisons (June 13, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The Court accepted the petition in part and allowed the residents to enter ready-made food to their rooms though denied their request to cook for themselves in File No. 4581/15 High Court of Justice (Jerusalem), Ismail v. Comptroller of Prisons (Nov. 19, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The State committed to improve residents' access to computers in light of a pending petition in File No. 4389/16 High Court of Justice (Jerusalem), Tespaisius v. Comptroller of Prisons (June 25, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>37</sup> The Court upheld third countries' agreements but ruled that a person's dismay at removal cannot serve as a cause for his or her detention when the State declares that it does not remove against people's will. File No. 8101/15 Administrative Appeals, Zegete v. Minister of the Interior (Aug. 28, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>38</sup> The State abolished the policy in light of the petition. For discussion, see *supra* note 24 and accompanying text. See also File No. 5616/09 High Court of Justice (Jerusalem), African Refugee Development Center v. Minister of Interior (Aug. 26, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 10463/08 High Court of Justice (Jerusalem), African Refugees Development Center v. Minister of Interior (Aug. 6, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>39</sup> HCJ 2293/17 Zagai Gresgher v. The Knesset (pending) (Isr.).

<sup>40</sup> The Jerusalem District Court sitting as an Administrative Appeals Court denied petitioners' argument that a long stay in Israel as a refugee entitles a person to permanent residency status or even naturalization. File No. 10-03-35344 Administrative Appeals (Jerusalem), Galan v. Minister of Interior (Apr. 15, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.). A petition against this decision is still pending in the Israeli Supreme Court. See File No. 4288/12, Administrative Petition, John Doe v. Minister of Interior (pending) (Isr.).

<sup>41</sup> The Court denied the petition, without discussing it on the merits, as the petitioners had an alternative remedy by petitioning the administrative courts. File No. 7501/17 High Court of Justice (Jerusalem), Hotline for Refugees and Migrants v. Minister of Interior (May 9, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>42</sup> On the consent granted by a municipality to enroll children of these populations in public schools in the shadow of a petition, see File No. 6162/12 Administrative Appeals, Eilat Municipality v. Maged Mangan (Aug. 27, 2012) (Isr.). On the State's commitment not to enforce the law forbidding employers to employ people who entered Israel through a non-recognized border and lack permit to work, see File No. 6312/10 High Court of Justice (Jerusalem), Kav LaOved v. Government (Jan. 16, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

significant changes into Israel's policies with regard to asylum seekers. In some of the cases, the State conceded to grant these people various rights in the shadow of a pending petition. In the immigration detention context, the tension between the branches of government has peaked since the Court struck down sections of the law authorizing immigration detention three times within a two-year period, leading the legislature to redraft it each time anew.<sup>43</sup> Aware of the high-stakes of this heated dialogue between the branches of government, the Court used various strategies—including the use of constitutional avoidance and comparative law—to mitigate the tension with the representative branches.<sup>44</sup>

The Court had repeatedly exhibited judicial activism, despite the fact that immigration matters—which are infused with profound social, financial, and security-related issues—are traditionally viewed as matters within the sovereign realm of the executive and the legislature.<sup>45</sup> By doing this, the Court attempted to fulfill its counter-majoritarian role, protecting the rights of the disempowered and politically under-represented (or, in this case, unrepresented) minority group of undocumented entrants. Yet at the same time, the Court risked retaliation and curtailment of judicial power. The government and some of the political parties which support it responded to some of these Court's decisions in an extreme manner, threatening to curtail the Court's power. They initiated bills to amend the Basic Laws of the State of Israel, which the Court treats as Israel's formal supreme constitution,<sup>46</sup> but that enjoy light entrenchment so that the Knesset may amend them in most instances by a simple majority.<sup>47</sup> Of particular importance in this context is coalition members' bills that would have incorporated a general override clause in Basic Law: Human Dignity and Liberty, to allow the Knesset to re-enact laws struck down by the Court to protect constitutional rights.<sup>48</sup> The former Minister of Justice, Ayelet

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<sup>43</sup> See *supra* note 35.

<sup>44</sup> See *infra* Parts 3 and 4.

<sup>45</sup> See, e.g., HCJ 7052/03 Adalah v. Minister of Interior 61 P.D. 202 (2006) (Isr.).

<sup>46</sup> See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Collective Vill. 49(4) PD 221 (1995) (Isr.).

<sup>47</sup> Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L. Q. 457 (2012); Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. 349 (2012).

<sup>48</sup> See Jonathan Lis & Revital Hovel, *Right-Wing Ministers Unveil Bill to Let Knesset Override Supreme Court*, HAARETZ (Dec. 20, 2017),

Shaked, made it a goal to “pack” the Court with conservative justices through judicial appointments (but with no attempt to increase the size of the Court).<sup>49</sup> The legal drama, in addition to the human drama, weighed heavily on the Court as it dealt with these migration-related cases.

This Article argues that the Israeli Supreme Court took a courageous judicial stance intended to protect the constitutional rights of the weakest members of Israeli society, determining that undocumented entrants’ rights are constitutionally protected, even at the price of taking heat from the representative branches.<sup>50</sup> At the same time, many of its decisions were formalistic, even technical, and did not address in a substantial way some of the major constitutional or international law issues on the agenda. Most importantly, by choosing the formalistic path, the Court failed to hold the representative branches accountable for their policy choices regarding undocumented entrants. Thus, even after the Court’s decisions, these branches could argue that the population at hand is comprised of economic migrants. The Court should have compelled the representative branches to conduct an effective and fair RSD process that would yield decisions within a reasonable time, whether the individuals are migrant workers or refugees. The Court should have further treated the length of a person’s presence in the country as a consideration that may lead to the acquisition of rights. We suggest that these formalistic and reductionist approaches were a conscious strategic attempt on the part of the Court to downplay the significance of its decisions. But the Court’s strategy of leaving ambiguity in its treatment of the substantive issues has backfired, and the costs of this decision outweigh the benefits. The heavy prices of this approach are borne by the political branches (including the Court) and ultimately, by the Israeli society and, perhaps most of all, by the undocumented entrants, which the Court sought to protect. This human and legal drama should be studied closely by any country that confronts similar dilemmas.

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<https://www.haaretz.com/israel-news/.premium-bill-would-let-knesset-override-supreme-court-1.5629190>.

<sup>49</sup> Justice Minister Ayelet Shaked, *Shaked: The Process of Changing the Supreme Court Has Ended*, ISR. NAT’L NEWS (Feb. 23, 2018, 02:28 AM), <https://www.israelnationalnews.com/News/News.aspx/242313> [<https://perma.cc/8MZD-PAQ7>].

<sup>50</sup> Cf. *Boumediene v. Bush*, 553 U.S. 723 (2008) (discussing the civil status of people as one of the considerations affecting the question whether they enjoy constitutional rights).

Our criticism of the Israeli approach is especially applicable to Trump's recent asylum ban,<sup>51</sup> which if upheld by the Court in *Trump v. E. Bay Sanctuary Covenant*,<sup>52</sup> will lead to results similar to those already evident in Israel. Trump's asylum ban would mean that refugees otherwise entitled to full protection would enjoy mere protection against removal. The implications for the asylum seekers and society at large of a policy that leaves people in a liminal state of mere protection from removal are manifest in the Israeli story and should serve as a warning to the U.S.

Interestingly, it was the lower courts, particularly the Immigration Appeal Tribunal, the Israeli equivalent of the Board of Immigration Appeals (BIA),<sup>53</sup> that occasionally stood up to the challenge and started to impose on the administrative branches the costs of failing to reach individual RSD decisions in a timely fashion.<sup>54</sup> A similar judicial pattern, in which lower courts are on occasion more "courageous" than the Supreme Court in guarding asylum seekers' rights, is manifested in the U.S. as well, and this Article reveals this dynamic when discussing the *Jennings v. Rodriguez* case.<sup>55</sup>

Part 2 of this Article argues that at times courts may courageously protect rights yet fail in their ultimate task of holding the political branches accountable. In the Israeli context, although the Court invalidated immigration detention three times in two

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<sup>51</sup> Proclamation No. 9822, 83 Fed. Reg. 57661 (Nov. 9, 2018).

<sup>52</sup> So far, the Federal District Courts issued a temporary restraining order, followed by a preliminary injunction. See *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018) (order); *E. Bay Sanctuary Covenant v. Trump*, 354 F.Supp.3d 1094 (N.D. Cal. 2018) (order granting temporary injunction); *Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782, 202 L.Ed.2d 510 (2018) (order in pending case), [https://www.supremecourt.gov/orders/courtorders/122118zr\\_986b.pdf](https://www.supremecourt.gov/orders/courtorders/122118zr_986b.pdf) [<https://perma.cc/FG72-LJVB>].

<sup>53</sup> *Immigration Appeal Tribunal, KAN-TOR & ACCO*, <https://www.ktlegal.com/israel-immigration/immigration-appeal-tribunal> [<https://perma.cc/F628-H8FP>]. In the Israeli immigration system, the Population and Immigration Authority clerks make the initial decisions. Individuals may appeal to the Immigration Appeal Tribunal to review these decisions. They may later further appeal to the District Court sitting as an Administrative Court and ultimately to the Supreme Court. *Id.* In the U.S., individuals may appeal the decisions of asylum officers to the immigration judges, then to the Board of Immigration Appeals, then to Circuit Courts, and finally to the Supreme Court. See United States Department of Justice, Board of Immigration Appeals, <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/N8LC-Q9K2>].

<sup>54</sup> See discussion *infra* Part 2.

<sup>55</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

years, it did not use the force of constitutional law to require the representative branches to account for who the individual people are and what rights they acquired as a result of their lengthy presence in the country. Parts 3 and 4 elaborate on the various strategies courts may employ to reduce the tension with the representative branches and their shortcomings. Constitutional avoidance may be more interventionist than invalidation. Comparative law may be used without according enough weight to distinguishing factors. These arguments are shown in the Israeli Court's treatment of immigration detention as well as agreements to remove undocumented entrants to third countries. Particularly, the Court relied heavily on U.S. case law when making some of its decisions, though it should have better accounted for the similarities and differences between the two legal regimes.

## 2. AVOIDANCE OF CONSTITUTIONAL AND INTERNATIONAL HUMAN RIGHTS ISSUES

Perhaps the most evident example of the manner in which the Israeli Supreme Court was determined to protect the rights of this vulnerable population is a series of cases dealing with the constitutionality of the detention of undocumented entrants. Paradoxically, the Court invalidated immigration detention legislation three times without using any of these cases as an opportunity to hold the political branches accountable regarding the most basic question of whether these people should be treated as refugees.

### 2.1. *Engaging in a Three-Stage Judicial Review of Immigration Detention*

When the first Sudanese immigrants entered Israel clandestinely, through the Egyptian border, Israel's Ministry of Justice responded by invoking an old law, titled the Prevention of Infiltration Law (Offenses and Jurisdiction) (The Infiltration Law).<sup>56</sup> The Knesset enacted the Prevention of Infiltration Law in 1954 to allow for the criminalization, detention, and removal of

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<sup>56</sup> Prevention of Infiltration Law (Offenses and Jurisdiction), 5714-1954, SH No. 16 p. 160 (as amended in 2012) (Isr.).



undocumented entrants into Israel.<sup>57</sup> At the time, the State enacted the statute as a state of emergency law and justified it with the need to prevent the entry of terrorists into the country.<sup>58</sup> The security and military apparatuses authorized and executed these detentions and removals. The law provided for administrative tribunals, consisting of military personnel, who tried the cases as courts of first instance and appellate courts. The decisions of these tribunals were final with no right of appeal to civil courts.<sup>59</sup> The law targeted citizens, residents, or visitors from Lebanon, Egypt, Syria, Jordan, Saudi Arabia, Iraq, and Yemen.<sup>60</sup> Israel considered all of these countries “enemy states” at the time of the bill’s passage.

In January 2006, Israel began to apply the law to Sudanese immigrants, some of whom were victims of the harsh events, often classified as genocide, perpetrated in Darfur, as well as entrants from others areas of North and South Sudan.<sup>61</sup> The executive branch justified its application of the law to this population on the basis of general security considerations because of the poor relations (or lack thereof) between Israel and Sudan.<sup>62</sup> Israel applied a parallel law, the Entry into Israel Law of 1952, to other undocumented entrants from non-enemy countries, authorizing shorter immigration detention periods of typically up to sixty days, subject to judicial review, in civil detention facilities rather than in military facilities.<sup>63</sup> Individual detainees challenged the use of the Infiltration Law against Sudanese immigrants in the Supreme Court (sitting as a High Court of Justice) in 2006.<sup>64</sup> In July 2008, the State committed in Court to transferring undocumented entrants caught by the security forces to civil detention facilities ran by the immigration authority

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<sup>57</sup> *Id.* §§ 2–30.

<sup>58</sup> *Id.* §34.

<sup>59</sup> *Id.* §§ 11–23; see also Yonatan Berman, *Detention of Refugees and Asylum Seekers in Israel*, in *WHERE LEVINSKI MEETS ASMARA: ASYLUM SEEKERS AND REFUGEES IN ISRAEL- SOCIAL AND LEGAL ASPECTS* 147, 188 (Tally Kritzman-Amir ed., 2015) (in Hebrew).

<sup>60</sup> *Id.* §1 amended in 2012; see also HCJ 7146/12 Adam v. the Knesset 64(2) PD 717, ¶ 11 (2013) (Vogelman, J., opinion) (Isr.).

<sup>61</sup> See Petition for Israeli Bar Association as Amicus Curiae Supporting HCJ 3208/06 Adam Gubara Tagal v. The Prime Minister (Oct. 7, 2008) (Isr.), [http://www.israelbar.org.il/uploadfiles/darpurs\\_refugees.pdf](http://www.israelbar.org.il/uploadfiles/darpurs_refugees.pdf) [https://perma.cc/N4G6-KFLD] (Isr.); see also Berman, *supra* note 59, at 187.

<sup>62</sup> Kritzman-Amir & Ramji-Nogales, *supra* note 13.

<sup>63</sup> Entry into Israel Law 6712-1952, SH No. 354 (Isr.).

<sup>64</sup> HCJ 3208/06 4 Anonymous Parties v. The Head of the Operations Division in the Israeli Defense Forces (Oct. 7, 2008) (Isr.).

within two to three days. Within fourteen days of a person's detention in such facilities, the State will bring the detainee before an adjudicator to review the detention under the Entry into Israel Law. Only if the security forces found that there are unique individual circumstances that justify it, may the State deviate from this legal arrangement. This decision practically meant that the State committed to refrain from using the Infiltration Law against Sudanese immigrants, who enter through the Egyptian border. The State accepted the position of the petitioners, the district courts, and even army personnel, that it may not apply a presumption of dangerousness against these people. This commitment forms part of the Court's decision in 2008.<sup>65</sup>

But five years later, in 2012, the Israeli legislature introduced an amendment to the Infiltration Law, authorizing the three-year detention of undocumented entrants, and the possibly indefinite detention of enemy nationals, including the Sudanese.<sup>66</sup> The High Court of Justice struck down this amendment, as well as two subsequent amendments to the Infiltration Law or provisions thereof, forcing the legislature to redraft them multiple times.<sup>67</sup>

In the *Adam* decision of September 2013, the Court ruled that a three-year immigration detention period amounted to a criminal penalty, and an unconstitutional infringement of the constitutional right to liberty of these undocumented entrants, and struck down a section of the statute.<sup>68</sup>

The legislature quickly responded by amending the statute in a speedy legislative process, creating a two-track system: the undocumented entrants would be in detention for a year, and the State may further place them in a designated residency center

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<sup>65</sup> See Berman, *supra* note 59, at 189; see also HCJ 3208/06 4 Anonymous Parties v. The Head of the Operations Division in the Israeli Defense Forces (Oct. 7, 2008) (Isr.) (updating announcement of the respondents to the Court, July 10, 2007).

<sup>66</sup> Prevention of Infiltration Law (Offenses and Jurisdiction) (Amendment no. 3 and Temporary Provisions), 5772-2012, SH No. 2332 p. 119, §§30A (C)(3), 30A (D)(3) (Isr.).

<sup>67</sup> Prevention of Infiltration Law (Offenses and Jurisdiction) (Amendment no. 3 and Temporary Provisions), 5772-2012, SH No. 2332 p. 119 (Isr.) [hereinafter Amendment 3]; Prevention of Infiltration Law (Offenses and Jurisdiction) (Amendment no. 4 and Temporary Provisions), 5774-2013, SH No. 2419 p. 74 (Isr.) [hereinafter Amendment 4]; Prevention of Infiltration Law (Offenses and Jurisdiction) (Amendments and Temporary Provisions), 5775-2014, 5775-2014, SH No. 2483 p. 84 (Isr.) [hereinafter Amendment 5]. Prevention of Infiltration Law (Offenses and Jurisdiction) (Temporary Provisions), 5778-2017, SH No. 2673 p. 60 (Isr.) [hereinafter Amendment 6].

<sup>68</sup> HCJ 7146/12 Adam v. the Knesset 64(2) PD 717, 745 (2013) (Isr.).

indefinitely. The statute itself was enacted as a temporary measure valid for three years.<sup>69</sup> Simultaneously, the State opened a residency center right next to the detention facility, in the far south of Israel, remote from any settlement. The statute imposed severe restrictions on the freedom of movement of the “residents,” who had to report three times throughout the day (morning, noon, and evening) to the detention officers within the facility.<sup>70</sup> These requirements effectively prevented them from leaving the facility. The prison authority ran the residency center and subjected the “residents” to administrative sanctions if they disobeyed the rules, which included transfer to the immigration detention facility.

In September 2014, the Court decided in the *Eitan* case—a second petition against the constitutionality of the Infiltration Law—to strike down this new version of the statute.<sup>71</sup> The Court held that the year-long detention period was an unconstitutional infringement of the undocumented entrants’ right to liberty.<sup>72</sup> It further found the nature of the “residency center” problematic since the various restrictions imposed on the undocumented entrants made it almost indistinguishable from a detention facility.<sup>73</sup>

The legislature amended the statute for the second time by liberalizing the detention scheme.<sup>74</sup> It shortened the maximum immigration detention period from a year to three months.<sup>75</sup> It cut down the stay period in the residency center to twenty months and granted the residents some more freedom of movement, having them report to the facility authorities only once a day, at night.<sup>76</sup>

But petitioners brought a third petition before the Court, challenging the constitutionality of the newly amended law. In the *Destá* case,<sup>77</sup> the Court ruled that one must read into the immigration detention scheme an implied condition that the State cannot detain

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<sup>69</sup> Amendment 4, *supra* note 67, §30A, ch. 4.

<sup>70</sup> Amendment 4, *supra* note 67. Regulations to Prevent Infiltration (Offenses and Jurisdiction) (Presence of Resident within the Center and Exit from the Center) (Provisional Provisions), 2013, KT 308.

<sup>71</sup> File No. 7385/13, 8425/13 High Court of Justice (Jerusalem), *Eitan—Israeli Immigration Policy Center v. The Israeli Government* (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Amendment 5, *supra* note 67.

<sup>75</sup> Amendment 5, *supra* note 67.

<sup>76</sup> Amendment 5, *supra* note 67.

<sup>77</sup> File No. 8665/14 High Court of Justice (Jerusalem), *Destá v. The Knesset* (Aug. 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

undocumented entrants even for three months, unless the detention serves the purpose of their identification and removal (whether voluntary or forced). This implies that since Israel was not refouling people to Sudan and Eritrea due to their unstable political climate, it could not hold Sudanese and Eritrean immigrants in detention for the entire three-month period, but rather had to release them upon their identification.<sup>78</sup> The Court further ruled that a mandatory twenty-month long residence in a residency center is unconstitutional since it constitutes too great an infringement of the right to liberty.<sup>79</sup> Accordingly, the Court invalidated the lengthy mandatory residency period but suspended the remedy for six months.<sup>80</sup> During this period of six months, the State would not be permitted to hold persons for longer than twelve months in the residency center. The Court further ordered that the State should immediately release those held for longer at the time of decision.<sup>81</sup> Following this decision, the Knesset introduced a new amendment, shortening the duration of the stay in the residency center to a maximum of twelve months.<sup>82</sup> A subsequent amendment closed down the residency center as of March 15, 2018, since the government believed that it did not serve its purpose any more.<sup>83</sup>

In this series of judicial decisions, the Court displayed judicial activism in striking down three versions of the same law in two years. It led the legislature to cut down the immigration detention period from three years to three months, coupled by a year-long stay in a residency center. This repeated confrontation between the branches of government thus led, at least in principle, to significant

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<sup>78</sup> *Id.* ¶ 5, 41 (Naor, Pres., opinion).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* ¶ 115.

<sup>82</sup> Amendment 6, *supra* note 67.

<sup>83</sup> The government closed the center thinking it was no longer needed in light of its intention to transfer the undocumented migrants, in accordance with bilateral agreements reached with third countries, which the Court had upheld. Prevention of Infiltration Law (Offenses and Jurisdiction) (Temporary Provisions), 5778-2017, HH No. 1167 p. 84, at 85 (Isr.). In media interviews and tweets, officials further justified the decision to close down the Holot residency center by explaining that it no longer deters undocumented migrants from staying in Israel, in light of Court decisions that have improved the living conditions and freedom of movement of those held there. They also argued that running the facility was very expensive and some of the funds could be used to hire more inspectors and remove more people. See Sue Surkes & AFP, *Ministers vote to close Holot migrant detention center*, THE TIMES OF ISRAEL (Nov. 19, 2017), <https://www.timesofisrael.com/ministers-vote-to-close-holot-migrant-detention-center/> [<https://perma.cc/6GF5-9SQ5>].

improvements in the protection of the constitutional right to liberty of undocumented entrants.

## 2.2. *Failing to Determine Who These Migrants Are*

### 2.2.1. *The Failure to Require Accountability*

Nevertheless, remarkably, the Court introduced this dramatic change in the immigration detention regime without requiring the authorities to determine whether the detained persons were refugees or economic migrants. While the legal categorization of undocumented entrants is sometimes challenging,<sup>84</sup> it is obviously critical, as there are clear legal obligations which derive from characterizing people as refugees.

The Court was unable to rely on either the State or the petitioners for the legal categorization of these undocumented entrants. This is because the State prevented their access to the RSD process until 2013,<sup>85</sup> and granted them instead, a group-based protection from refoulement, with very limited access to social and economic rights, as detailed above.<sup>86</sup> The state's terminology and reasons for extending only group-based rather than individual-based protection changed over time, but it was nevertheless clear that these are persons who cannot be returned to their countries of origin.<sup>87</sup> The Court criticized the State's heavy reliance on prolonged group-based protection without determining the duration of such protection,<sup>88</sup> without grounding this form of protection in procedures or regulations, and without anchoring the

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<sup>84</sup> See TALLY KRITZMAN-AMIR, *SOCIO-ECONOMIC REFUGEES* (2009) (Ph.D. dissertation, Tel Aviv University) (on file with author) (regarding the blurry lines between the category of "refugee" and that of "economic migrant").

<sup>85</sup> File No. 3844-17 Court of Appeals, *John Doe & Others v. Ministry of Interior—Population and Immigration Authority* (Dec. 13, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>86</sup> See *supra* Part I.

<sup>87</sup> HCJ 7146/12 *Adam v. the Knesset*, 64(2) P.D. 717, para. 112 (2013), (Arbel, J., opinion) (Isr.).

<sup>88</sup> AdminA 8908/11 *Nesenet Argey Asefu v. The Ministry of Interior*, para. 16 (2011) (Vogelman, J., opinion) (Isr.); HCJ, 7146/12 *Adam v. the Knesset*, 64(2) P.D. 717, para. 9 (2013) (Arbel, J., opinion) (Isr.).

rights of the protected persons.<sup>89</sup> At the same time, the Court refrained from prohibiting the State to use this form of protection. The reliance on group-based temporary protection was not unique to Israel: other countries have relied on temporary protection in cases of large-scale undocumented entry, though Israel applied the protection without enabling access to individual RSD for many years.<sup>90</sup>

Group-based temporary protection has the advantage of granting immediate relief without the need for a case-by-case determination of refugee status, which is costly and administratively burdensome for states. It is a regime of fewer rights to more people: it can also cover populations which without it would not be entitled to protection, but in the absence of a binding international instrument codifying this regime, temporary protection grants those protected fewer rights. It is intended, however, to be a temporary regime. States cannot substitute their obligations under the Refugee Convention with group-based temporary protection.<sup>91</sup> Additionally, whereas states must meet clear standards for the termination of the protection of refugees,<sup>92</sup> there are no such standards for the termination of temporary protection.<sup>93</sup>

Granting temporary protection also allows states to postpone dealing with individual persons, since they are handled as members of their group of nationality, or as demographics. Individuals do

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<sup>89</sup> See *id.* (Hayut J., opinion); HCJ, 7146/12 Adam v. the Knesset, 64(2) P.D. 717, para. 9 (2013) (Arbel, J., opinion) (Isr.).

<sup>90</sup> See Randall Hansen, et al., *Report on the Workshop on Refugee and Asylum Policy in Practice in Europe and North America*, 14 GEO. IMMIGR. L. J. 801, 809 (2000) (“The issue of how long protection should remain temporary if conflict continues received considerable attention. Current policies vary considerably, from three years in Holland to seven years in the United Kingdom.”).

<sup>91</sup> Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT’L L. 279 (2000); Joseph Pugliese, *The Incommensurability of Law to Justice: Refugees and Australia’s Temporary Protection Visa*, 16 L. & LITERATURE 285, 296–98 (2004); Scott Reynolds, *European Council Directive 2001/55/EC: Toward a Common European Asylum System*, 8 COLUM. J. EUR. L. 359 (2002).

<sup>92</sup> Refugee Convention, *supra* note 8, art. 1(C). Under the section, the protection of the Convention shall cease to apply to a refugee if, inter alia, “[h]e can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality”. *Id.* art. 1(C)(5).

<sup>93</sup> Joan Fitzpatrick, *supra* note 91, at 284.

not need – nor get the opportunity – to tell their stories and establish a well-founded fear of persecution. Instead, it is sufficient that they prove their nationality. Their voice is unheard, their humanity unexposed, and they do not seem relatable. They are not perceived in their entirety, but rather their existence is narrowed down to their “otherness.”<sup>94</sup>

In lieu of requiring the State to make a determination on the international status of the individuals, the Israeli Supreme Court referred to the individuals subject to this immigration detention regime as “infiltrators”.<sup>95</sup> While the use of this term is technically justifiable, as this is the term used in the legislation itself,<sup>96</sup> it is also a derogatory term. The term implies bad faith on the part of the undocumented entrant, as well as possibly a harmful intent. “Infiltrators” is a term that directs the focus on the undocumented entry, while “refugees” is a term that focuses on the reasons which are behind the decision to leave the country of citizenship or residency. “Infiltrators” is also a term that maintains the framing of these individuals as the impersonal “others.” These implied meanings did not escape the Court, and though some of the Justices hesitated using this term, they nevertheless chose to continue using it as the appropriate legalistic term under Israeli law.<sup>97</sup> Further, the Court used this term, while admitting it is difficult to establish the correct categorization of these individuals.<sup>98</sup>

It is difficult to understand how the Court could have made decisions on the matter of immigration detention without distinguishing between different types of undocumented entrants and without requiring the State to reach a decision within a reasonable and predefined period of time in pending applications for refugee protection. The categorization has an impact on the

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<sup>94</sup> Tally Kritzman-Amir, “Otherness” as the Underlying Principle in Israel’s Asylum Regime, 42 ISR. L. REV. 603, 619 (2009).

<sup>95</sup> HCJ 7146/12 Adam v. the Knesset, 64(2) P.D. 717, 745 (2013); File No. 7385/13, 8425/13 High Court of Justice (Jerusalem), Eitan—Israeli Immigration Policy Center v. The Israeli Government (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 8665/14 High Court of Justice (Jerusalem), Desta v. The Knesset para. 4 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>96</sup> Prevention of Infiltration Law (Offenses and Jurisdiction), *supra* note 22.

<sup>97</sup> HCJ 7146/12 Adam v. the Knesset, 64(2) P.D. 717, paras. 10–12 (2013), (Vogelman, J., concurring opinion) (Isr.).

<sup>98</sup> File No. 8665/14 High Court of Justice, Desta v. The Knesset (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 7146/12 Adam v. the Knesset, 64(2) P.D. 717, paras. 7–8 (2013) (Vogelman, J., opinion) (Isr.).

rights of the undocumented entrants under both international and constitutional law. Arguably, the constitutionality of the length of detention may differ when the detained are refugees or economic migrants.

The proper categorization of the undocumented entrants was an issue that explicitly came up before the Court. The parties to the different petitions raised the dispute as to the characterization of these individuals and thus this was an issue that the Court could have tackled.<sup>99</sup> The Court should have created a rebuttable presumption of refugee status in favor of these people, if the State did not make a determination within the defined period. Such a ruling could have incentivized the government to conduct efficient RSD processes. This position would have also been supported by international refugee law, which views recognizing the refugee status of a person as merely declaratory and allows states to refrain from processing migrants through individualized RSDs, so long as they grant them the same rights-protections as granted to refugees.<sup>100</sup> Such a ruling would have also been in line with the Israeli immigration detention norms, which instructed the State to release from immigration detention asylum seekers who submitted asylum application, if those applications were not examined within three months, or whose RSD was not completed within nine months.<sup>101</sup>

Since the Court refrained from requiring the State to determine whether these migrants are refugees or economic migrants, it did not confront the complexities of the Israeli RSD process. As mentioned above, PIA admitted in the Israeli legislature that it granted less than 0.1% of asylum seekers from Sudan and Eritrea refugee status.<sup>102</sup> Such markedly low recognition rates differ

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<sup>99</sup> See, e.g., File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset* para. 5 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.). However, the petitioners' position was that even if the detained are not refugees, they should not be detained since they are not deportable. Petition in HCJ 8665/14 *Desta v. The Knesset*, paras. 158-59 (Dec. 18, 2014) (Isr.), <https://law.acri.org.il/pdf/petitions/hit8665.pdf> [<https://perma.cc/GKM9-DFXB>].

<sup>100</sup> JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 154-92 (Cambridge University Press 2005).

<sup>101</sup> See HCJ 7146/12 *Adam v. the Knesset*, 64(2) P.D. 717, para. 37 (2013) (Vogelman, J., opinion) (Isr.).

<sup>102</sup> See *supra* Part I.



significantly from those of other democracies.<sup>103</sup> UNHCR, as well as Israel's own State Comptroller, have criticized the Israeli treatment of Eritreans and Sudanese, calling its RSD processes unfair and ineffective.<sup>104</sup> The Israeli Supreme Court criticized this exclusionary asylum regime on a handful of occasions,<sup>105</sup> but it never went ahead and required the State to conduct a fair RSD process, even when this remedy was specifically requested.<sup>106</sup> Nor did the Court apply a

<sup>103</sup> In comparison, in EU member states, in the third quarter of 2017, recognition rates of Eritrean and Sudanese as refugees were 54.45% (3,330 out of 6,060) and 50.2% (1,200 out of 2,390) respectively. See *First instance decisions by outcome and recognition rates, 30 main citizenships of asylum applicants granted decisions in the EU-28, 3rd quarter 2017*, EUROSTAT STATISTICS EXPLAINED (Dec. 13, 2017), [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First\\_instance\\_decisions\\_by\\_outcome\\_and\\_recognition\\_rates\\_30\\_main\\_citizenships\\_of\\_asylum\\_applicants\\_granted\\_decisions\\_in\\_the\\_EU-28\\_3rd\\_quarter\\_2017.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_by_outcome_and_recognition_rates_30_main_citizenships_of_asylum_applicants_granted_decisions_in_the_EU-28_3rd_quarter_2017.png) [https://perma.cc/9GMJ-KSCN]. A higher percentage of the Eritreans and Sudanese enjoys other protections. The undocumented migrants entering Israel may very well have been different from those reaching Europe even when they came from the same countries. To enter into Israel, one had to walk, rather than cross oceans. But even that cannot explain the sharp different recognition rates of Israel and Europe.

<sup>104</sup> UNHCR's position on the status of Eritrean and Sudanese nationals defined as 'infiltrators' by Israel, UNHCR 1-2 (Nov. 2017), <https://www.refworld.org/docid/5a5889584.html> [https://perma.cc/34R6-CB3Z]; State Comptroller's Annual Report, *supra* note 10, at 1419-64.

<sup>105</sup> See, e.g., File No. 7385/13, 8425/13 High Court of Justice (Jerusalem), Eitan – Israeli Immigration Policy Center v. The Israeli Government, para. 35 (Sept. 22, 2014) (Vogelman, J., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (“A comparative view shows that the world-wide percentage of approval for asylum requests submitted by Eritrean and Sudanese nationals – the countries of origin of the majority of the infiltrators in Israel – are significantly greater than the percentage in Israel. In 2012 (the last year with updated figures), the worldwide percentage for the recognition of Eritreans as refugees was 81.9%, and 68.2% for Sudanese (see the current Statistical Yearbook of the United Nations High Commissioner for Refugees, pp. 102, 104). According to the figures provided by the State, which are current as of March 3, 2014, it appears that less than 1% of asylum requests submitted in Israel by Eritrean nationals were approved, and not even one requests from Sudanese nationals was approved [ . . . ]”); File No. 8665/14 High Court of Justice (Jerusalem), Desta v. The Knesset, para. 3 (Aug. 11, 2015) (Hayut, J., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (“Thus, from July 2009 until Feb. 5, 2015, a total of nine asylum requests submitted by Sudanese and Eritrean nationals were approved, and 1,037 requests were denied. This data puts the rate of approval for asylum requests submitted in that period by Sudanese and Eritrean nationals in Israel at about 0.9%. When this figure is compared to the percentage of asylum requests of these nationals worldwide, the comparison itself raises questions as to the manner in which the state examines and decides upon such requests, as what comes out is a product of what goes in”).

<sup>106</sup> In petitions attacking the fact that the State dragged its feet and refrained from deciding cases of Sudanese asylum seekers from areas of ongoing conflict, the Court agreed to continuous extensions to allow the State excessive time for the completion of refugee status determination. See File No. 4630/17 High Court of

presumption that they are refugees, given the State's failure to determine their status. For the State, it was probably preferable to be seen as slow to determine individual cases, rather than be perceived as rejecting Sudanese and Eritrean asylum seekers at a disproportionately higher rate than do other countries.<sup>107</sup> The Court let the representative branches get away with this ambiguity.

### 2.2.2. *The Accountability Role of Courts*

It is a primary task of courts to bring the political branches to account for their actions. Even without the power to invalidate statutes, courts have an array of powers that allow them to expose the true nature of political action as well as make the issue before them salient. The courts may contribute to a culture that demands honesty, deliberation, and accountability, helping to create a more informed and conscious decision-making process for society at large. By exposing the true nature of political action, the courts enable democratic processes to kick in and civil society to exert pressure on decision-makers, potentially deterring action that, if not for the exposure, would have been pursued.

The role of the courts in holding other branches accountable is manifest in various common law doctrines. One example is the maxim that the legislature must explicitly empower the administrative branch to infringe rights, otherwise the courts would interpret the grant of authority as not including such power.<sup>108</sup> The requirement of explicitness is a form of accountability. The constitutional avoidance doctrine, which enables courts to prefer a statutory interpretation that aligns with the constitution rather than

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Justice (Jerusalem), Adam Gubara Tagal v. The Prime Minister (Oct. 29, 2018) (in Hebrew) (Isr.); *see also* HCJ 4630/17 Adam Gubara Tagal v. The Prime Minister (Dec. 17, 2018) (Isr.) (updating Response on Behalf of the Respondents).

<sup>107</sup> As discussed in the text accompanying notes 8 & 9, the State's legal position on the forced army draft prevented most Eritreans from receiving protection. This legal position was overturned by the lower tribunal in the Mesegene Case. *See* File No. 1010-14 Appeals Tribunal (Jerusalem), John Doe v. Ministry of Interior (Feb. 15, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The State has appealed this decision, but withdrew the appeal before the District Court reached a decision. *See* File No. 12154-04/18 Administrative Appeals, The State of Israel – The Population and Immigration Authority v. Joe Doe (Feb. 15, 2018) (in Hebrew) (Isr.).

<sup>108</sup> *See* Rivka Weill, *Juxtaposing Constitution-Making and Constitutional-Infringement Mechanisms in Israel and Canada: On the Interplay between Common Law Override and Sunset Override*, 49 ISR. L. REV. 103, 108 (2016).

one that would lead to the incompatibility and invalidity of a statute, may be interpreted in a similar vein.<sup>109</sup> If the political branches disagree with the statutory interpretation adopted under the constitutional avoidance doctrine, they may make their will to infringe rights more explicit. The non-delegation doctrine enables the invalidation of administrative action, because the issue should be dealt with by the legislature, not the executive.<sup>110</sup> It, too, is an accountability mechanism that prevents the legislature from escaping responsibility by delegation to the regulatory bodies.

The beauty of this arsenal of tools is that the courts are within their traditional roles as interpreters or supervisors of the administrative branch, which is compatible even with a parliamentary sovereignty system. Yet, they may powerfully change the incentives of the political actors. Once the political actors understand that they will pay a significant political price for their actions, they may change course. Justice Louise Brandeis rightly said: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>111</sup>

Even the explicit legislative override mechanism found in Canada and Israel owes its birth to this accountability idea.<sup>112</sup> The legislature may infringe constitutional rights, but must override them explicitly in a statute, thus, giving full accountability for its actions. The same applies for the British and New Zealand non-compatibility frameworks, which enable courts to declare a statute incompatible with certain rights without striking the statute down.<sup>113</sup> This time the courts are the ones to extract a political price from the legislature through publicity.

While the Israeli Supreme Court courageously invalidated three statutes or provisions thereof in a two-year period to protect the right to liberty of undocumented entrants, it failed to use these

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<sup>109</sup> See *infra* Part 3.1.

<sup>110</sup> See Cass R. Sunstein, *Nondelegation Canons*, 67 U CHI. L. REV. 315 (2000).

<sup>111</sup> LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (2009).

<sup>112</sup> See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, §33 (U.K.); Basic Law: Freedom of Occupation, 5752, SH No. 1454 p. 90, § 4 (Isr.).

<sup>113</sup> See, e.g., Human Rights Act 1998, c. 42 (UK); *Taylor v. Attorney General* [2018] NZSC 104 (N.Z.); Rivka Weill, *Exploring constitutional statutes in common law systems*, in *QUASI-CONSTITUTIONALITY AND CONSTITUTIONAL STATUTES: FORMS, FUNCTIONS, APPLICATIONS* 64 (Richard Albert & Joel I. Colón-Ríos eds., Routledge 2019) [hereinafter Weill, *Constitutional Statutes*].

opportunities to hold the representative branches accountable on the most fundamental question of all: deciding the identity of the individuals composing the group and the corresponding obligations of the State deriving from it. Despite criticizing the State's heavy reliance on a prolonged group-based protection, the Court refrained from forcing the State to make individual determinations on the status of these people nor grant them broader comparable rights to refugees.

### 2.2.3. *The Constitutional and International Law Implications*

It could be argued that the Court impliedly applied norms of refugee law to this population without determining explicitly that they are either refugees or presumptively refugees (until proven otherwise) for the sake of immigration detention. For example, the Court referred to Article 31 of the Refugee Convention,<sup>114</sup> which instructs:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.<sup>115</sup>

This section conveys an understanding of the international community that refugees are often not in a position to obtain travel documents and entry permits to the countries to which they flee, and prohibits penalizing them for their undocumented entry or presence.

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<sup>114</sup> See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, paras. 44, 68 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>115</sup> Refugee Convention, *supra* note 8.

The Queen's Bench Division in the U.K. interpreted the article to apply to asylum seekers, prior to their being recognized as refugees. It thus held that asylum seekers should not be prosecuted for possessing false documents on arrival in the U.K.<sup>116</sup> It held that entry could only be gained in many cases by the use of false documents.<sup>117</sup> This result aligns with a perception of refugee status as merely declarative, rather than constitutive.<sup>118</sup>

Allegedly, "[t]he expression "coming directly" in Article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there."<sup>119</sup> In the Israeli context, it would also apply to persons who have entered Israel after crossing through Egypt, but could not receive protection there. The Court refers to this section in the Refugee Convention, but refrains from explaining why it applies to the migrants at hand.<sup>120</sup> At the same time, the Court interprets the section as allowing detention

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<sup>116</sup> See *Regina v Uxbridge Magistrates' Court and another, Ex p Adimi Regina v Crown Prosecution Service, Ex p Sorani Regina v Secretary of State for the Home Department, Ex p Sorani Regina v Secretary of State for the Home Department and another, ex p Kaziu* [2001] Q.B. 667, 674, [https://www-iclr-co-uk.proxy.library.upenn.edu/document/2001002662/casereport\\_65817/html?query=2001+Q.B.+667+&filter=&fullSearchFields=&page=1&sort=relevance&pageSize=10#](https://www-iclr-co-uk.proxy.library.upenn.edu/document/2001002662/casereport_65817/html?query=2001+Q.B.+667+&filter=&fullSearchFields=&page=1&sort=relevance&pageSize=10#) [<https://perma.cc/UUV4-38Q8>].

<sup>117</sup> *Id.*

<sup>118</sup> According to the Office of the United Nations High Commissioner for Refugees (UNHCR): "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee." UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, para. 28 U.N. Doc. HCR/1P/4/ENG/REV.3 (Dec. 2011), <http://www.refworld.org/docid/4f33c8d92.html%20%5baccessed%2023%20July%202018> [<https://perma.cc/S2SW-F676>].

<sup>119</sup> UNHCR, *UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, para. 4 (Feb. 1999), <https://www.refworld.org/docid/3c2b3f844.html> [<https://perma.cc/XN7Q-Q4WF>].

<sup>120</sup> See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, paras. 44, 68 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

and the imposition of restrictions on the freedom of movement of asylum seekers before the determination of their status,<sup>121</sup> rather than as it was meant to be applied, as prohibiting such restrictions as a general rule.<sup>122</sup> Israel is not the only country to offer this restrictive interpretation of the section. Other countries detain or restrict freedom of movement of asylum seekers prior to determining their status.<sup>123</sup>

Moreover, even if the Court (mistakenly) interpreted the Refugee Convention to allow detention, it should have mattered whether the individuals are economic migrants or refugees. The purpose of detention of each of these two types of migrants differs and affects the proportionality of the length of their detention. While migrant workers may be detained to enable their removal to their home countries, refugees cannot be refouled to a country where their life or liberty may be threatened on account of “race, religion, nationality, membership of a particular social group or political opinion.”<sup>124</sup> Their detention is not allowed under international law, by and large, save for reasons of identity verification or due to security and public order considerations.<sup>125</sup>

Interestingly, the judicial restraint of the Supreme Court sometimes signifies the exact opposite of some of the decisions of the lower courts. The lower Appeals Tribunals expressed on occasion harsher critique of the representative branches, pointing to unreasonable delays in the processing of individual asylum applications, or the barriers to applying for asylum. They granted to some of these applicants permits to reside in Israel, until the Minister of Interior decides on their RSD applications.<sup>126</sup> The

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<sup>121</sup> *Id.* at para. 44 (“Although these sections treat restrictions upon freedom of movement, according to the accepted interpretation they also apply to the detention of persons who unlawfully entered the state in order to file an asylum application”).

<sup>122</sup> See UNHCR Guidelines on Applicable Criteria and Standards, *supra* note 119, para. 3 (stating that restrictions should not be automatic, unduly prolonged or without necessity).

<sup>123</sup> See *infra* Part 4 (regarding the U.S.); see also Pugliese, *supra* note 91 (regarding Australia); *infra* Part 4 (regarding residency centers).

<sup>124</sup> Refugee Convention, *supra* note 8, article 33.

<sup>125</sup> See Refugee Convention, *supra* note articles 9, 26, 31; see also UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 24 (2012), <https://www.refworld.org/docid/503489533b8.html> [<https://perma.cc/J4PD-YJK7>].

<sup>126</sup> See, e.g., File No. 4447-17 Appeals Tribunal, John Doe v. Ministry of Interior—Population and Immigration Authority (Feb. 6, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File 3844-17 Appeals Tribunal, John

Appeals Tribunals also criticized the State's sweeping legal position that rejected the vast majority of applications of Eritrean asylum seekers. The State determined that fleeing a country to evade army service, does not fulfill the requirements of the Refugee Convention. Rejecting the State's position, the Appeals Tribunals held that fleeing the army may at times be an act that leads the Eritrean authorities to attribute to the evaders political opinions that oppose the regime. They may thus persecute those people on political grounds, if the State returned them to Eritrea. While institutionally lower courts might be more inclined to demonstrate judicial restraint, and are more institutionally dependent, they have, on occasion, shown a considerable degree of activism in these cases. They occasionally held the State accountable for its failure to conduct effective RSD processes in individual cases and even granted refugee status to an Eritrean.<sup>127</sup> But unlike Supreme Court decisions, these lower court decisions do not have precedential value—they can be overturned<sup>128</sup>—and they do not have the teeth of a constitutional case.<sup>129</sup>

The U.S. judicial system is facing similar challenges in the context of the recent asylum ban. The ban would effectively prevent the courts from adjudicating asylum requests of those entering the U.S. in an undocumented manner, i.e., not through designated ports of entry, and enable the entrants to enjoy protection against removal at most.<sup>130</sup> While the legal challenges against the American asylum ban focus on its compliance with statutory law,<sup>131</sup> this Article suggests that the ban may infringe international refugee norms as well, along the lines of some of the secondary arguments made in these legal challenges. Upholding such a regime will prevent the

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Doe & Others v Ministry of Interior—Population and Immigration Authority (Dec. 13, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>127</sup> See, e.g., File No. 1010-14 Appeals Tribunal, John Doe v. Ministry of Interior—The Population and Immigration Authority (Feb. 15, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (providing an example of a state being held accountable for its failure to conduct effective RSD processes).

<sup>128</sup> See, e.g., CA 32641-10/18 The State of Israel—The Population and Immigration Authority v. Joe Doe (2017) (Isr.) (returning the decision in the Mesegene case to the lower court).

<sup>129</sup> Compare with the analysis of the Courts' rulings on migrant workers' rights issues. See Ofer Sitbon, *The Place of the Courts in Israel and France in the Formation of the Policy on Migrant Workers*, 10 L. & Gov. 273, 290-314 (2007) (in Hebrew).

<sup>130</sup> See *supra* note 51 and accompanying text.

<sup>131</sup> See *supra* note 52 and accompanying text.

courts from fulfilling their role to bring the representative branches to accountability.

### 2.3. *Failing to Refer to the Legal Implications of the Duration of Presence*

#### 2.3.1. *The Constitutional Law Dimension*

In various cases dealing with the constitutional rights of undocumented entrants, the Court had consistently refrained from making the length of their presence in the country into a constitutional consideration with implications on the scope of the rights they may be entitled to. This is despite the fact that the longer a person is positioned in a “temporary” state of uncertainty, the more it negatively affects his or her human dignity.<sup>132</sup>

The majority of decisions in the detention cases, for example, did not refer to legal, social or moral consequences, which derive from the fact that while some of these undocumented entrants have been in Israel for a short period of time, others were present for over a decade. Members of the Court were aware of this distinction between old and new entrants. Justices Amit and Vogelmann in separate concurring opinions suggested that, from a constitutional perspective, it might be less legitimate to transfer long-term undocumented entrants to residency centers, because of the greater disruption to their lives, as compared to new arrivals.<sup>133</sup>

The cases on immigration detention are not the only cases in which the majority of the Court refused to derive constitutional consequences from the duration of a person’s presence in the

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<sup>132</sup> See, e.g., Pugliese, *supra* note 91 (examining the negative effects of Australia’s Temporary Protection Visa regime on the lives of refugees and asylum seekers); but see Joseph Melnick & Susan Roos, *The Myth of Closure*, 11 GESTALT REV. 90-107 (2007) (challenging the notion that a lack of emotional closure forms the basis of neurosis associated with grief and loss).

<sup>133</sup> See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 5 (Aug. 11, 2015) (Amit, J., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.); *id.* at para. 52 (Vogelmann, J., opinion). Both Justice Amit and Justice Vogelmann dissented on a different matter. They held that the section of the law that allows the authorities to transfer detainees in residency centers to full detention in regular detention facilities as a disciplinary sanction is unconstitutional as it arises to the level of a criminal sanction in light of the lengthy detention period authorized under it.



country. In a later case regarding the possible detention and supposedly “voluntary” removal of asylum seekers to third countries, the Court mentioned the duration of a person’s presence in Israel under a form of temporary protection, as a personal consideration, that the State should weigh when considering removal.<sup>134</sup> However, this was not presented as a constitutional issue, but rather as a humanitarian consideration. In a case challenging the lack of possibility to naturalize for refugees, the Court determined that the fact that a person has stayed in Israel eleven years, out of which he was a recognized refugee for seven years, does not create a legal obligation on the part of the State to grant him or her permanent, as opposed to temporary, residency.<sup>135</sup> Finally, when considering the policy of not granting asylum seekers a right to work, the Court determined that the commitment of the State to refrain from enforcing the prohibition on their employment “strikes a proper balance in the difficult and sensitive reality.”<sup>136</sup> It did not, yet again, treat the duration of presence as a constitutional consideration, impacting the right to gainful employment.<sup>137</sup>

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<sup>134</sup> See File No. 8101/15 Administrative Appeals, *Zegete v. Minister of the Interior* (Aug. 28, 2017) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>135</sup> See File No. 35344-03-10, Administrative Affairs (Jerusalem), *Galan v. Minister of Interior* (Apr. 15, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.). For an argument that a lengthy stay as a refugee in a country may give rise to a right for permanent residency and even citizenship. See Livnat, *supra* note 10.

<sup>136</sup> File No. 6312/10 High Court of Justice (Jerusalem), *Kav Laoved v. the Government* (Jan. 16, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); see also Yuval Livnat, *Refugees, Employers, and “Practical Solutions” in the High Court of Justice: Responding to HCJ 6312/10 Worker’s Hotline v the Government*, 3 MISHPATIM ONLINE 23 (2011) (arguing against the decision as providing insufficient protection to asylum seekers).

<sup>137</sup> Cf. File No. 1708/07 District Court (Tel-Aviv-Jaffa) *Amon v. Minister of Interior* (Sept. 25, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The district court, sitting as an administrative court, decided that a documented migrant worker who stayed in Israel 17 years with a permit did not acquire a right to residency in Israel. It further ruled that the legislature did not grant the Minister of Interior discretion to grant permanent residency to documented migrant workers simply because of a lengthy stay in Israel. A petition to the Supreme Court led the Court to convince the migrant to withdraw the petition and request residency based on marriage in common-law with an Israeli citizen. File No. 8947/08 Administrative Appeals (Jerusalem), *Amon v. The Minister of Interior* (July 1, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The Court noted, without expressing an opinion on the merits, that its decision did not prevent the Minister of Interior from adopting a procedure with regard to future cases of documented migrant workers who spend many years in Israel.

Moreover, in all of these decisions, none of the Justices suggested that the duration of stay impacts the constitutional duties that the State may owe to these people. The State owes greater constitutional obligations to those whose presence is tolerated longer, even if they are not regularized or officially admitted. After all, by not resolving their legal status earlier, the State contributed to their presence and the formation of various types of reliance interests in their ability to continue to develop their lives in the country. The State may have the least obligations to those who never entered it, while its obligations to those who reside in it—with or without formal legal status—expand as time passes.<sup>138</sup>

Had the Court inferred any constitutional significance from the duration of stay, it would have escalated tension with the representative branches. In fact, the policy of the government, which the Court has upheld in different cases, was one of two contradictory notions: 1) Migrants, whether documented or undocumented, should only be allowed to remain in Israel temporarily, so that they would not be allowed to claim rights on the basis of being firmly integrated into Israeli society; 2) Migrants who have remained in Israel for a long period of time, despite Israel's policies to prevent such occurrences, cannot expect to be granted any rights on the basis of their long presence and integration into Israeli society.<sup>139</sup>

In the cases on immigration detention, the State preferred that those who were present in Israel the longest—the first to arrive—would move to the residency center first to prevent their integration

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<sup>138</sup> The Court offered these varying obligations of the State towards foreigners and those residing within its borders as a justification for the Law of Return. "It is true, members of the Jewish nation were granted a special key to enter (see the Law of Return-5710-1950), but once a person is lawfully present as a citizen, he enjoys equal rights with all other household members." CA 6698/95 Ka'adan v. Israel Land Auth., 54(1) PD 258, 280-81 (2000) (Isr.); see *Zadvydas*, 553 U.S. at 693 (majority opinion) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographical borders."). That the length of stay within a country matters is reflected in the immigration laws of various countries that make the passage of time a prerequisite for acquiring the status of permanent resident or citizen.

<sup>139</sup> *Livnat*, *supra* note 10, at 369-76. The policy is different with regard to migrants who come to Israel under the Law of Return and may immediately become Israeli citizens. The Law of Return applies to Jews and their immediate family members.

into Israeli society.<sup>140</sup> This follows a logic that is opposite to the one for which we are arguing. It should be noted that, since the detention cases were decided after Israel had already erected a fence limiting further undocumented entry through its southern border, almost all of the persons subject to immigration detention or confinement in the residency center were people who had resided in Israel for a lengthy period of time.<sup>141</sup> Distinguishing between undocumented people based on the length of their presence would have, at least, mitigated the infringement of their constitutional rights.

Treating the undocumented entrants as one indistinguishable mix migration flow, a group composed of possible refugees as well as economic migrants, with both newcomers and oldcomers, led to harsh consequences in terms of their human dignity. This group-based approach prompted the Court to state that it does not matter who is placed in residency centers, as long as *someone* is, to reduce the burden on Israel's disempowered neighborhoods. The President of the Court, Miryam Naor, held in the majority opinion:

I am of the opinion that realizing this purpose does not require holding any *particular* infiltrator in the residency center. It is sufficient that a group of *various* infiltrators be held in the residency center. Indeed, it is to be assumed that when one infiltrator is released from the residency center, another infiltrator will take his place. I am of the opinion that this turnover between the infiltrators staying in the residence center and others from outside realizes the purpose of the Law. It is sufficient that at any given time, part of the infiltrator population [ . . . ] is removed from the urban centers.<sup>142</sup>

This cannot possibly align with human dignity, which requires treating persons as an end, rather than a means, to promote broader social purposes.<sup>143</sup> The Court has repeatedly held in other detention contexts that a person's liberty cannot be compromised by the executive branch without criminal proceedings with full due

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<sup>140</sup> See, e.g., File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. Knesset*, para. 5 (Aug. 11, 2015) (Amit, J., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.); *id.* at para. 52 (Vogelman, J., opinion).

<sup>141</sup> See *id.* at para. 2 (Hendel, J., opinion).

<sup>142</sup> *Id.* at para. 100 (Naor, Pres., opinion).

<sup>143</sup> See H CJ 6427/02 *Movement for Quality Gov't v. Knesset* 61(1) PD 619 (2006) (Isr.).

process guarantees, unless his individual actions justify detention to prevent danger to others or to prevent his flight from legal proceedings.<sup>144</sup> A person's liberty cannot be compromised to serve other social ends, important as they may be.<sup>145</sup>

At the same time that the Supreme Court referred to undocumented entrants *en masse*, the lower courts referred to them in light of their individual traits, including their immigration story and the duration of their presence in the country. This sometimes led the lower courts to take a braver stance than the Supreme Court. Such was the case, for example, in the decision of the Appeals Tribunal to grant temporary residence status to five Sudanese asylum seekers who had been in Israel for six to ten years and waiting for a decision on their asylum application for over a year.<sup>146</sup> A second set of cases involved persons from Darfur, who waited four to five years for a RSD decision, and were not included in the list of 500 Darfurians eligible for temporary residence status on humanitarian grounds. In one decision, the Court ordered that the State should grant the asylum seeker temporary residency status and determine his RSD status within forty-five days.<sup>147</sup> In other decisions, the Court instructed the State to grant the asylum seekers a temporary residency status, pending their security clearances.<sup>148</sup> All in all, the lower courts granted at least eighty-one Darfurians temporary residence status until the State decides on the merits of their asylum request.<sup>149</sup> In a different form of intervention, the Appeals Tribunal granted an Eritrean asylum seeker, whose asylum

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<sup>144</sup> See, e.g., CrimA 7048/97 John Does v. Ministry of Def. 54(1) PD 721, para. 19 (2000) (Isr.) (Barak, Pres., opinion).

<sup>145</sup> See *id.* at para. 17.

<sup>146</sup> See File No. 4447/17 Appeals Tribunal (Jerusalem), John Doe v. Ministry of Interior-Population and Immigration Auth. (Mar. 6, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>147</sup> See File No. 4117/17 Appeals Tribunal (Jerusalem), John Doe v. Ministry of Interior-Population and Immigration Auth. (Feb. 6, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>148</sup> See e.g., File No. 1893/18 Appeals Tribunal (Jerusalem), M.O.M.A. v. Ministry of Interior-Population and Immigration Auth. (Mar. 7, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 2887/18 Appeals Tribunal (Jerusalem), N.M.A. v. Ministry of Interior-Population and Immigration Auth. (Mar. 6, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 3351/18 Appeals Tribunal (Jerusalem), A.A.A. v. Ministry of Interior-Population and Immigration Auth. (Mar. 6, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>149</sup> See File No. 2887/18 Appeals Tribunal (Jerusalem), N.M.A. v. Ministry of Interior-Population and Immigration Authority, para. 16 (Mar. 6, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

application was pending for more than five years, a work permit for a period of three weeks. After this initial period, he would be granted temporary residency status unless the State rejected his asylum application. This holding was based on the State's unreasonable delay in examining his asylum application.<sup>150</sup>

These different judicial attitudes might be related to the fact that the lower tribunals' decisions are narrower and more case-specific than those of the Supreme Court. This may explain the lower courts' willingness to take into account the duration of a person's presence in the country or the duration of his waiting for a decision. By doing so, the lower courts do not create widely applicable precedents. Another potential explanation may be that the lower courts' decisions are not as widely publicized. They are also administrative decisions, which lead to the annulment of administrative decisions, rather than constitutional decisions that might lead to the annulment of legislation. As there are no teeth comparable to those of a constitutional case, or even a generally applicable Supreme Court case, and since it was possible to appeal these administrative decisions, they did not trigger the kind of confrontation with the representative branches that Israeli society has witnessed with regard to Supreme Court cases dealing with the detention of undocumented entrants. Moreover, the Supreme Court even reversed lower courts' decisions on occasion, preventing asylum seekers from receiving interim status until their asylum applications were decided.<sup>151</sup> Thus, the Supreme Court was not just exercising judicial restraint on its own; it was also enforcing such restraint on the lower courts, possibly for the above-mentioned institutional reasons.

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<sup>150</sup> See File No. 2376/18 Appeals Tribunal (Jerusalem), John Doe v. Ministry of Interior-Population and Immigration Auth. (July 29, 2018), (on file with authors) (Isr.).

<sup>151</sup> See File No. 2317/19 Appeals Tribunal (Jerusalem) John Doe v. Ministry of Interior-Population and Immigration Auth. (Apr. 2, 2019), Nevo Legal Database (by subscription, in Hebrew) (Isr.); see also Merav Ben Zeev & Nimrod Avigal, *No Home, No Law – The Forgotten Story of the Refugees from Darfur*, HAMISHPAT ONLINE: HUMAN RIGHTS (June 4, 2019) (Isr.), [http://zola.colman.ac.il/wp-content/uploads/2019/06/89\\_3benzeev\\_avigal.pdf](http://zola.colman.ac.il/wp-content/uploads/2019/06/89_3benzeev_avigal.pdf) [https://perma.cc/3VA6-94ZP]; but see File No. 4331/19 High Court of Justice (Jerusalem), Adam v. The State of Israel-Population and Immigration Auth. (July 28, 2019), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (allowing asylum seekers to receive interim residency as they await the determination of their status by authorities).

### 2.3.2. *The International Law Dimension*

The duration of a stay in a country is not just relevant from a constitutional point of view but also from the point of view of international law. Under International Refugee Law, the longer the presence of a person in a country, and the more substantial his or her bond with the country, the more rights he or she is entitled to enjoy.<sup>152</sup> While the basic right of protection from refoulement to a territory, where a person's "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,"<sup>153</sup> is granted to anyone who is subject to the State's jurisdiction and alleges to be a refugee (until decided otherwise),<sup>154</sup> the rights to freedom of movement, engagement in self-employment and protection against expulsion apply to anyone who is "lawfully present."<sup>155</sup>

The interpretation of the term "lawful presence" and the rights that derive from this status are one of the instances in which a significant gap exists between states' practices and international human rights law.<sup>156</sup> Many countries do not grant rights to refugees until they affirm that these people are entitled to such treatment, despite the mere declarative nature of determining refugee status.<sup>157</sup> Many states are further unwilling to grant the protection against expulsion, until they grant refugees the right to remain in the country indefinitely.<sup>158</sup> Some states even treat refugees, who enter them in a documented manner, as not "lawfully present" until officially recognized as refugees.<sup>159</sup> These states' practices do not

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<sup>152</sup> See HATHAWAY, *supra* note 100, at 154–92.

<sup>153</sup> Refugee Convention, *supra* note 8, art. 33(1).

<sup>154</sup> See HATHAWAY, *supra* note 100, at 159–60.

<sup>155</sup> See Refugee Convention, *supra* note 8, arts. 18, 26, 32. At a higher level of attachment to the country, that of "lawful stay," the person may be entitled to additional rights, including wage-earning employment, practice of profession, freedom of association, and travel documentation, among others. See Refugee Convention, *supra* note 8, arts. 15, 17, 19, 28.

<sup>156</sup> See HATHAWAY, *supra* note 100, at 173–77; see also GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 524–25 (3d ed. 2007).

<sup>157</sup> See HATHAWAY, *supra* note 100, at 158–59; see also GOODWIN-GILL & MCADAM, *supra* note 156, at 524–25.

<sup>158</sup> See HATHAWAY, *supra* note 100, at 173 n.97.

<sup>159</sup> See, e.g., HATHAWAY, *supra* note 100, at 175–77 (describing a British case in which the Court held that a person who was temporarily admitted was not lawfully present). By "documented entry," we mean that the entry was in accordance with the law governing the entry to the country – typically through an official border

accord with the Refugee Convention. They collapse the distinction between “lawful presence” and “lawful stay” upheld in the Refugee Convention. Lawful stay grants more Convention rights to the refugees.<sup>160</sup> We join James Hathaway’s position in arguing that “lawful presence” should be interpreted to cover not just those whose entrance was documented, but also those who are undergoing a RSD process (after submitting their application and complying with the formalities necessary to that end), or are protected under temporary protection regimes. It covers people who present a form of authorization that falls significantly short of an ongoing permission to remain in a country.<sup>161</sup> The passage of reasonable time leads to the acquisition of rights, when the state neither processes asylum applications nor expels, since it expresses the implicit acquiescence of the state in the presence of the person and his or her *prima facie* entitlement to refugee rights. He or she becomes lawfully present in the state. This interpretation may find some support in discussions held during the drafting of the Refugee Convention.<sup>162</sup>

Such an interpretation is supported by the *Celepli v. Sweden* case from 1991.<sup>163</sup> In this case, it was established that a rejected asylum

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checkpoint – while carrying identifying and valid travel documents and entry permits, where applicable.

<sup>160</sup> At the higher level of attachment to the country, that of “lawful stay,” the person may be entitled to additional rights, including wage-earning employment, practice of profession, freedom of association, and travel documentation, among others. See Refugee Convention, *supra* note 8, arts. 15, 17, 19, 28.

<sup>161</sup> HATHAWAY, *supra* note 100, at 180–82.

<sup>162</sup> See HATHAWAY, *supra* note 100, at 175, 659–67. Compare U.N. ESCOR, 1st Sess., 15th mtg. ¶ 109, U.N. Doc. E/AC.32/SR.15 (Feb. 6, 1950), <http://www.refworld.org/docid/40aa1d5f2.html> [<https://perma.cc/XXS2-Q4FQ>] (recording that the French representative Mr. Rain has mentioned that, “any person in possession of a residence permit was in a regular position. In fact, the same was true of a person who was not yet in possession of a residence permit but who had applied for it and had the receipt for that application. Only those persons who had not applied, or whose application had been refused, were in an irregular position.”) *with id.* ¶ 108 (recording that the U.S. representative Mr. Henkin has recognized that “persons subjected to these restrictions [on movement but regularly admitted to the country] should nevertheless be considered, for purposes of the future convention, to have been regularly admitted.”).

<sup>163</sup> A 1991 case, *Celepli v. Sweden*, may support a broad interpretation of the term “lawful presence.” Sweden granted Celepli, a Turkish citizen of Kurdish origin, a right to stay in the country, even though it denied him refugee status. Sweden later suspected that Celepli was involved in terrorism and issued an order for his expulsion. It was never executed for fear of Celepli’s persecution if Sweden were to return him to Turkey. However, this order imposed severe limitations on his movement. Celepli argued in front of the Human Rights Committee that

seeker, whom Sweden did not remove on humanitarian grounds, is “lawfully present” for the purposes of the ICCPR. Thus, a similar argument may be made in the context of the Refugee Convention regarding persons whose asylum applications have not yet been determined.<sup>164</sup> Lawful presence should only terminate if and when the state makes a final determination (after all appellate processes have been exhausted), to either not recognize a person as a refugee or revoke refugee protection (in accordance with Article 1(C) of the Refugee Convention in a particular case).<sup>165</sup>

Even if this interpretation of the term “lawful presence” is rejected, at the very least, countries in which RSD processes are not fully functioning—whether it is because they are suspended for a certain period or with respect to a certain group of asylum seekers or because they are not fairly administered—must respect the rights of all asylum seekers as though they are, in fact, lawfully present refugees. Put differently, choosing not to conduct fair and effective refugee status verification processes does not authorize

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Sweden violated his human rights under the International Covenant on Civil and Political Rights (ICCPR), including the right to liberty of movement enjoyed by “[e]veryone lawfully within the territory of a State.” The United Nations Human Rights Committee found that Sweden did not violate Celepli’s rights. U.N. Human Rights Comm., *Celepli v. Sweden*, U.N. Doc. CCPR/C/51/D/456/1991, ¶ 10 (July 18, 1994), <https://www.refworld.org/cases,HRC,51b6e7ad4.html> [https://perma.cc/7NE9-3MDF]. “The Committee is of the view that, following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant, only under the restrictions placed upon him by the State party [as the State argued].” *Id.* ¶ 9.2.

<sup>164</sup> See *Minister of Home Affairs v. Watchenuka* 2003 (1) All SA 21 (SCA) para. 37 (S. Afr.) (holding that, while South Africa may prohibit employment and study during the first 180 days after it issued a permit to sojourn temporarily pending the result of an asylum request, there might be individual cases in which the application of such a prohibition would be unconstitutional).

<sup>165</sup> See HATHAWAY, *supra* note 100, at 185–86; see also *Rajendran v. Minister for Immigration & Multicultural Affairs* [1998] 166 ALR 619 (Austl.) (holding that a person who entered Australia with a visa and enjoys a bridging visa will cease to be both lawfully present and able to invoke Article 32 of the Refugee Convention once his application for refugee status is rejected); *C.I. v. Minister of Justice Equal. & Law Reform* [2015] IECA 192, paras. 35, 40–44 (Ir.), <http://www.courts.ie/Judgments.nsf/0/0D275058CF2AFFD080257EC1004E1A01> [https://perma.cc/W9BP-JG8J] (citing *Nyanzi v. U.K.*, 47 Eur. Ct. H.R. 18 (2008) and *Bensaid v. U.K.*, 33 Eur. Ct. H.R. 10 (2001)) (holding that, after an asylum application was rejected, “it would require wholly exceptional circumstances to engage the operation of Article 8 in relation to a proposal to deport persons who have never had permission to reside in the State (other than being permitted to remain pending determination of an asylum application)” because the deportee’s right to remain in the country was always precarious).



governments to withhold refugee rights.<sup>166</sup> Any other interpretation of the term “lawful presence” would allow refugees to be held hostage because of states’ decisions to refrain from fairly and adequately processing asylum applications.

More concretely, if the undocumented entrants in Israel are lawfully present—as we would argue, until the State officially decides to deny them asylum in a fair process and on an individual basis—then this consideration must affect not only their freedom of movement but also their protection from expulsion. Both of these rights are granted to persons who are lawfully present in a country. Protection from expulsion is much broader than protection from *refoulement*. It limits states’ ability to expel a refugee anywhere (even to other places where they may find safety), with exceptions that are limited to national security and public order grounds. Procedurally, expulsion requires due process before a competent senior authority.<sup>167</sup> Prohibiting the expulsion of persons whose asylum applications were not fairly and timely processed is a matter of basic fairness.<sup>168</sup> Different courts around the world have held, based on their obligations under domestic law as well as international law, that asylum seekers may remain in the country and cannot be expelled, pending the results of their applications for protection.<sup>169</sup>

In the context of transfer agreements between the host country and third countries, this means that the ability to expel pursuant to third country agreements complies with international law only if it occurs before lawful presence is established (at which point Article 32 governs and narrows the ability to expel). States may only expel

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<sup>166</sup> See HATHAWAY, *supra* note 100, at 184–85.

<sup>167</sup> See Refugee Convention, *supra* note 8, at §§ 32–33 (detailing the requirements for expulsion and the prohibition of refoulement); HATHAWAY, *supra* note 100, at 669–73 (explaining that exclusion requires legal due process, though not necessarily judicial review).

<sup>168</sup> See HATHAWAY, *supra* note 100, at 667.

<sup>169</sup> For example, see, e.g., *Arse v. Minister of Home Affairs* 2010 (7) BCLR 640 (SCA) (S. Afr.), holding the detention of the applicant unlawful because, under domestic South African law, notwithstanding any law to the contrary: no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence in the country if that person has applied for asylum . . . until a decision has been made on his or her application and that person has had an opportunity to exhaust his or her rights or [sic] review or appeal. See also Case C-534/11, *Arslan v. Czech*, 2013 E.C.R. (May 30, 2013) (holding that if a person applied for asylum after he was detained and ordered to be removed, then the state must determine his application status before removal is possible. The state may continue to detain him, if authorized under national law, when necessary to prevent his evasion of removal proceedings.).

a refugee claimant to a safe third country (subject to its obligation to non-refoulement directly or indirectly) during the early stages of the refugee claimant's arrival in its territory – before the person applies for recognition as a refugee or complies with the formalities of the RSD.<sup>170</sup>

To conclude, the Court has courageously protected the constitutional rights of undocumented entrants, but it missed the opportunity to bring the representative branches to accountability with regard to the most important issues on their agenda. It did not require the State to decide the refugee status of these people in a timely manner, nor did it accord the entrants, on an interim basis, rights accruing to them as a result of a lengthy presence in the country.

### 3. A HIGH STAKES CONSTITUTIONAL DIALOGUE

At the same time, the Court also employed various other strategies to reduce the conflict with the other branches of government. With each invalidation of immigration detention, the Court encountered increasing criticism that questioned the legitimacy of its authority to strike down primary legislation as unconstitutional, especially in the immigration context.<sup>171</sup> The constitutional dialogue turned into a constitutional struggle. As an act of institutional self-defense, the Court applied constitutional avoidance, sectioning of laws, and babysitting and delaying techniques in an attempt to downplay its own judicial activism.

#### 3.1. Using Constitutional Avoidance Doctrine

Over the course of the litigation on immigration detention, the legislature revised the three-year detention period (invalidated in *Adam*) to a one-year detention scheme (invalidated in *Eitan*) and then revised it again to a three-month period (upheld in *Desta*).<sup>172</sup> Although the Court required the legislature to explicitly make the

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<sup>170</sup> See HATHAWAY, *supra* note 100, at 663–64.

<sup>171</sup> See *infra* Part 1.

<sup>172</sup> See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 52 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

viability of removal a precondition for the constitutionality of detention in the *Eitan* case,<sup>173</sup> the legislature did not comply. It only shortened the detention period from one year to three months.<sup>174</sup> Rather than invalidating this three-month detention scheme, the Court upheld it in *Desta* by reading an implicit link between detention authority and the possibility of removal into the statute, determining that if the executive branch finds that it cannot remove a person, then it must release that person immediately. The Court preferred to “save” the statute from invalidity through this interpretation since this interpretation was a lesser intervention in the legislative function.<sup>175</sup>

However, the constitutional avoidance doctrine, which instructs courts to prefer an interpretation that does not lead to a finding of unconstitutionality, only applies when such an interpretation does not rewrite the statute.<sup>176</sup> It is questionable whether the Court’s interpretation in *Desta* abused the legislative language and intent. This questionability is revealed when considering the Court’s treatment of *stare decisis* in the case at hand. The Israeli Supreme Court does not typically treat *stare decisis* as a substantial constraint on its decisions.<sup>177</sup>

Nonetheless, *Desta* stands out, even against this background, since the Court deviated from its own prior ruling within a year. In the *Eitan* decision, the Court held that it may not read an implied condition, that the authority to detain is contingent on the possibility of removal, into the immigration detention statute. The Court thus required the legislature to make this condition explicit. One year later, after the legislature rejected this requirement, the Court read this condition into the statute anyway, through interpretation, in the *Desta* case. Of course, one may accept the Court’s explanation that

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<sup>173</sup> See File No. 7385/13, 8425/13 High Court of Justice (Jerusalem), *Eitan—Israeli Immigration Policy Center v. The Israeli Government*, para. 199 (Sept. 22, 2014) (Vogelman, J., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>174</sup> See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 47 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>175</sup> *Id.* at para. 48 (Naor, Pres., opinion).

<sup>176</sup> See, e.g., File No. 7385/13, 8425/13 High Court of Justice (Jerusalem), *Eitan—Israeli Immigration Policy Center v. The Israeli Government* (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); see *Jennings v. Rodriguez*, 138 S. Ct. at 836, 843.

<sup>177</sup> See AHARON BARAK, JUDICIAL DISCRETION 250–52 (Yadin Kaufmann trans., 1989) (arguing in favor of the “right decision,” even at the price of stability and *stare decisis*).

it is easier to read this condition into the statute when the legislature shortened the immigration detention period from one year to three months.<sup>178</sup> But, on the other hand, the *Desta* Court did not heavily weigh this explanation against the counter-argument: that not only had the legislature shortened the immigration detention period, but it had also considered whether to make an explicit link between detention authority and the possibility of removal and decided otherwise. *Stare decisis* is intended to provide stability to the legal landscape, protect the public's reliance and expectation interests, but no less, strengthen the legitimacy of the judicial decision-making authority. Yet, presumably for its own institutional preservation, the Court deviates from its own general reasoning on *stare decisis*.

When constitutional avoidance through interpretation amounts to rewriting a statute, the infringement on the legislative power is greater than a finding of unconstitutionality. The Court's decision may materially affect the remedies of the parties to the case. If the Court interprets the statute in a robust way that aligns with the petitioners' rights, then the petitioners receive their remedies immediately. If, on the other hand, the Court finds such an interpretation impossible and declares the statute inoperative, then the petitioners might have to wait for the legislature to act in order to address their grievances.<sup>179</sup>

The Court's decision might hinder the legislature's ability to respond to the judicial ruling. When a court declares a statute inoperative, the void might spur the legislature to gather the necessary majorities to draft a different legislative scheme. But, the forces of inertia and "veto-gates" operate differently when a statutory arrangement remains intact and the legislature merely needs to amend the statute in response to a judicial interpretation.<sup>180</sup>

No less important, when a court invalidates a statute, its decision resonates throughout the political arena and is thoroughly discussed. Thus, the courts carefully analyze whether to embark on such a costly course of action or not. If they issue too many judicial invalidations, then structural changes to the courts' jurisdiction and power may result. In contrast, no similar constraints operate to restrain the courts from adopting robust interpretation of statutes.

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<sup>178</sup> See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset* paras. 48 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>179</sup> See Weill, *Constitutional Statutes*, *supra* note 113, at 79.

<sup>180</sup> See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 11-12, 22-23 (1982).

Frustrating the legislative will through interpretation is always a matter of judgment.

It is true that, during the judicial proceedings in *Desta*, the State's attorneys suggested that the Court adopt an interpretation that would render striking down the law for a third time unnecessary.<sup>181</sup> But, these legal representatives are a part of the executive branch, and their afterthoughts in front of the Court do not replace an accurate account of the legislative language and will when enacting the statute.

### 3.2. Sectioning to Reduce the Appearances of Judicial Activism

The Court held that it had only invalidated the immigration detention laws twice,<sup>182</sup> though in all three cases—*Adam*, *Eitan* and *Desta*—the result was the invalidation of the laws or parts thereof.<sup>183</sup> One possible explanation of this miscount could be that, within the three cycles of litigation, the Court struck down the section providing for prolonged immigration detention twice and struck down the confinement to the residency centers twice. The Court counts the third time that it struck down the detention statute as a second instance of nullifying the law because it separates the different sections that it struck down.<sup>184</sup>

The sectioning of the law is far from convincing since the different sections of the law do not stand independently of each other. The residency center was created in response to the *Adam* decision, as a complementary means of confinement, as the legislature had reduced the detention period to one year. Clearly, the legislature linked the decrease in the detention period to the possibility of confinement in residency centers, and the Court failed to acknowledge this.

This façade enabled the Court to avoid explicit dealing with the heavy implications of its decisions: the fact that the legislature was violating constitutional and international law norms three times,

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<sup>181</sup> See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 46 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>182</sup> *Id.* at paras. 52–4.

<sup>183</sup> See *supra* Part I.

<sup>184</sup> See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, paras. 52–4 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

within a two-year period, with regard to the same group of people, and on the same issue.

### 3.3. *Delaying Decisions and Babysitting Techniques*

The Court decided the cases on immigration detention rather quickly, within a few months, in a manner befitting cases that deal with the right to liberty. In other cases involving the rights of undocumented entrants, the Court took several years to reach a decision. In many of these other cases, the Court held several hearings and attempted to see if the passage of time would resolve the issue or if the parties would reach an agreement in the shadow of legal proceedings. For example, the Court took two years to decide whether the State may use the old Infiltration Law to detain undocumented entrants from Sudan, even though the statute did not provide for judicial review.<sup>185</sup> During those years, the Court pressured the State to introduce some civil mechanisms of judicial review into the old law but eventually codified a compromise under which the government committed to review immigration detention under the Law of Entry into Israel.<sup>186</sup>

The judicial tactics of delay and babysitting were also manifest when the Israeli Army “pushed back” undocumented entrants who were attempting to enter Israel through its border with Egypt. The Army either prevented their entry or coordinated their return to Egypt within a short interval.<sup>187</sup> It took the Court nearly four years to deliver a decision on this policy. During those years, the Court pressured the government to introduce improved procedural safeguards to the pushback mechanism instead of deciding whether the pushbacks were permissible under international and constitutional law. These safeguards included the need to guarantee the safe return of these people and enable them to request asylum.<sup>188</sup> The Court ultimately rejected the petition as “theoretical” in 2011,<sup>189</sup> when the Israeli Army admitted to its inability to conduct

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<sup>185</sup> See *supra* note 61 and accompanying text.

<sup>186</sup> See HCJ 3208/06 4 Anonymous Parties v. The Head of the Operations Division in the Israeli Defense Forces (Oct. 7, 2008) (Isr.).

<sup>187</sup> See File No. 7302/07 High Court of Justice (Jerusalem), Hotline for Refugees and Migrants v. Minister of Def., para. 1 (July 7, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>188</sup> See *id.* at paras. 5–11.

<sup>189</sup> *Id.* at para. 12.

coordinated pushbacks with Egypt after the overturn of the regime.<sup>190</sup> After delaying the decision for so long, the Court found it sufficient to say that it assumes “that if and when the policy of returns to Egypt is renewed . . . it would be implemented in accordance with acceptable standards of international law, and with adequate guarantees to insure in a high level of certainty the safety of those returned.”<sup>191</sup> The Court refrained from providing any further guidance to the State on which legal constraints restrict its ability to conduct such pushbacks.

A third example may be found with regard to the right to access food when at the residency center. When the State prohibited undocumented entrants from bringing food into the residency centers and prevented self-cooking in them, the Court took nearly two and a half years to reach a decision. While the petition was pending, the Court attempted to persuade the government to concede.<sup>192</sup> The petitioners submitted the petition in the midst of the religious fast of Ramadan and argued that they lacked access to food items necessary for the observance of the religious holiday. Nonetheless, the Court delayed a decision on the merits.

A fourth, and the most important, example has to do with principled petitions challenging the State’s failure to conduct fair and effective RSDs for Sudanese asylum-seekers’ applications.<sup>193</sup> These petitions have been pending before the High Court of Justice for about two years to date, as the Court has preferred to grant deference to the State to come up with solutions. The State, on the other hand, has continued to submit occasional updates to the Court, initially suggesting that a policy on these asylum applications is about to be formed and applied<sup>194</sup> and then finally suggesting that

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<sup>190</sup> See *id.* at paras. 9–11.

<sup>191</sup> *Id.* at para. 12.

<sup>192</sup> See File No. 4581/15 High Court of Justice (Jerusalem), *Ismail v. Comptroller of Prisons* (Nov. 19, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The Court accepted the petition in part and allowed the residents to bring ready-made food to their rooms, even though it denied the residents’ request to cook for themselves.

<sup>193</sup> See HCJ 1031/18 *Moshir v. Minister of Interior* (Feb. 5, 2018) (Isr.), [https://drive.google.com/file/d/1dl\\_8biOqtgwKX11bFzMzN2w\]prZvyRMt/view](https://drive.google.com/file/d/1dl_8biOqtgwKX11bFzMzN2w]prZvyRMt/view) [<https://perma.cc/E43N-S74J>]; HCJ 4630/17 & 7552/17 *Tagal v. Prime Minister of Isr.* (June 7, 2017) (Isr.).

<sup>194</sup> See, e.g., HCJ 4630/17 & 7552/17 *Tagal v. Prime Minister of Isr.* (Oct. 29, 2018), <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C17%5C300%5C046%5Cv36&fileName=17046300.V36&type=4> [<https://perma.cc/6PRE-66SF>].

RSD reviews for Sudanese asylum-seekers should be halted in light of the political changes in Sudan.<sup>195</sup> Throughout this period, the Court has acted as a “babysitter,” allowing the State to drag its feet and granting a number of extensions. The Court has been granting these extensions, even though its decision to refrain from acknowledging that at least some of the Sudanese asylum-seekers meet the definition of “refugees” has had immediate and harsh consequences for them.<sup>196</sup>

This growing tendency of the Israeli Supreme Court to serve as a “babysitter,” guiding the authorities to arrive at a solution that the Court perceives to be palatable, is not subject-specific.<sup>197</sup> The Court tends to “babysit:” (1) in situations in which rendering a decision, rather than reaching a compromise, would lead to results that are less “just”; (2) in cases that are politically sensitive, in an effort to avoid a conflict with the other branches of government; and (3) in complicated matters, in an attempt to reduce the Court’s intense workload and avoid the need to write lengthy decisions.<sup>198</sup> In the context of the various decisions on the rights of undocumented entrants, this strategy has led to prolonged infringements on the human and constitutional rights of these individuals.

In conclusion, the Court’s use of constitutional avoidance, sectioning of the law, and delay and babysitting techniques have all contributed to the failure of the Court to bring the political branches to account in refugee matters.

#### 4. STRATEGIC USE OF COMPARATIVE LAW

The Israeli Supreme Court has relied heavily on comparative law in its various decisions on undocumented entrants’ rights. It has seemingly taken for granted that it was legitimate to use comparative law as part of its reasoning. It further assumed that this reliance enhanced the legitimacy of its decisions in the eyes of both Israelis and the international community.<sup>199</sup> At times, the Court has

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<sup>195</sup> See, e.g., HCJ 4630/17 & 7552/17 Tagal v. Prime Minister of Isr. (July 9, 2019) (Isr.).

<sup>196</sup> *Supra* introduction.

<sup>197</sup> Ariel Bendor & Tal Sela, *Judicial Discretion: The Third Era*, 46 MISHPATIM 605, 639–41 (2018) (Isr.).

<sup>198</sup> *Id.*

<sup>199</sup> There is no equivalent debate to the one taking place in the U.S. Supreme Court regarding the question whether such reliance on comparative law is at all



used comparative law to portray Israel as a state that shoulders its part in the global refugee crisis and faces challenges similar to those encountered by other countries.<sup>200</sup> At other times, the Court presented the Israeli struggle with undocumented entry as unique, either because of its geographical circumstances,<sup>201</sup> or because of political, economic and demographic considerations.<sup>202</sup> But there were shortcomings to the use of comparative constitutional law, since distinguishing factors were not given adequate weight.

#### 4.1. Employing Strategic Comparisons

The global tendency to refer to comparative law and states' practices in the context of immigration and refugee law is well-documented.<sup>203</sup> Eyal Benvenisti and George Downs argue that often the judicial reliance on comparative law is strategic, aiming to achieve inter-judicial cooperation in order to "stand up to the domestic political process without incurring the 'costs' of increasing the numbers of refugees."<sup>204</sup> Benvenisti argues that courts refer to comparative legal sources in order "either to bolster their respective domestic political processes or to withstand what they view as a coordinated intergovernmental assault on their independence."<sup>205</sup> This can explain the Israeli Court's use of comparative law in the

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legitimate. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (questioning whether the Court's reliance on comparative law is legitimate).

<sup>200</sup> *See, e.g.*, File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 2 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.) ("In the Adam case and the Eitan case, we noted that these challenges are not unique to Israel, and that there has been a constant rise in the number of men and women wandering outside their countries for various reasons over the last decades."); *id.* (Vogelman, J., opinion) ("Like other countries, Israel is also required to contend with the global refugee and migrant crises that is the worst since the Second World War.").

<sup>201</sup> *See, e.g., id.* para 1 (Vogelman, J., opinion) (noting that Israel is the only Western country with a continental border to Africa).

<sup>202</sup> *See* File No. 8101/15 Administrative Appeals, *Zegete v. Minister of the Interior*, para. A (Aug. 28, 2017) (Rubinstein, J., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (discussing Israel's unique security and immigration challenges).

<sup>203</sup> *See generally* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241 (2008).

<sup>204</sup> EYAL BENVENISTI & GEORGE W. DOWNS, *BETWEEN FRAGMENTATION AND DEMOCRACY: THE ROLE OF NATIONAL AND INTERNATIONAL COURTS* 136 (2017).

<sup>205</sup> Benvenisti, *supra* note 203, at 270.

context of undocumented entrants as well. The Court has presumably resorted to comparative law to increase its legitimacy in light of the institutional de-legitimation it has endured. The representative branches harshly criticized the Court as protecting the rights of undocumented entrants and frustrating the will of both the legislature and government.

The Court conducted comprehensive reviews of comparative law to both uphold and strike down governmental policies towards undocumented entrants. For example, in the *Desta* case, the Court used comparative law for both purposes. It determined that a three months detention period was constitutional, because it aligned with comparative practice.<sup>206</sup> It further held, based on comparative practice, that a twenty-month mandatory residence stay in a designated center was unconstitutional.<sup>207</sup> In *Zegete*, the Court referred to comparative law to uphold third country agreements, which allow supposedly “voluntary” removals of undocumented entrants to third countries.<sup>208</sup>

The Court thus used comparative law as an “immunization device” that foresees possible criticisms and attempts to preemptively respond to them. These criticisms may come from both those who believe the Court was overtly activist (critique from the “right” or the authorities) as well as from those who believe it was insufficiently protective of rights (critique from the “left” or the undocumented entrants’ civil society organizations).

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<sup>206</sup> See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 55 (Aug. 11, 2015) (Naor, Pres., opinion) Nevo Legal Database (by subscription, in Hebrew) (Isr.) (“A maximum period of three months does not, therefore, deviate from what is acceptable in most countries in which the purpose of detention is similar to the declared purpose in the matter before us.”).

<sup>207</sup> See *id.* para 101 (noting that “the lengthy period established by the Law has no parallel in comparative law”).

<sup>208</sup> See e.g. File No. 8101/15 Administrative Appeals (Jerusalem), *Zegete v. Minister of the Interior*, paras. 30, 33, 37, 39–40, 45 (Aug. 28, 2017) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (allowing only “voluntary” removals, as per the agreements themselves. Thus, the Court did not allow holding persons in detention until they agree to be removed to the third counties).

#### 4.2. Comparing the Incomparable: 1. Immigration Detention

The Supreme Court reached its conclusion regarding the unconstitutionality of the detention period in all three cases based *inter alia* on the U.S. Supreme Court case, *Zadvydas v Davis*.<sup>209</sup>

Kestutis Zadvydas and Kim Ho Ma had both entered the U.S. in a documented manner as children, at the age of 7 and 8. Zadvydas held no additional citizenship. As a result of criminal activity, the INS decided to deport each of them, but no country agreed to accept them. Ma and Zayydas spent three and seven years, respectively, in detention centers before their cases reached the U.S. Supreme Court. When their hearings occurred, Zadvydas had resided for thirty-seven years and Ma for sixteen years in the U.S.<sup>210</sup>

The similarities between the *Zadvydas* and *Desta* cases are few and far between. In both contexts, the courts were dealing with immigration detention. In both, the courts expressed commitment to the notion that states should ultimately refrain from detaining a person who is not deportable. In both, the courts shared a commitment to the constitutional avoidance canon, and preferred to “save” a statute from unconstitutionality through interpretation rather than resort to invalidity.

However, the differences outweigh the similarities. In terms of the factual differences, the petitioners in *Zadvydas* were resident aliens who were convicted felons with final orders for their deportation. In the Israeli cases, however, the persons at hand entered Israel in an undocumented manner and did not acquire the status of resident, yet except for a handful of persons, the overwhelming majority of them did not commit crimes and posed no danger to society. The State did not decide on their refugee status and did not issue an order for their removal. Each of these differences could and should affect in a substantial way the constitutionality of their respective detention.

The normative holdings of the two cases are starkly different as well. Under *Zadvydas*, during a removal period of ninety days provided in the statute, the INS may hold a person in detention, regardless of the person’s deportability. Beyond the ninety days, the statute providing for detention should be read to avoid unconstitutionality, as limited to a judicially-constructed

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<sup>209</sup> See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>210</sup> See *id.* at 684-86.

“reasonable” detention period of six months. Only after six months of detention, a person may provide good reasons to believe that there is no significant likelihood of his removal in the reasonably foreseeable future, and then the government may rebut with evidence.<sup>211</sup> However, in *Dest*, the Israeli Supreme Court did not permit even one day of detention, if the person cannot be deported.

Furthermore, in *Zadvysas*, the Court emphasized that its reading into the statute to avoid unconstitutionality was made possible only because Congress did not explicitly authorize unlimited immigration detention.<sup>212</sup> But, in *Dest*, though the Court required the legislature to make an explicit connection between detention and removal in its previous decisions, the legislature opted otherwise. Nonetheless, the Court read the requirement into the statute. In addition, the U.S. Supreme Court in *Zadvyd* explicitly limited the scope of its ruling to admitted persons.<sup>213</sup> Israeli law does not use a similar distinction between admissible and non-admissible persons. Nevertheless, the Israeli Court relied on *Zadvyd* in *Dest*, which dealt with undocumented entrants, some of whom might (at least temporarily) be initially classified as inadmissible to the U.S.

This interpretation of *Zadvyd* is reinforced by the U.S. Supreme Court’s decision of March 2018 in *Jennings v Rodriguez*.<sup>214</sup> In *Jennings*, the Court held as a matter of statutory interpretation, without examining the constitutionality of the statute, that the INS is statutorily authorized to hold some types of undocumented entrants in detention without a bond hearing for as long as it takes it to reach a decision on the merits of their defensive asylum application.<sup>215</sup> The Court explicitly rejected the argument that asylum seekers may be released once they submitted their asylum applications.<sup>216</sup>

There are some similarities, between the *Jennings* and the *Dest* cases, which are worth fleshing out. Rodriguez was a permanent resident of the U.S., convicted of a drug offense with a pending removal order. He argued that he was entitled for a bond hearing as his removal order was challenged in court.<sup>217</sup> In a similar

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<sup>211</sup> See *id.* at 701.

<sup>212</sup> See *id.* at 689.

<sup>213</sup> See *id.* at 682.

<sup>214</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

<sup>215</sup> The affirmative asylum process is for individuals who are not in removal proceedings and the defensive asylum process is for individuals who are in removal proceedings.

<sup>216</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018).

<sup>217</sup> See *id.* at 838.

situation with him were persons who raised a credible claim for defensive asylum applications,<sup>218</sup> whose circumstances were similar to those of the detainees in the Israeli *Desta* case.<sup>219</sup>

The Court of Appeals for the Ninth Circuit in *Jennings* adopted an interpretation of the statute that granted an implied right to periodic bond hearings every six months, to avoid unconstitutionality.<sup>220</sup> The Supreme Court, in a majority decision, held that such an interpretation was contradictory to the plain language of the statute.<sup>221</sup> The Court held that the *Zadvydas* ruling did not extend as far as requiring bond hearings in this type of immigration detention, primarily since the statute at hand used the words “shall,” rather than “may,” be detained.<sup>222</sup> The *Zadvydas* reading-in of a limited detention period of six months cannot be applied since Congress expressly authorized detention until final decision, with no bond hearings, in these particular circumstances.<sup>223</sup>

The *Desta* case also dealt with circumstances—in which the Knesset clearly intended to authorize prolonged immigration detention even when deportation was unavailable—which made the reading-in as odd as that conducted by the Ninth Circuit. The Court in *Desta* presumably utilized constitutional avoidance due to “institutional survival” considerations, whereas in *Jennings* case, the Court refrained from using this approach, remanding the case and possibly triggering a constitutional analysis of the question. It should, however, be noted that the *Jennings* decision does not detract from the principle laid out in *Zadvydas* (and shared by *Desta*), which ties the ability to detain with deportability.

The implications of the compilation of the two U.S. Supreme Court cases are that detention is limited in time after a final removal order (*Zadvydas*), but possibly prolonged pending an individualized

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<sup>218</sup> See *id.* at 859.

<sup>219</sup> The Israeli asylum system does not distinguish between affirmative and defensive asylum applications. In most cases involving Eritreans and Sudanese, however, it was clear that removal was not possible, even without RSD, due to temporary group protection from deportation.

<sup>220</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

<sup>221</sup> See *id.* at 857–58.

<sup>222</sup> *Id.* at 846–50, 862–65.

<sup>223</sup> See *id.* at 859. (Breyer, J., dissenting) (stating that Congress did not explicitly authorize prolonged detention without bond hearings. Rather, it did not foresee that prolonged detention would occur. Had Congress expected prolonged detention, it would have inserted a requirement for periodic bond hearings. Justices Ginsburg and Sotomayor joined his dissent).

determination whether to remove a person at all (*Jennings*). This “anomalous”<sup>224</sup> result did not escape Justice Breyer, who exclaimed in a minority opinion: “Those whose removal is legally or factually questionable could be imprisoned indefinitely while the matter is being decided. Those whose removal is not questionable (for they are under a final removal order) could be further imprisoned for no more than six months.”<sup>225</sup> Justice Scalia, in his dissenting opinion in *Zadvydas*, expressed similar frustrations in the opposite direction, as a reason why to indefinitely detain deportable aliens.<sup>226</sup> The *Desta* case is located on a somewhat different plane, since it instructs to refrain from detaining persons, who are not candidates for removal (because of the temporary group protection afforded to them), even before there is a final individualized decision regarding their removal.

The different circumstances could account, together with the political and institutional differences,<sup>227</sup> to the different outcomes of the three cases. In the circumstances of *Jennings*, the State has every interest to examine the pending applications with due efficiency. The statute thus assumed that asylum proceedings (not including appeal) ordinarily end within six months.<sup>228</sup> By doing so, the state can cut down its own expenditures on immigration detention, as well as the risk to be found violating prohibitions of the Refugee Convention on limiting the freedom of movement of refugees and criminalizing their undocumented entry. The risk of prolonged detention seems thus smaller, but it had nonetheless materialized, with some asylum seekers held in detention for more than two years.<sup>229</sup> In this sense, it may very well be that the lower court was more protective of rights, just like the lower courts in Israel.

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<sup>224</sup> *Id.* at 859 (Breyer, J., dissenting).

<sup>225</sup> *Id.* at 874.

<sup>226</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 702 (2001).

<sup>227</sup> A plausible interpretation of these conflicting results is the different composition of the U.S. Supreme Court. When the Court decided *Zadvydas*, in 2001, it was easier for Justice Breyer to persuade his colleagues to join his relative liberal interpretation. In 2018, Justice Breyer found himself in the minority of a Court composed of eight Justices (Justice Kagan took no part in the decision of *Jennings*). Another explanation may be that the Court decided *Zadvydas* before September 11, 2001.

<sup>228</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830, 859 (2018) (Breyer, J., dissenting).

<sup>229</sup> See *id.* at 860 (“The classes before us consist of people who were detained for at least six months and on average one year . . . The record shows that the Government detained some asylum seekers for 831 days (nearly 2.5 years) . . . Two-thirds of the asylum seekers [detained] eventually received asylum.”).

The self-interest of the state in expeditious proceedings may not be assumed both in the *Zadvydas* and Israeli immigration detention circumstances. In the absence of possibilities to execute a removal order, as in *Zadvydas*, states may prefer enduring the costs of immigration detention to releasing a person to society, whom they decided to remove. This is especially true on a strategic level, since a state may fear that if other states knew that their refusal to accept deportees will lead to their release within it, this will incentivize other states to refuse to accept them. In his dissenting opinion in *Zadvydas*, Justice Kennedy expressed a similar concern.<sup>230</sup> In the Israeli immigration detention cases the state had no realistic option to remove the undocumented entrants, nor did it want to grant them refugee status, as discussed above.<sup>231</sup> The detention period thus had no foreseeable expeditious end. The State had further expressed its interest to exclude the undocumented entrants and deter future entries despite the high costs of detention. However, in the *Desta* line of cases, unlike in *Zadvydas*, the State ran the risk of violating the Refugee Convention, by detaining possible refugees for their undocumented entry.<sup>232</sup> It is precisely for this reason that the Court's repeated intervention was so important, and why its failure to prompt an expeditious individual RSD determination was so unfortunate.

The comparison between the *Desta* case and the *Jennings* and *Zadvydas* cases indicates that the differences between the cases are of such significance that it is clear that although the Israeli Supreme Court reached the right result in *Desta*, it definitely should not have relied on *Zadvydas* to legitimize its decision.

#### 4.3. Comparing the Incomparable: 2. Residency Centers

In the *Desta* case, the Court also relied on comparative law to evaluate the proportionality of the limitations placed on the freedom of movement of undocumented entrants by placing them in a

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<sup>230</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting) (“The result of the Court’s rule is that, by refusing to accept repatriation of their own nationals, other countries can effect the release of these individuals back into the American community.”).

<sup>231</sup> See *supra* Part 2.

<sup>232</sup> Cf. File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset* (Aug. 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.), with *Zadvydas*, 533 U.S. at 702.

residency center.<sup>233</sup> The Court examined different policies of governments around the world toward asylum seekers, demonstrating that the use of residency centers was widespread and served the purpose of preventing the “mass influx,” as the Court put it, of cities.<sup>234</sup> “‘Mass influx’ is not only measured quantitatively, but also relatively, inter alia, giving consideration to the state’s resources, and specifically its asylum system and its capabilities.”<sup>235</sup> President Naor wrote:

The purpose of preventing settling in the urban centers— which concerns easing the burden upon the urban center in which there is a significant concentration of aliens— . . . accords with the rules of international law. The interest in preventing the concentration of asylum seekers in certain cities stood at the base of various measures that restrict the freedom of movement of asylum seekers in Norway, Switzerland, Germany, and Kenya.<sup>236</sup>

The Court further relied on the European Union’s directive that allows asylum seekers to be assigned to areas within the territory in which they enjoy freedom of movement.<sup>237</sup>

The Court found, however, that while the purpose of the residency center was “proper,” the twenty-month mandatory stay in it did not pass the proportionality *stricto sensu* test (balancing harm resulting from infringement of rights and benefits derived thereof for the public interest): “The lengthy period established by the Law has no parallel in comparative law.”<sup>238</sup> Typically, living in the residency centers is voluntary and intended to provide social benefits in comparative practice,<sup>239</sup> but even when the stay is

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<sup>233</sup> At the time of the *Desta* decision, Israel placed 1,950 undocumented migrants in the residency center. 76% were Sudanese and the rest Eritreans. Of them, 1,521 submitted requests for asylum. Half of the submissions occurred while at the residency center. The maximum period of stay in the center was 14 months. See File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 55 (Aug. 11, 2015) (Naor, Pres., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (discussing the residency patterns and applications for asylum of the Holot residency center).

<sup>234</sup> *Id.* para. 71.

<sup>235</sup> *Id.* para. 73.

<sup>236</sup> *Id.* para. 69.

<sup>237</sup> See *id.* para. 70 (citing Council Directive 2003/9, 2003 O.J. (L31) 18 (EC); Directive 2013/33, 2013 O.J. (L180) 96 (EU)).

<sup>238</sup> *Id.* para. 101.

<sup>239</sup> *Id.* para. 101–5.



compelled, it is shorter.<sup>240</sup> The President concluded: “To the best of my knowledge, no western country maintains residency centers that are not voluntary for asylum seekers . . . with the purpose of population dispersal.”<sup>241</sup> This led the Court to shorten the maximum duration period allowed at the center from 20 months to one year.

While the majority opinion acknowledged the differences between the Israeli residence center and comparative practice, it did not give enough weight to two additional factors. The first is that many of the residency centers in other countries are dispersed throughout the country, including in the major cities, rather than located in an isolated desert, as in Israel.<sup>242</sup> The Court equated dispersal with placing undocumented entrants in an isolated residence center.<sup>243</sup> Only the concurring Justices emphasized this

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<sup>240</sup> See *id.* para. 101 (“Thus, for example, while asylum seekers in Germany and Switzerland are required to stay in a reception center upon arrival in the country, the period of that stay is only three months.”).

<sup>241</sup> *Id.* para. 105.

<sup>242</sup> See, e.g., Swiss Refugee Council, Types of Accommodation: Switzerland, <http://www.asylumineurope.org/reports/country/switzerland/reception-conditions/housing/types-accommodation> [https://perma.cc/S27X-M7DJ] (highlighting the use of underground bunkers to raise reception capacity); Informationsverbund Asyl und Migration, Types of Accommodation: Germany, <http://www.asylumineurope.org/reports/country/germany/reception-conditions/housing/types-accommodation> [https://perma.cc/959F-5BSY] (“For a period of up to 6 months after their application has been filed, asylum seekers are generally obliged to stay in an initial reception centre (*Aufnahmeinrichtung*). An obligation to stay in these centres for a maximum of 24 months may be imposed by Federal States as of July 2017 although only Bavaria had made use of this provision until the end of 2017. Furthermore, asylum seekers from Safe Countries of Origin are obliged to stay there for the whole duration of their procedures . . . there is at least one such centre in each of Germany’s 16 Federal States with most Federal States having several initial reception facilities.”); ASGL, Types of Accommodation: Italy, <http://www.asylumineurope.org/reports/country/italy/reception-conditions/housing/types-accommodation> [https://perma.cc/3FF2-S6GY] (last visited Nov. 12, 2019); Accem, Types of Accommodation: Spain, <http://www.asylumineurope.org/reports/country/spain/types-accommodation> [https://perma.cc/G6H7-XLSK] (last visited Nov. 12, 2019); Dutch Council for Refugees, Types of Accommodation: Netherlands, <http://www.asylumineurope.org/reports/country/netherlands/reception-conditions/access-forms-reception-conditions/types> [https://perma.cc/3Y29-J8K3] (last visited Nov. 12, 2019).

<sup>243</sup> President Naor brought support for the residency center from UNHCR. “Even the U.N. Commission for Refugees—in its comments upon the bill for the Law that is the subject of these proceedings—recognized that dispersal of the asylum-seeking population among various cities is necessary in order to ease the burden upon the cities in which the infiltrators have concentrated.” File No.

difference. Justice Amit wrote: “The Israeli model is unique, and in practice, it is not intended for population dispersion, as argued, but rather to concentrate the population in one facility that is remote from any settled area.”<sup>244</sup> Justice Melcer similarly suggested that a previously attempted dispersion plan “would be preferable from the perspective of the Petitioners to that of a remote residency center surrounded only by sand and desert.”<sup>245</sup>

The second is that while in other countries the residency centers typically hold recent arrivals,<sup>246</sup> Israel prioritized those who have been in the country the longest to move to the residency center first.<sup>247</sup> This difference should affect the test of balancing rights versus social interests: The infringement of the constitutional rights of the undocumented entrant is of a much smaller scope when the person has just recently entered the country and the state places him or her in a certain region, and much greater when the state uproots a person from a place of residence and integration of a few years.

#### 4.4. Comparing the Incomparable: 3. Third Country Agreements

The Court used extensive comparative law to also legitimize its decision to uphold Israel’s confidential third country agreements. Under these agreements, Israel may remove undocumented entrants from Eritrea and Sudan to two countries, which will allow these migrants to reside and work.<sup>248</sup> Under these agreements, Israel

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8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 69 (Aug. 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>244</sup> File No. 8665/14 High Court of Justice (Jerusalem), *Desta v. The Knesset*, para. 5 (Aug. 11, 2015) (Amit., J., opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>245</sup> *Id.* at para. 9 (Melcer, J., Opinion). For an elaborate plan to “disperse” asylum seekers in different parts of Israel, see Amir Alon, *Business tycoons present asylum seeker integration plan*, YNETNEWS (May 23, 2018), <https://www.ynetnews.com/articles/0,7340,L-5268553,00.html> [<https://perma.cc/K5QK-QP9H>].

<sup>246</sup> See *supra* note 240.

<sup>247</sup> See *supra* Part 2.

<sup>248</sup> See File No. 8101/15 Administrative Appeals (Jerusalem) *Zegete v. Minister of the Interior* (Aug. 28, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.). According to the press, the two countries are Rwanda and Uganda, despite the two countries’ denials; see, e.g., Lee Yaron & Noa Landau, *Israel Releases Asylum Seekers Jailed for Refusing Deportation to Rwanda*, HAARETZ (April 4, 2018, 10:57 PM), <https://www.haaretz.com/israel-news/uganda-no-deal-with-israel-for-them-to-dump-their-refugees-here-1.5976136> [<https://perma.cc/FR75-LSP7>].

committed not to disclose the identity of these countries and to transfer undocumented entrants to these third countries only with their consent.<sup>249</sup> Israel offered those consenting to removal, a monetary award of \$3,500 USD,<sup>250</sup> and announced that those who refuse the removal would be detained, until this policy was prohibited by the Court.<sup>251</sup> Israel further committed to the Court that “at this stage” it will remove only undocumented entrants who did not apply for asylum or whose application it rejected.<sup>252</sup> It further committed to remove those arriving last first, though most candidates for removal spent at least a few years in Israel.<sup>253</sup>

The removal scheme evolved over time and resulted in several petitions and an appeal to the Israeli High Court of Justice, until the State effectively nullified it when the third countries backed out of the agreement. As a result, the Court decided only the first challenge regarding the third country agreements and rendered the rest of the petitions redundant with the nullification of the agreement.<sup>254</sup>

The Court held that there is “almost universal consensus” that a state has the authority under international law to remove undocumented entrants to safe third countries based on an

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This is also supported by the testimonies of those who the State removed to the third countries. See Ruvi Ziegler, *Benjamin Netanyahu's U-turn: no redemption for asylum seekers in Israel*, THE CONVERSATION (April 9, 2018, 8:43 AM), <http://theconversation.com/benjamin-netanyahus-u-turn-no-redemption-for-asylum-seekers-in-israel-94441> [<https://perma.cc/V2A3-9QDH>].

<sup>249</sup> See File No. 8101/15 Administrative Appeals (Jerusalem), *Zegete v. Minister of the Interior*, para. 3, 33, 117 (Aug. 28, 2017) (Naor, Pres., Opinion), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>250</sup> See *id.* para. 6.

<sup>251</sup> See *id.* para. 5.

<sup>252</sup> *Id.* para. 5. The later deportation procedure from January 2018 did, however, specifically mention that PIA “will consider expanding the population” which might be removed to a third country, including persons whose asylum applications are pending. See Third Country Removals Procedures, art. 3.4 (Jan. 30, 2018), [https://www.gov.il/BlobFolder/policy/third\\_country\\_deportation\\_procedure/he/10.9.0005\\_0.pdf](https://www.gov.il/BlobFolder/policy/third_country_deportation_procedure/he/10.9.0005_0.pdf) [<https://perma.cc/7Y9M-Q6PT>].

<sup>253</sup> *Id.* para. 16.

<sup>254</sup> See File No. 8101/15 Administrative Appeals (Jerusalem), *Zegete v. Minister of the Interior* (Aug. 28, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.). One of the petitions required primary legislation to execute removal of undocumented migrants under the non-delegation doctrine. File No. 679/18 High Court of Justice (Jerusalem), *Avivi v. Prime Minister* (Apr. 10, 2018) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

individual decision.<sup>255</sup> The court stated, “There is no rule of international law that prohibits the transfer of asylum seekers to a third country.”<sup>256</sup> Under international law, states may share the responsibility of processing applications for refuge and granting refugee status. On the comparative level, third country agreements are widespread throughout the Western world, including Europe, Australia, the U.S., and Canada.<sup>257</sup> In fact, “In the last decades, states have signed hundreds of third country agreements, most of them bilateral and a few multilateral, many of them by members of the European Union.”<sup>258</sup> Neither international law nor internal law requires the State to obtain the consent of the undocumented entrant as a condition for his or her removal.<sup>259</sup> The Court found that the confidentiality of the particular third country agreements was a hindrance to proper supervision of their execution. However, although it is extremely uncommon in third country agreements, the State successfully convinced the Court that it is able to supervise the execution of these agreements.<sup>260</sup> The Court further held that the petitioners did not meet the burden of convincing it that these third countries were unsafe in light of the State’s data.<sup>261</sup> Finally, the Court held that the State was not authorized to detain people in order to compel them to agree to their removal, since the particular third country agreements required that removal only be done with consent of the undocumented entrant. Nonetheless, the State may detain a person for 60 days, as provided in the Entry to Israel Law, to enable his or her removal to a different country, but only if such an option of removal was at all feasible.<sup>262</sup>

The Court conducted a massive investigation into international and comparative law to determine whether the practice of third country agreements is widespread. Indeed, many countries have signed and implemented third country agreements.<sup>263</sup> Yet the Court

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<sup>255</sup> *Id.* paras. 30–32, 38.

<sup>256</sup> *Id.* para. 39.

<sup>257</sup> *See id.* para. 37.

<sup>258</sup> *Id.* para. 77.

<sup>259</sup> *See id.* paras. 33–34, 115–17.

<sup>260</sup> *See id.* paras. 79–103.

<sup>261</sup> *See id.* paras. 56, 74. The Court held that these countries were parties to the Refugee Convention, had UNHCR offices, and allowed the undocumented migrants access to their court system. *Id.* paras. 86, 101.

<sup>262</sup> *See id.* para. 124.

<sup>263</sup> *See, e.g.,* GOODWIN-GILL & MCADAM, *supra* note 156, at 390–408; HATHAWAY, *supra* note 100, at 659–95; Cathryn Costello, *The Asylum Procedures Directive and the*

failed to acknowledge or give proper weight to the major differences between the international practice of third country agreements and the agreement discussed in *Zegete*. First, most third country agreements are intended to enable a state to shift the responsibility of conducting RSD to another country and apply to recent arrivals. The State cannot “relieve” itself of the responsibility, once the person becomes “lawfully present,” as was arguably done in the Israeli agreements.<sup>264</sup>

Second, typically third countries have some kind of nexus with the undocumented entrant, whether it is his or her country of citizenship, residence, habitual residence, or even a country of transit.<sup>265</sup> Thus, under the Directive of the European Union, the concept of a safe third country requires “a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country.”<sup>266</sup> This nexus is the reason for the expectation that the third country should share the responsibility for the immigrant, and it makes the transfer of the immigrant to the third country more reasonable, since there is a connection between the immigrant and that state. It is also arguably fairer since it prevents “asylum shopping” on the immigrant’s part.

In contrast to the decision of the Israeli Supreme Court to uphold these agreements, some courts around the world have struck down

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*Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?*, 7 EUR. J. MIGRATION & L. 35 (2005).

<sup>264</sup> See *supra* Part 2.3.2.

<sup>265</sup> This has not, however, been Australia’s policy. See Shani Bar-Tuvia, *Australian and Israeli Agreements for the Permanent Transfer of Refugees: Stretching Further the (Il)legality and (Im)morality of Western Externalization Policies*, 30 INT’L J. REFUGEE L. 474–76, 486–88 (2018) (discussing Australia and Israel’s new policy against refugees regarding permanent transfer to countries in exchange for payment to the countries).

<sup>266</sup> Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, 2013 O.J. (L 180), 80, <https://www.easo.europa.eu/sites/default/files/public/Dve-2013-32-Asylum-Procedures.pdf> [<https://perma.cc/894A-XM8S>].

third country agreements,<sup>267</sup> or prevented their implementation<sup>268</sup> in circumstances that would jeopardize the human rights of undocumented entrants. Thus, despite taking a rather activist stance on some other immigration-related matters, the Israeli Court is lagging behind other courts who have taken a more activist approach on similar matters.

Overall, this Part has shown that the use of comparative law and practice in the treatment of refugees must account for the differences as well as the similarities between different legal regimes to qualify as a legitimating factor of judicial decisions. When differences are not addressed, it might reflect the failure of the courts to bring the political branches to accountability on the domestic as well as international levels.

## 5. THE ROAD AHEAD

Constitutional courts are often the players that protect the rights of asylum seekers and require the representative branches to abide by their international and constitutional obligations. This dynamic is unfolding in the U.S., especially since the election of President Trump. It has been part of Israeli politics and law since 2007. These two countries have been influencing each other's policies with regard to immigration and treatment of refugees. It is thus worthwhile to study the human and legal drama accompanying Israel's treatment of undocumented entrants. It may serve as an important lesson for the U.S.

Presumably, the Israeli Supreme Court has attempted to walk a fine line between protecting the rights of undocumented entrants in

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<sup>267</sup> See, e.g., *Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R. (2012) (holding that Italy could not evade its responsibilities under the European Convention of Human Rights by relying on a bilateral agreement with Libya, and that intercepting ships at sea and preventing their arrival to Italy by returning asylum seekers to Libya may be a violation of the non-refoulement principle); *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*, and *Plaintiff M106 of 2011 v. Minister for Immigration & Citizenship* [2011] HCA 1, 32 (Austl.) (invalidating the Minister for Immigration and Citizenship's declaration of Malaysia as a country that Australia may remove asylum seekers to in order for Malaysia to process their asylum claims, partly because Malaysia was not a party to the Refugee Convention).

<sup>268</sup> See, e.g., *M.S.S. v. Belgium & Greece*, App. No. 30696/09 Eur. Ct. H.R. (2011) (finding by the European Court of Human Rights that Belgium was in violation of its international obligations for transferring an asylum seeker to Greece under the Dublin II Regulation, even though Belgium should have known of the deficiencies of Greece's asylum procedures).

strategically planned decisions, on the one hand, and preserving its own institutional legitimacy, on the other hand. The Court made an effort to downplay its own activism and reduce the tension with the other branches of government by engaging in constitutional avoidance, sectioning laws to suggest that it had struck down fewer laws than it actually had, and delaying decisions to enable parties to strike a compromise. It strategically used comparative law to anticipate and address critiques from all parts of Israeli society, when often the comparison did not adequately address the differences between legal systems. This was most evident by the Israeli judicial reliance on *Zadvydas*.<sup>269</sup>

The Court may have tried not to displease the different parties too much on this sensitive, ideological, conflict. It strategically refrained from requiring the representative branches to make efficient individual RSD determinations as part of a binding constitutional decision. It further refrained from inferring constitutional implications from the length of presence of undocumented entrants in Israel. With these two moves, it tried to please the critics of the Court from the “right” by appearing as if it was deferring to the State on these matters, despite the fact that the State was determined to drag its feet on these issues. It, nonetheless, courageously protected “core” constitutional rights of these undocumented entrants, thus responding to demands of its critics from the “left.”

Leaving undocumented entrants in civil and political limbo carries a heavy cost. It negatively impacts their ability to enjoy human rights and undermines society’s character, cohesiveness, and values more generally. As the Trump administration is attempting to confer undocumented entrants from the Mexican border similar indeterminate status, the Israeli Court’s experience with judicial restraint should serve as a cautionary tale for the federal courts that will determine whether Trump’s asylum ban is upheld.

The Israeli Court employed these avoidance methods based on strategic considerations. However, they led to costs, both domestically and internationally, that outweighed the benefits to the Court, the representative bodies, and Israeli society. The Court itself ultimately authorized putting undocumented entrants in a confined residency center based on their group characteristics rather than individual acts.

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<sup>269</sup> See *supra* Part 4.2.

The Court now enjoys little trust from all sides of the controversy, and political attempts to diminish its power – whether in general or in immigration matters – persist. There are various legislative bills that attempt to constrain the Court’s judicial review power and grant the legislature a general override power that will overcome constitutional decisions.<sup>270</sup> Israel still weighs different options to remove undocumented entrants to third countries or countries of origin, especially since Eritrea and Ethiopia signed a peace agreement ending a 20-year war.<sup>271</sup> This state of affairs led Holocaust survivors and others in Israel to argue that Israel is shamefully mistreating refugees. The Israeli society is torn over the issue of the desirable treatment of these undocumented entrants and how to understand their status, and it was the Court’s duty to demand that the representative bodies decide the merits of these important questions.

Last but not least, while the political branches may have thought they could persuade the international community that these are economic migrants, the world views Israel with disdain for attempting to remove people that other countries treat as refugees.<sup>272</sup> This debate, in which different elements of Israeli society talk past each other, could have been conducted more constructively, if only this responsible adult – the Court – had required the representative bodies to decide who these people were. By deciding this question, Israel would have also decided who it was.

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<sup>270</sup> See, e.g., Jonathan Lis & Revital Hovel, *Right-Wing Ministers Unveil Bill to Let Knesset Override Supreme Court*, HAARETZ (Dec. 20, 2017, 1:28 PM), <https://www.haaretz.com/israel-news/.premium-bill-would-let-knesset-override-supreme-court-1.5629190> [<https://perma.cc/4MD6-2DS3>] (discussing the unlikelihood of the proposed Basic Law – a law that would allow the Knesset to reenact past overturned laws by the Supreme Court – to pass considering both sides of the coalition are currently withholding support); Stuart Winer & TOI Staff, *In U-Turn, Netanyahu Said to Reject ‘Extreme’ Draft of High Court Override Bill*, TIMES ISR. (Apr. 15, 2018, 12:42 PM), <https://www.timesofisrael.com/in-u-turn-netanyahu-said-to-reject-extreme-draft-of-high-court-override-bill/> [<https://perma.cc/2HUQ-DA8M>] (discussing the divide over limiting the power of the judicial branch).

<sup>271</sup> See Lee Yaron, *Israel Considers Deporting Asylum Seekers to Eritrea and Sudan*, HAARETZ (July 24, 2018, 6:54 AM), <https://www.haaretz.com/israel-news/.premium-israel-mulls-deporting-asylum-seekers-back-to-eritrea-and-sudan-1.6310950> [<https://perma.cc/FR75-LSP7>].

<sup>272</sup> See Gershon Gorenberg, *Israel is Betraying its History by Expelling African Asylum-Seekers*, WASH. POST (Jan. 29, 2018, 2:05 PM), [https://www.washingtonpost.com/news/global-opinions/wp/2018/01/29/israel-is-betraying-its-history-by-expelling-african-asylum-seekers/?utm\\_term=.9b5f5546fcc2](https://www.washingtonpost.com/news/global-opinions/wp/2018/01/29/israel-is-betraying-its-history-by-expelling-african-asylum-seekers/?utm_term=.9b5f5546fcc2) [<https://perma.cc/K3B5-ZEF7>].